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Message from Hon'ble the Chief Justice (Patron-in-Chief, J&K Judicial Academy)

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Chief Justice

MESSAGE

I am glad to know that Jammu & Kashmir State Judicial Academy is publishing its Newsletter for the month of February, 2021 describing its activities and containing articles of legal importance, news & views on legal aspects and important judgments of the Supreme Court and High Court of Jammu & Kashmir.

I am told that Jammu and Kashmir State Judicial Academy is one of the oldest in the country. Hon'ble Mr. Justice Murtaza Ali, the then Chief Justice of the High Court mooted its idea in the year 1972. A training institute for the Judicial Officers was established in the year 1973. It was in the year 2008 that the present Academy was established with wings at Srinagar and Jammu having a full fledged Director.

This Judicial Academy is a centre for sharpening the legal acumen of Judicial Officers of the UT. It is a platform that provides new techniques and skills for dispensing justice more speedily and effectively.

The Director and his team of editors under the supervision and guidance of the Chairperson has worked really hard to organize training courses and bringing out the Newsletter with valuable information of legal importance.

I am sure that the Newsletter would prove to be profitable not only to our Judicial Officers but to all of legal fraternity and in upholding the rule of law and the Constitution.

I trust the Academy would keep growing to serve the ends of justice and the Newsletter will keep everyone informed with its work and activities.

My sincere best wishes.

(Pankaj Mithal)

From the Editor's Desk

The institution of justice delivery as we now see, has a long history of its own not only in India but across the globe wherever the civil society has recognized the rule of law. During the past several decades, this institution has seen changes as per the change in the behaviours of the population and steered in many directions either by the legislative endeavours or judicial activism, with the ultimate goal of achieving optimum credibility. But with changing times and growth of population in an unprecedented manner, these tools have over the years weakened and the burden has started to tell upon the health of the institution. If at all we have to evaluate the two most phenomenal and course changing moments of the Indian judicial system, we can safely say that one has already been achieved to a great extent i.e. separation of powers on the strength of which judiciary attained a separate character and could exercise functions without influence. Second is to make this system free from cumbersome situations and to deal with ever growing pendency in efficient and balanced manner so that the essence of justice is not strangled in the clutches of bottlenecks and pendency of litigation in its various forms. Although much has been said and done in this regard but the day a workable and dynamic mechanism is put in place to address this lingering issue, the second landmark will be achieved. This is important to truly achieve the cherished goal of independence of judiciary.

The concept of speedy trial and minimizing the backlog might have been a subject of debate a decade ago, but as the population grew so did the population of the litigants in the courts. This had the impact of judicial minds having a serious thought about devising tools and mechanism on the strength of which the huge rush of litigation and its pendency would be countered, that too without compromising on justice. Definitely, a balance between lessoning the burden of litigation and maintaining the optimum quality of justice is imperative.

In this regard Alternate Dispute Resolution (ADR), has been perceived as a remarkable tool for expeditious disposal, in which a great stress has been laid on referring the cases for mediation, conciliation, arbitration and Lok-Adalats. It is intended that normal course of procedure is somewhat eased and parties are given a chance to resolve their legal matters in an environment free from regular procedural shackles. However, it must be kept in mind that all those critical matters of justice and issues cognate to it cannot be referred to such alternate mediums. Thus, a great caution must be exercised while referring the cases with this view that the exercise is not futile or having every chance of being returned back to be adjudicated by the regular courts. It has been seen that in many cases the matters are sent for these ADR because of the fact that the court wants to lessen its burden temporarily, which in itself is not the essence for which these ADR tools were devised.

ADR is now recognized more as 'Appropriate Dispute Resolution' than 'Alternative Dispute Resolution'. It is well established that all the disputes cannot be redressed through the regular litigative processes of the courts. Different kinds of disputes have different adjudicatory elements, as such, different modes of settlement are suited for different kinds of disputes. More scientific approaches are being worked out for varied nature of disputes and their modes of resolution. Development on this front would greatly reduce the pressure on the courts of law in India and thereby stress on the institution of justice shall be substantially reduced, leaving sufficient space for the serious business in the institution of justice delivery. This would also ensure enhancement of the quality of justice dispensation.

LEGAL JOTTINGS

"In a constitutional framework which is intended to create, foster and protect a democracy committed to liberal values, the rule of law provides the cornerstone. The rule of law is to be distinguished from rule by the law. The former comprehends the setting up of a legal regime with clearly defined rules and principles of even application, a regime of law which maintains the fundamental postulates of liberty, equality and due process. The rule of law postulates a law which is answerable to constitutional norms. The law in that sense is accountable as much as it is capable of exacting compliance. Rule by the law on the other hand can mean rule by a despotic law. It is to maintain the just quality of the law and its observance of reason that rule of law precepts in constitutional democracies rest on constitutional foundations."

Dr Dhananjaya Y Chandrachud, J. in *Himachal Pradesh Bus Stand Management and Development Authority (HPBSM&DA) v. The Central Empowered Committee Etc. & Ors.*, Civil Appeal Nos. 5231-32 of 2016, decided on January 12, 2021.

CRIMINAL

Supreme Court Judgments

Criminal Appeal No. 88 of 2021
Ajay Kumar @ Bittu & Anr. v. State of Uttrakhand & Anr.
Decided on: January 29, 2021

The Supreme Court reiterated that the power under Section 319 CrPC is a discretionary and extra-ordinary power which has to be exercised sparingly. The test that has to be applied to attract Section 319 CrPC is one which is more than prima-facie case as exercised at the time of framing of charge but short of satisfaction to an extent that the evidence if goes unrebutted would lead to conviction. In absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. The Court further held though only a prima-facie case is to be established from the evidence led before the court, not necessarily tested on anvil of cross-examination, it requires much stronger evidence than mere probability of complicity.

Special Leave Petition (Crl.) No. 380 of 2021
Rekha Sengar v. State of Madhya Pradesh
Decided on: January 21, 2021

While considering the question concerning severity of the offences under the provisions of PC&PNDT Act, the Supreme Court observed as under:

"The passage of this Act was compelled by a cultural history of preference for the male child in India, rooted in a patriarchal web of religious, economic and social factors. This has birthed numerous social evils such as female infanticide, trafficking of young girls, and bride buying and now, with the advent of technology, sex-selection and female feticide. The pervasiveness of this preference is reflected through the census data on the skewed sex-ratio in India. Starting from the 1901 census which recorded 972 females per 1000 males; there was an overall decline to 941 females in 1961, and 930 females in 1971, going further down to 927 females in 1991. Records of Lok Sabha discussions on the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill, 1991 reflect various members' concern with this alarming state of affairs, which acted as a clarion call to the passage of the PC&PNDT Act. (See: Lok Sabha Debates, Tenth Series, Vol. XXXIII No.2, July 26, 1994, Eleventh Session, at pages 506-544).

The prevalence of pre-natal sex selection and feticide has also attracted international censure and provoked calls for strict regulation. In September 1995, the UN 4th World Conference on Women, adopted the Beijing Declaration and Platform for Action which *inter alia* declared female feticide and pre-natal sex-selection as forms of violence against women. (See: Beijing Declaration and Platform for Action, adopted in 16th plenary meeting of UN 4th World Conference on Women, (15th September, 1995), Article 115).

While the sex ratio has improved since after the passage of the PC&PNDT Act, rising

to 933 as per the 2001 census, and then to 943 in the 2011 census, these pernicious practices still remain rampant.

As per the reply filed by the then Minister of State, Health and Family Welfare in the Rajya Sabha on 27.3.2018, as of December 2017, around 3,986 court cases had been filed under the Act, resulting in only 449 convictions and 136 cases of suspension of medical licenses.

The unrelenting continuation of this immoral practice, the globally shared understanding that it constitutes a form of violence against women, and its potential to damage the very fabric of gender equality and dignity that forms the bedrock of our Constitution are all factors that categorically establish pre-natal sex-determination as a grave offence with serious consequences for the society as a whole.

5. We may also refer with benefit to the observations of this Court in Voluntary Health Association of India v. State of Punjab, (2013) 4 SCC 1, as follows:

"6…Above statistics is an indication that the provisions of the Act are not properly and effectively being implemented. There has been no effective supervision or follow-up action so as to achieve the object and purpose of the Act. Mushrooming of various sonography centres, genetic clinics, genetic counselling centres, genetic laboratories, ultrasonic clinics, imaging centres in almost all parts of the country calls for more vigil and attention by the authorities under the Act. But, unfortunately, their functioning is not being properly monitored or supervised by the authorities under the Act or to find out whether they are misusing the pre-natal diagnostic techniques for determination of sex of foetus leading to foeticide.

7…Seldom, the ultrasound machines used for such sex determination in violation of the provisions of the Act are seized and, even if seized, they are being released to the violators of the law only to repeat the crime. Hardly few cases end in conviction. The cases booked under the Act are pending disposal for several years in many courts in the country and nobody takes any interest in their disposal and hence, seldom, those cases end in conviction and sentences, a fact well known to the violators of law…"

In the present case, contrary to the prevailing practice, the investigative team has seized the sonography machine and made out a strong *prima-facie* case against the petitioner. Therefore, we find it imperative that no leniency should be granted at this stage as the same may reinforce the notion that the PC&PNDT Act is only a paper tiger and that clinics and laboratories can carry out sex-determination and feticide with impunity. A strict approach has to be adopted if we are to eliminate the scourge of female feticide and iniquity towards girl children from our society. Though it certainly remains open to the petitioner to disprove the merits of these allegations at the stage of trial."

Criminal Appeal No.53 of 2021
Dilip Singh v. State of Madhya Pradesh & Anr.
Decided on: January 19, 2021

The Supreme Court in the context of order of the trial court directing the accused to deposit heavy amount as pre-condition for bail, observed that –

"It is well settled by a plethora of decisions of this Court that criminal proceedings are not for realization of disputed dues. It is open to a Court to grant or refuse the prayer for anticipatory bail, depending on the facts and circumstances of the particular case. The factors to be taken into consideration, while considering an application for bail are the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; character behaviour and standing of the accused; and the circumstances which are peculiar or the accused and larger interest of the public or the State and similar other considerations. A criminal court, exercising jurisdiction to grant bail/anticipatory bail, is not expected to act as a recovery agent to realise the dues of the complainant, and that too, without any trial."

Criminal Appeal Nos.47-48 of 2021
Lakhvir Singh etc. v. The State of Punjab & Anr.
Decided on: January 19, 2021

The Supreme Court held that Section 4 of Probation of Offenders Act is distinct from Section 6 as it is discretionary in nature while Section 6 provides that a court "must not" sentence a person under the age of 21 years to imprisonment unless sufficient reasons for the same are recorded, based on due consideration of the probation officer's report. The relevant aspects while giving benefit under Section 6 of the Act are: the nature of offence, the character of the offender, and the surrounding circumstances as recorded in the probation officer's report.

The Court further held that where the accused is under 21 years of age on the date of the offence and not on the date of conviction, Section 6 would not come to their aid. The Court further said that the benefit of probation under the Probation of Offenders Act is not excluded by the provisions of the mandatory minimum sentence under Section 397 of IPC.

Criminal Appeal No. 1919 of 2010
Anversinh @ Kiransinh Fatesinh Zala v. State of Gujarat
Decided on: January 12, 2021

The Supreme Court in this case held that a perusal of Section 361 of IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such 'enticement' need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl.

However, mere recovery of a missing minor from the custody of a stranger would not *ipso-facto* establish the offence of kidnapping. Thus, where the prosecution fails to prove that the incident of removal was committed by or at the instigation of the accused, it would be nearly impossible to bring the guilt home.

A bare perusal of the relevant legal provisions show that consent of the minor is immaterial for purposes of Section 361 of IPC. Indeed, as borne out through various other provisions in the IPC and other laws like the Indian Contract Act, 1872, minors are deemed incapable of giving lawful consent. Section 361 IPC, particularly, goes beyond this simple presumption. It bestows the ability to make crucial decisions regarding a minor's physical safety upon his/her guardians. Therefore, a minor girl's infatuation with her alleged kidnapper cannot by itself be allowed as a defense, for the same would amount to surreptitiously undermining the protective essence of the offence of kidnapping.

Similarly, Section 366 of IPC postulates that once the prosecution leads evidence to show that the kidnapping was with the intention/ knowledge to compel marriage of the girl or to force/induce her to have illicit intercourse, the enhanced punishment of 10 years as provided thereunder would stand attracted.

The Court held that the consent of the minor would be no defence to a charge of kidnapping. There are many factors which may not be relevant to determine the guilt but must be seen with a humane approach at the stage of sentencing.

As regards imposition of sentence, the Court held that there cannot be any mechanical reduction of sentence unless all relevant factors have been weighed and whereupon the court finds it to be a case of gross injustice, hardship, or palpably capricious award of an unreasonable sentence. It would thus depend upon the facts and circumstances of each case whether a superior Court should interfere with, and resultantly enhance or reduce the sentence. Following are certain relevant factors: first, whether force had been used in the act of kidnapping. Whether there was preplanning, use of any weapon or any vulgar motive. Although the offence as defined under Section 359 and 361 of IPC has no ingredient necessitating any use of force or establishing any oblique intentions, nevertheless the mildness of the crime ought to be taken into account at the stage of sentencing.

Second, although not a determinative factor, the young age of the accused at the time of the incident cannot be overlooked.

Third, owing to a protracted trial and

delays at different levels, how many years have passed since the incident since in this case more than twenty two years have passed since the incident.

Fourth, the present crime was one of passion. No other charges, antecedents, or crimes either before 1998 or since then, have been brought to the notice of court.

Fifth, there is no grotesque misuse of power, wealth, status or age which needs to be guarded against. Both the prosecutrix and the appellant belonged to a similar social class and lived in geographical and cultural vicinity to each other. Far from there being an imbalance of power; if not for the age of the prosecutrix, the two could have been happily married and cohabiting today. Indeed, the present instance is an offence: *mala prohibita*, and not *mala in se*. Accordingly, a more equitable sentence ought to be awarded.

In this case, the prosecution established the appellant's guilt beyond reasonable doubt and that no case of acquittal under Sections 363 and 366 of the IPC was made out. However, the quantum of sentence was reduced to the period of imprisonment already undergone.

Criminal Appeal No. 15 of 2021
Kamlesh Chaudhary v. The State of Rajasthan
Decided on: January 5, 2021

The court held that filing of charge sheet by itself cannot be a ground for cancellation of bail. Bail granted under Section 167 CrPC can be cancelled on other grounds available in law to the prosecution.

Criminal Appeal No. 1256 of 2017
Hari Om @ Hero v. State of Uttar Pradesh
Decided on: January 5, 2021

The Supreme Court reiterated that in case of circumstantial evidence, all the incriminating facts and circumstances should be fully established by cogent and reliable evidence and the facts so established must be consistent with the guilt of the accused and should not be capable of being explained away on any other reasonable hypothesis than that of his guilt. In short, the circumstantial evidence should unmistakably point to one and one conclusion only that the accused person and none other perpetrated the alleged crime. If the circumstances proved in a particular case are not inconsistent with the innocence of the accused and if they are susceptible of any rational explanation, no conviction can lie. Judged from this standpoint, it is not possible to affirm the conviction of the appellant for the offence of murder of any one or more of Bhanwar Singh, Roop Singh, Lad Kanwar and Inder Kanwar.

It was also reiterated that the court should scrutinise the evidence of a child witness with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony.

Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

Criminal Appeal No. 24 of 2021
Murali v. State rep. by the Inspector of Police
Decided on: January 5, 2021

The Supreme Court held that Section 320 CrPC does not encapsulate Section 324 and 307 IPC under its list of compoundable offences. Given the unequivocal language of Section 320 (9) CrPC which explicitly prohibits any compounding except as permitted under the said provision, it would not be possible to compound the offences which are not compoundable.

The Court held that an amicable settlement can be a relevant factor for the purpose of

reduction in the quantum of sentence.

It would be inappropriate to order compounding of an offence not compoundable under the Code ignoring and keeping aside statutory provisions but the factum of compromise between the parties is indeed a relevant circumstance which the Court may keep in mind.

J&K High Court Judgments

CRMC 77 of 2019
Sonia Devi & Anr v. State of J&K & Anr
Decided on: January 29, 2021

The Court held that the offence of kidnapping has four essentials:

1. Taking or enticing away a minor or a person of unsound mind;
2. Such minor must be under 16 years of age , if a male or under 18 years of age, if a female;
3. The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind and;
4. Such taking or enticing must be without the consent of such guardian.

The court further discussed the expression 'take' and 'entice' in this case. The Court held that the expression 'take' would mean to cause to go, to escort or to get into possession, whereas the expression 'entice' means an act of the accused by which the person kidnapped is induced of his or her own accord to go to the kidnapper. In order to prove the ingredients of taking or enticing away a minor, the prosecution has to show that the accused had some active part in the minor leaving his/her lawful guardian's house.

The Court held that the minor may not be competent to give her consent to her taking, but a minor certainly competent to leave the protection of her guardian on her own accord.

CRR No. 52 of 2013
P.B. Kholi v. Kashav Verma & Anr
Decided on: January 28, 2021

The Court held that as a rule of prudence, the evidence of a child witness is to be considered with close scrutiny and only on being convinced about the quality of statement and its reliability, conviction can be passed on the basis of statement of a child witness. Further, the court is required to rule out the possibility of a child witness being tutored before placing reliance upon its statement.

The court further discussed that the provisions contained in Section 417 of J&K CrPC show that it is primary responsibility of the State to file an appeal against the judgement of acquittal and in case the judgment of acquittal is passed in a case instituted upon a complaint, the appeal can be filed by the complainant subject to grant of leave by the High Court. Thus, statutory right to file an appeal in a case instituted upon a police challan is the sole prerogative of the State. Even though, under the Central CrPC Section 378, a right is given to a victim to file an appeal against the judgment of acquittal, yet there is no such corresponding provision in the J&K CrPC.

CRM(M) No. 611 of 2019
Saqib Ali Shah & Ors. v. State of J&K & Anr
Decided on: January 27, 2021

The Court held that the probate of a Will when granted establishes the Will from the death of the testator and the effect of probate of Will over the property contained therein has conclusiveness attached to it. Once a Will has been probated, it is conclusive as to the execution and validity of the Will not only upon all the parties who might be before the Court but also upon all other persons whatever in all proceedings arising of the Will or claims under or connected therewith.

The Court further held that the only remedy available to a person aggrieved of the order of probate is to approach the same Court by ay of an application for revocation of the probate. It is not open to an aggrieved person to question the genuineness of the Will which has been probated by resorting to criminal proceedings.

The judgment of the Probate Court in respect of the validity of the will is conclusive and binding on all persons. Merely because, during the preliminary verification of the case, handwriting expert has rendered his opinion that the signatures of the testator on the Will in

question appear to be not genuine, is not a reason good enough to register the FIR, particularly when the marginal witnesses to the Will in question have deposed with regard to the genuineness of the Will before the Probate Court and a finding regarding genuineness of the will has been recorded by the said Court.

"The rectification of an order emanates from the fundamental principles that justice is above all. In the Constitution, substantive power to rectify or review the order by the Supreme Court has been specifically provided under Article 137 as noted above. The basic philosophy inherent in granting the power to the Supreme Court to review its judgment under Article 137 is the universal acceptance of human fallibility."

Ashok Bhushan, J. in *Rajendra Khare v. Swaati Nirkhi & Ors.*, Review Petition (Crl.) No. 671 of 2018, decided on January 28, 2021.

CIVIL

Supreme Court Judgments

Civil Appeal Nos. 231-232 of 2021
Balwant Singh @ Bant Singh & Anr. v. Sudarshan Kumar & Anr.
Decided on: January 27, 2021

The Supreme Court held in this case that a tenant cannot dictate how much space is adequate for the proposed business venture or to suggest that the available space with the landlord will be adequate. The Court observed as under:

"11. On the above aspect, it is not for the tenant to dictate how much space is adequate for the proposed business venture or to suggest that the available space with the landlord will be adequate. Insofar as the earlier eviction proceeding, the concerned vacant shops under possession of the landlords were duly disclosed, but the case of the landlord is that the premises/ space under their possession is insufficient for the proposed furniture business. On the age aspect, it is seen that the respondents are also senior citizens but that has not affected their desire to continue their business in the tenanted premises. Therefore, age cannot be factored against the landlords in their proposed business."

Civil Appeal No. 6744 of 2013
Manjula & Ors. v. Shyamsundar & Ors.
Decided on: January 27, 2021

While discussing the mandate for the appellate court in deciding appeal, the Supreme Court observed as under:

"8. Section 96 of the Code of Civil Procedure, 1908 (for short, 'CPC') provides for filing of an appeal from the decree passed by a court of original jurisdiction. Order 41 Rule 31 of the CPC provides the guidelines to the appellate court for deciding the appeal. This rule mandates that the judgment of the appellate court shall state (a) points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled. Thus, the appellate court has the jurisdiction to reverse or affirm the findings of the trial court. It is settled law that an appeal is a continuation of the original proceedings. The appellate court's jurisdiction involves a rehearing of appeal on questions of law as well as fact. The first appeal is a valuable right, and, at that stage, all questions of fact and law decided by the trial court are open for re-consideration. The judgment of the appellate court must, therefore, reflect conscious application of mind and must record the court's findings, supported by reasons for its decision in respect of all the issues, along with the contentions put forth and pressed by the parties. Needless to say, the first appellate court is required to comply with the requirements of Order 41 Rule 31 CPC and non-observance of these requirements lead to infirmity in the judgment."

Special Leave to Appeal (C) No. 5743 of 2020
The Commissioner Bruhath Bangalore

Mahanagara Palike & Anr v. Faraulla Khan & Anr.
Decided on: January 25, 2021

The Supreme Court reiterated that mutation entries do not by themselves confer title which has to be established independently in a declaratory suit.

Civil Appeal No. 131 of 2021
Haryana Space Application Centre (HARSAC) & Anr. v. M/s. Pan India Consultants Pvt. Ltd.
Decided on: January 20, 2020

The Supreme Court held that the appointment of the Sole Arbitrator is subject to the declarations being made under Section 12 of the Arbitration and Conciliation Act, 1996 with respect to independence and impartiality, and the ability to devote sufficient time to complete the arbitration within the period of 6 months. The arbitrator will charge fees in accordance with the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration."

Writ Petition (C) No. 26 of 2020
Manish Kumar v. Union of India & Anr.
Decided on: January 19, 2021

The Supreme Court in this case held that where there are more than one applicants in the pending application in respect of real estate project, if they combine in future application, they would stand exempted from court fees. Secondly, in case, any of the applicants, if they were to move jointly with the requisite number under the second proviso, the exemption will be limited only to once. Meaning thereby, if exemption has been availed of by any one out of the joint applicants, in conjunction with others, then, the other joint applicants cannot claim exemption. If there are any applicants, falling under the first proviso, and who are among the petitioners, in regard to the same corporate debtor, they would also be entitled to the exemption from payment of the court fee.

Civil Appeal No. 9546 of 2013
Venigalla Koteswaramma v. Malampati Suryamba & Ors.
Decided on: January 19, 2021

The Court clarified that the expression "declaration", for the purpose of a suit for partition, refers to the declaration of the plaintiff's share in the suit properties.

The Court stated, "If the story of indebtedness of the deceased goes in doubt, the suspicions surround not only the Will but agreement too". The Court held that partition is really a process in and by which, a joint enjoyment is transformed into an enjoyment in severalty. A partition of property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to partition. In a suit for partition, the Court is concerned with three main issues: (i) whether the person seeking division has a share or interest in the suit property/properties; (ii) whether he is entitled to the relief of division and separate possession; and (iii) how and in what manner, the property/properties should be divided by metes and bounds? Etymologically, the expression "declaration", for the purpose of a suit for partition, essentially refers to the declaration.

The courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.

The Court held that—

(1) wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own

and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-à-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other."

If the decree is joint and indivisible, the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent.

Contempt Petition (Civil) No. 92 of 2008
Rama Narang v. Ramesh Narang and Ors.
Decided on: January 19, 2021

The Supreme Court has held that where an objection is taken to the jurisdiction to entertain a suit and to pass any interim orders therein, the Court should decide the question of jurisdiction in the first instance. However, that does not mean that pending the decision on the question of jurisdiction, the court has no jurisdiction to pass interim orders as may be called for in the facts and circumstances of the case. It has been held, that a mere objection to jurisdiction does not instantly disable the court from passing any interim orders. It has been held, that it can yet pass appropriate orders.

It was observed that— Though, this Court has observed, that the question of jurisdiction should be decided at the earliest possible time, the interim orders so passed are orders within jurisdiction, when passed and effective till the court decides that it has no jurisdiction, to entertain the suit. It has been held, that those interim orders would undoubtedly come to an end with the decision that the Court had no jurisdiction. This Court has held, that if the Court holds that it has no jurisdiction, it is open to it to modify the orders. However, it has been held, that while in force, the interim orders passed by such court have to be obeyed and their violation can be punished even after the question of jurisdiction is decided against the plaintiff, provided violation is committed before the decision of the court on the question of jurisdiction.

Civil Appeal No. 7469 of 2008
M/s. Padia Timber Company Pvt. Ltd. v. The Board of Trustees of Visakhapatnam Port Trust through its Secretary
Decided on: January 5, 2021

It is a cardinal principle of the law of contract that the offer and acceptance of an offer must be absolute. It can give no room

for doubt. The offer and acceptance must be based or founded on three components, that is, certainty, commitment and communication. However, when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that condition. An acceptance with a variation is no acceptance. It is, in effect and substance, simply a counter proposal which must be accepted fully by the original proposer, before a contract is made.

Civil Appeal Nos. 19-20 of 2021
Kirti & Anr. Etc. v. Oriental Insurance Company Ltd.
Decided on: January 5, 2021

The Supreme Court in this case made general observations regarding the issue of calculation of notional income for homemakers and the grant of future prospects with respect to them, for the purposes of grant of compensation which is summarized as follows:

a. Grant of compensation, on a pecuniary basis, with respect to a homemaker, is a settled proposition of law.
b. Taking into account the gendered nature of housework, with an overwhelming percentage of women being engaged in the same as compared to men, the fixing of notional income of a homemaker attains special significance. It becomes a recognition of the work, labour and sacrifices of homemakers and a reflection of changing attitudes. It is also in furtherance of our nation's international law obligations and our constitutional vision of social equality and ensuring dignity to all.
c. Various methods can be employed by the Court to fix the notional income of a homemaker, depending on the facts and circumstances of the case.
d. The court should ensure while choosing the method, and fixing the notional income, that the same is just in the facts and circumstances of the particular case, neither assessing the compensation too conservatively, nor too liberally.
e. The granting of future prospects, on the notional income calculated in such cases, is a component of just compensation

There are two distinct categories of situations wherein the court usually determines notional income of a victim. The first category of cases relates to those wherein the victim was employed, but the claimants are not able to prove her actual income, before the court. In such a situation, the court "guesses" the income of the victim on the basis of the evidence on record, like the quality of life being led by the victim and her family, the general earning of an individual employed in that field, the qualifications of the victim, and other considerations.

The second category of cases relates to those situations wherein the court is called upon to determine the income of a non-earning victim, such as a child, a student or a homemaker. Needless to say, compensation in such cases is extremely difficult to quantify.

The Court often follows different principles for determining the compensation towards a non-earning victim in order to arrive at an amount which would be just in the facts and circumstances of the case. Some of these involve the determination of notional income. Whenever notional income is determined in such cases, different considerations and factors are taken into account.

One category of non-earning victims that courts are often called upon to calculate the compensation for are homemakers. The granting of compensation for homemakers on a pecuniary basis, as in the present case, has been considered by this Court earlier on numerous occasions.

The rationale behind the awarding of future prospects is therefore no longer merely about the type of profession, whether permanent or otherwise, although the percentage awarded is still dependent on the same. The awarding of future prospects is now a part of the duty of the court to grant just compensation, taking into account the realities of life, particularly of inflation, the quest of individuals to better their circumstances and those of their loved ones, rising wage rates and the impact of experience on the quality of work.

Academic activities of the High Court of J&K for the Law Interns

Interaction of Hon'ble Mr. Justice Rajesh Bindal, Chief Justice (Acting) with newly appointed Civil Judges, Junior Division

On 1st of January, 2021, J&K Judicial Academy organized an interaction of Hon'ble Mr. Justice Justice Rajesh Bindal, Chief Justice (Acting) with newly appointed Civil Judges (Junior Division) - 2020 batch. 40 newly appointed officers participated in the interaction through virtual mode from their respective places of posting.

The interaction began with Hon'ble Mr Justice Rajesh Bindal greeting the officers on the New Year 2021 and wished them good health and remarkable success in their new assignments. The officers also reciprocated by wishing his Lordship.

After briefly talking to the officers on the role and responsibilities of the Judicial Officers, especially for the new entrants in the Judicial service, Justice Bindal asked all the Judicial Officers to share their experiences and also to highlight the problems and difficulties cropping up, having worked in the field for about almost a month. Many of the officers shared their experiences and projected the difficulties faced by them in their initial days of service, ranging from lack of sufficient infrastructure in the courts, non-availability or insufficiency of official accommodation, inexperience of the sub -ordinate staff etc.

The officers felt that during their training course, owing to Covid-19 restriction and SOPs, they could not get sufficient exposure to actual court atmosphere. Major part of the training programme was conducted virtually for which reason the practical aspects of the training could not be accomplished in the manner these were proposed in the induction training programme. Because of inadequate practical learning in the actual court settings, the officers felt that on each day they are getting exposed to new issues. They all are trying to address those issues by seeking guidance from their superior officers in their respective districts. They wished that Academy may organize few special sessions for them to enhance their skills in dealing with the practical difficulties to which they have been confronted in the initial days of their service. Justice Bindal directed the Academy to prepare a module for short duration training programme for the officers in this respect.

The officers also expressed their feelings after joining as Munsiffs in their respective courts. They were very enthusiastic and energetic and felt a sense of high responsibility. They were all ready to face the new challenges and perform their duties enthusiastically and with a positive note. They assured that they will follow all the principles of Judicial conduct and always will keep the esteem of the Judiciary very high. They were of the firm view that everyone will get Justice whosoever comes in their courts. Some of the officers also discussed the problems they were facing due to harsh climatic conditions. But they were ready to shoulder their responsibilities and provide justice to the people. They said that they will not take any hasty decisions and in case of any difficulty they will seek guidance from their superior Judicial Officers.

Justice Bindal was overwhelmed by the views expressed and the determination of the officers. Lordship said that whenever anyone requires guidance, Lordship could be approached through the Judicial Academy. The officers also thanked Lordship for this generosity. Justice Bindal exhorted the Judicial Officers to regularly read the latest judgments of the Supreme Court and J&K High Court. Lordship advised that the Judicial Officers should follow the principals of judicial conduct and be honest, impartial and hard-working. The prime focus of the Judicial Officer should be imparting Justice and they should work hard so that the common people have faith and trust in them that they will certainly get Justice from them.

The newly appointed Judicial Officers thanked Justice Bindal for Lordship's guidance and kind remarks and assured that they will follow Lordship's guidance in true spirit.

Recording of Confessions and Statements under Section 164 Criminal Procedure Code: A Practical Approach

Introduction-

The provision under section 164 has been inserted by legislature in the chapter-XII of the Code of Criminal Procedure. The provision provides for recording of confession and statement of the accused and the witness. It is crystal clear that all confessions are statements, but all statements are not confessions. In this article it would be tried to discuss each and every aspect of the concept as well as practice of section 164 CrPC.

Bare provision with amendment-

Before going to various aspect of the topic it pertinent to mention the amended provision of the section-164 CrPC. The provision as per amendment of 2013 is as follows-

164 - Recording of confessions and statements

1. Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence;

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

2. The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

3. If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.

4. Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate".

5. Any statement (other than a confession) made under Sub-Section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(5A) —(a)- In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of 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, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police;

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a

special educator in recording the statement;

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video graphed.

(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.

6. The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

Who is empowered for recording confessions or statements-

It is very important to discuss here as to who is empowered to record the confession and statement of the accused and witness. Sub section (1) of the section 164 clearly provides that any Metropolitan Magistrate of Judicial Magistrate may whether or not he has jurisdiction in the case to record the confession or statement of accused as well as victim or witness by the same. It means that Executive Magistrate or Police commissioner having power of Magistrate has no jurisdiction to record the confession or statements. See the case laws-

1. State of UP v. Singhana Singh, AIR 1964 SC 358
2. Nika Ram v. State of HP, AIR 1972 SC 2077

It may be kept in mind that in case where recording of confession or statement is required, such Magistrate may not have the jurisdiction to try a particular case. However, in the case of a female victim, the statement should be recorded by a lady Judicial Magistrate. Hon'ble Supreme Court in the case of State of Karnataka by Nonasinapare Police v. Shivanna @ Tarkari Shivanna Special Leave Petition (Crl.) No. 5073/2011, judgment dated 25.04.2015 gave directions in this respect as under:

"9. On considering the same, we have accepted the suggestion offered by the learned counsel who appeared before us and hence exercising powers under Article 142 of the Constitution, we are pleased to issue interim directions in the form of mandamus to all the police station in charge in the entire country to follow the direction of this Court which are as follows:

(i) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/ preferably Judicial Magistrate for the purpose of recording her statement under Section 164 CrPC A copy of the statement under Section 164 CrPC should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 CrPC should not be disclosed to any person till charge sheet/ report under Section 173 CrPC is filed.

(ii) The Investigating Officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably a Lady Judicial Magistrate.

(iii) The Investigating Officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.

(iv) If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

(v) Medical Examination of the victim: Section 164 A CrPC inserted by Act 25 of 2005 in CrPC imposes an obligation on the part of Investigating Officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under Section 164 CrPC

Stage of the recording of the confessions or statements -

Further very important question arises before us as to when the statement is to be

recorded. For the better understanding or convenience this question may be divided into two parts; one in respect of time and another in respect of person.

In respect of time sub section (1) of section 164 CrPC clearly provides that confession or statement may be recorded during the course of investigation or afterwards before the commencement of the inquiry or trial. Now the question before us is about commencement of the inquiry i.e., when will it be deemed that inquiry has commenced? The answer is — when the Magistrate takes cognizance under section 190 CrPC It also means that if charge sheet has been submitted by the IO but the Magistrate has not taken cognizance yet. Such confession or statement would be admissible in evidence and it cannot be discard only on the ground that charge sheet has been submitted. In the case of Raja Ram v. State, AIR 1966 All 192 had the occasion to consider the following question:

"Whether a confession recorded by a Magistrate under Section 164 of the Code of Criminal Procedure after the police had completed its investigation and submitted a charge-sheet, but before the Magisterial enquiry has commenced, is inadmissible in evidence."

The concurrent opinion of each of the three judges (comprising the full bench) on the above question was in the negative, and it was held that a statement under Section 164 CrPC may be recorded after the conclusion of investigation and before commencement of the inquiry or trial. Third opinion expressed by Justice D.P. Uniyal specifically dealt with the point in time when an inquiry may be treated to have commenced. That question was answered in the following words:

"24. Under the provisions of the Code the inquiry under Chapter XVIII commences when the Magistrate takes cognizance of the offence within the meaning of Section 190 (1)."

In the below mentioned case laws Hon'ble Supreme Court and Allahabad High Court reiterated the principle propounded in the above mentioned case law-

1. Nandini Jadaun v. state of UP, Case No-29654/2018 judgment dated 29.09.2018 (All.).
2. Nafeesa v. State of U.P. & Ors. 2015 (5) ADJ 648 (All).
3. Ajay Kumar Parmar v. State of Rajasthan, judgment dated 27.09.2012 (SC)
4. Jogendra Nahak & Ors v. State of Orissa & Ors., judgment dated 04.08.1999 (SC).
5. Mahabir Singh v. State of Haryana, Criminal Appeal No-471/1998, Judgment dated 26.07.2001 (SC).

Situation would be not different if charge sheet has been filed under section-173(8) CrPC It means that even though charge sheet has submitted by the IO but further investigation is going on, in that case also confession or statement may be recorded in terms of section 164 (1) CrPC

On plain reading of the section 164 it is not clear whether the IO is required to sponsor recording the confession or statement or not. In 2013, provision has been amended adding sub section 5A. This casts a duty upon the Magistrate that "In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of 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, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police;

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement;

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video graphed.

A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be cross-examined on such

statement, without the need for recording the same at the time of trial."

But above newly added provision and the earlier provision do not clarify about the controversy if sponsorship of IO for recording of confession or statement is mandatory or victim or witness or accused can approach the Magistrate for the same. After the pronouncement of the Hon'ble Supreme Court in 1999, it is established that except for the confession of the accused, the Magistrate is not authorized to record statement without sponsorship of the IO. It means that confession of the accused may be recorded by the Magistrate on the request of the Accused, but recording a confession is in the discretion of the Magistrate. If the Magistrate is of the opinion that confession should be recorded, before proceeding further a report in this respect may be called from the police station concerned to established identity of the accused and it could be assured that investigation is going on. See in this regard — Jogendra Nahak & Ors. v. State of Orissa & Ors., Judgment dated 04.08.1999 (SC). It was held that -

"If a magistrate has power to record statement of any person under Section 164 of the Code, even without the investigating officer moving for it, then there is no good reason to limit the power to exceptional cases. We are unable to draw up a dividing line between witnesses whose statements are liable to be recorded by the magistrate on being approached for that purpose and those not to be recorded. The contention that there may be instances when the investigating officer would be disinclined to record statements of willing witnesses and therefore such witnesses must have a remedy to have their version regarding a case put on record, is no answer to the question whether any intending witness can straightaway approach a magistrate for recording his statement under Section 164 of the Code. Even for such witnesses provisions are available in law, e.g. the accused can cite them as defence witnesses during trial or the court can be requested to summon them under Section 311 of the Code. When such remedies are available to witnesses (who may be sidelined by the investigating officers) we do not find any special reason why the magistrate should be burdened with the additional task of recording the statements of all and sundry who may knock at the door of the court with a request to record their statements under Section 164 of the Code.

On the other hand, if door is opened to such persons to get in and if the magistrates are put under the obligation to record their statements, then too many persons sponsored by culprits might throng before the portals of the magistrate courts for the purpose of creating record in advance for the purpose of helping the culprits. In the present case, one of the arguments advanced by accused for grant of bail to them was based on the statements of the four appellants recorded by the magistrate under Section 164 of the Code. It is not part of the investigation to open up such a vista nor can such step be deemed necessary for the administration of justice.

Thus, on a consideration of various aspects, we are disinclined to interpret Section 164(1) of the Code as empowering a magistrate to record the statement of a person unsponsored by the investigating agency. The High Court has rightly disallowed the statements of the four appellants to remain on record in this case. Of course, the said course will be without prejudice to their evidence being adduced during trial, if any of the parties requires it."

In Mahabir Singh vs State of Haryana, AIR 2001 SC 2503, it was held that -

"The sub-section makes it clear that the power of the Magistrate to record any confession or statement made to him could be exercised only in the course of investigation under Chapter XII of the Code. The section is intended to take care of confessional as well as non-confessional statements. Confession could be made only by one who is either an accused or suspected to be an accused of a crime. Sub-sections (2), (3) and (4) are intended to cover confessions alone, de hors non-confessional statements whereas sub-section (5) is intended to cover such statements. A three Judge Bench of this Court in Jogendra Nahak and ors. v. State of Orissa and ors. {2000 (1) SCC 272} has held that so far as statements (other than confession) are concerned they cannot be recorded by a Magistrate unless the person

(who makes such statement) was produced or sponsored by investigating officer. But the Bench has distinguished that aspect from the confession recording for which the following observations have been specifically made:

There can be no doubt that a confession of the accused can be recorded by a Magistrate. An accused is a definite person against whom there would be an accusation and the Magistrate can ascertain whether he is in fact an accused person. Such a confession can be used against the maker thereof. If it is a confessional statement, the prosecution has to rely on it against the accused.

We have no doubt that an accused person can appear before a Magistrate and it is not necessary that such accused should be produced by the police for recording the confession. But it is necessary that such appearance must be in the course of an investigation under Chapter XII of the Code. If the Magistrate does not know that he is concerned in a case for which investigation has been commenced under the provisions of Chapter XII it is not permissible for him to record the confession. If any person simply barges into the court and demands the Magistrate to record his confession as he has committed a cognizable offence, the course open to the Magistrate is to inform the police about it. The police in turn has to take the steps envisaged in Chapter XII of the Code. It may be possible for the Magistrate to record a confession if he has reason to believe that investigation has commenced and that the person who appeared before him demanding recording of his confession is concerned in such case. Otherwise the court of a Magistrate is not a place into which all and sundry can gatecrash and demand the Magistrate to record whatever he says as self-incriminatory."

Procedure of recording confession-

Section 164 (4) mandates that confession may be recorded according to the procedure prescribed in section 281 CrPC. In the case of Ram chandra v. State, (1956) All 236, Allahabad High Court held that a Magistrate has discretion to record or not to record a confession. If he decides to record it, the provision requires him to comply with four requirements -

(1) It should be record and signed in the manner provided in section 281 and then forwarded to the Magistrate concerned.

(2) Accused should be give a statutory warning that he is not bound to make a confession.

(3) Magistrate should be first satisfied that it is being made voluntarily.

(4) Magistrate should record a memorandum at the foot of the confession.

It must be kept in the mind that oath is not required to be administered for recording of confession.

Procedure for recording statement.

All confessions are statements but all statements are not confessions. It means that statement includes statement of a victim, statement of a witness, a statement recording during identification parade and the statement of the accused not amounting to confession which is relevant under sections 17 to 21 of the Indian Evidence Act, 1872. Calcutta High Court in the case of Legal Remembrancer v. Lalit Mohan Singh Roy, (1921) ILR 49 (Cal), it was held that the word statement is not limited to a statement by a witness, but includes the statement made by accused not amounting to a confession.

The first very important thing is that it should be recorded in the manner prescribed under sec 164 (5) of the CrPC. It means that oath shall be administer and recorded in the manner of recording of evidence. It may be in the audio-video mode. But when statement is recording under sub section 5A then Magistrate shall record the statement of the person against whom such offence has been committed, as soon as the commission of offence is brought to the notice of the police. Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement; Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video graphed.

Second very important thing is that in

case of lady victim, statement should be recorded by a lady Judicial Magistrate but if Lady Magistrate is not available then by the male Judicial Magistrate in presence of lady staff if possible. It must also be borne in mind that in the POCSO matters it should be recorded in the manner prescribed in the section 25 of the POCSO Act. In the simple terms, it should be recorded in the presence of her parent or support person.

Third important thing is that preferably the statement should be recorded in the language of the victim. If the language of the victim is different, then it should be recorded in the language of the court and signed by the Magistrate as well as victim after making the victim understand it properly.

Fourth important thing is that identity of the victim must be ascertained by the Magistrate which can be done with the help of the IO.

After recording the statement it shall be sealed properly and a copy should be provided to the IO with the direction to keep it confidential.

Nature of the confession or statement recorded under section 164 -

It is well established that the nature of the confession or statement under this section is a public document. It need not to be proved before the court by the Magistrate. It means that a Magistrate may not be summoned for the purpose of proving confession or statement before the courts. See case laws -

1. Guruvindapali Anna Rao v. State of AP, (2003) Crimes 72.
2. Mona Rajan Sil v. State, 2008 Cr.L.J. 4719 (Cal).

Recording of confession in jail -

If the confession of the Accused has been recorded in the jail then such kind of confession is improper and not admissible in evidence. See case law-

Devilal v. State of Ajmer, AIR 1954 SC 462.

Whether Confession can be recorded in Magistrate's Chamber-

A confession can be discarded merely on the ground that it was recorded not in the open court but in the chamber. See case law -

Abed Ali Jamadar v. State,1988 Cr.L.J. 354 (Cal).

Whether second statement can be recorded - It is well established that second statement of the victim can not be recorded as a general principle in respect of same incident but if it is in addition to the previous statement then it may be recorded on the request of the IO. See case law-

Nafeesa v. State of U.P. & Ors. 2015 (5) ADJ 648 (All).

Whether copy of the statement can be issued to any person other than IO -

Even though the statement recorded under this section is a public document, various High Courts have propounded that a copy of the statement can be issued after getting nominal charges. In Karnataka by Nonasinapare Police v. Shivanna @ Tarkari Shivanna Special Leave Petition (Crl.) No. 5073/2011, judgment dated 25.04.2015 it was held that copy of the statement cannot be given to the accused or any other person except IO, till the stage of 207 CrPC. Hon'ble Supreme Court reiterated the same principle in the case of Miss "A" v. State of Uttar Pradesh, Criminal Appeal No.659 of 2020, judgment dated 08.10.2020 (known as Chinmayanand Case). Hon'ble Supreme Court held that no person is entitled to a copy of statement recorded under section 164 of the Code till the appropriate orders are passed by the court after the charge-sheet is filed. The right to receive a copy of such statement will arise only after cognizance is taken and at the stage contemplated by sections 207 and 208 of the Code and not before.

Whether dying declaration can be deemed to be the statement u/s 164 CrPC.

It is well settled that when any dying declaration is recorded but victim survives then such statement of the victim would be relevant under section 164 even though oath has not been administer. This has been recognized by the Hon'ble Supreme Court in the case of State of UP v. Veer Singh & Ors., Criminal Appeal No-727-729 of 1998, judgment dated 28.04.2004, holding that - It is trite law that when maker of purported dying declaration survives the same is not statement under Section 32 of the Indian Evidence Act, 1872 (for short the 'Evidence Act') but is a statement in terms of Section 164 of the Code. It can be

used under Section 157 of the Evidence Act for the purpose of corroboration and under Section 145 for the purpose of contradiction. This position was highlighted in Ramprasad v. State of Maharashtra (1999 (5) SCC 30), Sunil Kumar & Ors. v. State of Madhya Pradesh (JT 1997 (2) SC 1), and Gentela Vijayavardhan Rao v. State of A.P. (1996 (6) Supreme.

Evidentiary value of the confession/ Statement-

It is well settled that confession and statement recorded under this section are not substantive piece of evidence. But confession or statements are relevant and admissible in evidence, but these can be used for corroboration or for the purpose of contradiction under section 145 and 157 Indian Evidence Act. See case law-

1. Ram kishan Singh v. Harmit Kaur, 1972, 3 SCC 280.
2. Tulsi Singh v. State of Punjab, SC Judgment dated 07.08.1996.
3. Kashmira Singh v. State of MP, AIR 1952 SC 159.
4. Baij Nath Singh v. State of Bihar, 2010 (70) ACC 11 SC.
5. Utpal Das v. State of WB, AIR 2010 SC 1894.
6. State of Karnataka v. P. Ravi Kumar,(2018) 9 SCC 614.

Conclusion-

Statement recorded by IO under section 161 has no evidentiary value in respect of trial, and it can be used only for the purpose of contradiction. But confession or statement is a weak kind of evidence but it can be used for the purpose of corroboration as well as contradiction.

- Mr. Vijay Kumar Katiyar,
Sr. Civil Judge (U.P.)
Deputy Director,
Judicial Officers' Training & Research Institute, Lucknow

Shared household under Domestic Violence Act

The definition of 'shared household' in Section 2(s) of the Protection of Women from Domestic Violence Act, 2005 (DV Act) is an exhaustive definition. The first part of definition begins with expression "means" which is undoubtedly an exhaustive definition and second part of definition, which begins with word "includes" is explanatory of what was meant by the definition.

The use of both the expressions "means and includes" in Section 2(s) of DV Act clearly indicates the legislative intent that the definition is exhaustive and shall cover only those which fall within the purview of definition and no other.

Section 2(s) of the DV Act defines shared household as a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.

The intention of the legislature to insert such comprehensive and all-encompassing definition of the shared household in DV Act was for two primary purposes: Firstly, to delink the concept of ownership from possession so as to protect women from domestic violence in the form of removal or threats of removal from house in which she has no title; Secondly, to keep up with family structure in Indian households where sons even after their marriage continue to live with their parents in a house owned by them. Unfortunately, this intent behind the provision had been undermined in S.R. Batra v. Taruna Batra.

In the case of S.R. Batra & Another v. Smt. Taruna Batra (2007) 3 SCC 169, the Supreme Court with reference to definition of shared household under Section 2(s) of the DV Act stated that the definition of 'shared household' in Section 2(s) of the Act is not very happily worded, and appears to be the result of clumsy drafting requires to be interpreted in a sensible manner.

The Court held that under Section 17(1) of the Act wife is only entitled to claim a right to residence in a shared household, and a 'shared household' would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. In the case, the property in question neither belonged to the husband nor was it taken on rent by him nor was it a joint family property of which the husband was a member. It was the exclusive property of mother of husband and not a shared household. In Roma Rajesh Tiwari v. Rajesh Dinanath Tiwari, (2017) SCC OnLine Bom 8906, the Bombay High Court elaborated on the right of women to reside in her matrimonial home or shared household. The Court observed that the 'Statement of Objects and Reasons' of the Act makes it clear that, this DV Act is enacted to secure the right of a woman to reside in her matrimonial home or shared household, irrespective of the question 'whether she has any right, title or interest in the said household or not'.

It is also irrelevant whether the respondent has a legal or equitable interest in the shared household. The moment it is proved that it was a shared household, as both of them had, in their matrimonial relationship, i.e. domestic relationship, resided together there and in this case, upto the disputes arose, it follows that the petitioner-wife gets right to reside therein and, therefore, to get the order of interim injunction, restraining respondent-husband from dispossessing her, or, in any other manner, disturbing her possession from the said flat. The judgment, delivered by a bench headed by Justice Ashok Bhushan, has held that an aggrieved woman has a right to reside in a house although she or her husband may not own the premises jointly or singly, or might have taken it on rent jointly or singly. It said the household may even belong to a joint-family or is rented by the woman's in-laws but the complainant still has a right to reside in it if she has been living there after her marriage. It would also not matter if she has been compelled to move out after the discord since the house will still be treated as a 'shared household', entitling her to live in it once she files a complaint under the Domestic Violence Act.

What is a 'shared household' where a complainant can assert a right to residence?

The shared household, the Court has now ruled, is the house where the complainant was either living at the time when application was filed or was living in the recent past but has now been excluded from the use or she is temporarily not there because of the adverse circumstances.

The living of a woman in a household has to refer to a living which has some permanency. The court has said that mere fleeting or casual living at different places shall not make a shared household. The intention of the parties and the nature of living including the nature of household have to be looked into to find out as to whether the parties intended to treat the premises as shared household or not. And once satisfied that a particular house is a shared household, a court can grant an entitlement in favour of the woman of the right of residence under the shared household irrespective of her having any legal interest in the same or not.

Right to live in the shared household is an economic right of women. Denial of access to such a shared household by any action, omission/commission, or conduct of the husband/male partner or any of his relatives is considered to be economic abuse according to the DV Act (section 3 explanation 1(iv)(c))

In Satish Chander Ahuja v. Sneha Ahuja in Civil Appeal No. 2483 of 2020 (Arising out of SLP (C) No. 1048) the Court held that a woman living with her husband in premises belonging to his relatives has a right to claim residence in a "shared household".

The bench said that the SR Batra case did "not lay down the correct law" and did not correctly interpret Section 2(1)(s) of the 2005 Act. "It further held that shared household referred to in Section 2(s) is the shared household of aggrieved person where she was living at the time".

The bench observed that—

"the definition of shared household given in Section 2(s) cannot be read to mean that shared household can only be that household which is household of the joint family of which husband is a member or in which husband of

the aggrieved person has a share".

The bench was hearing a petition filed by a father-in-law whose contention was that the suit property was not a shared household property, but was exclusively owned by him and hence, neither his son nor daughter-in-law had any right in that property. The father-in-law had purchased the property in 1983. After getting married in 1995, his son started living with his wife on the first floor. Later, due to marital problems, the husband filed for divorce in 2014, alleging cruelty by the wife. In 2015, the wife filed a separate case under the Domestic Violence Act against her husband and in-laws. The father-in-law, however, submitted before the trial court that the daughter-in-law was herself subjecting him and his wife to domestic violence. Moreover, as the husband was still alive, the father-in-law had no duty to maintain the daughter-in-law.

However, she submitted that she had the right to reside in the property as it was a shared household. But the trial court directed her to hand over possession of the property to the father-in-law.

When the matter was appealed before the Delhi High Court, it set aside the order of the trial court and sent the matter back to it for fresh hearing and made the husband a party to the case. The father-in-law, thereafter, filed an appeal before the Supreme Court, seeking to uphold the order of the trial court.

The Supreme Court bench, interpreting the legal position of shared household, observed that "shared household referred to in Section 61 2(s) is the shared household of aggrieved person where she was living at the time when application was filed or in the recent past had been excluded from the use or she is temporarily absent.

"The words 'lives or at any stage has lived in a domestic relationship' have to be given its normal and purposeful meaning. The living of woman in a household has to refer to a living which has some permanency. Mere fleeting or casual living at different places shall not make a shared household. The intention of the parties and the nature of living including the nature of household have to be looked into to find out as to whether the parties intended to treat the premises as shared household or not."

Throwing light on the position of women in Indian society, the bench said:

"The progress of any society depends on its ability to protect and promote the rights of its women. Guaranteeing equal rights and privileges to women by the Constitution of India had marked the step towards the transformation of the status of the women in this country…. The domestic violence in this country is rampant and several women encounter violence in some form or the other or almost every day, however, it is the least reported form of cruel behaviour. A woman resigns her fate to the never ending cycle of enduring violence and discrimination as a daughter, a sister, a wife, a mother, a partner or a single woman in her lifetime."

"This non-retaliation by women coupled with the absence of laws addressing women's issues, ignorance of the existing laws enacted for women and societal attitude makes the women vulnerable. The reason why most cases of domestic violence are never reported is due to the social stigma of the society and the attitude of the women themselves, where women are expected to be subservient, not just to their male counterparts but also to the male's relatives," it said.

In Civil Appeal No. 3822 of 2020 Smt. S Vanitha v. The Deputy Commissioner, Bengaluru, the judgement broadens the understanding of "shared household" for married women. A "shared household" would have to be interpreted to include the residence where the appellant had been jointly residing with her husband. Merely because the ownership of the property has been subsequently transferred to her in-laws or that her estranged spouse is now residing separately, is no ground to deprive the appellant of the protection that was envisaged under the DV Act. The fact that specific proceedings under the DV Act had not been instituted when the application under the Senior Citizens Act, 2007 was filed, should not lead to a situation where the enforcement of an order of eviction deprives her from pursuing her claim of entitlement under the law. The inability of a woman to access judicial remedies may, as this case

exemplifies, be a consequence of destitution, ignorance or lack of resources can not come in her way to seek her right. Even otherwise, recourse to the summary procedure contemplated by the Senior Citizen Act, 2007 was not available for the purpose of facilitating strategies that are designed to defeat the claim of the appellant in respect of a shared household. A shared household would have to be interpreted to include the residence where the appellant had been jointly residing with her husband. The Court concluded that the claim of the appellant that the premises constitute a shared household within the meaning of the PWDV Act, 2005 would have to be determined by the appropriate forum. The claim cannot simply be obviated by evicting the appellant in exercise of the summary powers entrusted by the Senior Citizens Act, 2007.

The apex court held that "Section 3 of the Senior Citizens Act, 2007 cannot be deployed to over-ride and nullify other protections in law particularly that of a woman's right to a "shared household" under Section 17 of the DV Act. A shared household would have to be interpreted to include the residence where the appellant had been jointly residing with her husband. Merely because the ownership of the property has been subsequently transferred to her in-laws or that her estranged spouse is now residing separately is no ground to deprive the appellant of the protection that was envisaged under the DV Act.

This indicates that the meaning of shared household has undergone a drastic change over the years, from S.R Batra case of 2006 to Satish Chander Ahuja case and S. Vanitha case of 2020.

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Guest Column

Remembering Nani Palkhivala

It was 101 years back Nani Palkhivala was born on January 16, 1920. He played his innings till December 11, 2002 (almost 82 years). On the day of his death, a banner was put up at the Marine Drive with the caption:-

"We the nation"

"We the people"

Have lost a LEGEND.

He belonged to the 20th century. He continues to be relevant in 21st century. Legends do not die. In fact, he created a permanent legacy in the legal – Judicial Co-parcenary. It is said that Nani was God's gift to India. Therefore, this piece.

Nani on birth was called Nanabhoy by his parents. He belonged to a humble middle class Parsi family. His ancestors used to make and fix 'Palkhis' – Palanquins. Therefore, the surname Palkhivala. Not very tall. He stood 5 feet 7 inches. Slim. Not many kilos to carry.

It is recorded that as a child, Nani suffered from a dreadful stammer. What a handicap! He used to struggle to say a few words. Even unable to complete a sentence. It was a hard sight. His father used to make him run on the beach with an almond under his tongue. He would read by speaking reasonably loud. He made every effort to overcome this. Nani would take part regularly in debates and elocution contests. He hated to come second. He was determined to get over this handicap. It is said that he would not have been such a speaker and a great orator if he did not have this stammer. Nani was, indeed, a rare example. He overcome completely his handicap during his student days only. Nobody could say that he ever suffered from a stammer. He flowed so smoothly. He was like the Rolls-Royce. He became a genius in the art of communication. Both oral and written.

It was his father who inculcated in him the passion for literature. This remained abiding joy for him throughout his life. He recalled that as a child of ten he started enjoying the magic that lies in the words. He developed the skill to use the right word for the right occasion. He was a voracious reader from his childhood. He used to save money to buy second hand books. He used to visit regularly a book shop on Grant Road in Bombay. Palkhivala used to sit for hours reading the latest arrivals. Biographies, history and literature books. M.C. Chagla was elevated as a judge of Bombay High Court in 1941. He narrates an incident. It was lunch interval. He was in his chamber. His secretary told him that some Palkhivala wants to meet

him. The secretary was asked to bring him in. Justice Chagla saw that a shy and diffident young man was standing in front of him. Justice Chagla was a member of the Syndicate of the University. Palkhivala requested Justice Chagla that he wants a note from him to permit him to read in the university library. Justice Chagla was happy to give him such a note. He was happier to find that young persons did not merely read law but were also interested in literature and history. Such was the passion of Nani.

Nani after completing his matriculation joined the St. Xavier's College. He completed his B.A. with Honours in English literature. After graduation, Palkhivala's ambition was to become a lecturer in a local college. He appeared for the interview. A lady candidate was selected. He was not. The lady had prior teaching experience. This proved to be the turning point in his life journey. Palkhivala continued to be in touch with the lady lecturer. He used to invite her for lunch in later years. But for her selection, he would have never become a lawyer.

It would not be wrong to say that the greatest lawyer of India had come to law accidently. Even his rejection as a lecturer did not bring him to law. He joined M.A. in English literature. Two more years were spent in getting his M.A. degree. Nani wanted to take the Indian Civil Service (ICS) examination. This was at that time the dream of young Indians. The ICS examination was scheduled to be held in New Delhi. A severe epidemic broke out that year. Accordingly, he was told not to go to Delhi. In fact, he did not submit his application in view of the epidemic. The Government later declared that the examination would be held at Bombay. It was too late to submit the application form. Consequently, Palkhivala could not attempt the ICS examination.

It was under these circumstances that Palkhivala joined the Government law college in 1942. His father was always keen that he should do law. He stood first in the First and Second LLB examinations in 1943 and 1944 (LLB used to be two years course). He joined the Bar in 1944. Since, Palkhivala wanted to practice on the original side; he was required to pass 'Advocates (O.S.)' examination. He not only stood first in this examination but secured the highest marks in every individual paper of this examination. It has been rightly said that Palkhivala seemed genetically coded to be an outstanding lawyer.

Palkhivala joined the chamber of Sir Jamshed Ji Kanga. He was the tallest leader of the Bar. Kanga had a talented and formidable team of lawyers. His chamber was crowded. Kanga had a large table for himself. The other juniors – Kolah, Mistri and Seervai had one table each. Palkhivala also had a table but with only one chair. Soon, Palkhivala got so busy. He would frequently have conferences sitting in his car. There was simply no space in his chamber to have conferences with his clients. Palkhivala in the beginning of his career got an opportunity. Palkhivala was assisting R.J. Kolah in a matter which was fixed before Justice N.H. Bhagwati (father of former CJI P.N. Bhagwati). R.J. Kolah and the Advocate General concluded their arguments on a particular day. The case was fixed for the next day for the rejoinder of Kolah. It so happened that Kolah was busy in another matter the next day. He asked Palkhivala to complete the arguments in the rejoinder. Palkhivala did not sleep for the night. He prepared the case. Palkhivala urged new points which are normally are not allowed in a rejoinder. The Advocate General M.P. Amin was gracious enough. He did not object to raising the new points. He only requested that he should be allowed the right of surrejoinder. Palkhivala continued for the whole day. A word spread around that Palkhivala was arguing an important matter. The students from the university rushed to the Bombay High Court to listen to him. He performed so well. He ultimately persuaded the judge to take a contrary view. For a two year old lawyer, this was an achievement of its own kind. The judgment was taken in appeal before the Division Bench. The view taken by the single judge was upheld. This case has been described as the 'booster rocket' in the professional journey of Palkhivala. He was hardly for three years at the Bar (1946-47) when his annual income was Rs.60,000/- This amount be equal to one crore today. Within seven years of his

journey at the Bar, he purchased a large flat of 5,000 sq. feet at Commonwealth Building on Marine Drive. He continued to live in this flat till he breathed his last. From the age of 33 (1953), he started appearing regularly in the Supreme Court independently. Destiny also plays its own role. He was engaged to argue a Special Leave Petition in the Supreme Court on May 8, 1953. The return ticket from Delhi to Bombay was booked by the night flight on the same day. On May 5, Nani developed bad cold with fever. He returned the brief. The next day, Nani changed his mind. It meant a lot to the poor litigant. It so happened that on May 7, the temperature rose still higher and Nani had no option but to return the brief once again. C.K. Daphtary, the then Solicitor General who lived in Delhi, agreed to step into Nani's place. The plane which left Delhi on the late evening of May 8, with full passenger load, crashed. There was no survival. He was destined to make his contributions to legal literature and constitutional jurisprudence.

Justice Y.V. Chandrachud, former CJI was one year senior to Palkhivala. They both were at the bar. Both were selected as part time lecturer by Chief Justice Chagla in 1949. Nariman, Sorabjee, Ashok Desai and Anil Dewan were the students of Palkhivala. This is a good practice. Young lawyers lecture as the visiting faculty. They get a real good exposure. I myself was taught by Dr. A.S. Anand (1964-66) who later became the CJI. This practice has also been followed in the Panjab University. M.M. Punchhi and J.S. Khehar taught at the Panjab University who later became CJIs. Palkhivala taught till 1952. His love for teaching was genuine. One could gauge the measure of his scholarship from the fact that he was appointed Tagore Professor of Law at the Calcutta University. While being the Indian Ambassador to the United States between 1977 to 1979, he addressed the U.S. Universities, other academic institutions and Think Tanks all over the world. The University of Princton, New Jersey (USA), conferred upon him the Honorary Degree of Doctor of Laws. The same honour was bestowed on him by the Lawrence University, Wisconsin (USA). He was a unique blend of academic scholarship and professional excellence.

The memory of Nani was phenomenal. He could read passages from his favorite poems effortlessly from memory. Iqbal Chagla, Senior Advocate has a story to share about Palkhivala's grasp and memory. Palkhivala would take notes on a 'thumb-nail' size paper. He would argue the case in depth and in detail with perfect recall for days together. His memory never failed him. It was both sharp and photographic. Soli Sorabjee in his tribute says that Nani was the reincarnation of Macaulay. Nani even surpassed him so far as memory was concerned. Macaulay did not have to grapple with intricate and complex details of finance bills. Year after year. He used to analyze the 'budget' without the budget papers at the Brabourne Stadium. It was a feast to watch Nani. This, in fact, had become the annual feature. The yearly event. There used to be two budget speeches. One by the Finance Minister in the Parliament. The other by Palkhivala outside the Parliament. Palkhivala's budget speech was well greased with quotations and punch lines. Yet without reference to notes. The FM used to carry the budget papers in a special brief case. Palkhivala's memory container never failed him. Unmatchable. Mind bogging. A real asset of a lawyer.

Nani was only 6 years into the legal profession when the Indian Constitution came into existence on January 26, 1950. Nani played the role of the savior of the Indian Constitution. During the period from 1950 to 1972, the Indian Constitution was frequently amended as it suited to the Political Executive and the Parliament. There was a popular joke that the law book shops will not keep a copy of the Constitution. The Constitution was being treated like the 'periodical'. In the words of Nani, the Constitution had become 'Defaced and Defiled'. Many constitutional cases like Golak Nath (1967), Bank Nationalization (1970), Privy Purses (1971) and Bennett Coleman (1972) were argued by Palkhivala in the top court of the country. Keshavananda Bharti (1973) created constitutional history. The Constitution Bench of thirteen judges laid down that the Basic Structure of the Constitution cannot be altered, amended and destroyed. This one case which was argued for

months together by Palkhivala ultimately proved to be the savior of the Constitution. In 1975, Chief Justice A.N. Ray assembled a Bench of 13 judges to overturn Keshavananda and the unamendability of the Basic Structure. Nani was at his best. Chief Justice Ray was left alone and was forced to dissolve the bench. Justice H.R. Khanna was part of this bench. He has recorded: "the height of eloquence to which Palkhivala rose on that day has seldom been equaled and never surpassed in the Supreme Court". Even after Keshvananda Bharti, Palkhivala argued St. Xavier (1974), the Minerva Mills (1980) and the Mandal (1993) cases. His contribution in shaping the Indian Constitution for the future is unique. Today, Indian Constitution has completed 71 years of its journey. The Basics of the Indian Constitution continue to be the same. The concept of Basic Structure has become an 'exportable' constitutional recipe in many other jurisdictions. It would not be wrong to say that today the Indian Constitutional Jurisprudence is wholesome. Constitutional Morality, Values and Complete Justice are Basics of the Indian Constitution. This would not have been possible but for the role played by Nani Palkhivala.

It was in early sixties (when he was in early forties), Pakhivala was offered Judgeship of the Supreme Court. Directly from the Bar. These days, in early forties, the Judgeship of the High Court is not offered. If he had accepted the offer, he would have the longest term as a judge and Chief Justice of India. His inner voice did not allow him to accept the offer. He also declined the constitutional position of Attorney General of India. The moot point remains, if he had accepted, could Pakhivala had earned the distinction of being the savior of the Constitution. Let me be clear without hesitation, on the occasion of 72nd Republic Day, the shape of the Indian Constitution would have been different. If not a new Constitution. Palkhivala accepted Indian Ambassadorship to United States in 1977 though reluctantly. India had just gone through the Emergency period of 1975-76. He returned to India in 1979. He immediately wore the black robes. He argued Minerva Mills case. It commenced on October 22, 1979. The judgment was reserved on November 16, 1979. Once again, the focus was on saving the BASICS of the Constitution.

What was the source of his sustenance? Pleasure did not please him. He enjoyed his work. Every moment. The urge to contribute more and more. His work was his multi-vitamin. May his tribe multiply!

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Summary Judgment: A Robust Tool To Curb Unnecessary Trial

Introduction

Summary Judgment, as the combination of two words suggests, is an outcome of a case decided summarily, based on the documentary evidence produced before the Court by the parties, without going for recording of the oral evidence. The cause of action for filing the application under Order XIII-A of the Code of Civil Procedure, 1908, as inserted by the Commercial Courts Act, 2015, arises only when the summons are served upon the defendant. The Order is applicable to both the parties to the litigation. It is not limited to the claim of the Plaintiff, rather it is extended to the counter-claim filed by the defendant as well. Application by a party for the Summary Judgment is filed not merely for deciding a claim or counter-claim but also to seek answer of any particular question on which the claim depends.

The Rules of Civil Procedure empower the Court to narrow issues and expedite proceedings by granting Summary Judgment where the common law permits. It is an effective tool for deciding cases where it can be clearly demonstrated that a trial is unnecessary. However, to grant a Summary Judgment the Court must be satisfied that there is no genuine issue for trial. The Courts have strictly interpreted the Summary Judgment test in recent years so that the rule does not unnecessarily deprive the plaintiffs and defendants of their days in Court. The Order XIII-A of the Civil Procedure Code, 1908 talks about the summary disposition of such disputes

where an appropriate application is filed by the plaintiff or the defendant, to dispose of the suit in a summary fashion i.e. without conducting a full dress trial. The Court can exercise this power when the Plaintiff or Defendant have no real prospect of succeeding on the merits and there is no compelling reason why the suit should not be summarily disposed of.

The High Court of Delhi, in Oxbridge Associates Ltd. v. Atul Kumra, 2019 SCC OnLine Delhi 10641, it was held that "an application is not essential to seek the Summary Judgment and the Court, on its own or on the asking of either party, is entitled to see/ adjudicate, whether a case for Summary Judgment is made out." The Court further observed that the Delhi High Court (Original Side) Rules, 2018, in Chapter X-A thereof, also provides for Summary Judgment and does not provide for any application to be moved. The Law Commission has also discussed this concept and made certain recommendations in its 253rd Report on Commercial Division & Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015.

253rd Law Commission Report

Pursuant to the Law Commission's 188th Report on Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts, wherein, necessity for Commercial Courts was expressed, the Law Commission further, in its 253rd Report, submitted that a new procedure for "Summary Judgment" be introduced to permit the Courts to decide a claim pertaining to any commercial dispute without recording oral evidence, as long as the application for Summary Judgment has been filed before the framing of issues. Courts are also to be empowered to make "conditional orders" wherever necessary.

Summary Judgment is described as "a blunt instrument" that can abruptly terminate litigation. While a Summary Judgment is not a substitute for regular trial, it is a tool that allows Courts to weed out cases that do not need a trial to be resolved. It also allows the Court to simplify and streamline the cases so that trial is more efficient and focused on the areas of actual dispute.

Intention and Objective

The purpose of Summary Judgment is to avoid unnecessary trials. It may also simplify a trial, as when partial Summary Judgment dispen ses with certain issues or claims. For example, a Court might grant partial Summary Judgment in a personal injury case on the issue of liability. A trial would be necessary to determine the amount of damages.

Two criteria must be met before Summary judgment may be properly granted: (1) there must be no genuine issue of material fact; and (2) the Movant must be entitled to Judgment as a matter of right. A genuine issue implies that certain facts are disputed. Usually a party opposing Summary Judgment must introduce evidence that contradicts the moving party's version of the facts. Moreover, the facts in dispute must be central to the case; irrelevant or minor factual disputes will not defeat a motion for Summary Judgment. Finally, the law as applied to the undisputed facts of the case must mandate Judgment for the moving party. Summary Judgment does not mean that a Judge decides which side would prevail a trial, nor does a Judge determine the credibility of witnesses. Rather, it is used when no factual questions exist for a Judge or Jury to decide.

The moving party has the initial burden to show that summary judgment is proper even if the moving party would not have the Burden of Proof at trial. The Court generally examines the evidence presented with the motion in the light most favourable to the opposing party. Where the opposing party will bear the burden of proof at trial, the moving party may obtain Summary Judgment by showing that the opposing party has no evidence or that its evidence is insufficient to meet its burden at trial.

The Supreme Court, in Ambalal Sarabhai Enterprises v. K. S. Infraspace LLP & Anr., 2019 SCC OnLine SC 1311 held:

> "… Keeping in view the object and purpose of the establishment of the Commercial Courts and fast tracking procedure provided under the Act, the statutory provisions of the Act and the words incorporated thereon are to be meaningfully interpreted for quick disposal of commercial

litigations so as to benefit the litigants especially those who are engaged in trade and commerce which in turn will further economic growth of the country."

The Division Bench of the Madras High Court, in Syrma Technology Pvt. Ltd. v. Powerwave Technologies Sweden AD & Anr", 2020 SCC Online Mad 5737 held;

"11. … the Commercial Courts Act has been introduced with the intention to give qualitative and quantitative decisions. Interestingly, the enactment fixes responsibility on all the stakeholders, including Judiciary, in achieving the avowed object."

The Delhi High Court further held, in Bright Enterprises Pvt. Ltd. & Anr. v. M.J. Bizcraft LLP & Anr", 2016 SCC OnLine Delhi 4421,

" …from the provisions laid out in Order XIII-A, it is evident that the proceedings before Court are adversarial in nature and not inquisitorial. It follows, therefore, that Summary Judgment under Order XIII-A cannot be rendered in the absence of an adversary and merely upon the inquisition by the Court.".

In order to have a better understanding of the concept, it will be pertinent to have a look at some of the provisions concerned under the Code and their interpretation.

Statutory Provisions for Summary Judgment

(A). Rule 1 of Order XIII-A of the Code of Civil Procedure, 1908 sets out the procedure by which the Courts may decide a claim pertaining to any commercial dispute without recording oral evidence. Sub-rule (2) for the purpose of this order includes the word "claim". Rule 1 of Order XIII-A of the Code of Civil Procedure, 1908 thus reads as under;

"1. Scope of and classes of suits to which this Order applies.– (1) This Order sets out the procedure by which Courts may decide a claim pertaining to any commercial dispute without recording oral evidence.

(2) For the purposes of this Order, the word "claim" shall include-

(a) part of a claim;

(b) any particular question on which the claim (whether in whole or in part) depends; or

(c) a counterclaim, as the case may be.

(3) Notwithstanding anything to the contrary, an application for Summary Judgment under this Order shall not be made in a suit in respect of any commercial dispute that is originally filed as a summary suit under Order XXXVII.

(B). Rule 2 of Order XIII-A of the Code of Civil Procedure, 1908 provides that an application for the Summary Judgment can be filed any time after the service of the summons has been served upon the defendant. Proviso to the clause reads that no application for Summary Judgment may be made after issues are framed by the Court.

The High Court of Madras held, in "Syrma Technology Private Limited v. Powerwave Technologies Sweden AD & Anr.", 2020 SCC OnLine Mad 5737;

"Thus, if one reads the provision as a whole, what emerges is that an application may not be filed after framing of the issues. The first part speaks of the entitlement to file an application and the second is the outer limit. Although, the legislation uses the words 'may', one has to see the preceding words, *'no application for Summary Judgment*'.. The power being discretionary, it has to be exercised before the framing of issues. The reason being that once issues are framed and taken note of to be answered, regular trial is the way out."

One may argue that the defendant may file an application for Summary Judgment under the above said order after receiving the summons under sub-clause (b) of clause 2 of sub-rule (1) of Rule 1 of Order XIII-A of the Code of Civil Procedure, 1908. However, filing the same will not entitle him to claim an extension of the time period, statutorily fixed for filing the Written Statement.

The Division Bench of the High Court of Delhi has held in *Bright Enterprises (supra)*:

"…the provisions related to Summary Judgment, which enables Courts to decide claims pertaining to commercial disputes without recording oral evidence, are exceptional in nature and out of the ordinary course which a normal suit has to follow. In

such an eventuality, it is essential that the stipulations are followed scrupulously, otherwise, it may result in gross injustice."

(C). Rule 3 of Order XIII-A of the Code of Civil Procedure, 1908 laid down the following grounds for the Summary Judgment against a party on a claim when it *considers that:*

(a) the Plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim; and

(b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence.

To narrow down the grounds for Summary Judgment, the Court, while deciding the said application, is required to disclose the grounds that the Plaintiff has no real prospect of succeeding on the claim, or, the defendant has no real prospect of successfully defending the claim and also, that there is no other justifiable reason for keeping the claim alive and allowing the recording of oral evidence.

The High Court of Delhi held in "Su-Kam Power Systems Ltd. v. Kunwer Sachdev & Anr.", 2019 SCC OnLine Del 10764:

"91. Rule 3 of Order XIII-A CPC, as applicable to commercial disputes, empowers the Court to grant a Summary Judgment against the defendant where the Court considers that the defendant has no real prospects of successfully defending the claim and there is no other compelling reason why the claim should not be disposed of before recording of oral evidence. The expression "real" directs the court to examine whether there is a "realistic" as opposed to "fanciful" prospects of success. This Court is of the view that the expression "no genuine issue requiring a trial" in the Ontario Rules of Civil Procedure and "no other compelling reason.....for trial" in the Commercial Courts Act can be read mutatis mutandis. Consequently, Order XIII-A CPC would be attracted if the Court, while hearing such an application, can make the necessary finding of fact, apply the law to the facts and the same is a proportionate, more expeditious and less expensive means of achieving a fair and just result.

92. Accordingly, unlike ordinary suits, Courts need not hold trial in commercial suits, even if there are disputed questions of fact as held by the Canadian Supreme Court in "Robert Hryniak v. Fred Mauldin", 2014 SCC OnLine Can SC 53, in the event, the Court comes to the conclusion that the defendant lacks a real prospect of successfully defending the claim."

The High Court of Delhi, in an another case of "*Ambawatta Buildwell Pvt. Ltd. v. Imperia Structure Ltd. & Ors.", 2019 SCC OnLine Del 8657,* held:

"what has to be seen is, whether the defence pleaded, has any chance of succeeding in law and if the answer is in the negative, a decree on admissions or under Order XV of CPC or a Summary Judgment under Order XIII-A of the CPC as applicable to commercial disputes read with Chapter X-A of the Delhi High Court (Original Side) Rules, 2018, has to follow."

(D). Rule 4 of Order XIII-A of the Code laid down the following procedure for filing such application, which reads as under:

4. Procedure.- (1) An application for Summary Judgment to a Court shall, in addition to any other matters the applicant may deem relevant, include the matters set forth in sub-clauses (a) to (f) mentioned hereunder:

(*a*) the application must contain a statement that it is an application for Summary Judgment made under this Order;

(*b*) the application must precisely disclose all material facts and identify the point of law, if any; in the event the applicant seeks to rely upon any documentary evidence, the applicant must, –

(*i*) include such documentary evidence in its application, and

(*ii*) identify the relevant content of such documentary evidence on which the applicant relies;

(*d*) the application must state the reason why there are no real prospects of succeeding on the claim or defending the claim, as the case may be;

(*e*) the application must state what relief the applicant is seeking and briefly state the grounds for seeking such relief.

(*2*) Where a hearing for Summary

Judgment is fixed, the respondent must be given at least thirty days' notice of:

(*a*) the date fixed for the hearing; and

(*b*) the claim that is proposed to be decided by the Court at such hearing.

(*3*) The respondent may, within thirty days of the receipt of notice of application of Summary Judgment or notice of hearing (whichever is earlier), file a reply addressing the matters set forth in clauses (*a*) to (*f*) mentioned hereunder in addition to any other matters that the respondent may deem relevant:

(*a*) the reply must precisely—

(*i*) disclose all material facts;

(*ii*) identify the point of law, if any; and

(*iii*) state the reasons why the relief sought by the applicant should not be granted;

(*b*) in the event the respondent seeks to rely upon any documentary evidence in its reply, the respondent must—

(*i*) include such documentary evidence in its reply; and

(*ii*) identify the relevant content of such documentary evidence on which the respondent relies;

(*c*) the reply must state the reason why there are real prospects of succeeding on the claim or defending the claim, as the case may be;

(*d*) the reply must concisely state the issues that should be framed for trial;

(*e*) the reply must identify what further evidence shall be brought on record at trial that could not be brought on record at the stage of summary judgment; and

(*f*) the reply must state why, in light of the evidence or material on record if any, the Court should not proceed to Summary Judgment.

Once the application for Summary Judgment is filed, the respondent has to be given 30 days' notice intimating him the next date fixed for the hearing and also the claim to be adjudicated upon. This Order casts a duty upon the respondent that the reply, among other things, must concisely state the issues that should be framed for trial and also identify what further evidence shall be brought on record at trial that could not be brought on record at the stage of Summary Judgment. Besides, the reply must also state as to why, in light of the evidence brought before it, the Court should not proceed to issue a Summary Judgment. Onus has been shifted on the respondent, if he opposes the application for Summary Judgment, to file the proposed issues before the Court. This will enable the Court to verify the authenticity of the defence adopted by the respondent.

(E) Rule 5 of Order XIII-A of the Code of Civil Procedure, 1908 provides for evidences to be placed before the Court for hearing of Summary Judgment, which more specifically reads as under;

5. Evidence for hearing of Summary Judgment.–(*1*) Notwithstanding anything in this Order, if the respondent in an application for Summary Judgment wishes to rely on additional documentary evidence during the hearing, the respondent must:

(*a*) file such documentary evidence; and

(*b*) serve copies of such documentary evidence on every other party to the application at least fifteen days prior to the date of the hearing.

(*2*) Notwithstanding anything in this Order, if the applicant for Summary Judgment wishes to rely on documentary evidence in reply to the defendant's documentary evidence, the applicant must:

(a) file such documentary evidence in reply; and

(b) serve a copy of such documentary evidence on the respondent at least five days prior to the date of the hearing.

(*3*) Notwithstanding anything to the contrary, sub-rules (*1*) and (*2*) shall not require documentary evidence to be:

(*a*) filed if such documentary evidence has already been filed; or

(*b*) served on a party on whom it has already been served.

(F). Rule 6 of Order XIII-A of the Code of Civil Procedure, 1908 provides the list of orders to be made by the Court as under;

6. Orders that may be made by Court. – (*1*) On an application made under this Order, the Court may make such orders that it may deem fit in its discretion including the following:

(*a*) judgment on the claim;

(*b*) conditional order in accordance with Rule 7 mentioned hereunder;

(*c*) dismissing the application;

(*d*) dismissing part of the claim and a judgment on part of the claim that is not dismissed;

(*e*) striking out the pleadings (whether in whole or in part); or

(*f*) further directions to proceed for case management under Order XV-A.

(*2*) Where the Court makes any of the orders as set forth in sub-rule (*1*)(*a*) to (*f*), the Court shall record its reasons for making such order.

It is clarified that the Court may pass any other order in addition to the above orders and the Court is also obliged to record the reasons for making the orders.

The High Court of Madras has held in *Syrma Technology (supra)*:

"Thus, to conclude, we are of the view that when an application is filed under Order XIII-A, a Court is expected to keep in mind the provisions contained in Order XIII-A Rules 6 & 7 before considering a Summary Judgment under Order XIII-A Rule 3. We are conscious that Order XIII-A Rule 6 also speaks of a Judgment on the claim both part or full. Order XIII-A Rule 7, read with other modes mentioned under Order XIII-A Rule 6, act as contraceptive to grant of Summary Judgment under Order XIII-A Rule 3. The question as to whether the case is complicated or not is not the concern of the Court especially in deciding an application filed invoking Order XIII-A CPC. Obviously, the respondent in the application has to produce his best evidence, which would be his "lead trump" as he would stand the chance of losing his case."

(G). Rule 7 of Order XIII-A of the Code of Civil Procedure, 1908 talks about the conditional order as under;

7. Conditional order.– (*1*) Where it appears to the Court that it is possible that a claim or defence may succeed but it is improbable that it shall do so, the Court may make a conditional order as set forth in Rule 6 (*1*)(*b*).

(*2*) Where the Court makes a conditional order, it may:

(*a*) make it subject to all or any of the following conditions:

(*i*) require a party to deposit a sum of money in the Court;

(*ii*) require a party to take a specified step in relation to the claim or defence, as the case may be;

(*iii*) require a party, as the case may be, to give such security or provide such surety for restitution of costs as the Court deems fit and proper;

(*iv*) impose such other conditions, including providing security for restitution of losses that any party is likely to suffer during the pendency of the suit, as the Court may deem fit in its discretion; and

(*b*) specify the consequences of the failure to comply with the conditional order, including passing a judgment against the party that have not complied with the conditional order.

The purpose of the conditional order is to safeguard the interests of the parties.

The Madras High Court observed in *Syrma (supra)*:

"This Rule provides sufficient power to the Court to pass a conditional order. This power has to be exercised when "it appears" to the Court that it is possible that a claim or defence may succeed but it is improbable that it shall do so. If we read order XIII-A Rules 6 & 7 together, a clear picture would emerge. If it appears to the Court that a claim or defence may succeed and it is also probable, then the application filed seeking a Summary Judgment will have to be dismissed. If it appears to the Court that it is possible but improbable as stated in Rule 7 of Order XIII-A of the Code, then it may consider passing a conditional order. If the Court considers that a plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim there is no other compelling reason as to why the claim should not be disposed of before recording of oral evidence, it may give a Summary Judgment. Alternatively, the Court can also consider striking out the pleadings either in whole or in part. This discretion is given to the Court before deciding to give a Summary Judgment. Therefore, the Court has to keep in

mind and decide as to whether it is a fit case for striking out the pleadings dismissing an application and proceed further or a conditional order could be passed. After exhausting these stages, the question of granting a Summary Judgment would arise."

(H). Rule 8 of Order XIII-A of the Code of Civil Procedure, 1908 empowers the Court to impose cost upon the defaulting parties as per the dynamic provisions incorporated under Sections 35 & 35-A of the Commercial Courts Act, 2015, which reads as under.

8. Power to impose costs. – The Court may make an order for payment of costs in an application for Summary Judgment in accordance with the provisions of Sections 35 and 35-A of the Code.

Insertion of Order XV-A – After Order XV of the Code of Civil Procedure, 1908, the following Order shall be inserted, namely:

6. Powers of the Court in a Case Management Hearing. – (*1*) In any Case Management Hearing held under this Order, the Court shall have the power to-

(*a*) prior to the framing of issues, hear and decide any pending application filed by the parties under Order XIII-A;

It may be noted here itself that the provisions of Order XIII – A of the Code of Civil Procedure, 1908 are *para materia* to Rule 24.2 of the Civil Procedure Rules in England.

Emphasising the scope of Order XIII – A of Order XIII – A of the Code of Civil Procedure, 1908, the Delhi High Court in the Judgment of "Bright Enterprises Private Limited & Anr. v. M. J. Bizcraft LLP" & Anr.", 2017 SCC OnLine Delhi 6394, held as under:

"21…Rule 3 of Order XIII-A CPC empowers the Court to give a Summary Judgment against a plaintiff or defendant on a claim if it considers that – (a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and (b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence…"

In the Judgment of "Rockwool International A/S & Anr. v. Thermocare Rockwool (India) Pvt. Ltd.", 2018 SCC OnLine Delhi 11911, the Delhi High Court observed the following requisites for passing a Summary Judgment:

i. There is no real prospect of a party succeeding in a claim;
ii. No oral evidence would be required to adjudicate the matter;
iii. There is a compelling reason for allowing or disallowing the claim without oral evidence.

The scope of Summary Judgment has also been explained by the Delhi High Court in the judgment of "R. Impex Vs Punj Lloyd Ltd.", 2019 SCC OnLine Delhi 6667, as under:

"18….but vide the said Act, Order XIII-A titled "Summary Judgment" has been incorporated in CPC insofar as applicable to commercial suits and Rule 2 whereof, while prescribing the stage for making application for summary judgment, provides that the same be filed at any time after the summons have been served on the defendant but not after the court has framed the issues in respect of the suit. Rule 3 of Order XIII-A, while prescribing the grounds for summary judgment, empowers the Court to give summary judgment against a plaintiff or defendant on a claim, if it considers inter alia that the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be and there is no other compelling reason why the claim should not be disposed before recording of oral evidence. Rule 4 prescribes the procedure for making summary judgment.

27. The purpose of the proviso to Rule 2 of Order XIII-A is to discourage filing of applications for summary judgment after issues have been framed, thereby delaying trial and to empower the Court to, if finding the same to be dilatory, dismiss the same in limine.

28. The objective of the Commercial Courts Act even otherwise is to expedite the disposal of the commercial suits and none of the provisions thereof can be interpreted as counterproductive to the said objective of the Commercial Courts Act and it would delay rather than expedite the disposal of commercial suits, if inspite of finding a suit to be befitting of summary judgment, the Court considers itself

constrained merely on account of issues having been framed."

The scope of Summary Judgment as also the object of CCA was re-emphasised by the Delhi High Court in "Mallcom (India) Limited & Anr. v. Rakesh Kumar & Ors.", 2019 SCC OnLine Delhi 7646.

The above principle has been reiterated in the matter of "Jindal Saw Limited v. Aperam Stainless Services and Solutions Precision SAS & Ors.", 2019 SCC OnLine Delhi 9163, wherein, the Delhi High Court explained the scope of Order XIII-A CPC. The relevant text of the Judgment is reproduced below:

"22. Order XIII-A CPC, as made applicable to commercial suits within the meaning of the Commercial Courts Act, is titled "Summary Judgment". Rule 2 thereof provides, that an application for summary judgment may be made at any time after summons have been served on the defendant, till the framing of issues. Rule 3 is as under:

"3. Grounds for summary judgment.– ……..

(a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and

(b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence."

Rule 4 thereof providing the procedure for applying for a summary judgment inter alia requires the applicant to state the reason why there are no real prospects of succeeding on the claim or defending the claim and requires notice of the said application to be given to the opposite party of 30 days, and the reply to such application to precisely identify the points of law if any and the reasons why the relief of summary judgment should not be granted and why there are real prospects of succeeding on the claim or defending the claim and to state the issues to be framed for trial and what evidence is to be lead thereon and permits additional documentary evidence to be filed with such reply."

Summary Judgment Vis-à-vis Judgment on Admission

The High Court of Delhi, in *Su-Kam Power Systems Ltd. v. Kunwer Sachdev (supra)* held that the "legislative intent behind introducing Summary Judgment under Order XIII-A of the Code is to provide a remedy independent, separate and distinct from Judgment on admissions and Summary Judgment under Order XXXVII of the Code."

Conclusion

Summary Judgment and the mechanisms to determine an issue before trial support one of the key principles of the Rules of Civil Procedure: to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. If a trial is unnecessary or can be expedited, or the legal issues can be narrowed, then a party has legal tools at its disposal to achieve such a result. The procedure given under Order XIII-A of the Code of Civil Procedure, 1908 has the sole purpose to reduce the time period in deciding the commercial dispute of a specified value. It is not alien to say that the amendment in the Code is basically to strengthen the confidence of the merchant class in the fairness, transparency and effective Justice Delivery System. Loopholes exploited by some of the parties have also been taken care of in the present provision. Moreover, it can be noted that the Special Courts, that too, of District Judges, which are Superior Courts at the District level, have been designated to adjudicate the matters. The fact that trial is a default process in every civil suit has been done away with the insertion of Order XIII-A of the Code of Civil Procedure, 1908. Therefore, the intention of the legislature is to enable the Courts to decide the commercial disputes of a specified value in a time bound and efficient manner.

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