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The Editor
March of the Law
National Law School of India University
Post Bag No. 7201, Nagarbhavi
Bangalore 560 072
Phone 350160

MARCH OF THE LAW

EDITOR

HEM LALL BHANDARI

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The National Law School of India University, Bangalore does not necessarily agree with the views expressed by the authors in any of the articles herein.

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EDITORIAL

*THIS **Third** issue of **"March of the Law"** (1991-92), scheduled to be released by the end of October, 1992 was delayed due to circumstances beyond our control. We therefore sincerely apologise to our subscribers and readers.*

Until the publication of the previous issue of this digest, we were relying almost entirely on written contributions from researchers and experts outside our university. This year we have deviated from this settled policy – and for good reasons – in bringing out this issue, now in your hands. The deviation or change has been necessitated by our strong emphasis on continued research and writing which forms an integral part of our curriculum and teaching programmes.

*A large number of our meritorious students, particularly seniors and research scholars, expressed their desire to undertake research on different branches of statutory and decisional laws and thus produce **"March of the Law"** from within the NLSIU, thus eliminating the uncertainties and delay in getting the manuscripts from persons outside the university. We ventured on this new experiment which is expected to be institutionalised in the years to come. This issue, therefore, is the product of combined efforts of our students and faculty members. It needs to be emphasized that most of the surveys published in this issue are the original contributions of our students, written under the guidance and supervision of respective faculty members.*

This new policy of engaging our young students on research and writing on the various branches of law has three distinct advantages. First, we are assured of written manuscripts from within the NLSIU. Second, our young students derive an added advantage and experience in sharpening their research skills and getting their contributions published. And last but not the least, we feel that this new experiment will enable us to go a long way in fulfilling our commitment to the larger social responsibilities to the consumers of justice at the Bar and the Bench, and to the entire system of governance under the Rule of Law and the Constitution. It is our deep concern to these larger socio-legal and developmental goals which drives us – the teacher and the taught – to undertake research, training and

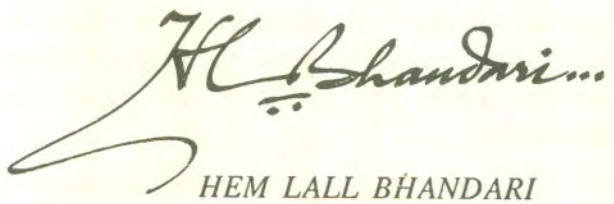
publication of legal literature on current developments in the vast ocean of laws.

In our endeavours of this kind, therefore, we seek the active support and co-operation of the entire legal fraternity of our nation in our relentless pursuit of academic excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement, very much in keeping with the mandate of Article 51A(j) of our Constitution.

We sincerely hope that the legal fraternity will discern a qualitative improvement in this digest and come forward as subscribers in large numbers. We encourage and welcome constructive criticisms and comments from all our subscribers and readers on the quality and content aspect of this publication. Suggestions for its imporvement are always welcome.

Now a rather disappointing line in conclusion. From 1993, this publication shall cost Rs.200/- per copy and we hope that our subscribers will bear with us and appreciate our financial constraints in meeting the ever-increasing cost of paper and printing.

December 20, 1992



HEM LALL BHANDARI
EDITOR

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I. ADMINISTRATIVE LAW

In the area of administrative law the Supreme Court in 1991-92 remained concerned with the basic problems attending the exercise of administrative power.

Administrative legality constituted the major segment of its concern and it has continued to emphasise strict legality. However, the entire line of decisions did not remain truly reflecting this basic salutary postulate of administrative law; there were marginal let-ups. Regrettably the Court continued to reflect softness in dealing with erring officials which would operate to side-line the significance of the Supreme Court in *Rudal Shah*. But the Court seems to have taken a strong step towards introducing the principle of administrative supervision of administrative legality in *Kanoria Chemicals*.

In the area of 'natural law' the Court has come quite close to opening up the entire administrative process with its holding in *E.G. Nambudri* and if the thrust be followed up consistently, the dream of administrative law to make the administrative process open, fair and impartial may well be realised first in India than elsewhere in the world. The Court has, however, tried to prevent the plea of denial of natural justice to be used as a procedural dodge delaying or denying justice according to law as administered by the appropriate courts.

On the whole, the line of development of the law during the period under review has kept to the 'existing' line, peaking on the questions of administrative supervision of administrative legality and the misuse of 'natural justice' as a procedural dodge.

ADMINISTRATIVE LAW

*T. Devidas**

The Supreme Court this 1991-92 term was again required to exercise on administrative legality from various aspects. The Court has touched new heights as the following survey would reveal.

That the administration has no power except what the law of the land allows is far too axiomatic and settled to need a restatement. Therefore the courts lending strong support to the principle of strict administrative legality was a logical step taken in *Ayurveda Prasark Mandal v. Geetha Bhaskar Pendse.* [1]

Respondent was appointed as Lecturer in Sanskrit for one academic year and continued in the subsequent years against a post reserved for a backward-class candidate owing to non-applications from that category. Later, in 1986-87, the post was kept unfilled and in May 1987, after an advertisement, another candidate was selected. Meanwhile the post was de-reserved. Respondent's contention that she should be regarded as regularly appointed was not accepted by the Court as it found that the appointment of the respondent was purely temporary and the appointment was not in strict conformity with the law. They found the same infirmity with the appointment of the other candidate who was selected as well as with the procedure followed for de-reservation itself.[2] *Andhra Steel Corporation Ltd v. A.P.S.E.B.*[3] concerned a question about the right to the benefit of concessional rates for power as against the power of the Corporation to levy minimum charges for an installation. The Court held that there was no right to concessional tariff which could be revoked any time without prior notice or hearing and there was no promissory estoppel involved.[4]

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* Faculty member, NLSIU, Bangalore.
Ram Anand Shankar & M. Christopher, Students IV Year, NLSIU, Bangalore, assisted in collecting the cases.

1 (1991)3 SCC 246.

2 This emphasis on the need for strict legality for administrative action is indeed a welcome step and it is hoped that the Court would keep the principle stressed in future decisions so that legality will be at a premium and justice according to law automatic.

3 (1991)3 SCC 263.

4 Supply of power at concessional rates as an inducement to locate industries in the State would be well within government's powers. It should be possible for an individual to rely on the representations of a government except when it is patently contrary to law. The Electricity Board had supplied power at concessional rates and therefore the State should have been required to subsidise the difference in rates for the time stipulated in the inducement.

In *S.S. Dhanoa v. Union of India,* [5] the Supreme Court negatived the contention that once appointed Election Commissioner he could be removed only on reaching 65 years of age or on completing five years of service whichever is earlier. The Supreme Court took the view that when the President had power under the Constitution to fix the strength of the Commission from time to time, there was no warranty to read any limitations into that power. The Court was satisfied with the candid admission of mistake in the creation of the posts and viewed the entire happening as one of the exegencies of employment.[6]

Mithilesh Garg and Ors. v. Union of India and Ors [7] is interesting for the position taken by the Supreme Court that while it is not disputed that the Regional Transport Authority has the power under the Act to refuse an application for grant of license by giving reasons, existing operators could not prevent others from coming into competition under the liberalised policy of the Motor Vehicle Act, 1988 and the Authority was bound to keep a watch on the erroneous and illegal exercise of power in granting permits under the liberalised policy. The Court seems to have announced administrative supervision of administrative legality as a principle in Indian administrative law.[8]

Smt. Shrish Dhawan v. M/s Shaw Brothers [9] saw the Supreme Court rule that non-disclosure of a fact not required by statue to be disclosed was not a fraud on the statue. The Court was of the view that the duty was only not to deceive. The Court pointed out that fraud in public law or administrative law arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal; it must result in exercise of jurisdiction which otherwise would not have been done. The Court found Sec.21 of the Delhi Rent Control Act as reflecting the legislative policy and they saw no requirement under Art. 21 of the Constitution for the Controller to enter into an enquiry on an application made by landlord supported by a statement and agreed to by the tenant.

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5 (1991)3 SCC 567.

6 It was by a Notification dated 7-10-89 that two additional posts of Election Commissioners were created. By a Notification dated 16-10-89 the petitioner and another were appointed. Another Notification of 16-10-89 laid down the conditions of office of the two new appointees. On 1-1-90, another Notification abolished both the posts! Regrettably the abuse of power, that was conceded, went unpunished despite the provision in S.166 of the I.P.C. and the injury to the legitimate service expectations of the appointees.

7 (1992)1 SCC 168.

8 If this is intended to inject the principle of an ongoing administrative supervision of administrative legality it would be the most significant step the Court has initiated in recent years.

9 (1992)1 SCC 534.

The Court proceeded to characterise an action as 'mindless' if it involved the passing of an order without any regard to the provisions of law. Where the law required an authority to make an order on inquiry or on being satisfied about the existence or non-existence of a fact, then the duty cast is higher and an order passed without due regard to the duty to investigate could be 'mindless'. In the absence of any statutory requirement ..... to enter into an inquiry it may utmost be regulatory oversight,[10] said the Court. It held that errors in jurisdictional facts would make the administrative order *ultra vires* and bad.

The holding by the Supreme Court in *Baikuntha Nath Das v. Chief Dt. Medical Officer, Baripada* [11] that uncommunicated adverse remarks can be considered in the forming of an 'opinion' by the competent authority to compulsorily retire a government servant and that principles of natural justice were not attracted as the order of compulsory retirement did not amount to punishment, is, it is submitted, taking too technical a view of the question.[12] The position in *Posts and Telegraph Board v. C.S.N. Murthy*[13] is only slightly better in that the adverse remarks were not uncommunicated. Power of the departmental superior was always available for exercise and a notice that if he did not improve in his service

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10 It is unfortunate that the implications of the denial of power to deny the protection of law by action or inaction as contained in Art. 14 was not raised before the Court in the case. As law can apply only to the facts it addresses itself to govern. Art. 14 would be an omnibus cover compelling the looking into jurisdictional facts correctly.

11 (1991)2 SCC 299.

12 The rule of principle that adverse remarks should be communicated to the government servant is intended to serve two distinct purposes. One is apparently an opportunity for the employee to 'improve' and if necessary, place facts before the competent authority to get the adverse remarks and therefore serves as a valuable safeguard against arbitrary exercise of power or formation of opinions which can prejudice the career prospects of the employee. The fact that his legitimate expectations can be adversely affected is itself sufficient to warrant safeguards. The second is perhaps more important. Communication of an adverse entry is publication of a certain exercise of power which has a bearing on the career and serves primarily to take the matter beyond the power of the authority making the entry so that any alteration of the state position will be automatically be verifiably reflected. Absent this safeguard it would be possible to add at any time any adverse remark anywhere in the long trek of service and to use it to form a subjective satisfaction to terminate the gains of employment which would certainly aspect the quality of life through an alteration of legitimate economic expectations.

The presently stated position can promote a kind of slavery for, to avoid an adverse entry, one may find oneself forced to do every bidding of an official superior whether properly relatable to official functions or not and would go against the affirmed value of dignity of the individual. It is hoped that this would soon be corrected.

Malafides, arbitrariness and perversity are near incapable of proof after a lapse of time and publication through communication of any adverse entry seems to be the only safeguard, keeping the doors of judicial review open would not seem to be a satisfactory substitute to preventing inquiry through any arbitrary exercise of powers.

13 (1991)2 SCC 317.

performance he may have to be retired could have been an opportunity to protect self-interest through better application. 'Prosperity to delay matters' is a difficulty and unspecific change which is highly subjective with the officer making it.[14]

In *Peerless General Finance and Investment Co. Ltd v. Reserve Bank of India,* [15] the Supreme Court reiterated the settled view that administrative action, if within granted power, would not be invalidated for the reason only for non-reference to the specific source of power.

In this case, the Court also held that rules made under a statute must be treated for all purposes of construction or obligations as if they were in the Act and were to have the same effect as if they were contained in the Act.[16]

In *Dattatraya M. Nadkarni v. Municipal Corporation of Greater Bombay*[17] the Supreme Court ruled that it is open the Courts to go behind the form and ascertain the true character of an order.

Dr. Nadkarni, a Medical Assistant under the Municipal Corporation of Greater Bombay, was charge-sheeted on 5.7.61 for not having given proper charge of the Dispensary on his suspension on 2.11.1960 and for the loss of the Registers of International Health Certificates issues in 1957, 1958, 1959 and upto March 1960, as they could not be located despite thorough search, and he was subsequently removed from service. The challenge was that it was really dismissal and, as his salary was Rs.520/- p.m., dismissal required the approval of the Standing Committee in terms of Sec.83 (2) of the Bombay Municipal Corporation Act, 1888, while his order of removal was passed only by the Commissioner. The contention that Sec.83 did not provide for a punishment of removal was accepted as evident in the text itself and the Court found the order void for want of power. The Court

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14 The philosophy behind Art. 309 seems to be to provide a safeguard against caprice of individuals. A notice and an opportunity before the exercise of power to disconnect legitimate economic expectations from service would seem better to answer the policy underlying Art. 309, as well as the freedom and dignity of the individual.

15 (1992)2 SCC 343.

16 Admittedly the plenary power of the legislature that enacted the Act and the power placed with the delegate do not stand on equal footing and the two products from differing quanta of power cannot rank on par. Under the India constitutional scheme subordinate legislation can stand only lower in status and cannot be 'as if enacted in the Act' itself. It can only be subordinately useful vis-a-vis the Act as conceded even in the United Kingdom by the House of Lords in *Minister of Health v. R.Ex.p. Yaffe* (1931)AC 494. Therefore to consider subordinate legislation on par with the enabling Act for the purposes of obligations would require a second thought in so far as it aspects policy, and essential legislative power which cannot be delegated. *See* Delhi Laws Act, 1912, *Re.* AIR 1951 SC 332 and *Gwalior Rayon Co. v. Asst. Commissioner of Sales Tax,* AIR 1974 SC 1660.

17 (1992)2 SCC 547.

exonerated him of all the charges which were found based on false premises and accepted the plea of the appellant's legal representative that they were not interested in the reliefs of salary or other emoluments.[18]

Y.P. Chawla v. M. P. Tiwari [19] raised an interesting question as to the binding nature of certain administrative instructions issued by the Central Board of Direct Taxes under Sec. 119 of the Income Tax Act vis-a-vis the discretionary power vested with the Commissioner of Income Tax under Sec. 279(2) to compound any offence.

The High Court found the instructions No. 137 dated 11.3.1980 issued by the Board inconsistent with the legislative policy in Sec. 279. The Supreme Court, however, was of the view that the circulars issued by the Board in terms of Sec. 119(1) of the Act are binding on all officers and persons employed in the execution of the Act even if they deviate from the provisions of the Act.[20] Reliance was placed on the explanation added to Sec.279, which was given retrospective effect from 1.4.62, under which power to give orders, instructions or directions were to include instructions or directions for the proper composition of offences.

In *Fine Chemicals Ltd v. Assessing Authoity*[21] the Supreme Court reiterated its position that orders issued under a statute would be valid if power be avialabe but the provision is not stated, and where the statute did not prescribe any specific form, the form of expression of the power either as 'order' or 'notification' did not matter.

Sec. 5 of the General Sales Tax Act 1962 provided :

"5. Exemption from taxation - the Government may subject to such restrictions and conditions as may be prescribed, including conditions as to license and license fees, by order exempt in whole or in part from

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18 When the Court found the exercise of power void in law, the logical consequences should have been allowed to follow. The Commissioner who issued the order through a colourable exercise of power should have ben held personally liable in damages as well as for transgressing the prohibitions in Sec. 166 of the Indian Penal Code by his acting in disregard of the directions of Art. 14 of the Constitution. Softness in dealing with erring public servants would be misplaced sympathy and a root cause for repeated violations of law. The observations of the Supreme Court in *Rudul Shah v. State of Bihar* AIR 1983 SC 1086 would deserve steady following and it is hoped the Court would stand persuaded to develop constitutional tort law as the only reliable guarantee against temptation of the official to disregard and disrespect fundamental rights guaranteed by the Constitution, the fundamental law of superior obligation.

19 (1992)2 SCC 672.

20 To give instructions at variance with the provisions of the Act would seem impermissible under the scheme of our Constitution for it would run afoul of Art. 14. Executive power available under the Constitution is only what is allowed by law.

21 (1992)2 SCC 683.

payment of taxs any class of dealers or any goods or class or description of goods."

The 'order' in terms of this provision would be legislative in character,[22] although termed an 'order' provided the'class' character is maintained. Logically, the Court held that such exercises were amenable to modification by subsequent exercises of the same power. As a legilslative exercise the change would normaly be prospective and for all fact situations covered by the law obtaining at the time of happening of the relevant fact. No principle of promissory estoppel would avail aganist a legislative power, the Court said.

State of Sikkim v. Dorjee Tshering Bhutia[23] raised an interesting question. The Sikkim State Civil Service Rules framed under Art. 309 of the Constitution required recruitment through competitive examinations conducted by the Public Service Commission and/or selection from among persons serving in connection with the affairs of the State of Sikkim in the ratio 50:50. There was a *non obstante* provision in Clause (3) which allowed, in the exegencies of service, for government in consultation with the Public Service Commission to adopt such other method as it may specify by Notification.

The Public Service Commission was constituted only on 11.1.1982 with the appointment of Sri. K. R. K. Menon as its Chairman. But in 1981 it was decided to hold a written examination and *viva voce* test for selections to service.

The State rested its arguments on necessity especially as the Public Service Commission was not constituted. The Court noted as settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provision is without jurisdiction and a nullity, and yet made allowance for the fact that the Public Service Commission was not in existence for "justifiable reasons" as the Court presumed. In that situation executive power was allowed to be applied to meet the emergencies of the situation.

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22 The question whether the delegation amounted to a delegation of essential legislative power was not raised in the case. If tax is a demand of sovereignty and aspects policy as the power to tax carries within the power to destroy (*See McCulloch v. Maryland 4 Led 579* (1809) it would seem that the power to exempt from tax imposts which the legislature has judged would fall to the province of essential legislative power and cannot be delegated to the executive.

23 JT 1991(3) SC 456.

The High court had struck down the State action but the Supreme Court allowed it.[24]

In *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation*[25] the Supreme Court held that every wide power, the exercise of which has far reaching repercusion has inherent limitations on it. It should be exercised to effectuate the purpose of the Act. "The public functionaries should be duty-conscious rather than power-charged", said the Court. It added that an arbitrary action is *ultra vires* and it does not become bonafide and in good faith merely because there was no personal gain or benefit for the person exercising discretion, and held that an action is malafide if it was contrary to the purpose for which it was authorised to be exercised, and that an action is bad even without proof of motive of dishonesty.

The Court ruled that the Corporation being an instrumentality of the State itself, its officers and employees are subject to the same public law limitations as the government,[26] and the government cannot act in a manner which would benefit a private party at the cost of the State. The Court held that Corporation or its officers or servants as trustees are bound to exercise their power in good faith in selling or dealing with the property of the debtor as a man of ordinary prudence would exercise in the management of his own affairs to preserve and protect his own estate.

Administrative Discretion

This area of law where the exercise of power is only partly capable of proof again engaged the attention of the Court during the term 1991-92 as well.

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24 It is unfortunate that the Court did not consider the significance of Art. 256 of the Constitution commanding compliance with every law, as well as the availability of power under Art. 309 to make laws regulating the conditions of service including conditions of recruitment to services under the State. Besides, the power under Art. 309 was as easily available for exercise as the executive power itself.

A better way of balancing the situations of necessity and the constitutional scheme under Art. 14, 16 and 309 read together with Art. 256 would have been to regard the selections and appointments made as purely temporary, their continuance being subject to their selection by the Public Service Commission.

The decision unfortunately sets a premium by State inaction because it seems inconceivable that the State could not appoint a Chairman for its Public Service Commission for five long years.

25 JT 1992 (2) SC 326.

26 This is the message of Art. 14 and Art. 256 of the Constitution. It would have been welcome if these provisions were expressly referred to *neuro dot qui non habet*. A state can not, by setting up another entity, clothe it with powers which it does not itself possess, neither can it give that entity its entire power. Such an entity can only be subordinately useful always.

In *Union of India and Ors v. Teram Parashramji Bhombhate* [27] the Supreme Court held that no court or tribunal can compel government to accord sanction for a secondary school as it involved financial burdens.

The Court was of the view that the teachers would not get the pay scales admissible to government school teachers.

The question came up in relation to some teachers employed to teach students in classes VI to X at the same premises where Government had started a primary school from classes I to V and was running it for the benefit of the children of the employees of the Ordnance Factory at Ambazari. The Court, by formal logic, ruled that they were not employees of the Central Government and therefore could not be considered to have a grievance against the government.[28]

G. B. Mahajan v. Jalagaon Municipal Council [29] saw the Supreme Court acknowledge an administrator's right to trial and error so long as both trial and error are bonafide and within the limits of authority. Something overwhelming must appear before the Court will interfere.

The case also saw the Court say that "reasonableness" in adminstrative law parlance must distinguish between proper use and improper abuse of power. It is not the tort law standard, the Court pointed out; it should be one to which no reasonable authority would have come to. A public law element was required for judicial review to be invoked.

The Court cited Prof. Wade with approval that"unreasonableness in administrative law has become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motive and purposes, a wide category or errors commonly described as irrelevant considerations and mistakes and misunderstanding which can be classed as self-misdirection, or addressing oneself to the wrong question."

The question of delegation of powers would raise more questions than

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27 (1991)3 SEC 11 (decided 3.5.91).

28 It is apparenntly the case that the Secondary School was a recognised one for, else, it would not have lasted long enough to ask the questions first before the Central Administrative Tribunal and then before the Supreme Court. The Tribunal had accepted the plea of equal pay for equal work and issued certain directions to be got observed before the 1989-90 academic year, but the Supreme Court ruled that these directions were without authority of law.

Equal pay for equal work in Art. 39 (d) is an economic justice principle which does not seem to admit a public private divide and it was unfortunate that the Court did not go into the aspect of violation of the equal protection guarantee by non-action on the part 'the State'. It is unfortunate that the failure to provide compulsory primary education up to the age of 14 years as enjoined by Art. 47 especially as the government had started classes I to V as a welfare measure for the employees of the Ordnance Factory was not noticed.

29 (1991)3 SCC 91.

stand answered. A land that was gifted to the municipality in 1913 was, under the terms of gift, used by the Agricultural Produce Market Committee as a Cotton and Wholesale vegetable market. The Municipal Committee, to put the land to better use, persuaded the Market Committee to yield up possession, and got suitable amendments to the gift deed from the heirs of the original donor. A developer was to develop a commercial complex on the land at his cost, in return for five shops being given free of rent to the heirs of the donors, allot shops to various shop keepers to whom the municipality had given assurances, at fixed rates for 50 years, give 17 floors of the administrative building and ground to the municipality free of cost. The rest of the accommodation could be disposed of by the developer at his discretion and he could retain the premia paid by the disposees for himself.

The Court stood persuaded by the arguments of Singhvi that the transaction came within the power conferred by Sec. 272(1) of the Maharashtra Municipalities Act, 1965 which provided that the council may put up to public auction or dispose by private sale the privileges of occupying or rising any stall, shop, stand, shed, pen or space in a municipal market or municipal slaughter house for such period and on such terms as it may think fit, and validated the action.[30]

Uttar Pradesh S.R.T.C. v. Md. Ismail [31] saw the Supreme court re-state the settled principle that the Corporation could not deny to itself the discretion to provide alternate jobs to drivers who fail the vision tests as contemplated by Regulation 17(3) of the Corporation. The view of the High Court that the employee had a vested right for an alternate job was taken as fallacious. The High Court's direction to offer alternate jobs was also held to be untenable at law.

The Court disapproved of the Corporation acting machanically without proper dispassionate judgement in individual cases.

In *B.N. Shanbarappa v. Uthanur Srinivas and Ors,*[32] the Supreme Court pointed out that the power vested in the Deputy Commissioner by

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30 The Court seems to have unwrittingly allowed the municipality to do indirectly, what it cannot do directly, more especially is breach of constitutional limitations on its power as 'state'. It was bound to give equality of status and of opportunity to all citizens who desired to avail of the facility in the commercial complex although the municipality could set the conditions. As it has turned out in the case, for the first part of the transaction the developer was an agency or instrumentality of the municipality and for the second he was a private individual dealing with his private personal property. The State action line of reasoning was not canvassed before the Court.

31 (1991)3 SCC 239.

32 (1992)2 SCC 61.

Sec. 4(1) of the Karnataka Zilla Parishad, Taluq Panchayat Samitis, Mandal Panchayat and Nyaya Panchayats Act, 1983 did not exhaust with the first specification of the headquarters of a Mandal but was repeatedly available as often as required its exercise to alter the place designated for headquarters. The discretion was however not to be exercised arbitrarily, whimsically, or without application of mind or for an unjust or malafide purpose and its exercise was open to judicial review.[33]

In *Kanoria Chemicals and Industries Ltd v. State of U.P.*[34] the Supreme Court held the requirement of hearing satisfied when a full and fair opportunity to state their objections to the proposed revision of electricity supply tariff rates was given to them enabling them to place all their special features before the Board for consideration. The question came up in the context of a revision of the contractual rate for supply of electrical energy to the appellants from the Richard Hydro Electric Generating Station. Failure on the part of the Board to spell out the manner in which the revised rates were arrived at, the Court held, did not vitiate the exercise of power. Despite the contract with the appellants to supply electrical energy at concessional rates for special considerations, the Board had power[35] to revise the tariff even beyond the uniform tariff applicable to other bulk consumers of power, and even retrospectively, the Court ruled.

Sec. 60(5) (as of the Electricity (Supply) Act, 1948 was read by the Court as intended to enable the Board to cast off the shackles placed by an ancient contract.[36]

The equitable plea of estoppel was raised in a few cases and the apex Court had differing dimensions of the question to answer.

In *Md. Fida Karim v. State of Bihar,* [37] the Supreme Court found that license to vend liquor granted for five years subject to yearly renewal and change in policy was valid and did not create any promissory estoppel against the government. Policy cannot be cribbed by contract and the Court rightly allowed the freedom of change of policy especially as public interest was involved.

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33 The safeguard would have been built in by requiring a reasoned order for changing the head quarters.

34 (1992)2 SCC 124.

35 By this reading the Court seems to have admitted the French principle of 'Supervision.' - *See* Neville Brown and Goomes, French Administrative Law (London : Butterworths 1967) p. 105.

36 This holding would seem to need a re-look in so far as under the Indian Constitution, similarly situated entities have to be similarly treated by 'the State'.

37 (1992)2 SCC 631.

Amrit Banaspati Co. Ltd. v. State of Punjab[38] saw the Supreme Court examine the question when representations made by or on behalf of government are binding on the Government.

In this case, a representation was made on behalf of the Government by the Industries Secretary and the Director of Industries, pursuant to a government policy, that a new unit shall be entitled to concessions. The appellant established a business investing substantial sums of money and meanwhile, in response to his representations, government issued a written sanction.[39] The Court held that the appellant was entitled to refund of sales tax if it was found that the representation in line with government's policy, and it was acted upon. The Court pointed out that the government functions through its officials and so long as they are acting bonafide in pursuance of government policy the government cannot be permitted to disown it, as a citizen can have no means of knowing if what was being done was with the tacit approval of government. The Court added that if it is found that the representation made by the official concerned was such that any reasonable person would believe it to have been made on behalf of the government, then, unless the representations are established as beyond the scope of authority, it should be held binding on government.

In this particular case, the appellant claimed refund of sales tax. The Court noted that tax was a demand of sovereignty and therefore even a legislature, much less a government cannot enact a law or issue an order or agree to refund a tax collected except when the levy or realisation was contrary to a law validity enacted or the tax law was invalid for unconstituionality.

Realisation of tax through the State mechanism for the sake of paying it to a private person directly or indirectly is impermissible under the constitutional scheme, the law does not permit it, nor can equity countenance it, the Court said. The scheme of refund of sales tax was held unenforceable at law. Exemption from tax was held to be different from the refund of tax.

Natural Justice

The Supreme Court was called upon to exercise on the broad rubric which holds all fundamental postulates of fairness and justice again this term.

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38 (1992)2 SCC 411.

39 This in itself was authentic indication of government's posture on the question of concessions and, absent lack of power under law, operated to cure any deficiency in any earlier representation.

Union of India v. E.G. Nambudiri [40] saw the Supreme Court hold that principles of natural justice were applicable to administrative orders as well.[41]

The respondent was communicated fix adverse remarks about his in service performance during one year against which he represented but the representation was rejected. His memorial to the President resulted in the first four adverse remarks in the list of the six given to him being expunged, the other two were retained. But before the communication of this position he had moved the Central Administrative Tribunal that quashed all the orders, enduring the one of the four adverse remarks and the other retaining two, on the ground that for absence of reasons the orders were vitiated in law.

The Supreme Court however allowed Government's appeal for the reason that the remark at No.5 that 'nothing had come to notice regarding his integrity' was neutral though not commendatory and remark No.6 that 'he was given advice/warning at various levels but he did not react to these' was self-explanatory. The Court was of the view that the superior authority was not obliged to write a detailed judgement or order and was under no legal obligation to record reasons for rejecting the representation[42], and found the quashing by the Central Administrative Tribunal as bad in law.

The Court held that in the absence of any statutory rule or statutory instruction requiring the competent authority to record reasons it was not obliged to do so. But, the Court added, the competent authority has no license to act arbitraily; it must act in a fair and just manner. It is always open to an administrative authority to produce evidence before the Court

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40 (1991)3 SCC 38.

41 This is well close to articulating that administrative action really involves a judging albeit in contexts different from the other areas of the state power spectrum.

42 Art. 14 of the Constitution has been held to be not allowing arbitrariness anywhere. *See Royappa v. State of Tamil Nadu* AIR 1974 SC 555. This would itself compel the giving of reaons especially as the administrative review of administrative action would be quasi-judicial. The Court rightly perceived that the competent authority had no license to act arbitrarily; it had to act in a fair and just manner. Yet it felt sufficient if the reasons were on the record; they need not be communicated. The Court's view that "it is not permissible to the authority to support its order by reasons not contained in the records" provides only illusory comfort. The records are completely at the disposal of the authority for any doctoring that may be found necessary to thwart judicial review. The only safety for the power-addressee is in the publication of the reasons for the exercise of power in such a way that the authority cannot change its position without leaving verifiable evidence about the change. The foolproof safeguard is in orders to contain the reasons therefore. Natural Justice has grown beyond its infant stride, and it is essential that the Court require communication of reasons or speaking orders as the safeguard against abuse of power.

to justify its action. It proceeded to observe that it has never been a principle of natural justice that reasons should be recorded.However, it said, there is necessity for giving reasons in view of the expanding law of judicial review to enable the citizen to discover the reason behind the decision. It is therefore desirable, said the Court, that reasons should be stated.Such reasons must clearly exist on records as it is "not permissible to the authority to support its order by reason not contained in the records."

The purpose of the rules of natural justice is to prevent miscarriage of justice and it is no more in doubt that the principles of natural justice are applicable to administrative orders if such orders affect the right of a citizen. Arriving at a just decision is the aim of both a quasi-judicial and administrative inquiry, said the Court.

In *Union Carbide Corporation v. Union of India* [43] the Supreme Court ruled that the citizen is entitled to be "under the Rule of Law and not the Rule of Discretion" and that "to remit the maintenance of constitutional rights to judicial discretion is to shift the foundations of freedom from rock to sand." But the Court was of the view that "natural justice should not degenerate into a set of hard and fast rules; there should be circumstantial flexibility" citing Lord Reid in *Wiseman v. Promeman* 1971 AC 297. Omission to comply with the requirement of the rule *audi alteram partem* as a general rule vitiated the decision. Resultant or independent prejudice need not be shown, the Court said, adding that denial of natural justice is itself enough prejudice.

Ramakrishna Verma v. State of U.P.[44] the Supreme Court ruled that where the directions as to hearing were avoided by 50 persons by filing suits and obtaining injunctions, they were not to be permitted to have an underserved and unfair advantage. Their permits were cancelled.

The Court noted that the 50 operators including the appellants have been running their stage carriages by blantant abuse of the processes of the Court by delaying the hearing and also that on 3.4.1968 the Court had approved the scheme of nationalisation in *Jeewan Nath Wahal v. State Transport Appellate Tribunal* is that natural justice cannot be used as a procedural tool to delay the reaching of justice according to law, and, on the facts of the case, seems rightly taken.

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43 (1991)4 SCC 584.
44 (1992)2 SCC 620.

In *Maharashtra State Board of Secondary and Higher Education v. K.S. Gandhi* [45] the Board discovered, after the evaluation of the answers of the March 1990 examination, that some answer scripts had been tampered with. The students were issued show cause notices and allowed inspection of answer sheets. Parents were allowed, but lawyers were not, during the inspection. The students were required to fill up a questionnaire. They denied that either they or their parents were privy to the tampering. As a penalty, the Standing Committee withheld the declaration of their results and they were prevented from appearing at the supplemental examination.

The High Court allowed the students' appeal but the Supreme Court reversed holding that assistance of an advocate at a domestic inquiry was not necessarily a part of the principles of natural justice and depended on the particular facts and circumstances of the case.

The Court was of the view that when an order affected the rights of a citizen, irrespective of whether by a quasi judicial or administrative order unless the applicable rule expressly or by necessary implication excluded[46] the recording of reasons, it was implicit that principles of natural justice or fair play required the recording of germane, precise and relevant reasons as part of fair procedure.

In *G. Venkateshwarulu v. Govt. of Andhra Pradesh* [47] an appeal made against the confiscation of food grains, was held not maintainable by the High Court. The advocate for the party was served with the order but he failed to inform his party.

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45 (1991)2 SCC 716.

46 Principles of natural justice have been read into general constitutional requirement for the purpose of Art. 14 by the Supreme Court and would qualify as Constitutional law elaborating the scope of Art. 14. This would be constitutional law laid down by the Supreme Court which by reason of Art. 13(2) would deny power to the State to make a law at variance with it.
The plea of denial of natural justice was upheld in the following cases :
Southern Steelnet and Alloys Ltd. v. Karnataka Electricity Board AIR 1991 All 196; *M. Shivaramakrishna Reddy v. Secretary, R.T.A.*, AIR 1991 AP 183; *V.V. Pushpakaran v. P.K. Sarojini* AIR 1992 Ker 9; *Catholic Association of Bombay v. Municipal Corporation of Greater Bombay*, AIR 1992 Bom 100; *G. Israib v. Government of Andhra Pradesh* AIR 1992 AP 90; *Anil K. Sheeh v. Principal Madan Mohan Malaviya College*, AIR 1991 All 120; *Lakshmikant Pandey v. Union of India*, AIR 1992 SC 118; (list is not exhaustive).
Plea of denial of natural justice as a procedural dodge was not allowed in *S.P. Gupta v. U.P. State Electricity Board*, AIR 1991 SC 1309; *S. Charthil Kurriar v. Director of Technical Education*, AIR 1991 Mad. 223; *Rajendra v. State of M.P.* AIR 1991 SC 1857; *Kamerunnissa v. Union of India* AIR 1991 SC 1617, *Phoolchand Sardana v. Delhi Development Authority*, AIR 1991 Dc. 265.

47 AIR 1991 NOC 101 (AP).

In *Dag Minerals* v. *Director of Mining and Geology,* [48] the High Court of Orissa held that the right of appeal within 30 days available to an aggrieved person cannot be denied through the device of non-communication of the order of refusal.

K. Satyashankara Shetty v. Mangalore University [49] provided the opportunity for the Karnataka High Court to hold that denial of copies of documents in a disciplinary inquiry and allowing only 48 hours' time to prepare his defence amounted to denial of natural justice.

In *Jwain Kumar v. Drug Dult Lohia* [50] the Supreme Court laid down the test for reasonable likelihood of bias as consisting in "whether a reasonable person in possession of relative information would have thought that bias was likely and whether that person concerned was likely to be disposed to decide the matter only in a particular way."

In *Golap and Ors v. Prluban Chandra Panda* [51] the Court ruled that where a judge of a High Court had earlier appeared on behalf of the petitioner in the same matter in an earlier writ petition, his decision was violative of the principles of natural justice. Real bias was not required to be shown.

In *AK Mittal v. Vice-Chancellor, Roorkee University,* [52] invitation of a disciplinary inquiry just before an examination and continuing it during the days of examination was held to be a denial of natural justice. The Court found it highly unfair and unjustified as well.

Conclusion

The reinforcement of the principle of administrative legallity in *Ayurveda Prasarak Mandal,* and the suggestion of a principle of administrative supervision of administrative legality in *Mithilesh Garg* make the highs reached during the period under review. Regrettably there have been a few positions taken that would not square with the Constitution and the law already laid down.

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48 The case did not, unfortunately consist of the duty by the advocate who in the judicial process is an officer of the Court and consequently a public servant. It is doubtful if the plea of limitation can be set up by the State under the Indian Constitution because of Art. 256 read with Art. 14 and Sec. 166 of the Indian Penal Code read with Sec. 44 was also not noticed.

48 AIR 1991 Ori. 330.

49 AIR 1992 Kant 79.

50 AIR 1992 SC 188.

51 AIR 1991 Cal 295.

52 AIR 1991 All 177.

II. COMMERCIAL LAW

BANKING & INSURANCE

Kavitha Thomas *
Poonam Asija **
N.L. Mitra ***

Banking

One of the major contributions of the New Economic Policy (NEP) is deregulation or decontrol i.e., dismantling the 'License-Raj' as it is presently called. The massive infra-structural layout under the Public Sector Undertakings (PSU) is suddenly made open to private dealings in the form of share-transactions without working a suitable regulatory structural adjustments, as a result of which, perhaps, the biggest scandal of the independent India has taken place in its Stock Exchanges. There has been a colossal failure of the fiscal and financial disciplines of the Reserve Bank of India. SCAM, as it is fashionably named, is now in the hands of the investigative agencies, both administrative and legislative, for bringing out all facts into the light. But as Prime Minister himself said, it has a dreaded effect on the national economy and on the faith of the foreign investors. May be a year hence, we shall have something to report on this issue.

(a) ***Issues relating to repayment*** : Generally in a loan account, the recognised banking practice is to add the interest to the amount advanced and treat the total amount as the principal sum for the next period. In commercial transactions, contractual rate of interest is to be awarded as a rule. The Bank can apply sums paid towards any lawful debt paybale to it unless a specific instruction is given by the debtor. The law on the issue is specified in Sec. 59 to 61 of the Indian Contract Act, 1872. The basic principles on which those legal provisons were based, were laid down in the famous *Clayton's*[1] case. In *Syndicate Bank v. West Bangal Cement Ltd.*[2] a prayer was made for stipulating the pricipal sum of the loan; determining a reasonable rate of interest and asking the Bank for appropriating the sums paid towards the 'principal sum'. The Court held that Bank was entitled to charge contractual 'rate of interest'. The interest charged from time to time added to the principal amount for the next period of time, was

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* & ** Students V Year, NLSIU, Bangalore.
*** Faculty Member, NLSIU, Bangalore.

1 *Devaynes v. Noble Clayton's Case*, (1816)1 Mer 572.

2 (1992) 71 Comp.Cases 602.

held to be a rational and reasonable practice. A sum paid without any specific instruction could be used by the Bank in payment of any lawful debt of the debtor. In *Bank Maddira Ltd v. Maddi Venkatasubbiah*[3] the Bank filed a suit for recovery of amount advanced to a businessman. A prayer was made to reduce the rate of interest under Sec. 139, Loan Act, 1918 and Sec. 34 of the Civil Procedure Code. It was held that the debtor was liable to pay the interest as per the contractual obligation. Accordingly the respondent was liable to pay interest at the contractual rate from the date of filing of the suit and interest at the rate of 12% till realisation. It was also held that under Sec. 21A of the Banking Regulations Act, it was not permissible for the Court to reopen the question of rate of interest and reduce it on the ground that it was excessive. In *Krishan Lal v. State Bank of Patiala*[4] an agricultural loan was held to be not a commercial transaction and hence Sec. 34 of the Civil Procedure Code was applied. The trial court was held to have no jurisdiction to pass an order granting future interest at a higher rate than 6% p.a. Such an order was held to be challenged in the execution proceedings. An agricultural loan held to be not a commercial transaction could be a doubtful decision. In *Bhavnagar Brik Manufacturing Co v. Bank of India,*[5] the decision of the trial court to attach the hypothecated goods for recovery of the loan amount was upheld on appeal on the ground of protection of public interest for recovery of loan against debtors likely to dispose of hypothecated goods. In *C.Assiamma v. State Bank of Mysore*[6] the Court held that a person holding the general power of attorney could acknowledge debt of the person for which the power of attorney was held. No special power of attorney was required for the act.

(b) ***On Security :*** In *Nangia Construction (India) P. Ltd v. National Buildings Construction Ltd*[6] the Court distinguished the nature of guarantee under the Indian and the English Law. It was held that under the Indian Law, an unconditional Bank guarantee was not permitted. A Bank was liable under Bank guarantee only if the default was made by the principal debtor. Besides, if a prima facie case of fraud was found against the debtor or an unpaid enrichment, the Bank could refuse encashment of the Bank guarantee. The Court further held that if the beneficiary was found guilty of fraud, then the consideration for Bank guarantee would be unlawful and the Bank guarantee would be void and unenforceable. Equity and good conscience would require that Bank guarantee was not permitted to be

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3 (1992) 73 Comp.Cases 541.
4 (1992) 73 Comp.Cases 660.
5 (1992) 73 Comp.Cases 676.
6 (1992) 74 Comp.Cases 139.
6 (1992) 73 Comp.Cases 701.

encashed in such a case. In *G.S. Atwal and Co. Engineers (Pvt.) Ltd v. Hindusthan Steel Workers Consruction Ltd.*[7] it was held that the respondent could not recover loss and damages due to not acting in accordance with instruction of the customer and could not saddle its customer with any additional liability. Here, in this case, the petitioner entered into a contract with the respondent for constructing schools in Libya. Instruction was issued to the Bank to furnish mobilization advance repayment guarantee. But the Bank negligently issued mobilization advance cum repayment guarantee. The beneficiary did not point out mistakes, he ought to have invoked the said Bank guarantee for recovery of loss and damages alleged to have been suffered by him due to the alleged breach of contract by the petitioner. In *K.Chellappa Pillai v. Canara Bank*[8], the Bank was negligent of taking care of the goods bailed as security and as a result the goods were stolen from the custody of the Bank. The Bank was asked to credit the amount of the value of the stolen goods. In *Tumkur Town Veerashaiva Co-operative Bank Ltd v. M.C. Shyamala*[9] the Bank seized the hypothecated vehicle on default in paying for the repayment of loan. The Court held that the action was justified in view of Sec.176 of the Contract Act read with clauses 5 and 10 of the hypothecation contract. In *Canara Bank v. Anthony Fernandez and Others*[10] the Bank filed an appeal to recover the loan amount against the principal debtor and the surety. It was argued that under the agreement the Bank should have taken action as soon as default occured in payment of any instalment. But the Bank did not take action to recover the instalment in time and did not take possession of the vehicle as per the terms of hypothecation but allowed time to the first respondent so that the vehicle could disappear. The Court held that the Bank failed to take timely action and its attempt to make the second respondent liable on the basis of the letters of the first respondent was against the rules of fairplay.

(c) ***On Cheques :*** If the drawer of a cheque fails to pay the amount on demand after return of the cheque being dishonoured by the Bank, it becomes an offence under Sec.138 of the Negotiable Instrument Act. A court can take cognizance of the offence only if a complaint is filed within one month after the cause of action arises. In *S.Prithviraj Kakkrilayya v. Mathew Koshey*[11] the Court held that an offence under Section 128 could not be questioned under Article 20(1) of the constitution of India. In

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7 (1991) 71 Comp.Cases 280.
8 (1991) 7 Comp.Cases 584.
9 (1992) 74 Comp.Cases 79.
10 (1992) 73 Comp.Cases 545.
11 (1991) 71 Comp.Cases 181.

Cresold C.S. Lobo v. Canara Bank[12] a cheque for crediting the customer's account was sent for collection to an outstation Bank by the pricipal Bank. After the amount was realised the Bank refrained to credit the account of the customer due to a third party's obtaining a garneshee order on the Bank for not paying the amount. While holding the action of the Bank justified, the Court held that the proceeds of a cheque must be deemed to have been realised by the principal Bank on the date on which the cheque has been encashed by the agent Bank, namely the principal Bank. In *Muthoothi Chitty Fund and Others v. V. C. Lukose* [13] it was held that by scoring off the word 'bearer' in a cheque its transferability could not be destroyed.

(d) ***On Services :*** A Bank extending a facility of transforming money on concessional rates on telegraphic transfer or through demand draft etc., would be treated as only special facilities which could be withdrawn by the Bank at any time. In *Consumer Education and Research Society v. Reserve Bank of India*[14] the Court held that a decision to withdraw special facilities extended by a Bank at any time could not be contested on the ground of arbitrariness and unreasonableness. The decision seems to be causing public inconvenience. Any service or facility extended by a Bank should require adequate notice for withdrawal of the facility. In *Rama Chakraborty v. Punjab National Bank*[15] the wife, i.e., the nominee of the deceased was not allowed by the Bank to operate Safety Lockers of the deceased until she could produce a succession certificate. It was held that death would mean termination of the contract and the nominee must be given access to the locker without asking for succession certificate. In *Venugopal v. Vijayalakshmi*[16] the suit was filed for a declaration that the plaintiff could operate the locker of the deceased because in his absence assessors were unable to take a value of the goods in the locker for obtaining succession certificate as indicated by the law court. The Court observed that the Bank was not expected to put the legal heirs in a difficult position. The Court recommended the Bank that it should keep the name of the nominee so that in such circumstances nominee could operate the locker keeping a signed list of articles with the Bank. The nature of RBI circulars and guidelines was tested in *M.K. Thampai v. Dhanalakshmi Bank Ltd*[17]. It was held that circulars of RBI issued under Sec. 21 of the Banking Regulation Act have statutory status.

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12 (1991) 71 Comp.Cases 290.
13 (1992) 73 Comp.Cases 414.
14 (1991) 71 Comp.Cases 556.
15 (1991) 71 Comp.Cases 397.
16 (1991) 71 Comp.Cases 393.
17 (1992) 73 Comp.Cases 600.

Insurance

Insurance today is one of the most important parts of our service sector. The concept of insurance is not very widely known in India, as it is abroad. This may be due to various socio-economic factors. The most widely known type of insurance is Motor Vehicle Insurance as it has been made compulsory in India.

Though the law with regard to Motor Vehicle Insurance is more or less settled as far as liability is concerned, certain questions still remain unanswered. For example, is salvage a sale or what is the impact of Sec. 64-VB of the Insurance Act in case of a bank guarantee? Also, questions like who has to decide the mode of indemnity among the various modes like cost loss, replacement and repairment, remain unanswered.

These questions need to be answered specifically.

Hence this paper attempts to trace out any new principle or any amendment relating to the Motor Vehicle Act during the year 1991-92. Out of around 125 cases, 54 appropriate cases have been selected and for the sake of convenience have been put under different heads.

Passenger

Passenger means only a person sitting or standing in a bus. Persons getting into or getting down from a bus are not the passengers and the company is liable to pay the entire amount, under Section 95(2)(b)(ii) of the Motor Vehicle Act[1] and the T.N.M.V. Rules 360, 363, 368 and 370.[2]

In policy, a pillion rider who had fallen on the road before being run over by the same scooter was held to be a gratuitous passenger and the company[3] was not held liable.[4]

The analogy was drawn from *Kuchi Mohammed v. Ahmed Kutty,* [5] where a passenger from the bus fell down due to an accident and died. It was held that she was a passenger as she had not voluntarily left the bus but was thrown out only due to the accident.

Similarly, in the above case, the pillion rider was thrown off only due to the accident. The Tribunal held him as passenger, which was reversed

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1 Hereinafter referred to as the M.V. Act.
2 *National Insurance Co. Ltd v. V.K. Sundravalli* (1991)70 Comp. Cases Mad 810.
3 Hereinafter referred to as the Co.
4 *New India Assurance Co. Ltd v. K. Sreedevi,* 1991 ACJ 610 (Ker).
5 1987 ACJ 650

by the High Court and it was held that he was a gratuitous passenger.

A person travelling on the roof-top of the bus was held to be a passenger. Though it was the driver's negligence, it was held that even if it would not have been so, such a person is a passenger. Hence the Company was liable to pay.[6]

In *New India Assurance Co. Ltd v. Savitri Devi,* [7] the Company was held liable to a person getting down from a bus as he was held to be a passenger.

Third party

In *United India Insurance Co. v. Lakshmi,*[8] it was held that neither the owner of the vehicle nor his driver come within the ambit of 'third party'. Hence, the Company was held not liable.

Similarly, where a jeep was owned by a partnership firm and was driven by one of the partners who met with an accident, it was held that the partner was the owner of the firm and was not covered by the expression 'any person' or 'third party' under Section 95(1)(b)(1) of the M.V. Act 1939.[9]

Workmen's Compensation Act

Liability of the insurance company does not include liability to pay special interest and penalty awarded under Sec. 4-A of the Workmen's Compensation Act. Amount under Sec. 4-A(3) is payable by the employer alone as it has to be paid when it falls due and the date of the accident and cause for justification of delay in payment are within the exclusive knowledge of the employer. The word liability under Sec. 95 of M.V. Act, 1939 has to be understood only as normal compensation and does not inlcude special interest.[10]

In *Oriental Insurance Co. Ltd v. Ram Kumar,*[11] the Commissioner's award against the insurance company was held to be valid and it was propounded that once the liability of the owner is established, the insurance

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6 *Infra, Venkatrao v. Sundara Basik,* 1991 ACJ 581 (Orissa).

7 1991 ACJ Delhi 91.

8 (1991)71 Comp. Cases Mad 816. *See also, New India Assurance Ltd v. Maradhan Panda,* 1991 ACJ 863 (Orissa) where a person who was held to be a pedestrian and not a passenger, it was also held that even if he would have been a passenger, the Company would have been liable.

9 *United India Insurance Co. Ltd. v. Kantibai,* 1991 ACJ Bom 22.

10 *Oriental Insurance Co. Ltd v. Hasmath Khatoon,* (1991)71 Comp. Cases Del 644.

11 1991 ACJ 1091 (P&H).

company is bound to indemnify the insured under the contract of insurance under Sec. 147 of M.V. Act, 1988 and the Workmen's Compensation Act, 1923.

In a case of the death of a cleaner of a goods vehicle in the course of employment, the insurance company was held to be liable even if the employer insured was not insolvent. Policy here covered the liability of the cleaner under the Workmen's Compensation Act by payment of additional premium.[12]

Transfer of the vehicle insured

In *Meenabai v. Nasirudi,*[13] a vehicle was transfered prior to the date of the accident but the policy was renewed in the name of the previous owner and it was held that the Company was not liable. Though the registration was in the name of the transferor he was also not held liable as the sale had been completed.[13]

In *Chacko PM v. Rosamma Antony,*[14] the registered owner i.e., transferor, was held liable as he could not prove the transfer.

In *Rangasamy v. Penamal,*[15] as the transfer was not intimated to the insurance company, the company was not held liable. This case relied on the earlier cases,[16] but dissented from *Dharman v. M.C. Srinnivasan,*[17] where it was held that defence of lapse of policy cannot be raised with reference to Sec. 96(2) M.V.A., 1939, which in the instant case was held to be a permissible defence.

No fault liability

In *National Insurance Co. Ltd v. Sadhelal,*[18] it was held that one cannot raise defences available under Sec. 147 of the M.V. Act, 1988 in case of 'no fault liability' under Sec. 140. But if the insurance company is successful in establishing any such defence in final adjudication, the owner of the vehicle shall reimburse the said amount to the company.

In *Ramula v. Shaik Khafu,*[19] it was held that the insurance company

12 *United India Insurance Co. Ltd v. Roop Kanwar,* 1991 ACJ 74 (Raj).
13 1991 ACJ (MP) 986. *See also, Marfinder Kaur v. Shanti Devi,* 1991 ACJ 845 (P & H).
14 1991 ACJ 597 (Ker).
15 1991 ACJ 45 (Mad).
16 1982 ACJ 288 (Mad).
17 1990 ACJ 27 (Mad).
18 1991 ACJ 1024 (MP). *See also, New India Assurance Co. Ltd. v. Lakshman Singh,* 1991 ACJ 42 (MP).
19 1991 ACJ 359 (AP).

cannot recover from the owner the amount paid by it under 'no fault liability' even if it is subsequently found that it is not liable to satisfy the claim filed under Sec. 110-A.

Liability of the insurer

Insurer is not liable in cases where the owner entrusts the vehicle to a garage for repair and due to the negligence of the worker there an accident occurs. As the owner in such cases is not held liable, the insurer need not indemnify the insured.[20]

In *New India Assurance Co. Ltd v. Ratin Prakash Rao,*[21] an amendment to Sec. 95 of the M.V. Act, 1933 was held to be prospective in nature. An analogy of Sec. 92-A cannot be drawn here, thereby distinguishing it from *T. Srinivasalu Reddy v. C. Govardhana Naidu* [22] where Sec. 92-A amendment was held to be retrospective in nature.

In *New India Assurance Co. Ltd v. paramu,*[23] Policy was issued in accordance with Sec. 95 of the M.V. Act, 1933 and had expired much prior to the coming into force of the M.V. Act, 1988. The insurance company was held not liable for the entire amount under Sec. 147 of the 1988 Act, as there is a provision in the 1988 Act treating a policy of insurance issued with any limited liability and in force before its commencement as one issued under Sec. 147; also the 1988 Act recognises the effectiveness of such policies for a specified period even after its commencement.

Procedure

Res judicata

In *Yeshvant Rama Shanbag v. United India Fire & Genl. Ins. Co. Ltd,*[24] where the tribunal held the insurance company liable and the amount was paid without making an appeal but later filed a suit against the insured for the recovery of the amount, it was held to be barred by *res judicata* as the decision of the Tribunal on the issue of the liability of the insurance had become final between the parties and it was not open to the insurance company to reagitate the same by filing a suit.

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20 *Peter Moris Lobo v. Sonal Maganlal Shingala,* 1991 ACJ 215 (Bom).
21 1991 ACJ 332 (AP).
22 1990 ACJ 66 (AP).
23 1991 ACJ 33 (Ker).
24 1991 ACJ 299 (Bom). *See also, United India Ins. Co. v. Sankranti Swaintors,* 1991 ACJ 132 (Orissa).

Evidence

Rules of evidence are not strictly applicable to proceedings under the M.V. Act. Proceedings before a tribunal are summary in nature. Any document having probative value and the genuineness of which is not in doubt, can be considered.[25]

Non production of policy[26] or not pleading limited liability[27] by the insurer will be held as unlimited liability.

In the event of two claims arising out of one accident, the insurance company is liable for each claim separately.[28]

In *Benny v. United India Insurance Co. Ltd,*[29] the insurance company produced a certified true copy of the policy to prove its limited liability. Held, that the insured who had failed to fulfil his statutory obligation of producing the policy could not contend that the insurance company produced only a truncated policy and its limit clauses could not be examined.

Burden of proof

Where the owner contended that the insurance company has unlimited liability but failed to produce the policy, when asked to do so, and the company on the other hand produced a copy of the policy as the original had been destroyed, it was held that the insurance company had discharged its burden and was said to have limited liability.[30]

In *Suresh Mohan Chopra v. Lakhi Prabhu Dayal,*[31] a driver was produced by the insurance company as a witness to establish that he had no driving license. It was concluded by the Tribunal that the insurance company had failed to establish that the driver had no license. The High Court reversed the findings of the Tribunal. In appeal the Supreme Court held that since the driver was the witness of the insurance company the High Court committed an error of law in reversing the Tribunal's findings. It was held that the burden was on the insurance company to prove that driver had no licence thereby reversing the decision of the Delhi High Court.[32]

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25 *New India Assurance Co. Ltd v. Saloni Dargentors,* (1991) 71 Comp. Cases Del 541. *See also, Oriental Fire & Gen. Ins. Co v. Veena Pruthis,* (1991)70 Comp. Cases (Del) 848.

26 *Zail Singh v. Jaganath,* 1991 ACJ 644 (Del).

27 *Punjab Dairy Dev. Corp Ltd v. Oriental Fire & Gen Ins. Ltd.* 1991 ACJ 775 (P&H).

28 *Supra,* n. 26

29 1991 ACJ 182 (Ker.)

30 *New India Assurance Co. v. Saloni Dargenters,* (1991) 71 Comp. Cases (Del) 541.

31 1991 ACJ 1 (SC).

32 1988 ACJ 443 (Del), reversed.

Joinder of pleas

An agreement between the insurance company and the owner to put forward the owner's defence also by the insurance company is *void ab initio* and unenforceable as there is a conflict of interest. Also, insurance company is forbidden by law to contest matters like negligence and quantum of compensation to be awarded under Chapter VII-A and VII of the M.V. Act.[33]

Necessary party

In *T.C. Kuruvila v. Managing Director Southern Roadways Ltd,*[34] an owner contended that he is entitled to be idemnified by the insurance company. The Tribunal issued notice of proceedings to the insurance company but passed an award against the owner and driver without waiting for return of the notice. It was held that the insurance company was a necessary party as per Sec. 96(1) and 96 (2). As a result, the case was remitted to the Tribunal for a fresh award after issuing fresh notice to the insurance company and after affording the company an opportunity of being heard.

Appeal

In *Oriental Insurance Co. Ltd v. Santosh Singh,*[35] the insurance company filed an appeal against the order of the single judge and the owner and driver of the car were also impleded as appellants. No power of attorney was signed by the owner and driver of the car in favour of their advocate who had filed an appeal. It was held that the insurance company could not challenge the quantum of compensation awarded, as the appeal was virtually filed by the insurance company the Court also held that *Vijay Kr. v. Haryana State*[36] was not applicable in the present circumstances.

In *New India Assurance Co. Ltd v. Lalita Naik,*[37] it was held that under the circumstances present in the instant case, the insurance company could challenge the quantum of compensation in appeal.

Public place

The insurance company was not held liable for an accident which took place within the precincts of a petrol bunk, which was held not to be a public place.[38]

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33 *K.S. Subramani v. A Thomas Ross,* 1991 ACJ 97 (Ker).
34 1991 ACJ 16 (Ker).
35 1991 ACJ 390 (P&H).
36 1990 ACJ 606.
37 1991 ACJ 1035 (Orissa).
38 *Nagarathnam v. Murugesam,*1991 ACJ 673 (Mad).

Liability of insurer with respect to goods vehicle

In *New India Assurance Co. Ltd v. B. Saraswathi Ammal,*[39] it was held that the insurance company was not liable where a lorry met with an accident and resulted in the death of the owner of the goods travelling with the vehilce. He could not be said to be a person employed by the person insured. The Court distinguished it from *T.M. Renykappa v. Fahmida*[40] where the insurance company was held liable along with the owner of the vehicle. The distinction was made on the ground that the Karnataka decision (1980) was with reference to the peculiar terms of Rule 161(1) of the Karnataka Rules.

In *New India Assurance Co. Ltd v. Rambhabai,*[40] the insurance company was held liable when the owner of the goods, who was travelling with the goods died due to the accident.

Interpretation of policy

In *Dattu Nath Kudekar v. National Insurance Co. Ltd,*[41] policy prohibited the use of a private carrier, for hire or reward, which was violated and the vehicle met with an accident. It was held that the hired vehicle was not covered by the driver's extension clause. As a result the driver could not be indemnified.

It has been held in *Chacko P.M. v. Rosamma Antony,*[42] that Tariff Advisary Committee's instructions have no application to a statutory policy and are applicable only to a comprehensive policy. In this case, the statutory policy did not cover the risk to the passenger. As a result, it was held that the insurance company was not liable for the death of the passenger.

Where policy covered the liability of the insured under the Workmen's Compensation Act, Fatal Accidents Act or at common law, in respect of personal injury to any paid employee, and the claimants opted to file a claim petition under the M.V. Act, it was held that the insurance company would be liable for the larger amount under common law; it was not to be restricted under the Workmen's Compensation Act.[43]

In *Kantilal Nagarbhai v. Kantibai Punjubhai,*[44] it was held that the insurance policy operates from the date of the policy and not from the date of the payment of premium.

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39 1991 ACJ 327 (Mad).
40 1980 ACJ 86 (Kant).
41 1991 ACJ 743 (Guj).
42 1991 ACJ 597 (Ker).
43 1991 ACJ 444 (Mad).
44 AIR 1991 Guj 177.

COMPANY LAW - I

*M.P. Padmanabha Pillai**
*Nandan S. Nelivigi***

Statutory Changes

Many statutes and rules in addition to a plethora of notifications having substantial bearing on corporate activities emerged during the period under review. Of these, the most important legislations are the Securities and Exchange Board of India Act 1992 and 'The Monopolies and Restrictive Trade practices (Amendment) Act, 1991.

In addition to the above two, The Sick Industrial Companies (Special Provisions) Act, 1985 was amended in December 1991, for the purpose of including a 'government company'[1] within the purview of the parent Act.[2] Another important legislative step was the repeal of the Capital Issues (Control) Act 1947.[3]

The Securities and Exchange Board of India Act, 1992

In recent times there has been a phenomenal growth of the stock market. In order to facilitate this growth in a healthy manner and to safeguard the interest of the investors the 'Securities and Exchange Board of India (hereinafter called the 'SEBI') was established in 1988 by a Government resolution. The SEBI was made a statutory body, with substantial powers, by an ordinance of 1992. The ordinance is now replaced by the Act. The SEBI, consists of six members, including the chairman, who have sufficient expertise and experience of law, finance, economics etc. The vital part of the Act is Chapter IV which enumerates the functions and powers of the Board.

The powers include

(a) Regulating the business in stock exchanges and any other securities market;

(b) Registering and regulating the working of stock brokers, sub-brokers, share-transfer agents, bankers to an issue, registrars to an issue and

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* Faculty Member, NLSIU, Bangalore.
** Student V Year, NLSIU, Bangalore.

1 A 'government company' is defined in Sec.617, Companies Act 1956.

2 This could be done by amending Section 3(i)(d), which defines a 'company'.

3 Repealed by Capital Issues (Control) Ordinance, 1992.

others who are associated with securities market;

(c) Prohibiting fraudulent and unfair trade practices and insider trading; and

(d) Regulating substantial acquisition of shares and takeover of companies etc. Section 12 makes it obligatory on all stock brokers, sub brokers, share transfer agents, bankers to an issue, registrars to an issue, portfolio managers, underwriters and others who may be associated with securities market to obtain a certificate of registration from the Board. The Board has the power to cancel or suspend the certificate so issued. The Central Government has power to issue directions to the Board (Sec.16). It may also supersede the Board in certain circumstances.[4] The Act is sufficiently armed to ensure compliance with the provisions therein.[5]

The Monopolies and Restrictive Trade Practices (Amendment) Act, 1991[6]

In order to implement the new economic policy of the Government, many provisions of the Monopolies and Restrictive Trade Practices Act, 1969 and The Companies Act of 1956 have to be amended. This statute is a step taken in that direction. Many provisions of the parent Act were amended.[7] Certain chapters or sections in the parent Act were omitted.[8] A few provisions were inserted or substituted.[9] The omitted provisions of Chapter III of the parent Act imposed certain restriction on interconnected and dominant undertakings, which were felt to be inconsistent with the new policy. Chapter IIIA which imposed restrictions on the acquisition and transfer of shares of or by certain bodies Corporate was deleted from the MRTP Act. The restrictions are now incorporated in the Companies Act. Part-B of the Amendment Act has inserted 8 Sections (Secs. 108-A to 108-I) in the Companies Act, 1956. The object and scheme of these provisions is to impose certain restrictions on the acquisition and transfer of shares of public companies, subsidiary private companies and foreign compaines.

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4 Sec.17.

5 Any one who contravenes or attempts to contravene any of the provisions of the Act or the rules or regulations made thereunder is liable for penal action (Section 24).

6 All the provisions save Section 7, are given retrospective effect from 27-9-91. The Act received Presidential asset on 28-12-1991.

7 The following Sections were amended: Secs. 2, 10, 11, 12, 12A, 27, 27A, 31, 36A, 36-D, 45, 46, 48, 48-C, 50, 54, 55, 67.

8 The provisions omitted are: Parts A & C of Chapter III; Chapter IIIA; Sec.47 and the Schedule to the Act.

9 The new provisions inserted into the parent Act are; Secs. 13-B, 26-C, 48-B.

Rules, Regulations, Notifications etc.

Some of the important rules and regulations made during the period are:

1. The Company Law Board Regulation, 1991. The constitution and jurisdiction of the Benches of the Company Law Board and the procedure therein are the main contents of this regulation;
2. The Company Law Board(Amendment) Regulation, 1992 which has amended some of the provisions of the Company Law Board Regulation 1991;
3. The Companies (Central Governments) General Rules and Forms (Second Amendment) Rules, 1991;
4. The Securities and Exchange Board of India (Terms and Conditions of Service of Chairman and Members), Rules 1992;
5. The Companies (Central Government's) General Rules and Forms (Third Amendment) Rules, 1991; and
6. The Monopolies and Restrictive Trade Practices Commission Regulations, 1991.

Case Laws

Transfer of shares

During the period under review many vital issues concerning transfer of shares and rectification of Register of members have attracted the attention of the various High Courts. In *Mukundlal Manchand v. Prakash Roadlines Ltd,*[10] the High Court of Karnataka was called upon decide whether the period stipulated in Sec. 108, within which time the instrument of transfer along with the other documents had to be lodged with the company for registration of the transfer,[11] was mandatory or only recommendatory. The petitioners assailed the registration of transfer of certain shares and the consequential entry of the transferees in the Register of Members and sought rectification of the Register. The ground of attack of the petitioners was that the transfer forms were not delivered to the

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10 (1991) 72 Comp.Cas. 575(Kar), Shivashankar Bhat, J.

11 Sec.108(1A) stipulates that every instrument of transfer in the prescribed form . . . shall . . be delivered to the company in the case of shares dealt in or quoted on a recognised stock exchange at any time before the Register of members is closed for the first time after the date of presentation the prescribed form to the prescribed authority under clause(a) or within 12 months of such presentation, whichever is later. In any other case within two months of date of such presentation.

company within two months from the date of stamping, as required by Sec.108(1a)(b)(ii) of the Companies Act. Rejecting the above contention the Court held that the stipulation of two months in the section is only recommendatory and not mandatory. Failure to comply with the two months time limit would not invalidate the transfer. The Court was of the view that a delivery of an instrument within a "reasonable time" should be held as a proper delivery.[12] The earlier decision of the Supreme Court,[13] holding that the requirements of Sec.108 were mandatory was held to be inapplicable to the case as it was related to Sec.108 as it existed prior to the introduction of Sec.108(1A).[14]

The Court also repelled the second contention of the petitioners that Art.7 of the Articles of Association, requiring that any shareholder desiring to sell any of his shares shall notify the same to the Board so that other members can have a preemption right to purchase those shares, was violated.

The Court held that when the proposed sale was to another share, holder, the preemption right embodied in the Article is inoperative and it was not further necessary to offer them to the other shareholders.

It is respectfully submitted that the observation of the learned judge that the period of two months stipulated in Sec.108(1A) (b) (ii) is only recommendatory and not directory and that delivery of the instrument of transfer within a 'reasonable' time should be held to be a proper delivery is of doubtful authority. A plain reading of the section does not warrant importing the concept of 'reasonable time' into it. The language therein is clear and unambiguous. That the legislature did not intend to confer such a discretionary power on the Board of Directors is also evident from clause (1-D) of the Section. This subsection provides 'Notwithstanding anything in subsection (1A) or subsection (1-B) or subsection (1-C), wherein the opinion of the Central Government it is necessary to do so, to avoid hardship in any case, that Government may on an application made to it in that behalf extend the periods mentioned in those subsections by such further time as it may deem fit. Thus it is amply made clear by the legislature that the authority empowered to condone the delay in the lodgement of the instrument of transfer is the Central Government and not the Board of Directors of the company concerned.

In *C.H. Joshi v. Bombay Paper Ltd.*, the Company Law Board (CLB), held that unless the adhesive stamp affixed to the share transfer deed is

12 *Id.* at 586-7.

13 *Mannalal Khetan v. Kedar Nath Khetan*, (1977) 47 Comp.Cas.185; AIR 1977 SC 536.

14 The subsection was substituted.

cancelled by the executant of the deed in accordance with the provisions of Sec.12 of the Indian Stamp Act, 1899, legally, the share transfer deed is not duly stamped and, under Sec.108(1) of the Act, it is mandatory that the company shall not register transfer of shares unless a properly executed instrument of transfer "duly stamped" has been delivered to the company.[15]

In the same case the CLB held that in proceedings under Sec.155 of the Act, the High Court had inherent powers to give directions to the company to return the transfer deed to the person who has presented it and give liberty to the applicant to submit the share documents afresh after taking necessary steps under the law.[16] No such inherent power is available to the CLB under Sec.111.

In *Vardhaman Publishers Ltd v. Mathrubhoomi Ltd,*[17] the Board of Directors of the respondent company exercising the discretionary power conferred on them by an amendment of the Articles, refused to register the transfer of a block of shares in favour of the petitioners. The amendment was effected after the petitioners lodged the transfer deeds and other documents with the company for registration of the transfer. The stamps required for the transfer were affixed on a paper produced along with the transfer application form, as it was physically impossible to affix all the required stamps on the transfer deed. The stamps were cancelled at the time of lodging the transfer application forms with the company, but not at the time of execution of the instrument of transfer. The main issues arising in the instant case were:

(1) Whether the instrument of transfer lodged with the company for registration was 'duly stamped' for the purpose of Sec.108;

(2) Whether the amendment of the Articles was valid and whether such amendment can be given retrospective operation so as to defeat the claim of the transferee who lodged the instruments of transfer before the amendment; and

(3) Whether the amendment was vitiated by malafides?

The petitions were filed under Sec.155 of the Compaines Act, for rectification of the Register of Members.

K. John Mathew J. of the Kerala High Court held that the instrument of transfer lodged with the company was 'duly stamped', for the purpose of Sec.108 and as required under Sec.2(11) of the Stamp Act. His lordship

15 (1991) 72 Comp.Cas.173 (CLB), S.P. Upsani (Chairman), Y.A. Rao (Member).

16 *Id.* Sec.155 was deleted by the Amendment Act, 1988.

17 (1991) 71 Comp.Case. 1 (Ker).

observed that even if the stamps were cancelled after the execution and just before the transfer deeds were lodged with the company, that will not be a material defect under the Stamp Act. The main question here is whether the revenue is collected and whether the stamps were duly cancelled so that they cannot be used again. The position here is different from that in a negotiable instrument. Relying on a judgement of the Supreme Court,[18] the learned Judge observed that the Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments and not to arm a litigant with a weapon of technicality. In the system of transfer of shares by blank transfer deeds, which is recognised by Company Law the practice is that the deed passes from hand to hand several times until a transferee, in whose hands the deed happens to be, decides to register the transfer in his favour by filling up the transfer deed and lodging the documents with the company for registration.

Referring to the issue of validity of the alteration of the articles the Court held that the alteration was valid as the conferment of Power on the Board of Directors to reject share transfers cannot be treated as an unlawful purpose. But, it was observed that if after a transfer is presented for registration, the Company alters its Articles by restricting the right to transfer the shares, with a view to preventing the registration of the particular transfer, the alteration does not deprive the applicant of his right to have the transfer registered in accordance with the Articles before the alteration.[19]

On appeal the division bench consisting of K.R. Radhakrishna Menon and T.V. Ramakrishnan JJ., concurred with the finding of the single judge that, the right of a transferee to get his name entered on the register gets crystallised when proper documents are lodged with the company. Such right cannot be defeated by subsequent actions of the company such as the amendment of the Articles. However, the Court held that in the instant case there was no proper lodgement of the documents as the instrument of transfer was not 'duly stamped' on account of non cancellation of the adhesive stamps at the time of execution of the transfer deed. Hence, the refusal to register the transfer was valid in law.

It is submitted that this is too technical a view and contrary to the view expressed by the Supreme Court in *Hindustan Steel Ltd v. Dilip Construction Co.*[20] Further, if the law is correctly stated by the Division Bench it would

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18 *Hindustan Steel Ltd v. Dilip Construction Co.*, AIR 1969 SC 1238.

19 The learned Judge quoted with approval the statement in Palmer's Company Law, 24th Edn. Vol I Chapter 14-21.

20 AIR 1969 SC.1238.

cast doubt on the validity of most of the blank transfers, a commercial practice frequently employed in the stock market and taken note of in the statute and case law.

Restrictions on transfers - binding nature of private agreements between members

In *V.B. Rangaraj v. V.B. Gopalkrishnan,*[21] the main issue was whether an agreement between the members of a private company restricting the transferability of shares in a particular way, but not incorporated in its articles, was legally valid. In the instant case, all the members of the company belonged to two branches of a family. They agreed that in the event of any member desiring to transfer any of his shares, the other members of the same branch will have a preemption right to purchase them. The agreement was not embodied in the Articles of the company. Violating the agreement a member sold his shares to members belonging to the other branch. In a suit filed for a declaration that the transfer was invalid, the Trial Court and on appeal the High Court held the sale, being violative of the agreement, was invalid.

On appeal, the Supreme Court held that shares in a company are transferable like any other movable property. The restrictions on the transfer of shares can be laid down only by the Articles of the company. A restriction which is not specified in the Articles is not binding either on the company or on the shareholders.

Register of members

In *Talayar Tea Company Ltd* v. *Union of India*[22] a division bench of the Madras High Court was called upon to interpret Sec.154 of the Act. The Court held that though a company may close its registers at its discretion, subject to the period mentioned in Sec.154, it could do so, only by complying with the mandatory requirements specified therein. One such requirement is that closure can be effected only after giving a minimum of 7 days notice published in a newspaper having circulation in the District in which the registered office of the company is situated. Notice published in the Daily Official List of the Stock Exchange is not a substitute for this. If the notice, as required under Sec.154(1), is not complied with there is no valid closure of register. Any refusal to register a transfer during the period of an invalid closure is improper.

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21 (1992) 73 Comp.Cas.201(SC), P.B. Sawant and B.P.Jeevan Reddy, JJ.

22 (1991) 71 Comp.Cas. 95(Mad.).

Transferability of shares of listed companies

In *Kinetic Engineering Company Ltd. v. Sadhana Gadia*[23] the main issue was the validity of a provision, in the Articles of a listed company, restricting the free transferability of its shares. Relying on the authority of such a provision, the petitioner company refused to register transfer of an 'odd lot' of shares presented for registration by the respondent. The CLB held that an application for registration of transfer of the securities of a listed company could be rejected only on the grounds specified in Sec.22A of the Securities Contract (Regulation) Act. Any provision in the articles of a listed company putting further restrictions will have no binding force either on the company or on the members. The Articles of a company cannot be treated on a par with statutory provisions. Though they are contractual terms between the company and members or members *inter se*, those provisions in the memorandum and articles which are contrary to any provisions of any law will be invalid *ab initio.*

In *Gammon India Ltd v. Hong Kong Bank,* [24] the CLB, considered the scope and ambit of the Powers of the Company Law Board in a reference made to it under Sec.22A of the Securities Contract (Regulation) Act and compared the same with its function under Sec.250 of the Companies Act. In the instant case one 'C', through various instrumentalities and agencies acquired a sizeable block of shares in 'G Ltd' (31%) and applied for registration of the transfer. The Board of Directors of the Company in its various meetings resolved to refuse registration in favour of the respondents, on the ground that registration in favour of the transferees would result in a change in the composition of the Board which would be prejudicial to the interest of the Company, its employees and the public at large. The Board came to this opinion in good faith and after taking into consideration the material placed before it. Reference was then made to the CLB under Sec.22A of the Securities Contract (Regulation) Act, for confirming the opinion so formed by the Board. It was in this connection that the CLB, considered its role and function in a reference under Sec.22A(4)(C). The CLB opined that in such a reference it does not sit in judgment to compare the merits and demerits of the management of the existing Board vis-a-vis, those of the new Board likely to take over the management, if the transfers are registered. The CLB has only to see whether, on the basis of the records placed before the Board at the time of consideration of the registration of transfer of the shares in question, the Board could have formed an opinion in good faith that there is a likelihood of change in the

23 (1992) 74 Comp.Cas.82 (CLB-Western Region Bench).
24 (1992) 74 Comp.Cas.123.

constitution of the Board of Directors and if so, whether such a change would be prejudicial to the interest of the company or public interest.

The difference between the roles of the CLB under Sec.250 of the Companies Act and Sec.22A of the Securities Contract (Regulation) Act, is this- In the case of orders under Sec.250(3), the opinion is formed by the CLB, whereas in the case of a reference under Sec.22A its function is only to confirm or reject the opinion formed by the Board.

Can a Joint Hindu Family, as such, be a member of a company

In *Vickers Systems International Ltd v. Mahesh P. Keswani* [24a] an interesting and important legal issue had come up for the decision of the CLB, in a reference under Sec.22A (4) (C) of the Securities Contracts (Regulation) Act 1956. The issue was whether a Joint Hindu Family, as such, can be registered as a member in the Company's Register of members. It is unambiguous that the JHF is not a legal entity, distinct and separate from its members. Section 41(2) of the Companies Act 1956 provides that only persons who agree in writing can become members of a Company. But shares in a company are movable property and a Joint Hindu Family can own property for the purpose of transferring shares in the name of the JHF. The transfer deed can be validly executed by its *Karta* for and on its behalf. In the opinion of the Board there is no legal bar on a Hindu Undivided Family investing its monies in Corporate Securities. The Companies Act does not prohibit membership of Hindu Undivided Families. It is submitted that the decision is legally sound and highly pragmatic in view of the recent development of investment in corporate securities as a prudent investment.

Duties of public financial institutions as investors

In *Parthasarathy v. Controller of Capital Issues,*[25] the Supreme Court observed that public financial institutions, while transferring or selling bulk number of shares, must consider whether such a transfer will lead to acquisition of a large proportion of the shares of a public company by a particular group, thereby creating a monopoly in favour of that group to have a controlling voice in the company and whether the same is not in public interest and not congenial to the promotion of business.[26] The Court further observed that though any person or company is lawfully entitled to purchase shares of another company in the open market, if the transactions

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24a (1992) 73 Comp.Cas.317.

25 (1992) 72 Comp.Cas.651(SC); AIR 1991 SC 1420; JT 1991 (2) SC 430.

26 (1991) 72 Comp.Cas.651 at 667, B.C. Ray,J.

is done "surreptitiously with a *malafide* intention by making use of some public financial institutions as a conduit in a clandestine manner, such deal or transcation would be contrary to public policy and illegal."[27]

Corporate entity

In *State of U.P. v. Renusagar Power Co.*,[28] the question which came up for consideration of the apex court related to the lifting of the corporate veil.

Hindalco had established an aluminium factory as part of the aluminium expansion scheme of Hindalco. 'Renusagar', a company for generating electricity, was incorporated in 1964. It was a wholly-owned subsidiary of Hindalco. Renusagar generated electricity only to the extent required by Hindalco, and Hindalco was the only consumer. Hindalco had complete control over Renusagar. For the purpose of expansion of Hindalco, Renusagar was treated by the Government of India and the State of U.P. as the captive power plant of Hindalco and Hindalco was taken to have its own source of generation. The question was whether Renusagar would be Hindalco's 'own source of generation' within the meaning of Sec.3(1)(c) and 4 of the Electricity (Duty) Act, 1952. Duty was leviable on the electricity supplied by Renusagar to Hindalco, only on the basis that the two companies are one legal entity. On the facts, the Court held that the corporate veil should be lifted in this case, though no question of evasion of tax was involved.[29] Renusagar's power plant was treated as 'own source of generation' of Hindalco.

The Court further observed that the concept of lifting the corporate veil is a changing concept. "The veil of corporate personality, even though not lifted sometimes," the Court noted, "is becoming more and more transparent in modern jurisprudence." It went on to state:

> It is high time to reiterate that, in the expanding horizon of modern jurisprudence, lifting of the corporate veil is permissible; its frontiers are unlimited. But it must, however, depend primarily on the realities of the situation.[30]

In *Godrej Soap Ltd v. State*,[31] the Calcutta High Court held that Article 20(3) of the Constitution, which grants privilege against self incrimination is not applicable to a company. It held that Art.20(3) does not contemplate

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27 *Id.* at 686, N.M. Kasliwal, J.

28 (1991) 70 Comp.Cas.27(SC), Sabyasachi Mukarji and S.Ranganathan, JJ.

29 *Id.* at 159.

30 (1991) 70 Comp.Cas. 27 at 60.

31 (1990) 70 Comp.Cas. 248 (Cal.), Anandamoy Bhattacharjee and Amulya Kumar Nandi, JJ.

non-natural persons, having only juristic personality. Whatever juridical personality the law might have conferred on a body corporate, it has not and cannot have invested a body corporate with sense organs to see, hear or perceive a thing and, therefore, it could never become a witness.

Oppression and mismanagement

In *Rajendra Nath Bhaskar v. Bhaskar Stoneware Pipes P.Ltd,* [32] the question arose whether in a petition under Sections 397 and 398, wherein allegations of oppressive conduct were made against a director, his legal representatives, could, on his death, be impleaded as parties. The director was alleged to have diverted the company's funds to promote his own family concerns at the cost and to the detriment of the company. A single judge of the Delhi High Court, having found the averments made by the petitioner to be true, ordered the company to purchase the shares belonging to the family of the deceased director. The application of the legal representatives to come on record was rejected on the ground that the oppressive conduct of a deceased director could not be ascribed to his/her legal representatives.

The Division Bench, on appeal, reversed the decision and allowed the legal representatives to be made parties. It agreed that the oppressive conduct of a deceased director could not be ascribed to his/her legal representatives. But, the Court reasoned that the order requiring the company to purchase the shares of the family of the deceased director affected the rights of the legal representatives. To pass such an order, without hearing the legal represntatives would be a violation of principles natural justice.

In *S.D.N. Waidyar v. Sri Venkateswara Real Estate P. Ltd.,*[33] the Karnataka High Court was only restating the well settled principle, when it declared that the relief under Sections 397 and 398 of the Act is an equitable relief which is entirely left to the discretion of the Company Court. Because of the equitable nature of the remedy and discretionary character of the Court's jurisdiction, the requirement of good faith on the part of the petitioner is necessary. The Court further held that even if the allegations of the petitioners, if proved, do make out a case of oppression and mismanagement within the scope of Sections 397 and 398 of the Act, the relief could be refused if no good faith could be found on the part of the petitioner.[34] The reasons for refusing reliefs under Sections 397 and

32 (1991) 72 Comp.Cas. 641(Del.), M.C. Jain, C.J., and Arun Kumar, J.

33 (1991) 72 Comp.Cas. 211 (Kar), Bopanna, J.

34 *Id.* at 241.

398 of the Act are equally applicable to winding-up petitions.

In *M. Moorthy v. Drivers Bus Services P. Ltd.,* [35] a purported sale of sole assets of a company by the directors, who were only usurpers, was found to be nothing but a pure adjustment between one of the usurper-directors and his relatives, unmindful of the interests of the company. The Court declared the sale void and held that the action amounted to oppression and mismanagement of the affairs of the company. Even subsequent neglect of the affairs of the company justified the relief under Sections 397 and 398.

In *Rajadhani Roller Flour Mills P. Ltd. v. Mangilal Bagri,*[36] the Delhi High Court held that the right of inspection of documents and books of a company is not limited to the board of directors under Sec.209(IV) of the Act. In order to prove the allegations made in a petition under Sections 397 and 398 of the Act, the shareholders of the company are also entitled to be allowed inspection of the books of accounts and other relevant papers of the company. Where there were allegations and counter-allegations in the petition regarding misuse of the funds of the company in an arbitrary manner, it was only with the help of the books of accounts that the matter could be investigated. The parties were entitled to look into the books of accounts and substantiate their case. In such a case there was no reason to refuse the xerox copies of such documents either.[37]

In *Mathrubhumi Co. Ltd v. Vardhaman Publishers Ltd.,*[38] a division bench of the Kerala High Court held that the power conferred on a company under Section 31 of the Act to alter the articles by special resoslution should not be abused by the majority shareholders so as to oppress the minority. In that case, the Court also explained the distinction beteween 'qaulified minority rights' and 'individual membership rights'. According to the Court, individual membership rights can be enforced by any individual shareholder. But to enforce qualified minority rights, the co-operation of the minority group of a specified size within the corporate body was required. It was said that an individual membership right is the right of a member to maintain himself pertaining to that status. This individual right implies that the shareholder can insist on the strict observance of the legal rules, statutory provisions and provisions in the Memorandum and Articles which cannot be waived by a bare majority of shareholders. Qualified minority rights enable the minority shareholders to

35 (1991) 71 Comp.Cas. 136(Mad).

36 (1991) 70 Comp.Cas. 788(Del), M.C.Jain and Arun Kumar, JJ.

37 *Id.* at 791.

38 (1992) 73 Comp.Cas.80(Ker), K.P.Radhakrishna Menon and T.V.Ramakrishnan, JJ.

preserve, in important matters, the *status quo* which is founded on the original contract of the shareholders and the company. Proceedings to enforce qualified minority rights under the Act could be intiated only under Section 397 or Section 398, read with Section 399 and not under Section 155 of the Act.[39]

In *CLB v. Ganesh Flour Mills Ltd,*[40] the Delhi High Court considered the co-relation between Secs. 397, 398 and 402 of the Companies Act. Y.K. Sabharwal J. observed therein that the specific Powers under Sec.402 are in addition to the Plenary Powers of the Company Court under Secs.397 and 398. Section 402 does not in any way curtail the powers under those provisions, but only enlarges it.

In *L.R.M. Narayanan* v. *Pudhuthotam Estates Ltd,*[41] a petition was filed under Sec.397, 398, 402 and 403, alleging serious malpractices against the Company and its directors and seeking relief against oppression and mismanagement. The petitioners satisfied the share qualification required under Sec.399(i). Some of the petitioners, subsequent to the acquisition of their shares by the controlling share holders, sought to withdraw from the company petition, in which case the petitioners pursuing the relief may not be having the shareholding required under Sec.399. It was held that the specified shareholding is required only for the presentation of a petition and not for its continuance. Once a valid petition has been admitted a shareholder who seeks to substitute himself as a petitioner in order to continue such a petition may be permitted to do so, even though he does not possess the required share qualification to file a pettion.

Payment of deposit amount by a Relief Undertaking

In *Re: Nirlon Ltd.,* [41a] the depositors of a company sought an order for repayment of their deposits by way of applications under Section 58A(9) of the Act. The company stated that it had been declared a relief under taking by the State Government under the Bombay Relief Undertakings (Special Provisions) Act, 1958, and that all its liabilities had been suspended. The Company Law Board held that the State Government had no authority under the Bombay Relief Undertakings (Special Provisions) Act, 1958, to suspend liabilities under a Central Act, and hence proceedings under Section 58A of the Act, a Central legislation, were not barred.

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39 (1992) 73 Comp.Cas.80 at 101.

40 (1991) 72 Comp.Cas. 459(Delhi).

41 (1992) 74 Comp.Cas.30(Madras).

41a (1991) 73 Comp.Cas.190(CLB), C.R.Mehta (Member); *See, Mrs. Kanak Mehta v. Jyothi Industries,* (1991)72 Comp.Cas.366(CLB).

Offences and reliefs

Many of the provisions of the Company Act are penal in nature, fastening liability on the company and/or the officers in default. But Sec. 633 empowers the Court to relieve an officer in default from liability, in the circumstances specified therein. [42]

In *Harechandra Maganlal v. Union of India,*[43] the Bombay High Court considered the ambit of the provision. Pandse J. observed therein that although the expression 'any proceedings' used in Sec. 633 is wide, the legislature intended to restrict it to those proceedings arising out of negligence, default, breach of trust, misfeasance or breach of duty etc. under the provision of other statutes. In the instant case, a company failed to pay its dues under the Provident Funds Act and the Employees State Insurance Act. Prosecutions were launched against the petitioners who were directors of the Company for violation of the provisions of the above two statutes. Thereupon they filed a petition under Sec. 633 pleading that they should be relieved from liability under those statutes as the default had occured due to reasons beyond their control. Rejecting the plea, the Court held that the jurisdiction of the Court under Sec. 633 is restricted only in respect of proceedings under the Companies Act, and does not cover proceedings in respect of breaches or violations arising under the other statutes.

The same principle was reiterated by the Supreme Court in *Rabindra Chamaria v. Registrar of Companies.* [44]

In another case,[45] a Company failed to file its annual returns and copies of the balance sheet and Profit and Loss accounts with the Registrar. It

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42 The Section reads: If in any proceeding for neglience, default, breach of duty, misfeasance or breach of trust against an officer of a company, it apprears to the Court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the Court may relieve him, either wholly or partly, from his liability on such terms as it may think fit; Provided that in a criminal proceedings under this subsection, the Court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a Court before which a proceeding against the officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section(1).

43 (1991) 71 Comp.Cas.66.

44 (1992) 73 Comp.Cas.257(SC), Ranganath Misra, C.J., Kuldip Singh and Mohan, JJ.

45 *K.K. Mehta v. Registrar.* (1991) 71 Comp.Cas. 669 (Delhi).

also failed to place the balance sheet and profit and loss accounts before the Annual General Meeting.[46] S.N.Sapra J. of the Delhi High Court observed in this case that all these are single defaults complete on the last day prescribed for the purpose in each case and not continuing offences. When complaints are filed for these offences beyond the period of limitation, the Court cannot take cognizance of them, unless delay is condoned by an order made under Sec.473 of the Code of Criminal Procedure, 1973. It was also observed in this case that before proceedings were initiated in other courts the officers in default can also file a petition before the High Court for anticipatory relief under Sec.633.[47]

Failure to file a return of deposits is also a single offence under Rule 11 of the Companies (Acceptance of Deposit) Rules, 1975, read with Sec.58A of the Companies Act and is complete on the last day prescribed for the filing of the return.[48]

In *Sekar Gupta v. Subhas Chandra*,[49] the Calcutta High Court held that where there were specific allegations of fraud and negligence against the directors, they could be prosecuted for an offence under the Negotiable Instruments Act, 1881, though the company was not made an accused.

Board of Directors

Appointment of directors

Sec.290 of the Act confers validity upon the acts done by a person as a director of a company, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification. In *M.Moorthy v. Drivers and Conductors Bus Service P. Ltd.*,[53] the Madras High Court held that Sec.290 will have no application where there had been usurpation of the office of director and managing director. On the facts of the case, it was held that one of the respondents (3rd respondent) was an usurper, as there was no evidence of his election as the managing director. Therefore, the co-option of other respondents as directors in the meeting which was attended by the third respondent alone, was held to be null and void.[54] Therefore, any resolution passed by the company approving the transfer of the assets, effected by one of the usurper directors, could not be held valid.

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46 *See*, Companies Act Ss.159, 210 & 220.

47 (1991) 71 Comp.Cas.669 at 673.

48 *S.P. Punj v. Registrar*, (1991) 71 Comp.Cas.509.

49 (1992) 73 Comp.Cas.590(Cal), Sunil Kumar Guin,J.

53 (1991) 71 Comp.Cas.136(Mad).

54 *Id.* at 145.

Appointment of managing or whole time directors, scope of Sec.269

Sec.269 confers on the Central Government to exercise control over the appointment of managing or whole time directors of public companies and private companies which are subsidiaries of public companies. Before the Amendment Act of 1988, the regulatory power of the Central Government in respect of such appointments and the consequences, if the Central Government did not approve any such appointment were laid down in clauses(1) and (5) of Sec.269. Clause(5) reads as follows:

> If the appointment of a person as managing or whole time director is not approved by the Central Government, the person so appointed shall vacate his office as such managing or whole time director on the day on which the decision of the Central Government is communicated to the Company and if he omits or fails to do so he shall be punishable with fine which may extend to five hundred rupees for everyday during which he omits or fails to vacate his office.

Clause(1) lays down that the appointments to the offices specified therein 'shall not have any effect unless approved by the Central Government'.

Adverting to the scope of these provisions, K.P. Radhakrishna Menon J. of the Kerala High Court observed that the refusal to grant approval is of no consequence at all and the person appointed as whole time or managing director, at the risk of his being punished, can continue in office even after the date of which the order rejecting approval is communicated to the company.[55] He further states that these provisions (i,e., Sec.269) are not capable of making any order, appointing a person as managing or wholetime director, ineffective for any period. This means that the regulatory power of the Central Government is nugatory, except for the purpose of collecting revenue.

One may find great difficulty in agreeing with the view expressed by the learned judge. Clause(1) in clear language states that the *appointment shall not have any effect unless approved* by the Central Government. Clause(5) provides that the person whose appointment is not approved *shall vacate the office on the date* on which the order of the Central Government is communicated to the company. A cumulative reading of these two provisions, will convince any one that continuance in office after the order of the Central Government refusing to grant approval is illegal and a continuing offence. An illegality or offence does not become legal or valid by mere payment of fine. Fine is only the punishment attached to the offence and not a validating process.

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55 *Sudarshan Trading Co. Ltd v. Government of India*, (1991) 71. Comp.Cas. 265 at 268 and 269.

The learned judge proceeded on the erroneous assumption that there is an apparent conflict between the two subsections viz., clauses (1) and (5). In fact there is no conflict either real or apparent, between these two provisions. The requirement of the Central Government's approval envisaged by the section is to ensure that incompetent and undesirable persons do not hold pivotal positions in public companies. If the learned Judge had considered this objective and resorted to the cardinal rule or harmonious construction, the error could have been avoided. It is submitted that the instant case is not good law.

It may be noted that though the section is substituted by a new provision by the Amending Act of 1988, the law on the point under discussion is not altered, except that for appointments satisfying the conditions specified in Schedule XIII, instead of seeking the approval of the Central Government, filing of a return in the prescribed form is sufficient.

Retiring directors

In *Bank of Baroda v. Official Liquidator,*[56] the directors of a company stood surety for the loan advanced to the company by a bank. Some of the directors retired and the new directors signed fresh guarantee bonds. In the absence of proof that earlier the guarantee had ceased to operate, the Court held that the retiring directors were jointly and severally liable with the other directors.

Remuneration of directors in other capacities

The proviso to Sec.309(1) of the Act lays down that the remuneration for services rendered by a director in any other capacity shall not be included in the remuneration payable to the director in that capacity, provided the services so rendered by him are of a professional nature. In order that the overall maximum on managerial remuneration payable to the directors should not exceed the limit prescribed under Sec.198, the proviso to Sec.390(1) of the Act stipulates that the Central Government should express its opinion regarding the requisite qualifications possessed by the director to render such professional services. In *Gajanana Motor Transport Co. Ltd v. Union of India,*[57] the Karnataka High Court held that once the Central Government is satisfied that the director possesses the requisite qualifications to render professional services, the Central Government was

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56 (1992) 73 Comp.Cas.688 (MP), R.K. Verma, J.

57 (1992) 73 Comp.Cas. 348 (Kar), G.P. Shivaprakash, J.

not empowered under Sec.309 to put any restriction on the remuneration payable to him by the company in respect of his professional services.

Election of directors

At any general meeting, persons other than the retiring directors are eligible to be appointed as directors, provided the candidate or any other member intending to propose him has given notice of the candidature to the company, at least 14 days before the meeting, alongwith a deposit of Rs.500. This requirement is embodied in subsection (1) of section 257. Subsection (1-A)[58] provides that such candidature, the notice of which was received by the company, shall be informed to the members by serving individual notice. In lieu of individual notice a company may, at least 7 days before the meeting, advertise in two newspapers circulating at a place where its registered office is located. Subsection (2) of Section 257, states that 'Subsection (1) shall not apply to a private company', leaving room for ambiguity as to whether or not the requirement of notice by the company to the members as provided in Sub-Section (1-A) is applicable to a private company. The mist of ambiguity was cleared by the Kerala High Court in a recent decision. In *Re: Sree Ram Vilas Press and Publications P. Ltd,*[59] it was held that Sec.257(2) of the Act applies to both Sections 257(1) and 257(1-A). Therefore, a private comany is not bound to inform its members of the candidature of a person for the office of director. The same interpretation was upheld by the division bench of the High Court on appeal.[60]

Alteration of the object clause

In the case of *Re: Geo Rubber Ltd.,*[61] the Southern Region Bench of the Company Law Board (CLB), considered the scope of the company's power to alter the objects clause in the Memorandum of Association. The petitioner company was set-up with the object of carrying on business of dealing in rubber products. But, owing to sudden development of adverse market conditions the company was forced to abandon the business even before it was started. Then, the company proposed to take up the business of marine products, for which an alteration of the objects clause became necessary. After the special resolution, as required by Sec.17, was passed

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58 Inserted by Act 65 of 1960.

59 (1992) 73 Comp.Cas.275(Ker), K.John Mathew,J.

60 *K.Meenakshi Amma v. Sree Rama Vilas Press & Publications P. Ltd*, (1992) 73 Comp.Cas. 285(Ker), Verghese Kalliath and G.H. Guttal, JJ.

61 (1991) 72 Comp.Cas. 713 (CLB), K.K. Char, Member.

unanimously at the general meeting of the company an application was filed before the CLB for confirmation of the alteration. The alteration of the object clause is permissible, only if it is required for any of the seven purposes specified in section 17(i). Two relevant purposes on which the company relied upon were specified in clauses (a) and (d) of the subsection. The purpose specified in clause(a) is 'to carry on the business more economically or more efficiently'. Clause(d) permitted alteration for the purpose of enabling the company to embark upon new business which 'under existing circumstances may conveniently or advantageously be combined with the existing business of the Company'. The issue in the instant case is this: How can a company combine a new business with the 'existing business', when the company had not embarked upon any business at all ?

The judicial opinion on the point is divided. Adverting to the scope of the alteration under clause(d) many decisions, both Indian and English have held that in the absence of an existing business there is no scope for alteration to enable the company to embark upon a new business. On the other hand a few decisions have held that where the company was compelled to stop its existing business by process of law, such as nationalisation, of the existing business, the object clause may be altered to enable it to embark upon a new business. Relying on the latter cases and extending the principles therein further, the CLB held that Sec.17 (i) (d) permitted the alteration of the object clause to enable it to take up a new business, even if the original object clause had not been translated into business.

It is submitted that between the two conflicting views on the scope of section 17 (i) (d), the former view is preferable as it is in consonance with the express language of the section, and also in view of Sec.433(c) which provides that a company may be wound up by Court if it does not commence its business within a year from its incorporation or suspends its business for a whole year.

The CLB further held that since the objects to be pursued by a company were to be decided essentially by the directors and shareholders, the views of the shareholders had to be given the foremost regard in considering a petition for confirmation. Since the resolution was passed unanimously it was held on facts that the alteration was permissible.[62]

In *Vardhaman Publishers Ltd. v. Mathrubhumi,*[63] a single Judge of the Kerala High Court held that an amendment made to the Articles of

62 *Id.* at 721.

63 (1991) 71 Comp.Cas. 1(Ker), K.John Mathew, J.

Association cannot take effect retrospectively so as to deprive a member of his accrued rights. The same principle was upheld by the division bench on appeal.[64]

Ambit of Ss. 18(4) and 19(2)

Sec.19(2) of the Act provides that where a company fails to file the required documents with the Registrar for purpose of registration of an alteration of the Memorandum of Association of the company within the period of three months prescribed under Sec.18 of the Act, the alteration and the order of the CLB confirming the alteration and all proceedings connected therewith shall become void at the expiry of such period. In *Shivalik Steel & Alloys P. Ltd. v. Reg. of. Cos,*[65] it was held that the section leaves no scope for the order to be kept valid and operative except when the CLB revives the order on sufficient cause being shown. This revival is possible only within a further period of one month after the expiry of the period of three months from the date of the order of CLB. The CLB is vested with no power under any other section to revive an order under Sec.17, which by the operation of law, has become void and inoperative.

Rectification of Register: powers of the court

In *Muniyamma v. Arathi Cine Enterprises P. Ltd.,*[66] the Karnataka High Court held that the jurisdiction of the Court under Sec.155 of the Act is discretionary.[67] Equitable principles govern the exercise of such jurisdiction. Where there is a complaint of unfair and unjust conduct on the part of the party invoking the jurisdiction of the Court under Sec.155 in relation to the subject-matter of the litigation and in relation to the reliefs sought for, no benefit should be made available to that party.

Supervisory power under Sec.392

Under Sec.392 of the Act, the Court has the power to supervise the carrying out of the revival scheme. It has been held that in the course of

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64 *Mathrubhumi Co. Ltd v. Vardhaman Publishers Ltd.* (1992) 73 Comp.Cas 80(Ker), K.P. Radhakrishna Memon and T.V.Ramakrishnan, JJ.

65 (1992)73 Comp.Cas.195(CLB), A.R. Ramanathan (Member). But it may be noted that under Sec.18(4) CLB is empowered to extend the time for registration of the order of CLB with the Registrar. Cumulative effect of the two provisions is that the power under Sec.18(4) can be exercised only when the order has not expired under S.19(2).

66 (1991) 72 Comp.Cas.555(Ker), Shivashankar Bhat, J.

67 The provision empowered the Company Court to rectify the Register of Members. The section was omitted from the statute by Amendment Act of 1988.

implementation of the scheme, if the Court is of the view that an extraordinary general meeting of the company is to be held in order to elect a new board of directors, the Court has the power to do so.[68] This power under sec.392 is not in any way affected or circumscribed by Sec.186 of the Act, which empowers the CLB to order a meeting to be called. On appeal,[69] the same view was reaffirmed by the division bench.

Discretionary Power of the Court

In *Re: Celtex Petrochemicals Ltd.*,[69a] the Madras High Court examined the principles goverining the exercise of discretion by Court while granting sanction to a scheme of amalgamation. The Court relied on the principles enunciated in *Re Coimbatore Cotton Mills Ltd.*,[69b] The Court observed as follows:

> When once the Court finds that the scheme is a fair one, then it is for the objector to show convincingly that the scheme is unfair and that, therefore, the Court should exercise its discretion to reject the scheme, notwithstanding the view of a very large majority of the shareholders that the scheme is a fair one . . . It is not the duty of this court to launch on an investigation upon the commercial viability, merits or demerits of the scheme which is the function of those who are interested in the arrangement.[70]

The legal status of company Law Board and scope of its powers

In *Carbon Corpn, Ltd v. Abudhay Properties P. Ltd.*[71] it was held that, though the CLB was given the powers of a civil court, under sub-sections (4C) and (4D) of Section 10E of the Act, it could not be considered as a Court. Hence, the provisions of the Limitation Act, 1963, in respect of extension of prescribed time in certain cases, were held to be inapplicable to the proceedings before CLB. The Board of Directors of Carbon Corporation Ltd, referred to the CLB, for confirmation of the opinion formed by it to refuse the registration of certain shares in favour of the transferees under Sec.22A(4) of the Securities Contract Regulation Act. But the reference

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68 *Re Shree Rama Vilas Press & Publications P. Ltd.*, (1992) 73 Comp.Cas.275(Ker), K. John Mathew,J.

69 *K. Meenakshis Amma v. Sree Rama Vilas Press & Publications P. Ltd.*, (1992) 73 Comp.Cas. 285.

69a (1992) 73 Comp. Cas. 298, Lakshmanan, J.

69b(1980) 50 Comp. Cas. 623 (Mad).

70 (1992) 73 Comp.Cas.298(Mad.), at 313-134; *See, Re Asian Investment Ltd.*, (1992) 73 Comp.Cas.517(Mad.); *Re Ucal Fuel Systems Ltd.*, (1992) 73 Comp.Cas.s63(Mad.); Bharatiya *Kamgar Sena v. Geoffrey Manners & Co.Ltd.*, (1992) 73 Comp.Cas.122(Bom).

71 (1992) 73 Comp.Cas.572.

could not be made within the time limit stipulated by the section. To the question whether the Company Law Board had the power to condone the delay in filing the reference under Sec.22A, of the Securities Contract Regulation Act by invoking Section 5 of the Limitation Act, the CLB answered in the negative. The Board relied upon a decision of the Supreme Court,[72] wherein it was observed thus:

> It is well settled by decisions of this Court that the provisions of the Limitation Act, 1963 apply only to proceedings in 'Courts' and not to appeals or applications before bodies other than courts such as quasi-judicial tribunals or executive authorities notwithstanding the fact such bodies or authorities may be vested with certain specified powers conferred on courts under the Code of Civil or Criminal Procedure.

Public issue of shares

Liability to repay the excess of application money

In *Raymond Synthetics Ltd v. Union of India,*[73] the Bombay High Court was called upon to interpret Section 73(2A) of the Act. When, a company intending to issue shares or debentures to the public, obtains permission to deal with them in the stock exchange, and allotment has been made by the company, excess application moneys have to be repaid to the applicants. Sub-section (2A) of Section 73 of the Act provides that the company shall repay such excess moneys *forthwith* without interest and in case it is not repaid within eight days from the date, the company becomes liable to pay, then the company shall repay the money with interest. The Court held that the provisions of Sec.73(2A) of the Act are absolute in nature and once the company fails to repay the excess amount within the grace period of eight days as contemplated by the Section, there is no escape from payment of interest irrespective of the circumstances which the company may suffer.[74] The Court further held that the provisions of the said Section do not leave any scope for any authority to extend the period on accrual of liability to refund or to pay interest. The liability to refund the excess amount arises 'forthwith' on allotment of shares and the liability to pay interest accrues on expiry of the grace period of 8 days.With respect to the date from which the liability of the company to make repayment arises. The Court held as follows:

> In cases where allotment is compeleted before expiry of ten weeks,

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72 *Town Municipal Council, Athani v. Presiding Officer,* AIR 1969 SC 279.

73 (1992) 73 Comp.Cas. 1(Bom), M.L. Pendse and A.V.Sawant, JJ.

74 *Id.,* at 14.

> then the liability to repay would arise immediately on completion of allotment, and in cases where the allotment is not completed till the expiry of ten weeks, then from the date of expiry of ten weeks from the date of closure of the subscription list.[75]

In this case, even though the Stock Exchange had granted the extension of time, it was held that the company was not absolved of its liability.[76] A recital in the prospectus, authorising the Stock Exchange to extend the said time for refund can't be construed as a waiver, because, the term being contrary to Sec.73 is void.

The company went on appeal to the Supreme Court, against the judgement of the Bombay High Court. The Supreme Court upheld[77] the holdings of the High Court, except on the main question as to when the liability of a company to repay arises. The Supreme Court declared thus:

> The liability of a company to repay excess application moneys under Sec.73(2A) of the Act arises on the expiry of ten weeks from the date of the closing of the subscription lists, and the interest begins to accrue thereon at the end of eight days therefrom. Neither the date of allotment nor the date specified in the prospectus is relevant to the commencement of liability for payment of interest on the excess money.[78]

Company meetings

The purpose of explanatory statements

Sec.173 of the Act requires that the explanatory statements, setting out all maternal facts relating to special items of business to be transacted in general meeting should be annexed to the notice of the meeting sent to the shareholders. It was held that the provisions contained in Sec.173 are mandatory and not directory and any disobedience of the provisions in that Section must lead to nullification of the action taken.[78]

Whether a writ would be issued to quash registration of a company

In *Maluk Mohammed v. Capital Stock Exchange Kerala Ltd,*[79] a

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75 (1992) 73 Comp.Cas.1 at 16.

76 *Id.*, at 17.

77 *Raymond Synthetics Ltd v. Union of India,* (1992) 73 Comp.Cas.762

78 *Id.*, at 781.

78 *Vardhaman Publishers Ltd v. Mathrubhumi Ltd.*, (1991) 71 Comp.Cas.1(Ker); *See, Re Shree Rama Vilas Press & Publications P. Ltd.*, (1992) 73 Comp.Cas.273(Ker); *K.Meenakshi Amma v. Sree Rama Vilas Press & Publications P.Ltd* (1992) 73 Comp.Cas.285(Ker.).

79 (1991) 72 Comp.Cas.333.

company was incorporated under the Companies Act, its main object being running a Stock Exchange business. Certificate for the commencement of the business required under Sec.149, was also issued by the Registrar. A writ petition was filed subsequently for quashing the certificate of incorporation and the certificate for commencement of business, issued by the Registrar under Secs.34 and 149 respectively of the Companies Act. Rejecting the petition K.A.Nair.J. of the Kerala High Court observed that a writ would not lie against a public company other than a Government Company, perhaps, except for the enforcement of a public duty or to prevent abuse of a statutory power. Redress against the wrongful or illegal activities of the company is available under the civil and criminal laws of the land.

It may be noted that the learned Judge has only decided, that if the certificate of incorporation and the certificate for commencement of business have duly been issued by the Registrar they cannot subsequently be cancelled by a writ on the grounds of the wrongful or illegal activities of the company. The decision does not lay down the rule that no writ would be issued against the Registrar, in matter connected with the incroporation of companies.

Suits against corporations: place of suing

The question of territorial jurisdiction in a suit against a corporation including a company was considered by the apex court in *Patel Roadways Ltd v. Prasad Trading Company*.[80] The Court observed that the explanation to Sec.20 of the Code of Civil Procedure would apply. If the corporation has only its principal or sole office at a particular place, the courts within whose jurisdiction such office is situate will also have jurisdiction. In such a case, even if the defendant may not be carrying on any business at that place, it would be "deemed to carry on business" at such place. But where the defendant had its principal office at one place and also subordinate office at another place, and the cause of action has arisen at a place where it has a subordinate office, the suit can be instituted in the court having territorial jurisdiction over the place where the subordinate office is situated and not at the place of the principal office.

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80 (1992) 74 Comp.Cas. 11.

COMPANY LAW II - WINDING UP

*M.P.Padmanabha Pillai**
*Minakshi Raghavan***

Litigations in this area continue to reflect the trend of the earlier period. The bulk of the cases reported during this period were centred on Sec. 433, which enumerates the grounds on which winding up may be ordered by the Court. Many of the decisions are mere applications of well established rules and principles rather than setting up precedents, but interesting questions of law have arisen in a few cases.

Is winding up order a discretion of the court ?

One of the issues raised in *Tinsukia Vasthra Bhandar v. Assam Tea Corporation Ltd.* [1] was whether the Company Court was bound to make a winding order, if a ground for winding up had been made out under any of the clauses of Sec. 433. Alleging that in spite of repeated demands, the respondents failed to pay a sum of money due to the petitioners, the latter instituted a company petition for compulsory winding up under Sec.433 (e) of the Compaines Act after serving a statutory notice required under Sec. 434(10(a). The respondent company did not file any counter affidavit. The petitioner adduced sufficient evidence to satisfy the Court that the sum claimed by them was really due from the respondent company by virtue of which the winding up of the company could be ordered. But the Company Court, speaking through Manisan J. observed:

> On a reading of Clause (1) of Sec.443 read with Sec. 433, it indicated that whether or not a winding up order is to be made is within the discretion of the Court. Therefore, the Court is not bound to make an order of winding up under Sec.443 although a ground for winding up under Sec.433(a) to (e) is made out.

Taking into account the sound financial position of the respondent company and appealing to their commercial morality, the Court gave another opportunity to the company to pay off the debts. The petition was ordered to be kept pending for some time, to facilitate this.

The discretionary nature of the Court's power under Sec.433, to put a company in liquidation was highlighted by the Delhi High Court in a

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* Faculty Member, NLSIU, Bangalore
** Student V Year, NLSIU, Bangalore

1 (1991) 72 Comp.Cas. 178 (Gau); *See also,* (1992) 73 Comp.Cas.136 (Mad). But *see* (1992) 73 Comp.Cas 362.

recent case.[2] The petitioner, a shareholder in the respondent company, filed a petition for the winding up of the company alleging the following:

(1) The company has suspended business for about 5 years;

(2) The company is unable to pay its debts; and

(3) The affairs of the company were being carried out by the controlling shareholders in a manner oppressive to the minority, its substratum had gone and in the circumstances it was just and equitable that the company be ordered to be wound up.

Adverting to the first ground, the Court held that though suspension of business for more than one year is a justifiable ground for a winding up order, before exercising the power on that ground, the Court is required to see the factors which led to the suspension of business and the possibilities of resumption of the business. While considering the equitable ground under Sec.433(b) on the plea that the substratum of the company has gone, the Court has to consider the interest of the members as well as that of the creditors. The conduct of the petitioner is also a relevant factor.

The 'substratum' plea once again came up for the consideration of the Karnataka High Court in *Syndicate Bank v. Printershall (P) Ltd.*[3] The petitioner bank argued that once it is proved that the substratum of the company is gone it is necessary in public interest to wind up the company. The provisional liquidator opposed the application mainly on two grounds:

(1) All the assets of the company had already been sold and a winding up order would only increase the financial burden of the company without any corresponding benefit to the creditors or others; and

(2) A winding up order shall not be made solely on the petition of a single creditor.

The Court agreed with the argument of the petitioner and ordered for the winding up.

Effect of winding up

What is the legal effect of an order of winding up ? Does it terminate corporate existence? These issues came up for the consideration of the Madras High Court in *Official Liquidator, Gannon Dunkerley & Co Ltd v. Asst. Commissioner U.L.T (Madras).*[4] Speaking through Raju J., the Court held that a winding up order does not put an end to the juristic personality of the company. Its effect is only to put the affairs of the company in the

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2 *Tani S Bhargava v. Sovintorg (India) Pvt. Ltd.*, (1991) 71 Comp.Cas.361 Y.K. Sabharwal, J.

3 (1991) 71 Comp.Cas.215 (Kar).

4 2 (1991) 73 Comp.Cas 168.

hands of the liquidator for the limited purpose of realizing its assets and distributing the same among the creditors, contributories etc. Till an order of dissolution under Sec. 481 is made by the Court, the company continues to exist as a juristic person with all rights, powers and liabilities of such persons. In the instant case, the official liquidator challenged, through a writ petition, the land tax levied by the respondent under the provisions of Tamil Nadu Urban Land Tax Act in respect of land registered in the name of the company. The petitioner argued that a company in liquidation cannot be an "owner" as its assets in entirety belong to its creditors and contributories. Rejecting the above contention, the Court observed that until the order dissolving the company is made by the competent court, it continues to exist as a juristic person, and hence liable to pay the land tax as a owner.

Nature of winding up proceedings

In *Kerala Iron Stores v. Faridabad Fabricators (P) Ltd.,*[5] a partnership firm filed a winding up petition against the respondent company under Section 433(e) of the Companies Act. The respondents raised a preliminary objection. Consequently the petitioner sought amendment of the petition which was vehemently opposed. The two issues involved in the case were:

1) Is non compliance of Sec. 69 of the Partnership Act, a legal ban for the petitioners to file a petition for winding up ? and
2) Should the consideration of amendment of a winding up petition be different from that of a plaint in a civil proceeding ?

Adverting to the first issue, Y.K.Sabharaval J. observed that Sec.69 only prohibits an unregistered firm from filing a suit to enforce a right arising from a contract or conferred by the Partnership Act. In a winding up petition, primarily the Court is required to adjudicate whether the respondent is commercially solvent or insolvent and not to enforce any right arising from a contract. The proceedings are not a suit. No decree like a suit is passed. The petitioner in this case is only exercising a statutory right under the Companies Act. That right is not arising from the contract between the petitioner and the company.[6]

To the contention of the respondent that Sec.69(3) warrants the extension of the disability under Sec.69 to other proceedings too, the Court observed that for the applicability of Sec.69, the other proceedings have to be for the enforcement of any right arising from a contract.[7]

Referring to the second issue, the Court held that the Company Court

5 (1992) 73 Comp.Cas. 330.

6 Ibid., 355.

7 The Supreme Court decision in *Jagadish Chandra Gupta v. Kajaria Traders (India),* AIR 1964 SC 1882 relied on by the petitioner explained.

has power under Rule 6 of the Company (Court) Rules 1959, read with Order 6, Rule 17, and Section 151 of the Civil Procedure Code to allow amendment of the winding up petition provided the amendment is not *malafide* or that it does not introduce any fresh or new cause of action. The contention that winding up petitions are different in nature from plaints and hence shall not be allowed to be amended did not find acceptance by the Court.[8]

The question of amendment of the petition for winding up under Sec.433 (e) came up for consideration before the Punjab and Haryana High Court in a different context in *Ashok Kumar v. Akal Transport Co. Ltd.*[9] During the pendency of a winding up petition under Sec. 433(e) the appellants moved an application praying that they may be allowed to be added as petitioners in the petition pending before the Court. The Court allowed them to join as co-petitioners. Consequently an amended petition was filed, but without the affidavit of the applicants. The Company Court dismissed the petition pointing out that the amended petition is virtually an independent or fresh petition and should be accompanied by affidavit. On appeal the division bench concurred.

Rules and practices applicable to proceedings before the company Court

The main issue for the consideration of the division bench of the Kerala High Court in *Ravindra S. More v. Sudarasan Chits (India) Ltd (In Liquidation)*[10] was whether in any claims or proceedings before the Company Court it was bound to follow the rules and proceedings of a civil court. The respondent company (in liquidation) took proceedings against the appellants, claiming a sum of money. The claim was based on a promissory note. The appellant, pleaded *inter alia* that the claim was time barred long before the winding up petition was filed, and also that there was no acknowledgement as alleged by the respondent. After the written statement was filed, but before framing of issues, the single judge decreed the claim subject to verification of the contention by the additional director. The division bench pointed out that the Court would be committing a great irregularity in proceeding to judgment without framing the issues. Except when the Companies Act or the Companies (Court) Rules, 1959, otherwise provide, the practice and procedure of courts under the provisions of the Civil Procedure Code so far as applicable shall apply to proceedings under the Companies Act also.[11]

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8 The Court relied upon the view expressed by Rangarajan, J. in (1977) 47 Comp.Cas.201 (Delhi).
9 (1991) 72 Camp.Cas. 158.
10 (1992) 73 Comp.Cas.393 K.S.Paripuranan and K.P.Radhakrishna Menon, JJ.
11 See Rule 6 of Companies (Court) Rules 1959.

Period of Limitation: Exclusion of Period

In another case,[12] where the company in liquidation filed a claim petition before the Company Court, the respondent pleaded that the claim was time barred. The Court held that in computing the period of limitation the liquidator was entitled to exclude the period from the date of the winding up order to the date of the Supreme Court judgement permitting the company to file claims before the High Court under Sec.446(2) and a further period of 1 year under Sec.458 A.

Revocation of admission of winding up petition

The question of revocation of an order admitting a winding up petition came up for consideration of the Madras High Court in *Shre Aravind Steel (P) Ltd v. Trichy Steel Rolling Mills Ltd.*[13] Speaking through Lakshmanan J, the Court observed that save in exceptional cases such power shall not be exercised. When the company petition is a gross abuse of the process of court or when the petition is filed with a *malafide* intention to realise the debts due from the company, the Court may take the extraordinary step of revoking the admission of the petition. But the fact that the respondent company has a *bona fide* defence to the claim of the petitioner is not a sufficient ground to revoke the admission of the petition though this is a relevant matter for consideration of the court at the time of final hearing of the winding up petition.

Winding Up Petition and Public Inconvenience

In a petition for winding up of the company, should the court take into consideration the inconvenience that may be caused to the general public by the winding up order ? In *M.V.Paulose v. City Hospitals Ltd* [14] a winding up petition was filed under Sec.433 alleging that the respondent company which was running a hospital, was unable to pay its debts. The Company Court found that the defence was not *bona fide*. Nevertheless, the Court made a conditional order dismissing the petition on the ground that immediate winding up of the company would cause hardship to the general public. On appeal, a division bench of the Kerala High Court held that the ground relied upon by the single judge to dismiss the petition was not sound in law. Speaking through Verghese Kalliath J, the Court quoted with approval the observation of Palmer in his 'Company Law' wherein the learned author stated that where a petitioning creditor can prove that his debt is unpaid and the company is insolvent, it is the duty of the Court to direct a winding up and the creditor is entitled to an order *'ex debito*

12 *Sudarsan Chits (India) Ltd (in liquidation) v. Smt Uma Sharma,* (1992) 73 Comp.Cas.381.

13 (1992) 73 Comp.Cas 607.

14 (1992) 73 Comp.Cas 362 (Ker).

justitiae'. When a limited company is ordered to be wound up, in almost all cases it would cause considerable difficulties to the general public. But that shall not be a reason for refusing winding a up order, if the petitioner is otherwise entitled to such an order.

Whether tenancy rights are "assets" in winding up

In *Smt. Nirmala R.B. v. Khandesh Spinning and Weaving Mills Co Ltd,*[15] the Supreme Court had to consider whether the tenancy right which a company had in a building are assets for the purpose of liquidation proceedings. The respondent company was the tenant of a flat in Bombay. A portion of the flat was sublet to the appellant. At the instance of a creditor, the company was ordered to be wound up. Subsequent to the winding up order the appellant instituted a suit in the Court of the Small Causes for a declaration that she is a lawful tenant of the portion subleased to her. A company application was also filed for grant of leave to continue the suit. The application was rejected by the Company Court. The premises were taken possession of by the official liquidator. Aggrieved by this, the subtenant went on appeal. When it reached the Supreme Court the Court observed that, the tenancy rights which a company has in a building within the purview of the Bombay Rent Control Act, may not be an 'asset' for the purpose of liquidation proceedings. Merely because a company goes into liquidation and a liquidator is appointed, the rights of the company vis-a-vis the landlord and/or its tenants do not undergo any change.

Property of the company in liquidation in possession of court receiver

In *Official Liquidator, Jaipur Mills Ltd (In Liquidation) v. Poddar Mills Ltd.,* the issue raised was whether, the official liquidator for initiating proceedings to recover the property of the company from a receiver, requires the leave of the Court which appointed that receiver. In 1980 the company was ordered to be wound up and the official liquidator was appointed as liquidator of the company. Certain premises owned by it were leased out to a third party. These premises were taken possession of by a receiver appointed by another High Court, in a suit filed by a creditor of the third party. This was subsequent to the order of winding up, but without knowledge of the order. Sec.456 of the Companies Act provides that, where a winding up order has been made, the liquidator shall take into his possession, all the effects to which the company is entitled. Such property and effects shall be deemed to be in the custody of the Court as from the date of the order of winding up. This raises doubt about the legal effect of the order of the High Court appointing the receiver and the

15 (1992) 74 Comp.Cas. 1.

possession of the property in his hands. Relying on a decision of the Supreme Court in *Everest Coal Company v. State of Bihar*,[16] it was held that when a court puts a receiver in possession of property, the property comes under court custody. The receiver is only an officer, or agent of the Court. Any obstruction or interference with the court's possession amounts to contempt of court. Any legal action in respect of such property is an interference. Hence, leave of the court which appointed the receiver is necessary for the official liquidator to recover the property.

Inability to pay

As noted earlier, a large number of litigations in this area were initiated by the creditors of the company who invoked Clause (e) of Sec.433 to obtain a winding up order.[17] Most of these cases involved only application of well settled principles to the particular fact situations, though a few threw light on some new aspects.

It is well settled that the process of liquidation shall not be allowed to be employed merely as a device to realise the debts from the company by coercive methods and when the claim of the petitioner is *bona fide* disputed by the respondent on reasonable grounds, winding up is not the proper relief. But if the defence of the company is not made *bona fide* or is an after thought, the court may make the winding up order. In *Straw Board Manufacturing Co Ltd v. Mahalakshmi Sugar Mills Co Ltd* [18] the appellant company purchased 100 trucks of bagasee from the respondents. Another 100 trucks sent by the respondents were also accepted. When the respondent demanded the price of the second consignment, the appellants promised to make arrangements but failed to pay. On a petition filed under Sec. 433(e) by the respondents, the appellants disputed the debt, stating that the second consignment was accepted by them as a good will gesture and on the specific understanding that the payment would be deferred for 3 years. Hence, the plea of the appellant was an afterthought and the defence was not *bona fide*. The Court ordered winding up of the appellant company. But in *Indian Duplicators Co Ltd v. V P L Electronics and Engineering Ltd,* [19] the respondent company admitted a portion of the debt, but a substantial part of the debt was *bona fide* disputed on substantial grounds. Held, the circumstances justified a winding up order. But it was pointed out that where the disputed part of the debt related to an insignification portion alone, the court may order winding up. What are 'substantial' or

16 AIR 1977 SC 2304.

17 *See* (1991) 71 Comp.Cas 443; 435; 544; 589; 631; (1991) 72 Comp.Cas 473; (1992) 73 Comp.Cas 136; 337; 357.

18 (1991) 71 Comp. Cas 544.

19 (1991) 71 Comp. Cas 589.

'insignficant' portions will have to be decided on the facts of each case.

In *R.Viswanathan v. Seshasayee paper and Board Ltd* [20] Lakshman,J. of the Madras High Court reiterated the well settled rule that in a petition under Sec.433(e) when the company *bona fide* disputes the claim raised by the petitioner, the Company Court will not undertake detailed investigation and order for winding up. Another principle emphasized was that if the statutory notice required under Sec. 434(1)(a) is not served on the company at its registered office, the Court shall not make a winding up order. The requirement of serving the statutory notice on the company shall be strictly complied with, failing which the statutory presumption as to the company's inability to pay its debts will not be available[21].

Priority of debts in the winding up

Subject to the provisions of Secs.529-A and 530, all unsecured creditors of a company in liquidation are treated *'pari pasu'*. Sec.529-A, inserted by the Amending Act of 1985 provides that the workmen's dues and the debts due to the secured creditors, whose right to realise their securities fully, were prejudically affected by the claim of the workmen in respect of their dues[22] have priority over all other debts. Next, the debts are enumerated in sec.530(i) in order of priority. All revenues, tax cesses and rates due from the company to the Central or a State Government or to a local authority at the relevant date[23] and having become due and payable within the 12 months next before the date are within the category of preferred debts under the provision.[24]

In *Rajratna Naranbhai Mills Co. Ltd v. STO, Petland* [25] the Supreme Court had to consider the ambit and meaning of the words having become due and payable within the 12 months next before the relevant date as appearing in Sec.530(i)(a).

The appellant company was ordered to be wound up on June 26, 1967. In the winding up proceedings, the sales tax officer claimed a sum of money as the sales tax dues and penalty payable by the company as a priority debt under Sec.530(i)(a). The liquidator admitted only part of it as a priority claim under the section, and he contended that the remaining part of the claim was not tax due and payable within the meaning of Sec.530(i)(a),

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20 (1992) 73 Comp. Cas 136.

21 *See also, Kalra Iron Stores v. Faridabad Fabricators (P) Ltd,* (1992) 73 Comp. Cas 337.

22 Proviso to Sec, 529(i) creates a statutory charge ranking *pari pasu* with the secured creditors charge in favour of workmen for their dues.

23 The 'relevant date' in a compulsory winding up is the date of the appointment of the provisional liquidator or if no provisional liquidator is appointed the date of the winding up order. In a voluntary winding up it is the date of resolution for voluntary winding up.

24 *See.* Sec.530(i)(a).

25 (1991) 71 Comp.Cas. 149

though the tax authorities could claim the same as a general creditor.

The Company Court held[26] that the tax becomes due when the taxing event occurs and not when the assessment orders are passed. In the instant case, though the assessment order was issued within a period of 12 months next before the relevant date, the tax became due much earlier than 12 months before the relevant date. The same would apply even if it had become payable only on the assessment order being made and notice was issued within a period of 12 months before the relevant date. Sec.530(i)(a) is not attracted because the tax became due long before the 12 months preceeding the relevant date. According to the learned Judge, to fall within the ambit of Sec.530(i)(a), two conditions must be satisfied:

(1) The tax must become due within the period of 12 months prior to the relevant date; and

(2) It must become payable within such time.

The conditions are cumulative.

In another case[27] decided during the same period, a division bench of the same High Court took a different view. Their lordships held that all those taxes etc. due to the Central or any State Government or local authority, which has become presently payable at any time within 12 months immediately before the 'relevant date', is covered by Sec.530(i)(a).

Differing from the case referred above, Punchi, J. speaking for the Court, observed thus:

> To put it in simpler words, the State has priority over debts, liabilittes and obligations which were born within the time frame of those 12 months and as such due from and becoming due and payable within those 12 months next before the relevant date, ascertainable, if necessary later, if not already ascertained. The words having become due and payable within 12 months next before the relevant date need be understood to mean putting a restriction or cordoning off the amount for which priority is claimable and not in respect of each and every debt on account of taxes, rates and cess etc. which may be outstanding at that time and payable. And further that such priority is in respect only of those debts which became due and payable because the liability to those is rooted, founded and belonging to that period of 12 months prior to the relevant date and none other, both the conditions existing.[28]

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26 *STO v. Rajratna Naranbhai Mills Co. Ltd,* (1974) 44 Comp.Cas 65.

27 *Baroda Board and Paper Mills Ltd (in Liquidation) v. ITO,* (1976) 46 Comp.Cas 25.

28 (1991) 71 Comp.Cas 149 at 157.

LAW OF CONTRACTS - GENERAL PRINCIPLES

*Ramanand Mundkur**

Introduction

The present survey deals with the developments in the law on the general principles of contract during the period between January 1991 and April 1992. As there were no legislative changes during the said period, only case law has been used to trace the developments.

The manner of review has been to divide the law into four major areas, viz., Formation of the Contract, Performance and Termination, Remedies, and Quasi-Contract. Each of these areas has then been further divided so as to enable a more comprehensive classification of cases.

Formation of the contract

Offer and acceptance

The very basis of a contract lies in the acceptance of an offer. The following section provides the scope and existence of offer/acceptance as determined by the Courts in their analysis of the effect of Sec.2 of the Indian Contract Act, 1872. In *Nutakki Sesharathnam v. Sub-Collector. Land Acquisition, Vijayawada,*[1] where during the acquisition proceedings the owner has stated that he was willing to accept compensation in a lump-sum but subsequently withdrew his consent and challenged the acquisition, the Supreme Court held that as the owner's offer had not been accepted by the authorities and the withdrawal of consent was before the award was made there was no valid contract and the owner could therefore validly challenge the acquisition.

Where an industry had not paid its electricity bill and petitioned against the imposition of certain charges therein, the Court required it to furnish a bank guarantee for the bill amount. The Allahabad High Court held that such a guarantee could not be regarded as a contract deferring payment of the bill. The only benefit the guarantee was intended to provide was an uninterrupted flow of power supply during the pendency of the litigation. It was not an agreement deferring payment.[2]

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* Student IV Year, NLSIU, Bangalore.

1 AIR 1992 SC 131.

2 *Modi Industries Ltd. v. Executive Engineer, Electricity Distribution Division, Modinagar, Ghaziabad,* AIR 1991 All 351.

In *Shetty v. KSRTC*,[3] where a tender notification required the deposit of a banker's guarantee, non-deposit of the guarantee was held to be non-compliance with an essential condition and as such the person inviting the tender was entitled to reject the reply to the notification.

In *Dhandu Undru Choudhury v. Ganpat Lal Shankar Lal Agarwal*,[4] the Supreme Court ruled that an ex-tenant of the Government could not claim a renewed contract for lease by holding-over where the Government was the manager and not the landholder of the property and as such once the tenancy had ceased the contract was terminated.

In *Pankaj Bhargav v. Mohinder Nath*,[5] reciprocal promises were affirmed as constituting a valid contract and thus in the Supreme Court's view a stipulation for payment of rent was held to bring about a valid contract a tenancy.

In *Satya Prakash Goel v. Ram Krishna Mission*,[6] a letter accepting the price offered made reference to future negotiations for finalising more terms. Thus in the Allahabad High Court's view the letter did not suggest an absolute acceptance and subsequently, no contract was found to subsist.

Similarly in *Vishakapatnam Port Trust v. Bihar Alloy Steels Ltd.*[7] where an importer had asked for continued use of a specific area in the port and the authorities had alloted a different and lesser area, the authorities acceptance was held not to be absolute by the Andhra Pradesh High Court.

In *M/s Vibgyer Structural Construction Pvt. Ltd. v. Orissa*,[8] a three year silence on the part of the Government as response to a demand for refund of security was held to be a refusal of the demand.

In *Shree Jaya Mahal Co-operative Housing Society v. Zenith Chemical Works Pvt. Ltd.*,[9] where the firm who were tenants of the building were threatened with eviction from the building for not having joined its co-operative society, the Bombay High Court held that the company could not accept the offer of membership when they had failed to do so within a reasonable time of the offer being made.

In *Nandganj Sihori Sugar Co. Ltd., Rae Barelli v. Badrinath Dixit*,[10]

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3 AIR 1992 Kant 94.
4 AIR 1991 SC 1037.
5 (1991) 1 SCC 556.
6 AIR 1991 All 343.
7 AIR 1991 AP 331.
8 AIR 1991 Ori 323.
9 AIR 1991 Bom 211.
10 AIR 1991 SC 1525.

the Supreme Court held that a letter from the chairman of a holding company advising the subsidiary to appoint a person to a post in the subsidiary company did not create any contract between the person named in the letter and the subsidiary whereby the subsidiary would be bound to employ such person.

The Delhi High Court ruled that a document titled 'Receipt', acknowledging receipt of earnest money for sale of a plot of land and which did not state that a formal document of agreement of sale would later be executed, was sufficient indication that a contract of sale had been arrived at. The mere heading of a document did not deprive it of its real nature.[11]

In *South Eastern Railways v. United India Insurance Co. Ltd,*[12] the Kerala High Court held that a term in a printed consignment note absolving the carrier from liability in the event of damage to the consigned goods due to fire, theft, etc. would not operate as the note did not carry the signature of the owner of the goods and as a mere printing of the consignment note would not constitute an agreement.

Consideration

The following section reviews the scope of the definition of consideration as well as the implications of its receipt in varying circumstances. The section also surveys the effect of lack of consideration.

In *Chandrakant Manilal Shah v. Commissioner of Income Tax,*[13] the Karta of a Hindu Undivided Family contracted with one of the coparceners to form a partnership. As consideration for the contract, it was claimed, that the coparcener offered his skill and labour. The issue that arose was whether this offer by the corparcener was a valid promise of consideration under Section 2(d) of the Contract Act. The Court opined that skill and labour were a separate asset belonging to the coparcener and were therefore a valid contribution. In the Court's words:

> It cannot be said that an individual member of the family can qualify for a share of profits in the family business by offering moneys, either his own or those derived by way of partition from the family, but not when he offers to be a working partner contributing labour and services or much more valuable expertise, skill and knowledge, for making the family business more prosperous.

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11 *M/s Nanak Builders and Investors Pvt Ltd v. Vinod Kumar Alag,* AIR 1991 Del 315.
12 AIR 1991 Ker 41.
13 AIR 1992 SC 66.

In *Andhra Bank, Suryapet v. Ananth Nath Goel,*[14] although a promissory note had been executed by several persons only one of the promissors received the consideration thereunder. The issue that arose was whether the promissors who did not receive consideration were liable under the pronote. The Andhra Pradesh High Court held that consideration to one is sufficient consideration to others who did not receive the consideration ipso facto and thus others would be liable under the promissory note.

In *Surechandra and Co. v. Vachiere Chemical Works,*[15] the Bombay High Court held that the acknowledgement of a debt in a firm's balance-sheet amounted to a clear written agreement accepting the debt as the firm's partner who had signed the balance-sheet was competent to bind the firm by her signature.

In *Rabindranath Sahu v. Maya Devi,*[16] an agreement for sale contained no stipulation with respect to the consideration. There was also no indication that the price would be settled on a separate date. It was also noted by the Patna High Court that the plaintiff had forged the defendant's signature in an application for permission before the Additional Collector. Hence when the plaintiff sought to enforce the agreement, the Court denied his claim as the agreement was void for lack of consideration and also as the plaintiff had acted wrongly in forging the signature. No specific performance could be granted in equity.

Capacity of parties and free consent are two aspects of the formation of the contract that ensure a balance in the bargaining positions of the parties to a contract. Consequently their importance cannot be understated in the high levels of discrepencies in today's society.

In *Johri v. Mahila Draupathi*[17] a lunatic's wife alienated his property to a person who knew of the owner's lunacy. The two issues raised related to the validity of the alienation and the possibility of restitution under Sec. 65 of the Act. The Madhya Pradesh High Court held that the present case was not one where the agreement or sale was subsequently discovered to be void and nor was it one where a contract became void because of a subsequent happening, but it was a case where the parties knew the alienation was not enforceable by law and was void. Consequently, as there was no contract, there could be no restitution under Sec. 65 of the Act.

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14 AIR 1991 AP 145.
15 AIR 1991 Bom 44.
16 AIR 1991 Pat 192.
17 AIR 1991 MP 340.

In *Yog Raj v. Kuldeep Raj Gupta,*[18] the plaintiff alleged that while he continued to pay rents to the defendant albeit without any receipts for the same, the defendant had managed to obtain a 'sham' decree for redemption of mortgage on the property for which he was paying rent. The plaintiff thus prayed that the Court may set aside the decree for redemption as void under Secs. 17 and 18 of the Act. As the plaintiff failed to make out any *prima facie* case substantiating his claim the Jammu and Kashmir High Court found itself unable to rule in his favour.

The Kerala High Court was inclined to rule similarly essentially on the facts of the case in *Joseph Zacharia* v. *Joseph Kuriakose.*[19] Here, the defendant who was related by marriage to the plaintiff had executed a *'samathapatram'* in the latter's favour which the plaintiff got properly stamped. Admittedly, the agreement had been executed in settlement of a dispute between the two parties which had been presided over by a mediator. However, when the plaintiff instituted the present suit, the defendant challenged the agreement as having been brought about by coercion and undue influence. The basis for such a claim, it was alleged, was that the plaintiff, who held several valuable documents of the defendants and who was carrying out several cases on behalf of the defendant at that time, had threatend not to return the documents unless the *'samathapatram'* was executed. However, the Court was not inclined to agree with the defendants claim for two reasons. First, the defendant took no action challenging the validity of the *'samathapatram'* until the present suit was filed, although he had ample opportunity to do so, and second, that the plaintiff had got the documents properly stamped probablised the plaintiff's claim that it had in fact been arrived at in settlement of a disputed claim. Thus no coercion or undue influence was found to have been applied.

Void agreements

Most of the cases in this area dealt with issues of public policy. However, in the case of *Reddiar* v. *Periaria,*[20] an agreement for sale did not state the exact survey numbers or precise limits of the property to be sold. The agreement was thus challenged as void for uncertainity. The Court held that as there was only one item of property that could be legally conveyed and this item of property approximated that reffered to in the agreement and so both parties were well aware of the property to be conveyed, there was no uncertainity.

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18 AIR 1991 J&K 26.
19 AIR 1992 Ker 103.
20 AIR 1991 Ker 388.

Public policy was a major issue in the highly publicised *Bhopal Gas Leak Review Case,*[21] and the *Larsen and Toubro Case.*[22] In the former the Supreme Court held that as the former settlement between UCC and the Government was opposed to public policy there was no question of using estoppel to preclude the Government from challenging the settlement. In the latter case, the Court held that although a company may purchase another's shares in the open market, if the transaction is done surreptitiously, with a malafide intention and by using a public financial institution in a clandestine manner, the transaction would be void as contrary to public policy by reason of Section 23 of the Contract Act.

In *Rattan Chand Mira Chand v. Aksar Nawar Juna,*[23] an agreement which required one party to give consideration to another party so that such other party may attempt to influence Government officials for the first person's benefit was opposed to public policy. In *Kamala Bai* v. *Arjan Singh,*[24] an agreement requiring transfer of land to a father as consideration for the father sending his married daughter with another without obtaining a proper divorce from the daughter's spouse was similarly regarded.

This area of law also witnessed two conflicting High Court decisions. The Calcutta High Court ruled that when a licensee transfered his license to a partnership firm of which he was a partner, there was an actual transfer and such transfer was opposed to public policy. On similar facts the Andhra Pradesh High Court ruled that there was no transfer. The only possible distinction between the two is that in the former the license had been obtained by the person in his capacity as owner of a sole proprietorship concern whereas in the latter case this was not so.[25]

In *Gurmukh Singh v. Amar Singh,*[26] the Court held that where two bidders had agreed to supplement one another's bids at an auction without any intention to lower the price of the item or to defraud the government, the object of the agreement was lawful and valid.

In his dissenting view in *CESC v. Subhash Chandra Bose,*[27] Ramaswamy J. opined that where a literal interpretation of the term agency led to defeating measures intended to promote social security such a construction was to be avoided as it was opposed to public policy.

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21 AIR 1992 SC 248. *(Union Carbide Corporation v. Union of India).*
22 AIR 1991 SC 1420. *(V. Parthasarathy v. Controller of Capital Issues).*
23 1991) 3 SCC 67.
24 AIR 1991 MP 275.
25 *See, Chandraborthy v. Mohan,* AIR 1991 Cal 1955, and *K.K. Rao v. K.B.Rao,* AIR 1991 AP 232.
26 (1991) 3 SCC 79.
27 (1992) 1 SCC 441.

In *Setty* v. *Bank of Baroda,*[28] the Karnataka High Court held that a surety bond under which the surety had waived his rights under Sections 133, 134, 135, 139 and 141 of the Contract Act was not an agreement opposed to public policy as the rights under those sections of the Act were alienable. This decision was concurrent with an earlier view expressed by the same Court[29] as well as by the Delhi High Court,[30] but it ran contrary to the opinion of the High Court of Punjab and Haryana.[31]

The Punjab and Haryana High Court held on two distinct occasions that a clause for price increase in an allotment agreement whereby the Government was able to recover the cost of acquiring the land to be alloted and which enabled sale of the land at market prices was not opposed to public policy.[32]

(The decisions in *DTC v. DTC Mazdoor Congress,*[33] and *M/s Shyam Gas Co. v. Uttar Pradesh,*[34] have not been elaborated on as they would be more appropriately dealt with under Administrative Law.)

Performance and termination of the contract

Doctrine of frustration

The following section surveys the scope and ambit of the application of the doctrine of frustration or impossibility stated in Section 56 of the Indian Contract Act, 1872.

In *Gwalior Rayon Silk Manufacturing (Weaving) Co. Ltd. v. Shri Andavar and Co,*[35] a contract for the supply of eucalyptus firewood could not be fulfilled for non-availability of the firewood. The Kerala High Court ruled that non-availability of a commodity did not render a contract impossible. In order to invoke Section 56 of the Act, the Court opined that, the party had to show the following :

a) The performance has become impossible;

b) The impossibility is not on account of an event that could have been prevented or anticipated; and

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28 AIR 1992 Kant 108. Cf., *Sethia v. Punjab National Bank,* AIR 1991 Del 285.
29 *See.* AIR 1987 Kant3.
30 *See,* AIR 1982 Del 487.
31 *See,* AIR 1961 P&H 281.
32 *Vipul Rai Sharma v. Ludhiana Improvement Trust,* AIR 1992 P&H 42, and *Autar Singh Sahi v. Haryana,* AIR 1991 P & H 298.
33 AIR 1991 SC 101.
34 AIR 1991 All 129.
35 AIR 1991 Ker 134.

c) The impossibility is not self-induced by the promissor, or is not due to his negligence.

In *Ramani Ammal v. Susilammal,*[36] a vendor had agreed, under contract, to give vacant possession of a portion of land at the time of the sale deed. However, the vendor was unable to evict the tenant from the land. The vendee agreed to take the sale deed without the vacant possession. The vendor urged that the contract was frustrated as vacant possession could not be delivered. The Madras High Court held that the vendor could not take advantage of his own wrong. The vendor had to transfer the property and the vendee was entitled to a claim for specific performance.

In *Easun Engineering Co. Ltd v. Fertilizers and Chemicals Travancore Ltd,*[37] the parties entered into a firm-price contract for the supply of transformers. Thereafter due to the Gulf War the cost of transformer oil rose by 400%. The Madras High Court ruled that such an abnormal price-rise caused by a change in circumstances totally upset the position of the contracting parties. Consequently, in the Court's view, the contract was clearly frustrated.

Novation and alteration

This section briefly surveys what changes may be validly made to a contract without creating a new contract by that change.

In *UCC v. Union,*[38] the Supreme Court ruled that the doctrine of full accord and satisfaction under Section 62 of the Contract Act did not apply when the original agreement was itself contrary to public policy.

In *Andheri Bridge View Co-operative Housing Society Ltd v. Krishnakant Anandrao Deo,*[39] the Bombay High Court held that change in price or change in the subject-matter of the contract was a change to the material parts of an agreement and hence such change brought about a new agreement.

In *Janab M HM Yagoob v. M. Krishnan,*[40] the Madras High Court found, on the facts, that an alteration whereby one party to the contract could raise a claim of part-performance under the Transfer of Property Act, and which claim acted to the detriment of the other party, was a material alteration and thus resulted in a new agreement.

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36 AIR 1991 Mad 163.
37 AIR 1991 Mad 158.
38 AIR 1992 SC 248. *See* n.21, *Supra.*
39 AIR 1991 Bom 129.
40 AIR 1992 Mad 80.

Remedies

Undue advantage

It is both a statutory and equitable requirement that a person should not derive an unfair advantages from a contract. Where such an advantage arises, it should be remedied.

In *Shaukat Ali Khan v. Babu Khan,*[41] neither party to an agreement was aware that the agreement was void and the agreement was only subsequently discovered to be void during Court proceedings. The Delhi High Court therefore held that given the above facts the plaintiff would be entitled to a compensation with interest for the advances he had made to the defendant under the (void) agreement.

The Gujarat High Court made a similar observation in *Balubhai Jethabai Shah v. Chhaganbhai Samabhai,*[42] that it appears to be just and proper that money paid in pursuance of a transaction thought to be valid but which in truth, by virtue of a statutory provision, is null and void should be recoverable under Section 65 and 70 of the Contract Act, (the provisions being read together).

Nonetheless, in the aforementioned *Johri v. Mahila Draupati* case,[43] an advance made on agreement which was opposed to public policy could not be restored.

Remedies for breach of contract

Where parties, by a contract, create mutual rights and obligation, the justification of such a right by the non-fulfillment of its corresponding obligations must necessarily be rectified.

In *Jagdish Singh v. Rathu Singh,*[44] where respondents were unable to redeem, within the stipulated time, land earlier sold under a contract as the land had been acquired, the Court ruled that the respondents could in the given circumstances claim damages under Section 73 of the Contract Act, in lieu of specific performance, and the damages would be measured per the provisions in Section 73.

In *Suresh Jindal v. Rizsoli Corriere Della Sera Prodzioni TUS p.a,*[45] the Supreme Court ruled that where by an action of the respondents the

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41 AIR 1991 Del 190.
42 AIR 1991 Guj 85.
43 AIR 1991 MP 340. *See.* n. 17, *Supra.*
44 (1992) 1 SCC 647.
45 AIR 1991 SC 2092.

plaintiff could receive more than he would by a monetary compensation, the plaintiff would be entitled to enforce the former.

In *Modi Industries Ltd v. Executive Engineer Distribution Division Modinagar, Ghaziabad,*[46] the Court held that an additional surcharge on delayed payment of an electricity bill was not imposed by way of a penalty but as a device to ensure timely payment. Hence, in the Court's view, such a surcharge, which was covered by the terms of supply of electricity, was not extra-contractual.

In *Motilal Banarasi Das v. Delhi Automobiles Pvt Ltd,*[47] where the vendor had not exercised an option to forfeit a deposit on a purchase and nothing on the record showed a right of forfeiture in the vendor's favour, the Delhi High Court ruled that the vendor could not exercise any right of forfeiture on the deposit.

In *Moghu Liner Ltd v. Manipal Printers and Publishers Ltd,*[48] the Kerala High Court held that a shipping company was not liable to pay damages, under Section 73 of the Act, for a loss that had occured during discharge of goods, as the contract of carriage in question did not include discharge operations.

In *Bhanwarlal v. Babulal,*[49] the Court ruled that in order to forfeit a deposit of earnest-money, under Section 74 of the Act, the amount to be so forfeited should have been explicity identified as earnest-money in such a way that it might have been so known to the auction purchaser. Without proof of any loss to the auctioner the forfeiture would not be supported by the provisions in Section 74 of the Act. Further, where the auctioner had re-auctioned the property after an inordinate delay, the auctioner could not claim loss for such delay from the first auction purchaser. This last rule was laid down by the Court in *Pran Nath Suri* v. *MP.*[50]

In *Arvind Coal and Construction Co v. Damodar Valley Corporation,*[51] the Patna High Court laid down the following guidelines on the forfeiture and deposit of earnest money :

a) It must be given at the moment the contrct is concluded ;

b) It is given to bind the contract ;

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46 AIR 1991 All 351. *See.* n. 2, *Supra.*
47 AIR 1991 Del 192.
48 AIR 1991 Ker 183.
49 AIR 1992 MP 6.
50 AIR 1991 MP 121.
51 AIR 1991 Pat 14.

c) It is part of the purchase price when the transaction is carried out ;

d) It is forfeited when the transaction falls through by reason of default of purchaser; and

e) The seller can then forfeit the money subject to the terms of the contract.

Quasi contract

Where a relation, appearing to resemble a contract, though not a contract in the strict sense, results in a person receiving a benefit, that benefit carries with it corresponding obligations.

Benefit out of non-gratuitous acts

In *G B Mahajan* v. *Jalgaon Municipal Corporation,*[52] the Municipal Corporation entered into a contract for development of certain land whereunder the developer would be required to execute the project at his own cost and to rehabilitate the 486 vendors who occupied that land. It was urged that such a contract was not valid as the power to finance and execute the project would result in the developer reaping unjust gains. The Court disagreed on the ground that a mere allegation that the developer would indulge in malpractices while disposing of the occupancy rights so as to accumulate unjust gains would not invalidate an otherwise legal venture.

In *Jain Mills and Electrical Stores v. Orissa,*[53] the purchaser, who had paid for his goods, received some of them after the date of delivery stipulated in the contract. It was urged that as the contract was not subsisting at the actual time of delivery, the goods were being held by way of unjust gain. The Orissa High Court held that as the buyer retained the goods and did not intimate any rejection to the seller in a reasonable time there was a valid sale. The claim of absence of contract could not be founded merely on grounds of delay, when the goods had been delivered pursuant to a request. Consequently, Section 70 of the Act would not apply.

Mistaken payment

The area of mistaken payment was largely applied only to payments made to the Government.

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52 AIR 1991 SC 1153.
53 AIR 1991 Ori 117.

In *South Eastern Coalfields Ltd v. Century Textiles and Industry,*[54] a cess which was levied was subsequently declared, by the High Court, to be illegal. Notwithstanding the Court's order, the cess continued to be collected. The issue that thus arose pertained to the quantum to be refunded. The Supreme Court held that only the cess collected after the High Court's order was to be refunded with interest, but not the cess collected before that order.

In *Indian Aluminium Co Ltd v. Thane Municipal Corporation*[55] the petitioner company paid octroi for a period of five years at one rate and later realised that they had paid at a excess rate. The company then filed for refund of the same through a writ of mandamus. The writ was filed after a period of two years had lapsed. The Supreme Court held that the company was not entitled to any refund as the amounts it has paid would have passed on to the consumers and as there was no justification to claim a refund after such a long lapse of time. The same view was followed in *Orissa Cement Ltd v. Orissa.*[56]

In *TELCO v. Municipal Corporation of the city of Thane*[57] the company paid excess octroi and claimed the same from the Corporation. The Corporation, for its part, alleged that the company had recovered the excess amount through its sales and that consequently a refund would result in an unjust enrichment for the company. As there was no evidence to show that the company had charged octroi separately in its bills and as the company specifically denied the Corporation's allegations, the Court ordered the refund and ruled that the question of unjust enrichment did not arise.

In a similar case before the High Court of Kerala , *Board of Trustees of Cochin Port Trust v. Ashok Leyland Ltd,*[58] the plaintiffs, while paying the defendant's bills, were required to pay an excess amount against excise. The defendants had, in fact, paid excise at consessional rates. When the plaintiffs claimed refund of the excess paid (over the concessional rates), the defendants replied that the payments had been within the Government's notification under the Central Excise Act. The Court held that the plaintiffs were entitled to a refund as the payment was made under mistake and also as the payment was beyond the terms of the contract. Elaborating on its second reason, the Court noted that the payment of excise was by the virtue of the Government's notification under the Excise

54 AIR 1991 SC 1593.
55 AIR 1992 SC 53.
56 AIR 1991 SC 1676.
57 AIR 1992 SC 645.
58 AIR 1992 Ker 1.

Act and not by virtue of the contract between the parties. In Shamsuddin J's words, "Once it is found that the plaintiff is not bound under the contract to pay at a higher rate and only at the rate of actual payment, the plaintiff is entitled to get refund (sic) of the excess amount paid under mistake."[59]

Conclusion

From the preceeding cases, one can discern the beginnings of a widening realisation by the courts on the substantial importance of contract laws is-a-vis the chosen model of economic development. With higher trust and duty being put on private enterprise for the development of the Indian economy an antithetical trend seems to be evolving in the judiciary. The broadening of the ambit of the concept of public policy under the Contract is perhaps, intended as a check against the abuse of this trust. In the future, the courts rulings on this aspect of the law would have the same implications for the law of Contract as the decision in the *Maneka Gandhi Case*[60] had for Constitutional Law. The recent stock scams suggest that *UCC* and *Larsen and Toubro* are going to be developed upon greatly in terms of the policy those cases espouse. One has perhaps only caught a glimpse of the tip of an evergrowing iceberg. It would be interesting to follow the judiciary's approach on the law in future years.

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59 *Id.* p. 5, para 12.
60 AIR 1978 SC 597.

LAW OF INSOLVENCY

S.V. Joga Rao *
Gyanendra Kumar **

The period under review[1] has witnessed a dearth of judicial decisions in the law of insolvency[2]. As there were no amendments, the present study is confined to a few judicial decisions.

Forfeiture of advance by Official Receiver: remedy under Section 4 or 68.

Whether there is any remedy available under Section 4 or 68[3] when the Official Assignee forfeits the advance paid by a buyer in auction for non-payment of the remaining amount was the issue that arose in *Bhanwarlal v. Babulal*[4] wherein D.M.Dharmadhikari,J. observed:

> To justify forfeiture of advance money the terms of contract should be explicit. In this case, the terms of contract were only orally intimated to the purchaser at the time of auction. Therefore, since the purchaser was not given to understand the explicit terms, the one fourth money deposited cannot be treated as advance and no forfeiture can be allowed.

Discussing the applicability of Sec.68[5], the Court said: "Sec.68 is not of relevance as it [S.68] will come into play only when the aggrieved party had actual or constructive notice of the act or decision complained of".

Time bar to insolvency petition : applicability of Sec.12(2)

Whether an insolvency petition presented by a creditor for debts owed to it for which decree for sale of goods hypothecated to it was got, could be defended on the basis of time bar in relation to Sec.12[6] ? This issue came up for consideration in *Bharat Chandulal Nmavati v. UCO Bank*[7]

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* Faculty Member, NLSIU, Bangalore.
** Student IV Year, NLSIU, Bangalore.

1 July, 1991 to May, 1992.

2 The relevant legislations are the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.

3 Provincial Insolvency Act, 1920. References hereinafter to the 'Act 1920' are to this 'Act'.

4 AIR 1992 MP 6.

5 S.68 of the Act of 1920 deals with 'Appeal to Court against Receivers'.

6 Section 12 of the Insolvency Act, 1909 deals with the grounds under which creditor can file a petition. References hereinafter to the 'Act 1909' are to this 'Act'.

7 AIR 1992 Bom 170, S.P. Bhurucha and N.D. Vyas, JJ.

wherein the court held :

> It is not necessary to examine in the present case whether the debt was barred by limitation on the date. Sec.12(2) is applicable only in relation to security which the petitioning creditor can relinquish in favour of the general body of creditors in the case of the debtor being adjudged insolvent.

Examining the facts of the case, the Court said :

> In the present case, the security was provided by the limited company. It would have, if realised, ensured for the benefit of the limited company and the appellant. The respondent [i.e., the creditor] could not have relinquished that security for the general body of the appellant's creditors. The appeal was, therefore, dismissed.

Sale of life-estate by Official Receiver

In *Chandra Nageshwaran* v. *Balakrishna,*[8] the life estate of an insolvent was brought to sale by the Official Receiver. This was challenged on the ground that under Section 28(5)[9], the Official Receiver was prohibited from taking any proceedings against the property which was exempt from attachment under the Code of Civil Procedure, 1908.

> A life-estate wherein the person has the right to enjoy the property during his life-time (as was here) can always be the subject matter of attachment and sale. Whoever purchases it will be entitled till the death of the person. Here since the property was not exempt from attachment under Section 60.[10] Hence Official Receiver was not prohibited from taking possession of the same under Section 28(5).

The sale was held to be valid.

Sale of Bunglow for lesser than purchase amount: act of insolvency

Whether the sale of the property by the debtor for lesser value would amount to an act of insolvency? This issue came up for scrutiny in *Maneklal Kantilal & Co. v. Shavallal Harjvandas,*[11] wherein the Court held:

> The sale for a lesser amount and the retention of possession as tenants would not 'ipso facto' indicate an act of insolvency. Here the sale proceeds were utilised to pay the debts. Hence it could not be said to have entered into with a view to defeat the claims of the creditors. Hence, not an act of insolvency.

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8 AIR 1992 Mad. 109, Srinivasn, J.

9 S.28 (5) of the Act 1920 deals with 'Effects of Order of Adjudication'.

10 Code of Civil Procedure, 1908 deals with 'Property for attachment and sale in execution of decree'.

11 AIR 1991 Guj. 143.

PARTNERSHIP LAW

S.V. Joga Rao *
Malavika Jayaram **

Since there are a handful of cases pertaining to the Law of Partnership,[1] the present survey is confined only to those aspects examined under different heads.

Nature of partnership

In *Chandrakant Manilal Shah and Another v. Commissioner of Income-Tax, Bombay* [2], the following issues came up for consideration :

a) Whether a contract *inter se* between undivided members of a family is permissible under the Hindu Law ?;

b) Whether an undivided member of an HUF can form a partnership firm with the Karta ?; and

c) Whether in such partnership, contribution of skill and labour as the member's capital satisfies the requirement of a valid partnership ?

Relying on the previous decisions, the Court pointed out that a contract *inter se* between members of the family is valid. For instance, an undivided member of an HUF (including its Karta) can be employed by the HUF for looking after the family business and paid a remuneration therefor.[3] Quoting from *Commr. of Income Tax v. Sir Hukumchand Manalal and Co*,[4] it was pointed out in this case that :

> The Indian Contract Act imposes no disability upon members of a Hindu Undivided Family in the matter of entering into a contract *inter se* or with a stranger. A member of an HUF has the same liberty of contract as any other individual; it is restricted only in the manner and to the extent provided by the Indian Contract Act. Partnership is, under Section 4 of the Partnership Act, the relation between the persons who have agreed to share the profits of a business carried on by all or any of them acting for all. If such a relation exists, it will not be invalid merely because two or more of

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* Faculty Member, NLSIU, Bangalore.
** Student IV year, NLSIU, Bangalore.

1 References hereinafter to the 'Act' are to the Indian Partnership Act, 1932.

2 AIR 1992 SC 69.

3 *Jitmal Bhuramal v. CIT*, (1962)44 ITR 887(SC).

the persons who have so agreed are members of a HUF.

The Court also upheld the contention by agreeing with the decision in *Ratanchand Darbarilal v. C.I.T.,*[5] where it was pointed out that "it is a well-settled proposition of Hindu Law that members of a joint family, and even corparceners, can, without disturbing the status of a joint family or corparcener, acquire separate property and run business for themselves." Similarly, in *I.P. Munavalli v. C.I.T. Mysore,* [6] it was pointed out that in respect of their separate divided property, the corparceners of a Joint Hindu Family, even though they had not become divided from one another and there had been no partition of the family peroperties, could become partners of a firm of which the Joint Hindu Family represented by its Karta is itself a partner. [7]

Relying on these decisions, the Court came to the conclusion that when a partner can become a partner with the family represented by its Karta, it is difficult to understand how such a partnership cannot come into being and why a corparcener who continues to be a member of the corparcenery cannot become a working partner of a firm of which he and the Karta are the partners.

Having answered these questions, the point was whether such a partnership could exist if a partner contributed his skill and labour as capital. The court held that when a partnership is permissible when the corparcener places at the disposal of the firm as his capital his separate property, why should it not be permissible if the contribution is skill or labour or both as the case may be ? "In case it is found that there is no real contribution of skill or labour by the corparcener for sharing the profits, the partnership will be held to be unreal and fictitious but that is a different thing from saying that there cannot at all be a valid partnership between the Karta and a corparcener when the latteer only contributes his skill and labour and is merely a working partner".[8] In their opinion, the argument that as the capital investment in the partnership is only labour when it should be funds, and therefore the partnership is not permissible, is not acceptable. The Court referred in this regard to CIT. *Lucknow v. Gupta Brothers,*[9] where the Allahabad High Court held that as labour and skill would also be consideration as contemplated by the Contract Act, a valid partnership

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5 (1985)155 ITR; AIR 1985 SC 1572.

6 (1969)74 ITR 529.

7 The Court in this case relied on the Privy Council decision in *Lachman Das v. CIT,* Punj, (1948)16 ITR 35; AIR 1948 PC 8.

8 *Chandrakant Manilal Shah v. CIT,* Bombay 1992 SC 66 at 71.

9 (1981)131ITR 492; 1980 Tax LR 1491.

had come into existence. In upholding this contention, the Court deviated from *Bhagat Ral Mohanlal v. Commr. of Excess Profits Tax, Nagpur*[10] on facts, and from *Pitamberdas and Co.*[11] and *Shah Prabhudas Gulabchand* [12] on the question of law.

The logic behind the decision in *Chandrakant Manilal Shah's case,*[13] was that, we no longer live in age where every member of an HUF considered it his duty to place his personal skill and labour at the services of the family with no *quid pro quo,* except the right to share ultimately on a partition, in its 'general prosperity'. Today, if an undivided member is skilled he is free to employ those skills elsewhere and the earnings will be his absolute property – he will not agree to utilise them in the family business unless the latter agrees to remunerate him therefor immediately in the form of a salary or share of profits.

Partnership at will

In *Gobardhan Chakroborthy v. Abani Mohan,*[14] the question as to when a partnership amounts to a partnership at will arose. The Court held that as per Section 7, the considerations are that where no term is expressly limited for its duration and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. In the absence of a provision either express or by implication there may be an implied contract as to the duration of a partnership.[15] But in this case, they found that the duration of partnership either by express provision or by implication could not be found. There, the duration was not only uncertain but the same depend upon the event which may happen i.e., grant of a permanent licence for running a cinema business, and hence they found it to be a partnership at will.

Principle of agency

The principle of agency came up for consideration in *Sangener Dal and Flour Mill* v. *F.C.I.,*[16] Section 18 postulates the agency principle with regard to partners of a firm.Sec. 19(1) says that an act of a partner done to carry on in the usual way the business of the kind carried on by the firm, binds the firm. But it is well settled law that the operation of

10 AIR 1956 SC 374.
11 (1964)52 ITR 341.
12 1971 Tax LR 1400.
13 *Supra,* n.7.
14 AIR 1991 Cal 195.
15 *Ibid.* at p.204.
16 AIR 1992 SC 481.

Sections 18 and 19(1) is subject to the exceptions engrafted in Section 19(2), which provides that in the absence of any usage or custom or trade to the contrary, the implied authority of a partner does not empower him to submit a dispute relating to the business of the firm to arbitration. Here in the instant case, one of the partners of the firm contracted, with the FCI to supply *dal*, and the contract one of the partners of the firm contracted contained an arbitration clause. The contention of the appellants was that the reference of the dispute to arbitration was without jurisdiction. But the Court rejected this by saying that none of the partners denied the validity of the contract nor raised any objection that they had not authorised that partner concerned to enter into the contract nor that they were not bound by acts done by him. Further, none of the partners raised an objection to the signing of the tender by that partner on behalf of the firm. In view of these facts, it was clear to the Court that they had ratified the contract. Also, the FCI had appropriated the security deposit made by the appellant firm and that the firm had entered into a binding contract with the FCI. Since that contract contained the arbitration clause which bound the partners, the contention that the reference was without jurisdiction was rejected.

The Court differentiated this case from *M/s Alagappa Cotton Mills v. Indo Burma Trading Corp.,* [17] because in the latter, the original contract did not contain an arbitration clause. In a separate letter with a rubber stamp (facsimile) of the firm one of the partners agreed for reference to arbitration. On those facts it was held that the reference did not bind the partners.

Dissolution

In *Harish Kumar v. Bacchan Lal,* the issue was, when did a partnership at will stands dissolved ? It was held that it stands dissolved from the date the partner decides not to transact business. Any subsequent notice by a partner for disssolution is of no consequence, and a suit for rendition of accounts filed three years after dissolution is barred by time under Article 5 of The Limitation Act, 1963. Further, the settlement of accounts between the partners is not necessary ingredient for dissolution of the firm nor would the continuance of the accounts in the firm's name with the Bank's after dissolution be of any consequence. This is quite evident when it has been provided in Section 43 of the Partnership Act that the partnership at will may be dissolved by giving notice in writing of the intention to dissolve the firm. At that time, the question of settlement of the accounts,

17 AIR 1976 Mad 79.

etc. does not arise. Rather, the accounts will have to be settled after dissolution of the firm for which the suit can be brought for rendition of accounts within three years under Article 5 of the Limitation Act from the date of dissolution. Here there was a dispute as to whether the firm was dissolved on the date on which it stopped doing business or on the date on which one of the partners deemed it proper not to continue the partnership and served a notice on the other partners for dissolution. Depending on this date, the question of limitation would be answered. It was held that dissolution of a partnership at will be can be inferred from the circumstances of the case. There are various modes of dissolution provided in the Act, of which one is under Section 43. Section 40 says a firm can be dissolved with the consent of all the partners or in accordance with a contract between them. That being so, it cannot be successfully argued that the firm could only be dissolved by issuing a notice as provided under Section 43. Relying on the case of *Amir Chand v. Jawahir Mal,* [18] where it was held that "in the case of partnership at will, the intention to dissolve may be inferred from circumstances showing that a partner has in fact abandoned his interest in the concern", the Court held here that the partnership stood dissolved on the date the partners stopped doing business together and started separate business, and not on the date of the subsequent notice. It was also held therein that "once it is held that the partnership came to an end long before 3 years prior to the date of institution of the suit for rendition of accounts, the suit did not lie and was barred by time". The same was found in the instant case.

Advances to the firm

In *M/s Keshari Engineering Works v. Bank of India,* [19] the question as to who would be liable to repay a loan advanced to a partnership firm came up for consideration. It was held that where a loan was advanced by a bank to a partnership firm and the documents were signed by all partners on behalf of the firm, all the principle borrowers would be liable to the bank to repay the amount. Therefore the declaration made by one of the principal borrowers admitting and acknowledging that he alone is liable to repay the loan would not bind the bank, as the privity of contract existed between the bank and all the principal borrowers. Such acknowledgement is of no consequence.

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18 AIR 1916 Lah 410.
19 AIR 1991 Pat 194.

Registration

In *Kavita Trehan v. M/s Balsara Hygiene Products Ltd,*[20] the issue was with reference to maintainability of a suit filed by partners of an unregistered firm (i.e., unregistered on the date of filing of the suit). The question was whether it would be hit by the provisions of Section 69(2) and be liable to be dismissed. In deciding this, case law was discussed.

In *Shankar Housing Corporation v. Smt. Mohan Devi,* [21] it was pointed out that as per Section 4, since a firm is not a separate legal identity but only a collective and compendious name for all partners, if a suit to enforce a right arising from a contract is to be instituted 'by a firm' against a third party, the firm would be the plaintiff. If the suit is to be instituted 'on behalf' of a firm, the partner or partners who wants or want to institute the suit on behalf of (i.e., for the benefit of) the firm would be the plaintiff. But in both cases, the suit would in effect be by or on behalf of all the partners of the firm.

Sec.69(2) lays down that a suit of this nature can only be instituted if:

a) The firm is registered, and

b) The persons suing are or have been shown in the Register as partners of the firm.

The use of the words 'is' and 'are or have been' which are in the present tense, show that the point of time contemplated in Sec.69(2) is at the time of institution of the suit.

In *M/s Shreeman Finance Corp. v. Yasin Khan,*[22] a recent case, the Supreme Court held that the suit was not maintainable in view of the fact that two of the partners on the date of institution of the suit were not shown to be partners as per relevant entries in the Register of Firms maintained by the Registrar of Firms.

In the instant case, the firm was not registered at all on the date of filing the suit and therefore was hit by Sec. 69(2) and was not maintainable.

In *Gujarat Water Supply & Sewerage Board v. S.H. Shivanani,*[23] the point in dispute was whether, when in an unregistered firm all the partners except one retire, and the business is carried on by the sole remaining partner, and all rights and liabilities of the dissolved firm are transferred

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20 AIR 1992 Del 92.
21 AIR 1978 Del 225 at p. 258.
22 AIR 1989 SC 1769.
23 AIR 1991 Guj 170.

to him, can the sole partner file a suit for breach of contract and claim damages ?

Relying on *Bhagawanji Morarji Goguldas v. Alambic Chemicl Works Co. Ltd,* [24] the Court pointed out that a suit by the partners of a dissolved firm to recover unliquidated damages for breach of contract is a suit to realise the property of the dissolved firm. Damages for breach of contracts are assets of the firm and as such can be realised by the partners although it is unregistered. The partners are not debarred from maintaining a suit under Section 69. It is true that transferability and attachability are two of the important insignia of property but they are not the only ones. A right to sue for damages for breach of contract though not transferable or attachable is property within the meaning of Sec. 69(3)(a). Accordingly it was held therein that such a suit for recovery is an exercise of the right to realise property of the dissolved firm of which he was a partner, and although the firm was not registered, he is not debarred from maintaining the suit under Section 69.

In applying *Nijlingappa Hattangi v. Subrao Babaji Teli,* [25] John Beaumont CJ, said :

> a suit to recover a debt due to a firm which is dissolved, brought, by persons who were the only members of the firm at the date of dissolution, is a suit to enforce a right to realise the property of a dissolved firm. Such a suit falls within an exception to Sec.69 and is maintainable even if the partnership is not registered under the Act.

In *Bihari Lal Shyamsunder v. Union of India,*[26] it was held that Section 69 imposes a disability for non-registration only during the subsistence of the partnership, and the words in Section 69(3), particularly "or any right or power to realise the property of a dissolved firm" remove any disability which existed during the continuance of the partnership.

The Court relied on these cases and decided that the suits were maintainable and were not hit by Section 69.

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24 AIR 1943 Bom 385.
25 (1937)39 Bom LR 1214; AIR 1938 Bom 108.
26 AIR 1960 Pat 397.

SALE OF GOODS

S.V. Joga Rao *
Probal Bhaduri **

This survey relates to the sale of goods cases reported during the year 1991-92. The case law in this regard is characterized by a paucity in numbers, as very few cases have been reported in this regard.

Document of sale constitutes sale / agreement to sell ?

In *United India Insurance Co Ltd v. O. Jameela Beevi*,[1] the issue before the court was whether the document of sale contitutes a mere agreement to sell, as a 'sale' would be complete only after registration has taken place and other conditions have been fulfilled.

The facts in this case were the rash and negligent driving causing the death of a person. The car was insured in the name of the owner who had sold it to another but the registration had not been transferred. The Court, while pointing out the difference between sale and agreement to sell, observed that in the former, a contract is formed whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price, whereas in the latter the property in goods is not transferred immediately but is subject to the fulfillment of certain conditions. The Court pointed out that although the document of sale used the expression sale, there was an explicit condition that the seller has to execute necessary papers on receiving payment and it amounts to a condition under Sec.4(3). On these grounds the Court held that since the registration was not changed, the property in the goods was not transfered.

Right to reject goods if not exercised amounts to acceptance

Exercise of right of lien when posession is with buyer

In *Jain Mills and Electrical Stores v. State of Orissa*,[2] the Court addressed an issue where the purchaser had the right to reject the goods in case of delay and if he did not do so, will it amount to acceptance ? Besides, can the seller exercise his right of lien in case of non payment

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* Faculty Member, NLSIU, Bangalore.
** Student IV Year, NLSIU, Bangalore.

1 AIR 1991 Ker. 380, U.L. Bhatt and G.H. Guttal, JJ.

2 AIR 1991 *Orissa* 117, V. Gopalswamy, J.

when possession is with the buyer ? The Court observed :

> The contract clearly stated that in case of delay the purchaser had the right to annul the contract. The contract is therefore governed by Sec.42[3] of the Sale of Goods Act, but in the present case, after the goods were received by the purchaser he retained the goods without informing the seller about the rejection. Therefore, in the light of Sections 42 and 63,[4] the purchaser is deemed to have accepted the goods[5].

With reference to the second issue, the Court was of the opinion that the unpaid seller has the right of lien but such right ceases to exist the moment the possession is transferred to the buyer.

Auction sale

In *Ganganagar Sugar Mills v. Rameshwar Das Tara Chand*[6] the issue before the Court was, in an auction sale, when does the property in goods pass?

The Court was of the view that in case of an auction sale, the property in goods passes at the fall of the hammer and the time of delivery is not of material relevance. Relying on Sec.64, the Court said that the contract of sale is completed as soon as the bid is accepted.

Transformation of condition into warranty

In *City & Industrial Development Corporation of Maharashtra, Bombay v. Nagpur Steel and Alloys Pvt. Ltd*,[7] the Court was faced by the issue whether non-exercise of a right given by a condition in the contract renders the condition to a warranty.

The relevant fact in this regard was that the contract of sale had a condition incorporated into it whereby the buyer got the right to reject the goods in case they did not measure up to the pre-determined standards. However, in the course of the transaction, the buyer did not reject the goods even though the goods did not measure up to the required standards. The Court was of the opinion that non-exercise of the right resulting out of the condition amounts to waiver of the condition. In this regard, the

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3 Deals with 'acceptance'.

4 Deals with reasonable time, a question of fact.

5 *Ibid.*

6 AIR 1992 Raj 14, Milap Chandra, J.

7 AIR 1992 Bom 55, V.A. Mohta and G.D. Patil, JJ.
AIR 1991 Kar 385, D.P. Hiremath and N.D.V. Bhatt, JJ.

Court also pointed out that Sec.59 does not give absolute remedy and will come into effect only when notice is given. In case of waiver, no protection is afforded by Sec.59.[8]

Transfer of ownership: effect on the contract of insurance

In *Oriental Fire & Gen. Insurance v. Union of India* the issue before the Court was about the third party liability of the insurance company when transfer of goods has taken place.

The brief facts in this case are : A transformer was sold by NGEF Ltd. to the Karnataka Electricity Board. It was dispatched to the buyer by rail. En route it suffered damages. The NGEF who had insured the goods took it back for repairs and claimed insurance for the full amount. The insurance company in turn demanded the amount from the Indian Railways.

The Court was of the opinion that once the property in goods passes on to the buyer, as under Sec.20[9] of the Act, the liability of the insurance company comes to an end. The Court also pointed out that the insurance company cannot step into the shoes of NGEF and file a suit for the recovery of damages against the Indian Railways.

8 Deals with 'Remedy for breach of Warranty'.

9 Deals with specific goods in a deliverable state.

SPECIAL CONTRACTS

*S.V. Joga Rao**
*S.P. Shailashree***

This review seeks to update the development of decisional law in the ambit of Special Contracts.[1] The period covered is from May, 1991 to April, 1992. The present survey is confined only to the judicial pronouncements as there are no legislative changes in this period. This period has witnessed issues relating to the enforcement of bank guarantee, surety's liability, hypothecation, pawnee's right to sue, etc.

Contract of Guarantee

Enforcement of bank guarantee

On the issue as to whether an agreement of guarantee could be given effect to despite the fact that the principal debtor was not a signatory to it, the Delhi High Court in *M/s Chand Chits and Finance (P) Ltd. v. M/s Super Advertisers and others,*[2] preferred to follow the long standing view[3] that it is not necessary that the principal debtor be an express party to the contract of guarantee. It would suffice if he was a party to the contract by implication.

In *GETSCO Inc. v. M/s Punjab Sons Ltd,*[4] the Supreme Court was asked to spell out the circumstances under which the enforcement of a bank guarantee could be restrained. In response, it reiterated[5] that in matters concerning documentary credits which were irrevocable and independent the Bank would be required to pay on demand, irrespective of whether there was suppression of material facts or not.

Similarly, the Orissa High Court, in *National Aluminium Co. Ltd v. M/s R.S. Builders (India) Ltd and Others,*[6] held that enforcement was not possible in all cases where the conditions laid down were fulfilled and where there was no fraud, misrepresentation, deliberate suppression of

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* Faculty Member, NLSIU, Bangalore.
** Student IV Year, NLSIU, Bangalore.

1 Contracts of Indemnity, Guarantee, Bailment and Agency.
2 AIR 1992 Del 85.
3 AIR 1991 SC 1994.
4 AIR 1991 SC 1994.
5 Also *See* (1988)1 SCC 174.
6 AIR 1991 Orissa 314.

material facts or the like. Enforcement was held to be independent of the adjudication of the dispute raised. The decision about fraud would be decided by the concerned court. While echoing same technique, the Bombay High Court, in *M/s S.C.I.L. (India) Ltd* v. *Indian Bank*[7] observed that the bank's liability arose indepedently of the main contract, in pursuance of which it was furnished.

Liability of surety — co-existive with that of principal debtor

In *Andhra Bank, Suryapet v. Ananthanath Goel*[8], the Court merely read Sec.127 of the Contract Act, with Sec.128, to hold that the liability of a surety (in this case a co-executant) was co-existive with that of the principal debtor. Reference was made to Sadasiva Aiyyar's observations[9] that in a case of joint-executants, they cannot be permitted even to prove that one of them was a mere surety.

Guarantor's liability in a case of hypothecation

In *Kamala Prasad Jadawal v. Punjab National Bank, New Delhi*[10], the MP High Court examined the options available to a pawnee, in the event of the pawnor's failure to repay the loan. It was a case of hypothecation of a tempo by the lead bank. When the appellant contended that the bank, by not taking appropriate action in time, had destroyed the security and had thereby lost its remedy against the appellant (who was the guarantor in this case), the Court held that an allegation of negligence against the bank could not lie in this case, as the security, being under hypothecation, was not in the possession of the bank. Also, the bank had the option of either selling the security or of suing the debtor for the loan advanced, under Sec.176[11] of the Act.

Contract of Bailment

Essentials

The Delhi High Court has discussed threadbare the concept of bailment in *The New India Assurance Co. Ltd and another v. The Delhi Development Authority and others.*[12] It held that the essentials of a contract of bailment were possession and a legal obligation to preserve the goods intact. The

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7 AIR 1992 Bom.131.
8 AIR 1991 AP 245.
9 *Sornalinga Mudali v. Pachai Naickan.* AIR 1914 Mad.41 (DB).
10 AIR 1992 MP 45.
11 See Sec.176 of the contract Act.
12 AIR 1991 Del 298.

Court observed that an enforceable contract is not necessary to constitute a contract of bailment.

Co-existence of bailor-bailee and master-servant relationships

The Kerala High Court in *Vijaya Bank v. M/s United Corporation and others*[13], examined the exact meaning and implication of a bailor-bailee relationship in the following words:

> . . . a person may become the bailee of a chattel while occupying simultaneously the position of servant or agent towards the bailor. The two relationships are imposed for different purposes and identified by different tests. Thus they may co-exist without conflict within a single situation.[14]

On the question relating to the extent of bailee's duty and liability, the Court said that the bailee was required to take all reasonable and diligent steps in the discharge of his duty.

Pre-condition to pawnee's right to sue pawnor

In *The Dhanalakshmi Bank Ltd. v. K.K.Jose and others,*[15] the Court held that a right to sue with reference to a debt assumes that the pawnee would be in a position to redeliver the goods pledged on payment. Referring to Sec.151 of the Act, the Court observed that the pawnee had a duty to look after the goods pledged, as a man of ordinary prudence.

> It necessarily follows that the goods to be returned by the pawnee should be the same goods pledged by the pawnor and they should be in the same condition in which they were entrusted to the pawnee, meaning thereby that no damage should have been caused to those goods on account of the negligence of the pawnee.[16]

While giving a similar opinion, the Orissa High Court in *Smt. Aratibala Mohanty v. SBI and the others*[17] went on record by saying that if the pawnee fails to redeliver the possession of the goods pledged, the relationship of pawnor and pawnee would come to an end.

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13 AIR 1991 Ker 209.
14 *Ibid.*
15 AIR 1991 Ker 388.
16 *Ibid.*
17 AIR 1991 Ori 260.

Two-fold right of unpaid pawnee

The defendants in *Bank of Maharashtra v. M/s Racmann Auto (P) Ltd*[18] contended that the plaintiff bank was duty bound to sell the pledged goods before filing a suit. However, the Court ruled that according to Sec.176 of the Act the pawnee has the discretion of either selling the pledged goods or suing the pawnor for the unpaid debt by retaining the pledged goods as security. Once the planitiff had exercised this discretion, the defendants could not force the former to sell the goods on the ground that the goods would deteriorate with the passage of time.

Banker's right of set off

The AP High Court in *Canara Bank v. M/s Taraka Prabhu Publishers Pvt. Ltd*[19] observed that the right of set-off claimed by a bank could not be denied on the pretext that the transfer of the amount was arbitrary and, thereby, violative of fundamental rights. According to the Court, this would only allow the concern to wriggle out of their contractual obligations on this plea.

Agency

Revocation of agency

In *Smt.Kishai Devi. v. The State of Rajasthan and others*,[20] the holder of a general Power of Attorney was refused the registration of a sale deed on the gound that he had ceased to be the agent of the petitioner on the date of presentation of the sale-deed to the Sub-Registrar. However the Court invoked Sec.204 of the Act to drive home the point that since a relationship of principal-agent existed at the time of execution, of the sale-deed, it continued till the day the sale-deed was presented for registration, notwithstanding the fact that the power of Attorney was withdrawn before the presentation. The executant having partly exercised his authority as agent (by executing the sale-deed) could not be deprived of the same by the vendors at a later point of time.

Thus, an overview of all the judgements would indicate only the reiteration of the existing law.

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18 AIR 1991 Del 278.
19 AIR 1991 AP 258.
20 AIR 1992 Raj 24.

III. CONSTITUTIONAL LAW

In this segment of Public Law, an effort has been made to throw light upon decisional law and legal developments on Fundamental Rights, Minorities and Law, Education and the Law, Centre-State Relations, Judiciary and Elections. There has been one constitutional amendment during the period under survey. In the area of fundamental freedoms, the Supreme Court continued to march ahead with more and more emphasis on protecting the rights of citizens against arbitrary and whimsical exercise of powers by the State and its instrumentalities. However, the Supreme Court was cautious while applying the test of agency or instrumentality of State to bring every functionary within the expression 'other authorities' in Art.12. "A wide enlargement of the meaning must be tempered by a wise limitation . . . The State control, however vast and pervasive, is not determinative. The financial contribution is not also conclusive. The combination of state aid coupled with an unusual degree of control over the management and policies of the body and rendering of an important public service being the obligatory functions of the state may largely point out that body is State." The Supreme Court refused to consider the National Council for Educational Research & Training as 'State'.

Art.14 which embodies anathema to arbitrariness was interpreted vigorously as in the past. In view of the ever-expanding scope of Art.14 as the fountain head of principles of natural justice, the Supreme Court held that no order shall be passed at the back of a person when it entails civil consequences. However, in the taxing statutes, the Supreme Court was inclined to uphold this power on the basis of doctrine of classification. The issue of gender justice and protective discrimination were also the subject matter of judicial enquiry and courts have consistently considered and upheld measures meant to give effect to the philosophy contained in Art.15(3) and (4). The Supreme Court was not prepared to stick to the ratio in *Nakara's case* in view of peculiar facts involved in that case in the matter of pension scheme introduced in lieu of Provident Fund to the bank employees who retired on a specified date. It shows the apex court is not indulging in mechanical jurisprudence based on arid textual approach but is adopting refreshingly original yet innovative approaches, having regard to the peculiar facts and complex circumstances of the case. The constitutional question of nationalisation and privatisation in the context of Art.19(1)(g) read with Arts. 19(6) and 39(b) and (c) in the backdrop of new liberal economic order have also attracted judicial attention. The reasoned reaction of the Court can be successfully summarised as under:

> It is true, that on the basis of the provisions in Art.19(6), nationalisation must be deemed to be in the public interest. But from this it does not follow that any and every act of denationalisation or privatisation is *per se* contrary to public interest. Indeed, in a given case, privatisation may be in public interest. So long as a decision is arrived at by the Government *bona fide,* the Court cannot sit in judgment over it nor is the decision violative of Arts.38 and 39.

This decision does augur well in the context of new economic policy sought to be persued by the Government of India. It would also require the Government to keep the matter constantly under review to come in and stay out wherever required.

Art.21 continued to dominate the judicial mind as the charter of unenumerated rights and failure to protect life, liberty, property of citizens, the state is under a constitutional obligation to compensate adequately. The apex court persisted in raising the protective umbrella by exercising compensatory jurisdiction. The Supreme Court categorically asserted that the fundamental rights of detenues should not be permitted to be whittled down by mechanical and whimsical attitude of the executive in taking cognisance of documents which formed the basis of satisfaction and casual approach in relying on such documents. Art.22(5) was judicially asserted as the *'magna carta'* for a detenu and any unjustified delay in the representation was held to be fatal for sustaining the validity of detention order.

In the province of freedom of religion, inter-relationship between Arts.25 and 26 and conceptual distinction between 'religion' and 'religious denominations' came in for juridical classification before the Calcutta and Madras High Courts. The Supreme Court continued to exhibit its fervour as the protector, guarantor and promotor of fundamental rights and as a sequal, the apex court remained flooded with a wide variety of cases thus demonstrating clearly and consistently the potentiality of writ jurisdiction under Art.32. However, the Court did not forget to remember the limits of judicial activism by throwing out the litigation on political questions, for the Court is concerned only with constitutionality and not policy.

With regard to minorities and law, the most significant legal development can be said to be the conferment of legal status on the Minorities Commission in the State of Bihar, which hitherto drew inspiration from mere executive order. On the judicial scene, liberal judicial trend initiated by the Supreme Court in *G.F. College, Shahajanpur v. Agra University* continued to hold the field and the entire scope of Arts. 29 and 30 has been

analysed under the broad categories of eligibility criteria for invoking minority status, the ambit and extent of the right to administer educational institutions of their own choice and the constitutional content of state regulation in the area, for clarity in thinking and lucidity in explanation. The liberal stand taken by the Supreme Court seemed to have suffered a set back in *St.Stephen's College v. University of Delhi* where it was held that the management of the minority educational institution can reserve upto 50% of the seats in their institutions, notwithstanding the express prohibition contained in Art.29(2) of the Constitution, can hardly be said to be in tune with the composite code theory evolved by the Supreme Court. Except for the above ruling which may seemingly threaten, if not destroy, secular education imparted by minorities receiving grants from the state, the decisional law in this area continued to uphold the earlier rulings on the basis of doctrine of *stare decisis*.

In the area of law and education which is poised for litigation explosion, the focal points for legal analysis consist in judicial controversy in the matter of admission, inclusive of reservation which sometimes is stretched so much to result in usurpation, management dimensions of educational institutions, legal controversy on theory, practice and management of evaluation system, service law jurisprudence applicable to teaching and non-teaching staff of educatinal institutions. The right of the university to determine reservation quota in favour of backward classes came into limelight in *Dileep Damodar v. A.P.* where the A.P. High Court, taking the holistic approach, reiterated that the question of reservation is inevitably linked with overall national policy and this policy decision cannot be left in the hands of university, as some form of uniformity on this count must be consistent with national and state level policy perspectives. The opponents of the above decision vehemently argue that the autonomy of university may be shattered if the university is not permitted to take into account relevant local conditions in framing its policy choice. The statutory status and the fact of students admitted in unrecognised institutions and the eligibility of such students to appear for exams were the subject matter of judicial scrutiny in earlier cases, and judicial trend slowly but steadily emerging seems to indicate that such students of unrecognised institutions are not to be allowed to sit for the exams. The reasons seem to be the reluctance of the judiciary to sit on appeal on an academic matter aspecting policy implications. But, in case of fraud and misrepresentation, courts have invoked compensatory jurisdiction in appropriate cases. The disastrous consequences of inordinate delay in the declaration of results on revaluation despite the provisions made by the university requiring it to be done

within the fixed period, denying the student an opportunity to appear for post-graduate exam resulted in the imposition of monetary liability on the university. The attempts of examinees to intervene in the valuation process was rightly resisted by the court in *Dr. S.S.Rane v. University of Bombay*. This decision strongly suggests that in the absence of malafide or arbitrariness, the court would not be inclined to act as controller of exams. The substituted/ad hoc positions in teaching cadre and the applicability of the principles of natural justice and the crying need for regularisation dominated the judicial spectrum in the realm of service jurisprudence.

The constitutional developments in the area of Centre-State and inter-state relations cover a wide area of consitutional amendment, legislations, ordinances and delegated legislation. The epoch-making constitutional amendment, viz., the Constitution (Sixty-ninth Amendment) Act, 1991 introduced Art.239AA and Art. 239AB dealing with creation of new area — National Capital Territory of India in the place of erstwhile Union Territory of Delhi, creation of a Legislative Assembly for the Capital Territory, a pre-eminent position for the President in the exercise of executive powers and overriding legislative power in favour of Parliament. To give effect to and to supplement the provisions contained in Art. 293AA, Parliament has passed the Government of National Capital Territory of Delhi Act, 1991 which provides for organisation of legislative powers within the area. Perhaps, there have been two ordinances the validity of which were the subject matter of judicial scrutiny: (i) the Cesses and Other Taxes on Minerals (Validation) Ordinance, later replaced by the Act of Karnataka Legislature. Both these ordinances threw light upon judicial strands with regard to legislative competence of Parliament and State Legislature and deep and penetrating analysis of several entries in the Schedule VII to the Constitution of India. Most of the decisional laws turn on the doctrine of occupied field, taxing powers of the legislature, controlled industries, scope of Art.248 read with item 97 List I, Art.285 and the scope of contempt of court law. The only significant judicial pronouncement consists in the holding by the Supreme Court that the power of regulation and control is separate and distinct from power of taxation.

As far as the Judiciary is concerned, there have been significant judicial pronouncments pertainng to the qualifications for the post of High Court Judges, removal of judges, condtions of service of the memebers of subordinate judiciary, the limits of powers of judicial review vis-a-vis contempt law, applicability of the provisions of Prevention of Corruption Act to judicial officers, and elucidation of 'minimum safeguards' in the case of arrest of judicial officers. The extent of the judicial accountability

has been the subject matter of judicial controversy as well as legislative wisdom. For the first time, in the Parliamentary history of our country, a requisite notice was given for a motion for presenting an Address to the President of India for the removal of one of the sitting judges of the Supreme Court of India. The Committee was constituted under Sec.3(2) of the Judges (Inquiry) Act, 1968. The comprehensive guidelines for the creation of the All India Judicial Service through the decisional law of the Supreme Court has been the high watermark of judicial activism. Last but not the least, a critique of decisional laws on election is also included in this survey.

CENTRE-STATE RELATIONS

*V.S.Mallar**
*L.Viswanathan***

Legislative development

The developments in this area during the period of survey include constitutional amendments, Parliamentary Legislation, Central ordinances, Notifications under Central Legislations and State Legislations.

Constitutional amendments

Articles 239-AA and 239-AB were inserted by the Constitution (Sixty-Ninth Amendment) Act, 1991. Sec.2(1) of the said Act provides that from the date of commencement of the Amendment Act, the Union territory of Delhi shall be called the National Capital Territory of Delhi and the administrator appointed under Article 239 shall be designated as the Lieutenant Governor. The amendment provides for a Legislative Assembly for the National Capital Territory, the seats of which shall be filled by members chosen by direct election from the territorial constituencies in the National Capital Territory.[1] There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Lieutenant Governor. The Chief Minister shall be appointed by the President and the other ministers on the advice of the Chief Minister. For the first time in the history of our constitutional governance, a restriction has been placed on the size of the Council of Ministers. Sec.2(4) of the Amending Act provides that there shall be not more than 10% of the total members of the Assembly in the Council of Ministers.

The position of the Lieutenant Governor is unique in certain respects. In case there is a difference of opinion between the Lieutenant Governor and his ministers on any matter, the Lieutenant Governor shall refer it to the President for decision and act according to the decision given thereon by the President and pending such decision it shall be competent for the Lieutenant Governor in any case where the matter, in his opinion, is so urgent that it is necessary for him to take immediate action, to take such action or to give such direction in the matter as he deems necessary.

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* Faculty member, NLSIU, Bangalore.
** Student IV Year, NLSIU, Bangalore.

1 S.2(2), the Constitution (Sixty-Ninth Amendment) Act, 1991.

There is a different form of division of powers. The Legislative Assembly shall have the power to make laws for the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union Territory except matters with respect to Entries 1,2, and 18 of the State List which deal with public order, police and land, and Entries 64,65 and 66 of List II in relation to these matters (offences against laws with respect to the matter, jurisdiction and powers of courts with respect to the matters and fees with respect these matters). This does not affect the power of the Parliament to make laws for Union Territories. If a law made by the Legislative Assembly is inconsistent with a law passed by the Parliament, the Parliamentary law will prevail. If the law of the Legislative Assembly has been reserved for the consideration of the President and has received his assent then it shall prevail over the Parliamentary law. But the Parliament has been conferred the power to legislate by way of amending, varying or repealing the laws so made by the Legislative Assembly.

It is submitted that the provisions of the Amending Act are destructive of the concept of federalism. The Parliament has been conferred power with least regard to the Legislative Assembly. To add to this, the advice of the Chief Minister is not binding on the Lieutenant Governor and in case there is a difference of opinion, the President of India will decide, who will be bound by the aid and advice of the Union Cabinet. In short it will be the Central Government's will which shall prevail in the capital.

Central legislations

Art. 239-AA (1)(a) provides that Parliament may by law make provisions for giving effect to, or supplementing the provisions contained in that article and for all matters incidental or consequential thereto. In pursuance of the said clause, the Parliament has passed the Government of National Capital Territory of Delhi Act, 1991. It makes provisions in respect of the Legislative Assembly and its functioning, including provisions relating to the Speaker, Deputy Speaker, qualification or disqualifications for membership, duration, summoning, prorogation or dissolution of the House, privileges, legislative procedures, etc.

Central ordinances

The Cess and other Taxes on Minerals (Validation), Ordinance 1992, was promulgated to overcome the repeated pronouncements of the Supreme Court on the legislative competence of the State Legislatures to levy cess

on royalty on minerals.[2]

Sec.2 of the ordinance says that the laws specified in the Schedule to this ordinance shall be, and shall be deemed always to have been as valid as if the provisions contained therein relating to cesses or other taxes on minerals had been enacted by the Parliament. Sec.2(2) validates the taxes or cesses collected under the laws specified in the Schedule.

It may not be out of place to mention that the legislations contained in the Schedule to the ordinance were struck down by the Supreme Court for want of legislative competence. However, the collections made under these laws were held to be valid.[3]

What the Parliament has sought to do in this case is to confer legislative competence on the State Legislatures which were held to back legislative competance as decided.

Notifications

Under Sec.6 of the Inter-State Water Dispute Act, 1956 it is obligatory on the part of the Central Government to publish an order of a Tribunal constituted under the Act. In the exercise of its powers under Sec.6 of the said Act, the Central Government has published vide Notification No.S.O.840(E) dated December 10, 1991, Ministry of Water Resources, in the *Gazette of India, Extra,* part II, S.3(ii), dated 10th December, 1991, pp 6-9, the order of the Tribunal granting interim relief to the State of Tamil Nadu.

State legislations

An ordinance was promulgated by the Governor of Karnataka for the protection and preservation of irrigation areas of the Cauvery basin in the State. The said Ordinance and the rules made thereunder shall have overriding effect notwithstanding anything contained in any order, report, of any court or tribunal. This ordinance was ratified unanimously by the Karnataka legislature.[4] Under the Act, it shall be the duty of the State Government to protect, preserve and maintain irrigation from the waters of the river and its tributaries in the irrigable areas under the various projects.

The validity of the ordinance came up for consideration in the advisory reference before the Supreme Court under Art. 143 of the Constitution and the Supreme Court opined that it is destructive of federalism and against

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2 *See* AIR 1991 SC 1676; AIR 1990 SC 85 and AIR 1992 SC 103.

3 *Ibid.*

4 The word 'Court' was deleted when the Act replaced the Ordinance.

the concept of rule of law and the Karnataka Legislature lacked legislative competence. But the Act apparently still remains in the statute book because it was only an advisory opinion of the apex court and the Act has not been formally repealed.

Dicisional laws

After the constitution of the Cauvery Water Disputes Tribunal, in pursuance of the directive of the Supreme Court[5] under Sec.4 of the Interstate Water Disputes Act, the State of Tamil Nadu and the Union Territory of Pondicherry sought interim reliefs before the Tribunal[6] requesting for release of water and restraining the Government of Karnataka from proceeding with the irrigation works being freshly undertaken. These applications were contested by Kerala and Karnataka on the ground that the Tribunal has no power to grant interim reliefs. Aggrieved by the order, the State of Tamil Nadu and the Union Territory of Pondicherry preferred an appeal by way of special leave before the Supreme Court which allowed the appeal and three member bench of the Supreme Court pointed out that the Tribunal had erred in reading the terms of reference and held that the said interim reliefs were covered by the letter of request of Tamil Nadu and consequently by the terms of reference of the dispute[7]. Hence, matter came back to the Tribunal for deciding the plea on merits.

The Tribunal, while deliberating on merits pointed out that the prime consideration ought to be, preserving as far as possible the rights of the parties and also ensuring that by unilateral action of one of the parties, the other party is not prejudiced from getting appropriate relief at the time of passing of the final orders. The principle adopted by the Tribunal in deciding the quantum was that there ought to be release of water by Karnataka which is to be fixed having regard to the realisation made over a span of years in the proximate past, after excluding abnormally good and bad years. It fixed the quantum of water at 205 Cmc. ft and directed that the release of water should be on a weekly basis.

Under the Inter-State Water Disputes Act, the Tribunal's order has to be published in the Official Gazette by the Central Government. The Central Government was hesitant in doing so and political pressure was mounting.

Meanwhile the Governor of Karnataka promulgated the Karnataka Cauvery Basin Irrigation (Protection) Ordinance, 1991 for the protection

5 AIR 1990 SC 1316.
6 CMP No 4 and 5 of 1990.
7 1991(1) SCALE 802.

and preservation of irrigation areas of the cauvery basin in the state.

While Karnataka maintained that the Tribunal had no power to pass an interim order, Tamil Nadu wanted the Central Government to publish the order. They were supported in their claims by Kerala and Pondicherry respectively. In this situation, the President referred the following questions to the Supreme Court under Art.143 for its opinion.

1. Whether the Karnataka Cauvery Basin Irrigation (Protection) Ordinance, 1991 and provisions thereof are in accordance with the provisions of the Constitution;

2. Whether the order of the Cauvery Water Dispute Tribunal dated June 25, 1991 constituted a 'report' and a 'decision' within the meaning of Sec.5(2) of the Interstate Water Dispute Act, 1956;

   Whether the order of the Tribunal is required to be published by the Central Government in order to make it effective; and

3. Whether a Tribunal under the said Act is competent to grant any interim relief to the parties to the dispute.

The State has competence to legislate with respect to all aspects of water including water flowing through inter State rivers, subject to certain limitations, *viz.*, the control or the regulation and development of the interstate river waters should not have been taken over by the Union (Entry 56, List I) and secondly, the state cannot pass legislations with respect to or affecting any aspect of the waters beyond its territory. Entry 14 of List II relates, among other things, to agriculture. In so far as agriculture depends upon water including river water, the State Legislature while enacting legislation with regard to agriculture may be competent to provide for the regulation and development of its water resources including water supplies, irrigation and canals etc., which are subjects mentioned in Entry 17, List II. However, it would be subject to Entry 56 List I.

The Supreme Court opined that the ordinance is unconstitutional because it affects the jurisdiction of the Tribunal appointed under the Inter-State Water Disputes Act in pursuance of Art. 262.[8] It is obvious from the provisions of the ordinance that its purpose is to nullify the effect of the interim order passed by the Tribunal. The State of Karnataka has thus, observed the Supreme Court, arrogated to itself the power to decide unilaterally whether the Tribunal has power to pass interim orders or not. Secondly, the state has also presumed that till a final order is passed by the Tribunal, the state has the power to appropriate the waters of the river

8 AIR 1992 SC 522.

to itself unmindful and unconcerned with the consequences of such action on the lower riparians. Apart from the fact that the ordinance directly nullifies the decision of the Tribunal, it also challenges the decision of the Supreme Court[9] which has ruled that the Tribunal had the power to consider the question of granting interim relief since it was referred to it. The ordinance further has extra-territorial operation in as much as it interferes with the equitable rights of Tamil Nadu and Pondichery to the waters of the river Cauvery. On grounds of extra territorial operations, it is beyond the legislative competence of the State and is *ultra vires* the provisions of Art. 245(1). The Supreme Court also observed that the action forebodes evil consequences to the federal structure under the Constitution and opens the door for each state to act in the way it desires disregarding not only the rights of other states, but also the order passed by instrumentalities under the Constitution of India.

The Supreme Court conclusively said that the Inter-State Water Disputes Act, 1956 was enacted under Art.262 of the Constitution and not under Art. 245 read with Entry 56, List I. The distinction between Art. 262 and Entry 56 List I is that whereas the former speaks of adjudication of disputes with respect to the use, distribution or control of the water of any interstate river or river valley, Entry 56 of List I speaks of regulation and development of interstate rivers and river valleys. The River Boards Act, 1986 enacted under Entry 56, List I does cover the field of regulation and development of interstate rivers and river valleys.

Other questions

The Court impliedly read from the terms of reference that the Central Government had made a reference to the Tribunal for an interim order. It said that it cannot be disputed that a request for an interim relief whether in the nature of a direction or for maintenance of status quo or for the grant of urgent relief or to prevent the final relief being rendered infructuous would be a matter connected with or relevant to the main dispute. The Court refused to answer the general question that whether a Tribunal under the Inter-state Water Disputes Act, 1956 has power to pass interim reliefs. In order to be made effective, the order, the Supreme Court said, has to be published.

Review by the Tribunal

The State of Karnataka approached the Tribunal for a review of the

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9 *Supra*, note 7.

interim order. The Tribunal rejected the plea but modified the order by adding a qualification that in years of distress the parties can approach the Tribunal for appropriate relief.

Occupied field

In *Adhiyaman Educational and Research Institution v. State*[10] the question which arose was whether the State Government or the University is competent to grant approval or withdraw it after the coming into force of the All India Council for Technical Education Act, 1987. The State Government had withdrawn permission granted earlier to the petitioner to start a private engineering college after the passing of the All India Council for Technical Education Act, 1987 and the University of Madras rejected the request for provisional affiliation on the basis of the report of the high powered committee to the effect that the conditions imposed were not fulfilled. The Madras High Court held that the power of the Parliament to legislate on matters covered by Entry 66 List I is exclusive and with reference to these matters, the State Legislature has no competence. The Madras University Act contains provision which would relate to co-ordination and determination of standards in colleges, including institutions of higher education or research and scientific and technical institution. Such of these provisions would be void and inoperative. It is not open for the State Government or the University to give approval or disapproval.

Sec. 58-A of the Bombay Prohibition Act, 1949 which provides for demand for maintenance of the excise staff for supervision of the manufacture of industrial alcohol was assailed for lack of legislative competence in *R.K.V.S.M.Ltd v. State of Gujarat.*[11] The Supreme Court speaking through Justices R.M.Sahai and S. Mohan upheld the legislation. It observed that the power to levy tax or duty on industrial alcohol no doubt vests in the Central Government. It is also true that the competence of the State Government to frame any legislation to levy a tax or duty on industrial alcohol is excluded. But by that a provision enacted by the state for supervision which is squarely covered under Entry 33, List III which deals with production, supply and distribution which includes regulation cannot be assailed. The principle of occupied field precluded the State Government from trenching on any power which was already covered by Central legislation. But in the absence of any provision in the Industries (Development and Regulation) Act, 1951 touching upon regulation or ensuring that industrial alcohol was not diverted, the state legislature was competent to

10 AIR 1991 Mad 246.
11 AIR 1992 SC 872.

legislate on it under Entry 33, List III.

The legislative competence of the Himachal Pradesh Legislature in enacting the Himachal Pradesh Resin and Resin Products (Regulation of Trade) Act, 1981 which provided for certain restrictions on manufacture or export of resin or resin products was questioned[12]. The High Court upheld its validity, taking recourse to Entry 26 of List II (trade and commerce within the State) which is subject of Entry 33, List III. The Court observed that since the petitioners were not able to bring to their notice any parliamentary legislation that occupied the field covered by the impugned enactment the State legislature was competent to pass the impugned legislation.

Entry tax

Weighing dues were charged on the sellers and purchasers of certain commodities. The question in *Sri Krishna Das v. Town Area Committee, Chirgur*[13] was whether the levy would fall under Entry 52, List II, which empowered the State Government to impose tax on the entry of goods into local area for consumption, use or sale therein. The Supreme Court held that since this imposition was upon the entry of the mentioned commodities into the town area for sale, it was covered by Entry 52, List II. In other words, weighing dues were construed as entry tax and sale or purchase of goods tax combined.

Tax on mineral resources and regulation of mineral development.

The validity of the levy of "cess", based on the royalty derived from mining lands, by the States of Bihar, Orissa and Madhya Pradesh was challenged.[14] The Parliament has enacted the Mines and Minerals (Regulation and Development) Act, 1957 under Entry 54, List I. The States tried to justify their claim by taking recourse to different entries which the Supreme Court rejected.

The imposition was sought to be covered under Entry 45, List II. But Court held that royalty for carrying on mining operations or tax thereon cannot be equated to land revenue. Tax on royalties cannot be a tax on minerals. Thus the imposition cannot be justified by having recourse to Entry 50, List II. And even if it is created as tax falling under Entry 50, List II, Sec.3 of the Minerals and Mines (Regulation and Development)

12 AIR 1992 HP 20.
13 AIR 1991 SC 2096.
14 AIR 1991 SC 1676.

Act, 1957 is a clear bar on the State Legislature taxing on the subject. It cannot also be treated as "tax on land" within the meaning of Entry 49, List II. The levy under the Act cannot be treated as fee falling under Entry 66, List II. The levy cannot be correlated to any services rendered or to be rendered by the state to the class of persons from whom the levy is collected. Whether royalty is a tax or not, the cess is only a tax and cannot be treated as a fee.

Another crucial observation made by the Supreme Court in this case is that under Entry 54, List I, the mere declaration of a law of Parliament that it is expending for an industry or the regulation and development of mines and minerals to be under the control of the Union under Entry 52 or Entry 54, List I does not denude the State Legislatures of their legislative powers with respect to fields covered by several entries in List II or List III. Particularly in the case of the declaration under Entry 54, their legislative power is eroded only to the extent control is assumed by the Union pursuant to the declaration as spelt out by the legislative enactment which makes the declaration. The measure of erosion depends upon the field of the enactment framed in pursuance of the declaration.

A similar levy was sought to be imposed by the State of Rajasthan. The purported levy was a tax on every land holder on the annual value of land held by him or used by him in so far as it concerns land containing minerals. This was held *ultra vires* the State Legislature relying upon *India Cement Ltd v. State of Tamil Nadu*[15] and *Orissa Cement Ltd v. State of Orissa*[16], for the same reasons.[17]

Relying, again on the aforesaid decisions, the Patna High Court, in *Central Coal fields Ltd v. State of Bihar* [18] disapproved the measuring of the cess under the Bengal Cess Act 1980, in respect of the mineral bearing lands on basis of royalty or the basis of pit head value of the mineral.

Controlled industries

In *Mahabir Prasad Jalan v. The State of Bihar,*[19] the challenge to the Bihar Land Reforms (Fixation of Ceiling Area and Acquistion of Surplus Land) Act, 1961 was taken on its application to land on which a tea factory stood, tea industry being a declared industry for the purposes of Entry 52, List I. The Patna High Court held that the provisions of the Ceiling Act

15 AIR 1990 SC 85.
16 *Supra*, note 11.
17 *The Federation of Mining Associations of Rajasthan v. State of Rajastan.* AIR 1992 SC 103.
18 AIR 1991 Pat 27.
19 AIR 1991 Pat 40.

do not entrench on the field relating to control of declared industry. The Ceiling Act seeks to achieve the objects as mentioned in the preamble thereof, and its objects have nothing to do with the control of a declared industry. In view of the definecation of land as contained in Sec.2(F) of the ceiling Act, it is evident that cultivation of tea comes within the purview of agricultural activity. Further, the Ceiling Act provided for acquisition of such lands which have been declared surplus and thus squarely falls within the purview of Entry 42, List III.

The High Court has also thrown light on the distinction between Entries 54 and 52 of List I. In terms of Entry 54 of List I, if a declaration is made by the Parliament by law in relation to regulation of mines and mineral development the power of the State Legislature to make any legislation in relation thereto is denuded. Whereas in terms of Entry 52, List I, where the control over the industries in respect of which the Parliament by law declares it to be expendient in public interest, power to make legislations by the State Legislature in respect of control over the industry is denuded. Even if a legislation contains a declaration (Entry 52) the Parliament does not thereby get within its control the field of legislation which is the subject matter of the State List.

Entry 24, List II is subject to Entry 52, List II. But the legislative competence of the State in respect of 'Land' (Entry 18) or in relation to 'Agriculture' as contained in Entry 14, list II, has neither been taken away nor can be taken away by the declaration made under Sec.2 of the Tea Act, 1953 or otherwise. It is now well settled, observed the Court, that even if such a declaration by the Parliament is made, the State Legislature does not cease to have the power conferred by an independent entry which has no proximate connection with the control of the industry.

In State of *Uttar Pradesh v. Synthetics and Chemicals Ltd,*[20] the legislative competence of the Uttar Pradesh Sales of Motor Spirit, Diesel Oil and Alcohol Taxation Amendment Act, 1976 which levied purchase tax on industrial alcohol, was challenged on the ground the State Legislature was incompetent to levy tax with reference to Entry 54, List II in respect of industrial alcohol in so far as the article was subject to regulation by the Central Government in exercise of its powers under the Industries (Development and Regulation) Act, 1951.

Rejecting these contentions, the Supreme Court held that the power of regulation and control is separate and distinct from the power of taxation. The power of taxation under Entry 54 List II, being a specific power,

20 (1991) 4 SCC 138.

cannot be cut down or in any manner fettered by the general power of control exercised by the Parliament by the legislation under Entry 52, List I, relating to an industry the control of which by the Union is declared by Parliament by law to be expendient in public interest, read with Entry 33, List III. This, observed the Court, is the crucial distinction between the wide taxing power of the State under Entry 54, List II and its conditional or restricted taxing power, for example under Entry 50, List II. The question therefore should be whether or not the impunged Legislation falls in pith and substances within Entry 54 of List II and not whether the industry is controlled within the ambit of Entry 52, List I. Such a control cannot prevent in any manner the state from imposing taxes on the sale or purchase of goods which are the products of such industry and which are referable to Entry 33, List III.

In coming to this conclusion the Supreme Court has made a marked and deliberate departure from its earlier decision in *Synthetics and Chemicals Ltd v. Uttar Pradesh* [21] where it had held that the Price Control Order made by the Government under the Industries (Development and Regulation)Act 1951 imposed a fetter on the legislative power of the State under Entry 54, List II to levy taxes on the sale or purchase of goods, which according to the Court was *per incuriam.*

The scope of Entry 52, List I came up before the Supreme Court again in *B.Viswanathaiah & Co v. State of Karnataka.*[22] The legislative competence of the Karnataka Legislature in enacting the Karnataka Silk Worm Seed and Cocoon (Regulation of Production, Supply and Distribution) Act 1979 was challenged on the basis that the Central Silk Board Act acts as a bar in terms of the declaration made under Section 2 of the said Act under Entry 52, List I. In tackling this contention, the Supreme Court divided an industry into three parts, raw materials, the process of manufacture or production and the distribution of the products. It further said that legislation in regard to raw materials would be permissible under Entry 27, List II, notwithstanding a declaration under Entry 52, List I. The process of manufacture or production can be legislated on by States under Entry 24, List II, so long as the industry is a controlled industry within the meaning of Entry 7 or Entry 52, List I. However, when the industry is also a controlled industry, legislation in regard to the production of the industry would be permissible by both the central and State Legislature by virtue of Entry 33, List III. The control of the industry vested in Parliament was only restricted to the aspect of production and manufacture of silk yarn or

21 (1990) 1 SCC 109
22 (1991) 3 SCC 358

silk. The State Legislature controls the supply and distribution of the goods produced by the industry. This aspect of the industry falls outside the purview of the control postulated under Entry 52, List I. Thus the declaration under Section 2 of the Central Act does in no way limit the power of the State Legislature to legislate on this aspect.

Investigation and enquiry

The validity of the Gujarat Lok Ayukta Act, 1980 was challenged in *Rajendra Mumbhai v. State.*[23] In conformity with the Supreme Court's ruling in *Karnataka v. Union of India,*[24] the Gujarat High Court held that the enquiries and investigations intended to be made under the impugned enanctment are enquiries for the purpose of Entries 1,8 List III and falls squarely within the scope of Entry 45, List III.

Residuary powers

Water cess was sought to be levied on the petitioners in *Tata Iron and Steel Co. Ltd v. State of Bihar*[25] for consumption of water for their industries under the Water (Prevention and Control of Pollution) Cess Act, 1977. Relying upon *Union of India v. H.S.Dhillon*[26] and *Municipal Corporation of Jullundar City v. Union of India,*[27] the High Court upheld the levy since the power to impose tax is not covered by any entry in List II or List III, it would be competent for the Parliament to impose tax under Entry 91, List I.

Other decisions on interpretation of the entries in Schedule VII to the Constitution

In *Delhi Judicial Service Association v. State of Gujarat,*[28] the question was whether the Contempt of Courts Act, 1971 impinges upon the power of the Supreme Court with regard to contempt of subordinate courts under Art.129. The Supreme Court observed that Entry 77, List I confers the power on the Parliament to enact a law on contempt of the Supreme Court. But the Parliament has no legislative competence to abridge or extinguish the jurisdiction or power conferred on the Supreme Court under Art.129 of the Constitution. Therefore the power is limited. This again is a different stand taken by the Supreme Court vis-a-vis its earlier position in *Board of*

23 AIR 1992 Guj 10.
24 AIR 1978 SC 68.
25 AIR 1991 Pat 75.
26 AIR 1972 SC 1061.
27 AIR 1981 P&H 287.
28 AIR 1991 SC 2176.

Revenue, U.P. v. Vinay Chandra [29] where the supreme Court held that any reading of Art. 215 should be done keeping in mind the object of the Contempt of Courts Act and its scheme. Parliament has by virtue of entries in List I and III power to define and limit the powers of the court in punishing contempt of court and to regulate their procedure. It points out that there are no curbs on the power of the High Court to punish for contempt of itself except those contained in the Act. If it can be a restriction of Art. 215, then it should also be a restriction on Art. 129 keeping in mind the essence of these provision. However, the Supreme Court has taken a different view in the present case.

In *Ramachandra Singh v. Union of India,*[30] the Patna High Court held that the Public Premises Eviction Act does not bar any action for eviction under the Bihar Public Land Encroachment Act in respect of agricultural property of the Union of India. Entry 32 List I does not bar State legislation in this regard.

The Supreme Court in *Ashoka Marketing Ltd. v. Punjab National Bank*[31] held that in so far as it relates to eviction of unauthorised occupation from premises belonging to or taken on lease or requisitioned by or on behalf of the Central Government, the Public Premises (Eviction of Unauthorised Occupation) Act, 1971 would fall under Entry 32, List I. In relation to property belonging to other legal entities it would fall under entries in List III. In respect of Delhi, the Rent Control Act has been enacted by the Parliament in exercise of the legislative powers in respect of matters in List III. Therefore Rent Control laws cannot be resorted to in respect of proceedings under the Public Premises (Eviction of Unauthorised occupation) Act, 1971. It reiterated its earlier view in *S.Mansarut v. Hindustan Steel Ltd.* [32]

Other decisions

The Haryana Municipal Act, 1973 and the Haryana Municipal (Cow - Houses) bye laws imposing fees were challenged as *ultra vires* the State Legislature. The Supreme Court, in *Gurbax Singh v. State of Rajastan*[33] held that under Entry 6, List II, it is open to the State Legislature to make every provision which would ensure maintenance of sanitation and hygienic conditions. The provisions of the Act, particularly those requiring license

29 AIR 1981 SC 723.
30 AIR 1991 Pat 223.
31 AIR 1991 SC 855.
32 AIR 1989 SC 406.
33 AIR 1992 Sc 163.

for using premises or enclosures for sheep, goats or swine etc., are clearly relatable to Entry 6, List II. A combined reading of Entry 6 and Entry 66 of List I enables the State Legislature to impose the fee.

Scope of Art. 285

Where motor vehicles tax was levied in respect of vehicles belonging to the Union of India, by the State of Rajastan, this was challenged as violative of Art. 285(1). The High Court upheld the contention.[34]

The Municipal Corporation of Delhi sought to levy property tax on the International Airports Authority of India. Immunity from tax under Art.285(1) was claimed by the IAAI. The Delhi High Court in *International Airports Authority of India v. Municipal Corporation of Delhi* [35] rejected the claim. The Court observed that although control is with the Central Government, and property is vested with it only for the purpose of administration and also merely because it cannot dispose the property without the consent of the Central Government, it does not cease to be the property of the authority and therefore cannot be exempted from the impostion of municipal tax.

Similar was the pronouncement of the Madhya Pradesh High Court in *Bhilai Steel Plant v. Special Area Development Authority*.[36] It observed that a Government Company incorporated under the Companies Act owning property has a legal entity of its own and consequently such property is not exempt from assessment of the property tax. This was in confirmity with the Supreme Court's ruling in *Western Coal Fields Ltd v. Special Area Dev. Authority*.[37]

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34 *Union of India v. State of Rajastan*, AIR 1991 Raj 96.
35 AIR 1991 Del 302.
36 AIR 1991 MP 332.
37 AIR 1982 SC 697.

ELECTION LAWS

*V.Vijaya Kumar**
*B.Girija***

The one year period from June, 1991 to May, 1992 witnessed a few legislative changes, including the ordinances proclaimed by the President under Article 123 of the Constitution, making necessary amendments to the Representation of the People Act, 1951 and the Conduct of Election Rules made thereunder. Apart from these ordinances and the Rule concerning the conduct of elections, one more legislation was also enacted by the Parliament to improve the service conditions and increase the salary of the Chief Election Commissioner and other Election Commissioners.

As the Lok Sabha was dissolved in March, 1991 the President of India under the power vested by Article 123 of the Constitution, promulgated the Representation of the People (Amendment) Ordinance, 1991 (2 of 1991) on April 18,1991.[1] This Ordinance substituted Sections 73-A and 73 AA of the Representation of the People Act, 1951 (hereafter referred to as the Act). This Ordinance was promulgated by the President to enable the Election Commission to constitute the Tenth Lok Sabha under Sec.73 of the Act without taking into account the Parliamentary constitutencies in the State of Jammu & Kashmir and to provide legal cover with regard to the postponing of the elections from the Parliamentary constituencies in the State of Jammu & Kashmir. This Ordinance was later replaced by the Representation of the People (Amendment) Act, 1991 (31 of 1991).[2]

Another Ordinance was proclaimed by the President on January 4, 1992 seeking to amend the Act. This Representation of the People (Amendment) Ordianance (1 of 1992) substituted a new section for Sec.52 of the Act.[3] Accordingly, the new Section 52 seeks to empower the Returning Officer to countermand the poll in the event of the death of any of the contesting candidates, but only of the recognised political parties. Earlier, if any of the contesting candidates died before the poll,including independent candidates, the Returning Officer was empowered to countermand the poll. Now it is restricted only to the candidates belonging to "recognised political parties". In other words, if an independent candidate

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* Faculty Member, NLSIU Bangalore.
** Student V year, NLSIU, Bangalore.

1 Current Central Legislations, Vol. XVII, Issue 8, August 1991, pp 71-72.
2 Current Central Legislations, Vol. XVIII, Issue 4, April 1992, p.162.
3 Current Central Legislations, Vol. XVIII, Issue 2, February 1992, pp. 124-125.

dies before the poll, there is no need for countermanding the poll as per the amended section of the Act. The new Section is as follows:

Sec.52 **Death of Candidate before the Poll**:- If a candidate, set up by a recognised political party, -

(a) dies at any time after 11 a.m. on the last date for making nominations and his nomination is found valid on scrutiny under Sec.36; or

(b) Whose nomination has been found valid on scrutiny under Sec.36 and who has not withdrawn his candidature under Sec.37 dies and in either case, a report of his death is received at any time before the publication of the list of contesting candidates under Sec.38; or

(c) dies as a contesting candidate and a report of his death is received before the commencement of the poll, the Returning Officer shall, upon being satisfied about the fact of the death of the candidate, by order, countermand the poll and report the fact to the Election Commission and also to the appropriate authority and all proceedings with reference to the election shall be commenced anew in all respects as if for a new election;

Provided that no order for countermanding a poll should be made in a case referred to in clauss (a) except after the scrutiny of all nominations including the nomination of the deceased candidate;

Provided further that no further nomination shall be necessary in the case of a person who was contesting candidate at the time of the countermanding of the poll;

Provided also that no person who has given a notice of withdrawal of his candidature under subsection (1) of Sec.37 before the countermanding of the poll shall be inelegible for being nominated as a candidate for the election after such countermanding.

Explanation

For the purpose of this section 'recognised Political Party' means a political party recognised by the Election Commission under the Election Symbols (Reservation and Allotment) Order, 1968.

This amendment is done, probably keeping in mind certain situations wherein the non-serious independent candidates are either abducted or killed just prior to the poll which has resulted in unncessary expenditure and redoing the same exercise all over again.

Another Ordinance was promulgated by the President exactly after a fortnight of the promulgation of the earlier Ordinance (1 of 1992) on January 19, 1992. The Representation of the People (Second Amendment) Ordinance (2 of 1992)[4] has amended Sec.30 of the Act and substituted the words "fourteenth day" for "twentieth day" in Clause (d) of Sec.30. Accordingly, the maximum time limit for electioneering has been reduced from twenty days to fourteen days.

Another amendment was made to the Conduct of Election Rules, 1961 by the Ministry of Law and Justice (Legislative Department) through a Notification No.S.O.398(E) issued on June 14, 1991 and published in *Gazette of India* the same day.[5] This was done in the exercise of the powers conferred by Sec.169 of the Act. Accordingly, in Rule 59-A, the marginal heading as well as the content were amended. In the marginal heading of Rule 59-A, for the words "Constituencies in Punjab" the words "Constituencies in Assam, Punjab" has been substituted. Likewise, in the content of the rule, for the words "State of Punjab", the words "State of Assam or in the State of Punjab" has been substituted.

To enable the Chief Election Commissioner and other Election Commissioners to function more effectively and independently, their salaries and other service conditions have been improved by the Chief Election Commissioner and other Election Commissioners (Condition of Service) Act, 1991 (6 of 1991)[6] which was passed by the Parliament and received the assent of the President on January 25,1991. This eight-para legislation enhanced the salary of the Chief Election Commissioner equal to that of the judge of the Supreme Court and the salary of Election Commissioner equal to the judge of a High Court. If such Chief Election Commissioner or other Election Commissioners were drawing pension at the time of appointment, their salaries can be fixed reducing the amount of such pension drawn by them. The other conditions of service relating to travelling allowance, medical and other facilities are now identical to the judge of the Supreme Court and High Court for the Chief Election Commissioner and other Election Commissioners respectively.

Along with these legislative developments, there has been a plethora of election cases, primarily due to the parliamentary as well as the Legislative Assemblies elections in few states. Majority of the cases related to the interpretation of the Representation of the People Act and few were with reference to the powers, duties and the constitution of Election Commission

4 Current Central Legislations, Vol. XVIII, Issue 4, April 1992, pp. 1-2.
5 Current Central Legislations, Vol. XVII, Issue 9, September 1991, pp.2-3.
6 Current Central Legislations, Vol. XVII, Issue 4, April 1991 pp. 42-45.

as well as Panchayat elections. These cases can be classified under the following categories:

1. Representation of the People Act
   (a) Corrupt practices;
   (b) Factors materially affecting elections; and
   (c) Cases relating to the election petitions in general.
2. Powers, duties and constitution of Election Commission; and
3. Panchyat elections.

Representation of the people act

(a) Cases relating to corrupt practices in elections

In the first case, the petitioners belonging to the Mizo National Front alleged that the victorious candidate belonging to the Congress(I) had indulged in corrupt practices within the meaning of Sec.123 of the Representation of the People Act, 1951. It was alleged that the Congress(I) candidate appealed to the voters by evoking the religious sentiments of the people by saying "let us vote for Mizo Congress (I) for Mizos and Christians." However, the election petition filed by the petitioners was not in consonance with Form 25 of the Rule and hence, it was argued on behalf of Congress (I) candidate that the same is liable to be dismissed for non-conformity with Form 25 of the Rule. The Supreme Court in *Sapa v. Singora* [7] held that bearing in mind the impact of corrupt practices on a candidate's future in public life and to ensure purity in public life, such allegations must be seriously taken note of. The Court further held that the defect in the affidavit in Form 25 is curable unless it forms an integral part of the petition.

In *Lakshmi Narayan Nayak v. Ramratan Chaturvedi,*[8] the Supreme Court reiterated the earlier position as held in *Manphul v. Surinder Singh*[9] and *Mani v. Anthony*[10] when it opined that the allegations of corrupt practices being quasi-criminal in nature, it required strict proof. Here in this case, as there was no evidence that the candidate had made any promise of gratification to electors, nor was there any evidence that the candidate had obtained a return promise from the voters, the Court was constrained to hold that the 'element of bargain' was absent and, therefore,

7 AIR 1991 SC 1557.
8 AIR 1991 SC 2001.
9 (1973) 2 SCC 599.
10 AIR 1979 SC 234.

the petition had to fail. On the allegation of the petitioner that the respondent had procured the assistance of government servants, who were in service, for the furtherance of the candidate's prospects in the elections, the Court held that owing to the irreconcilable contradictions in the plaint, even with reference to the name of the government servant involved, the petitioner had failed to establish his allegations of corrupt practices.

In *Chandrashekar Raju v. Pradeep Kumar Dev,*[11] there was an allegation that the appellant, who was declared elected, was a government servant at the time of filing his nomination. The Supreme Court, while admitting his appeal ruled that pending diposal of the case, the appellant would be permitted to participate in the debate in the Legislature and sign the register but he would not exercise his vote.

Several High Courts were also confronted with cases in which the corrupt practices were alleged to have been committed during the elections.

In *Abraham Kuriakose v. P.T.Thomas,*[12] the Kerala High Court was confronted with the issue where it was alleged that on the assassination of the former Prime Minister Rajiv Gandhi, the elected candidate had held a prayer meeting and distributed free rice to the electors, it was averred that this amounted to 'corrupt practice' and hence the election was liable to be set aside. Here, as there was no averment in the petition that any named elector was induced to vote for the elected candidate nor was there any averment that receipients exercised their vote in favour of the elected candidate on account of the distribution of rice to them. Hence, it was held that the facts pleaded could not be said to be sufficient to constitute ingredients of corrupt practices under Sec.123 (1) of the Act. The Court dismissed the petition.

Similarly, in *Ali Singhani Bhagwandas v. Rajiv Gandhi,*[13] where it was alleged that announcement of a new programme for upliftment of women on the eve of election amounted to corrupt practices along with excessive money spent during election by the successful candidate, was rejected by the Court.

In *Karan Singh v. Kamal Choudhary,*[14] the question arose whether a Governor is a "person in the service of the government" within the meaning of Sec.123(7) of the Act and if procuring his assistance during election would amount to a corrupt practice. The Punjab and Haryana High Court answered in the affirmative.

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11 (1991) 2 SCALE 1171.
12 AIR 1992 Ker 19.
13 AIR 1991 All 145.
14 AIR 1991 P & H 231.

The Karnataka High Court in *T.M.Chandrasekhar v. L.R.Shivaramegowda*[15] held that non-furnishing of true and proper accounts constitute a distinct breach of sub-sections (1) and (2) of Sec.77 attracting Sec.100 of the Act. It held that the Tribunal was not to ignore dishonest conduct and wilful supression of expenditure to come within prescribed limit. The Court further held that incurring expenditure not accounted for amounted to corrupt practice. It was also pointed out by the Court that mere irregularity in maintenance of accounts is distinct from wilful supression of expenditure and hence the non-compliance with Sec.77 would amount to corrupt practice with consequences of Sec.100 of the Act ensuing.

In *Purushottam v. Returning Officer, Amravati* [16] the question of confirmity with Form 25 of the Rules was raised. In this case, the second respondent had been elected to the Legislative Council and the petitioner challenged the same on the grounds of corrupt practices. The respondent sought the dismissal of the petition on the ground that the affidavit filed by the petitioner was not in confirmity with Form 25 of the Rules. The copy furnished to the respondent did not bear the name and designation of the notary, nor was it endorsed by the notary. The petitioner on the other hand contended that the defect in the affidavit is immaterial and relied on *Subbarao v. Member, Election Tribunal, Hyderabad* [17] and argued that the provisions of the Representation of the People Act ought not to be interpreted literally. The petitioner also relied on *Murarka Radhey Shyam Ramkumar v. Roop Singh Rathore* [18] where the apex court had observed that a proper affidavit could be allowed to be filed at a later stage and that a defect in the affidavit could not warrant dismissal of a petition. The Bombay High Court opined that the ratio in the above case would not apply to the given fact situation as in that case the defect in the affidavit was because of the mistake committed by the inexperienced oaths Commissioner but here that is not the case. The Bombay High Court further referred to *Mithilesh Kumar Pandey v. Baidhyanath Yadav* [19] where it was held that if the petition served on the respondent contained only the clerical mistakes and is of no consequence. But if it contains important omissions or discrepancy of vital nature likely to prejudice the defendent, there is no substantial compliance with the Act and the petition can be dismissed. The Court, in the given case concluded that it is difficult to hold that absence of endorsement was only a clerical mistake. It appears to be

15 ILR 1992 Kar 444.
16 AIR 1992 Bom 227.
17 AIR 1964 SC 1027.
18 AIR 1964 SC 1545.
19 AIR 1984 SC 305.

substantial and it could cause prejudice to the returned candidate. The Court approved of the earlier Supreme Court decision in *M. Kamalam v. Dr. V.A. Syed Mohammed* [20] where it held that a petition is in truth only one document consisting of two parts i.e., the election petition proper and the affidavit. Copy of a petition filed under Section 81(3) read with Section 83 would include copy of the affidavit. The High Court also reiterated the decision in *Rajendra Singh v. Usha Rani* [21] and concluded that it is not a part of the duty of the respondent to wade through the entire record to find out whether the copy supplied to him was correct or not. Here it was not possible for the respondent to know whether the affidavit was really sworn and if so before whom and on what date. Hence, it was not possible to hold that the copy supplied to the returned candidate confirmed to Section 81 (3) of the Act and liable to be dismissed.

(b) Factors material by affecting election

In *Kamakhya Prasad* v. *Digendra Purakhyastha and Others,*[22] the Gauhati High Court explained the terms "result of the election has been materially affected in the following words: "...individual result should not be judged by mere increase or decrease in total number of votes secured by the returned candidate but by the proof of fact that the wasted votes would have been distributed in such a manner between all contesting candidates as would have brought about the defeat of the returned candidate."

In two other cases, *Aditya Vesh Disciple of Swami Dayanand v. Bhajan Lal and Others* [23] and *Swaraj Singh v. Bansilal and Another* [24] the Punjab and Haryana High Court was asked to decide on whether a change in the election symbols a few days prior to the election can be said to have materially altered the elections. The Court on both the occasions relied on the cupreme Court's decision in *Samant Balakrishna v. George Fernandez*[25] in which it held that Section 83 of the Act, which requires that the election petition should contain material facts, was mandatory and that a mere incorporation of the words of the relevant section in the plaint does not amount to pleading of material facts nor would it disclose a cause of action and petition was liable to be dismissed, was reiterated by the Punjab and Haryana High Court in both the cases. The High Court held that "mere hope of votes to be polled can not be equated with material facts pertaining

20 AIR 1978 SC 840.
21 AIR 1984 SC 956.
22 (1991) NOC 66 (Gau).
23 AIR 1991 P & H 210.
24 AIR 1991 P & H 163.
25 AIR 1969 SC 1201.

to the cause of action to be founded thereon." Moreover, in both these cases there was a wide disparity in the votes secured by the winning candidates and the petitioners and hence the Court concluded that the change in election symbols did not affect the outcome of the elections. However, this judgment appears to have been altered by the Supreme Court in *Sapa v. Singora* [26] when it held that Section 83 of the Act is not mandatory. To support this ruling the Court referred to Section 86 of the Act which empowers the High Court to dismiss a petition which does not comply with Sections 81, 82 or 117, but there is no mention of Section 83. Hence, the Supreme Court came to the conclusion that although Section 83 is not mandatory, delay in compliance with Section 83 or omission to disclose the grounds/sources though not fatal, would weaken the probative value of the evidence and the Court may be lead to doubt the veracity of the evidence adduced later. The Supreme Court in this case referred to an earlier decision given by that very court in *Murarka Radhey Syam v. Roop Singh Rathore* [27] to arrive at the conclusion given above. In a way the Court in this case re-established the position which prevailed prior to *George Fernandes*' case.[28]

In *Rakesh Kumar v. Negi,*[29] the Himachal Pradesh High Court was confronted with the question regarding the legal implications of noncompliance with Section 81(3) of the Act which provides that an election petition must be accompanied by as many copies thereof as there were respondents. In the given case the petition was filed within the limitation period devoid of the requisite copies. The copies were handed over after the limitation period had lapsed. The High Court read Section 81(3) and Section 85(1) and concluded that for non-compliance with Section 81(3), the suit is liable to be dismissed. By this the High Cort reiterated the decision in *Satya Narain v. Dhiya Ram.*[30]

(c) Cases relating to the election petitions in general

In *Thupieri Renchaliya v. Election Court Kavali Constituency*[31] the Andhra Pradhesh High Court said that the material particulars are to be stated in an election petition, which is likely to differ from case to case, but a general allegation of irregularity will be no ground for the Court to order relief. The petitioner must specify the materials or the basis on

26 *Supra*, note 7.
27 *Supra*, note 18.
28 *Supra*, note 19.
29 AIR 1992 HP 21.
30 AIR 1974 SC 1185.
31 (1991) NOC 27 (A.P).

which his information is based.

In *Sohan Singh v. Chandra Kantha Goyal,* [32] the Bombay High Court held that an election petition must set out the facts and particulars so as to constitute a complete cause of action and if this is not stated the petition is liable to be dismissed. This was also reiterated by the Punjab and Haryana High Court.[33]

In *Deshmukh v. Amritlal,* [34] the Supreme Court held that an amendment to an election petition can be allowed provided it does not introduce a new allegation and provided it is within the limitation period. In this case an amendment was sought to be made in the election petition and on a totally new ground, and that too, after the limitation period. The Supreme Court reversed the judgment of the Madhya Pradesh High Court and held such a petition cannot be allowed.

Section 81(3) of the Act read with Rule 1 provide that the original petition must be attested as a 'true copy of the original' by petitioner. But the Supreme Court in *Sapa v. Singora,*[35] following its earlier decision in *Subba Rao v. Member Election Tribunal Hyderabad* [36] and *Kamalamma's case*[37] has held that a mere signature without words like 'true copy' amounts to a proper attestation. Taking clue from the above decisions, the High Court of Bombay in *Kanak Vardhan v. Bibekananda Meher*[38] has held that even if there is no attestation in every page of the petition but only at the end of the petition, it would be valid. While the Himachel Pradesh High Court in *Moti Ram v. Moti Ram* [39] held that documents signed as 'true copy' instead of 'attested to be a true copy' would be valid as a duly attested document. The Court further said that it should be treated as due compliance with Section 83(1) of the Act.

Section 99 of the Act requires the Court, whilst giving a finding that corrupt practice has been proved, to name all the persons who have been proved guilty of the same. But before so naming them the Court must issue notice to such persons asking them to appear before the Court and show cause why they should not be so named. In a case before it, the Bombay High Court had issued such notice to three persons but the notice was vague and it did not indicate what corrupt practices they were allegedly

32 AIR 1991 Bom 343.
33 *Supra,* note 23.
34 AIR 1993 SC 164.
35 *Supra,* note 7.
36 AIR 1964 SC 1027.
37 AIR 1978 SC 340.
38 AIR 1991 Ori 231.
39 AIR 1991 HP 68.

guilty of. The High Court in *Damodhar Tatyaba v. Vaman Rao*[40] further held that a notice to third party need not specify the corrupt practices. Aggrieved by the notice, the petitioners moved the Supreme Court. The State of Maharastra relied on an earlier ruling of the Supreme Court in which it was held that a notice under Section 99 of the Act was not required to be specific and argued that the notice in the instant case is perfectly valid. However, the Supreme Court, after examining the various provisions of the Act held that the notice had to be specific. The Court further pointed out that Section 83 provides for contents of an election petition which states that full particulars of an alleged corrupt practice must be set forth including a full statement as far as possible of the names of parties alleged to be guilty or the same alongwith the date and place of commission of such practice. The Court reasoned that it is clear from this that full particulars as far as possible must be furnished as the object of the provision being to appraise the rivals of the precise allegations against them. Moreover, if found guilty of such corrupt practices, such persons can be disqualified for a certain period from public life. Hence, the Court concluded by saying that proceedings pursuant to the issue of notice by the High Court under Section 99 are quasi-criminal in nature. The Court further opined that when legislative provision itself provides that in an election petition full particulars of the alleged corrupt practice must be stated it would be contrary to the object of such provision to hold that notice issued under Section 99 against a person who is not a party to the petition, for holding him guilty of corrupt practice, the notice should not appraise him of the precise charge against him. Hence, by implication, the Court overruled its own decision in SLP No. 13163 of 1988, but at the same time it was also careful to add that the new rule will apply prospectively.[41]

Section 117 of the Act provides for a security deposit to meet the cost of the petition and Section 86 of the same Act expressly provides that the 'High Court shall dismiss a petition which does not comply with Sections 81, 83 and 117'. In *Isher Singh v. Simranjit Singh Mann and Others*[42], the Punjab and Haryana High Court held that a court cannot grant an exemption from depositing the money. In a different fact situation which confronted the Supreme Court in *Manohar Joshi v. B.R. Patil* [43] where the original petitioner died when the suit was pending and four applications were received for being substituted in the place of original petitioner, the

40 AIR 1991 Bom 373.
41 (1991) 1 SCALE 410.
42 AIR 1991 P & H 182.
43 (1992) 1 SCALE 37.

question arose whether security deposit is a condition precedent to filing an application, or whether only those applicants who were chosen to substitute the original petitioner should thereafter be required to deposit an amount as security. The Court held that while considering an application for substitution it must also consider whether any deposit is to be made or not as security for costs. And if it is to be made, what is the amount which has to be deposited. If the Court comes to the conclusion on facts of a given case that no amount is to be deposited. If the Court comes to the conclusion from the facts of a given case that no amount is to be deposited as security for the costs, an order of substituon simpliciter would be sufficient. The fact that no deposit as security is to be made with reason therefore would however have to be simultaneously stated in the order of substitution. On the other hand, if the Court comes to the conclusion that some amount has to be deposited by the applicant who are proposed to be substituted as security for costs, the amount should simultaneously be specified in the order of substitution and the entitlement of such applicant to be substituted should be made subject to compliance with the condition of depositing the amount so specified. Article 173 of the Constitution provides that a person shall not be qualified to fill a seat in the Legislature of a State unless he is a citizen of India and makes and subscribes before a person so authorised in that behalf by the Election Commission an oath of affirmation.... Section 36(2) of the Act provides that the returning officer shall reject a nomination paper if the candidate is not qualified. In *Laskshmi Narayan Nayak v. Ramratan Chaturvedi* [44] relating to the oath, the Supreme Court reiterated its earlier decision in *Harjit Singh Mann v. Umraon Singh*[45] and held that taking oath is mandatory and its non-compliance would result in the rejection of the nomination itself.

Powers, duties and constitution of election commission

In *S.S. Dhanoa v. Union of India,*[46] a notification by the President rescinding an earlier notification where he had appointed two additional Election Commissioners was questioned. The conditions of service of the additional Election Commissioners were notified as 'to hold office for five years or till they attain sixty five years, whichever is earlier'. But, contrary to this the President issued the latter notification by which he abolished the posts within one year of creation. The Supreme Court

44 *Supra,* note 8.
45 AIR 1991 SC 701.
46 AIR 1991 SC 1745.

examined the relevant provisions of the Constitution and came to the conclusion that 'material loss on account of cutting short the tenure of service is not unknown in a service career and is one of the exigencies of employment. Creation and abolition of posts is the prerogative of the executive. Power to create posts is unfettered so also to reduce or abolish it'. Therefore the terms of service are not open to challenge.

In another case, *Maharashtra Wine Merchants Association v. State of Maharashtra*[47] the question whether the Election Commission can direct the closure of wine shops during the election was raised before the Bombay High Court. The nature and extent of powers conferred on the Election Commision under Article 324 of the Constitution was also questioned. After examining the provisions of Bombay Prohibition Act in conjunction with the Constitution, the Court held that the Election Commission cannot impose a ban on the sale of liquor. The Commission can at the most recommend a particular line of action to be taken to the concerned authorities. The Rules framed under the Bombay Prohibition Act provide that the Collector must order such closure. As such, the Collector must act independently and not under the dictation of the Election Commission.

In *Dr. Valampuri John v. Union of India*[48] the Madras High Court held that the special protection provided to the Prime Minister during election campaigns under Rule 71(6) was not violative of Articles 14, 328 and 329 of the Constitution.

In *R.S.Chib* v. *Election Commission of India and Others*[49], the petitioner challenged the validity of the order of the Chief Election Commissioner dated June 20, 1991, altering the date of election to Lok Sabha and also to the State Legislature in Punjab. The petitioner contended that the Chief Election Commissioner acted arbitrarily in postponing the election to September 25, 1991. However, the Court held that the Election Commissioner had the power to do so keeping in mind the exigencies of the situations and the conditions prevailing in a particular area. The Court came to this conclusion on the basis of a plethora of cases decided by the same Court in this regard and the principle is well established. However, on the other contention that the authorities have withdrawn the security given to the petitioner, the Court held that if the petitioner is a candidate the respondent-authorities should continue to provide security to him to ensure safety of his life and to enable him to contest the election as is being done in respect of other candidates. The Supreme Court dismissed the petition.

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47 AIR 1992 Bom 3.

48 AIR 1991 Mad 151.

49 1992 (2) SCALE 285.

Panchayat elections

The cases concerning Panchyat elections are also included as there is renewed thrust on decentralisation of powers of the government. Some of the draft proposals taken by the Central government as well as the State governments along with the existing laws, rules and other regulations would provide a very good ground for judicial interpretations.

In *Ambika Prasad Dubey v. District Magistrate Allahabad,*[50] the actions taken by the District Magistrate in ordering a repoll to the post of Pradhan were questioned. In this case, when the counting was in progress there was a breakdown in power supply and at that point of time some ballot papers which were not issued at the time of polling were somehow mixed with the other ballot papers. This was discovered when the counting resumed. On discovery of the same, the District Magistrate ordered a repoll. This was challenged on the ground that the District Magistrate had exceeded his power and that the right course of action would have been to ignore those questionable ballot papers. If this course was followed, the petitioner would have won. The Allahabad High Court dismissed the petition. On appeal, the Supreme Court examined the relevant rules under the Uttar Pradesh Panchyat Act, 1947 and held that those ballot papers which were not issued at the time of polling should have been ignored while counting the votes. Instead the Returning Officer and the District Magistrate have ordered repoll. In the present circumstances, repoll is not warranted and is contrary to law as well as beyond their powers. The Supreme Court declared the petitioner elected.

The Goa, Daman and Diu Village Panchyat Regulation, 1962 provides that a person convicted of an offence involving moral turpitude cannot continue as a member/councillor of such Panchyat. In *Bhanu Bai M.Raval v. Union of India,* [51] the question of continuation in office as a member/ councillor of Panchyat was raised. The trial court held an elected member to Panchyat as guilty of an offence invovling moral turpitude. A voter challenged the continuation of the member in office. In the meantime the member had filed an appeal before the High Court. The question which came up for consideration before the High Court was whether the disqualification would take effect immediately or on disposition of the appeal. The Bombay High Court relied on a decision of the Madhya Pradesh High Court[52] and concluded that unlike the Representation of the People Act where disqualification takes place only on the disposal of the appeal,[53] the

50 AIR 1991 SC 1106.

51 AIR 1991 Bom 91.

52 *Purushottamlal Kaushik v. Vidhyasharan Shukla,* AIR 1990 MP 188.

53 Sec. 82 of the Representation of the People Act, 1951.

mere filing of an appeal here in this case would not permit the member to continue in office either as a member or a councillor. When the attention of the Bombay High Court was drawn to the ruling of the Supreme Court in *Vidhya Charan Shukla v. Purushottamlal Kaushik,* [54] the High Court explained that inspite of the decision of the Supreme Court in the case so cited, the Supreme Court had not found fault with the reasoning of the Madhya Pradesh High Court. Hence, the Madhya Pradesh High Court's decision is still valid, the Bombay High Court opined.

A Full Bench of the Karnataka High Court heard a case pertaining to the delimitation of constituencies under the Karnataka Zilla Parishads, Taluk Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats Act, 1983 and overruled the decision of a Single Judge of the same Court.[55] In this case, a voter challenged the elections to a Panchyat because the Deputy Commissioner who had notified the delimitation of constituencies later issued an 'Errata Delimitation of Constituencies Notification'. Hence, it was the contention of the petitioner that the entire election must be scrapped. In its extensive judgment, a Full Bench of the Karnataka High Court in *State of Karnataka* v. *N.A. Nagendrappa and Others*[56] held that Section 21 of the Karnataka General Clauses Act provides that power to make includes the power to add, amend or rescind such notifications. Hence, the notification relating to the error in delimitation of constituency is valid. It overruled the Single Judge's decision who held that General Clauses Act was not applicable to election cases. To support its view, the Full Bench referred to the decision of the Supreme Court in *Mohammed Yunus v. Shiva Kumar* [57] where the apex court had applied the General Clauses Act to election rules; and in this case the petition was filed after all stages of election including declaration of results were completed. The Court opined that when the Act provides for adjudication of disputes, the same should be questioned in accordance with such Act and for reasons stated therein. There is no justification for the High Court to entertain application under Article 226 of the Constitution in the circumstances mentioned above.

In a few other minor decisions relating to Panchyat/Municipal elections, the Gujurat High Court in *Mahesh Sambhu Prasad Joshi v. K.S.Verma and Others*[58] held that according to the relevant provisions of the Bombay Provincial Municipal Corporations Act, 1949, preparation of electoral roll

54 AIR 1981 SC 547.
55 ILR 1989 Kar 324.
56 AIR 1991 Kar 317.
57 AIR 1974 SC 1218.
58 AIR 1991 Guj 72.

is mandatory before every election. Hence, elections cannot be held on the basis of the old electoral rolls.

The Tamil Nadu Panchayat Act, 1958 provides that to be a President of a Panchayat one must be a citizen of India. In *Oosarilar Ekambaram v. Visalakshi,* [59] the Madras High Court observed that the candidate was born in Malaysia, while his father was an Indian citizen. Based on evidence, the Court held that there is no evidence to prove that the candidate did not intend to return to India. Hence, the candidate was an Indian citizen and therefore he was eligible to contest elections.

In another case, *Achcha Bhoomanna v. Court of District Munsiff (Election Court) Adilabad* [60] the petitioner was elected as a Sarpanch by a margin of one vote. The respondent challenged the same and the election court declared the election void and ordered fresh elections to be held. The petitioner challenged the ruling of the election court before the High Court. The question which came up for consideration before the High Court was whether the petitioner had procured the votes of a few deceased persons and if so, could the election be declared void on that ground. On the basis of the evidence adduced, the Court held that "all facts and particulars necessary for allegation of improper reception of alleged votes are stated in the election petition." The Court also referred to the decision of the Supreme Court in *Shankar Babaji Savat v. Sakharam Vithoba Salunkhe* [61] where it was held that Section 100 (1) (d) (iii) of the Representation of the People Act also covers 'improper receptioin of votes' by the Presiding Officer at the time of polling. Based on this, the High Court of Andhra Pradesh concluded that Rule 60 of the Andhra Pradesh Gram Panchyat (Conduct of Election) Rules is in *pari materia* with Section 100 (i) (d) (iii) of the Representation of the People Act and hence Rule 60 covers "improper reception of votes".

Thus, it is observed that the High Courts in general tend to accept the interpretations to the Representation of the People Act given by Supreme Court and apply them to similar situations in resolving the conflicts arising out of various state legislations, rules and regulations concerning the elections to Panchayats as well as Municipalities.

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59 AIR 1991 Mad 203.
60 AIR 1992 AP 157.
61 AIR 1965 SC 1424.

FUNDAMENTAL RIGHTS

*V.S. Mallar**
*D. Sundari & M.G.Poojitha***
*Rashika Gupta****

The definition of the word 'State' under Art. 12 has undergone tremendous changes. The government performs a large number of functions; thanks to the prevailing philosophy of social Welfare State. The Government acts through natural and juridical persons. Some functions are discharged through the traditional governmental departments and officials while some functions are discharged through autonomous bodies existing outside the departmental structure. While the government acting departmentally or through officials, undoubtedly falls within the definition of 'State' under Art.12, doubts have been raised as regards the character of autonomous bodies[1].

The All India Reserve Bank Retired Officers Association,[2] the Churk Cement Mazdoor Sangh, a public sector undertaking,[3] the Allahabad University set up under the U.P. State Universities Act,[4] and the Karnataka Electricity Board[5] have all been held to be State under Article 12. The Indian Council of Medical Reserach[6] and the Haryana Khadi and Village Industries Board[7] were to fall within the expression "other authorities" in Article 12. In *Grih Kalyan Kendra Workers Union v. Union of India,*[8] one of the issues was whether the Grih Kalyan Kendra, a society, is a State within the meaning of Article 12. The Supreme Court held that it can be 'assumed' to be an instrumentality of the State, and proceeded to the next issue.

In *Chander Mohan Khanna v. NCERT,* [9] the issue was whether NCERT - the National Council for Education Research and Training is 'State' for the purposes of Article 12. Answering in the negative, the Supreme Court held -

Art.12 should not be stretched so as to bring in every autonomous

* Faculty Member, NLSIU, Bangalore.
** Students V Year, NLSIU, Bangalore.
*** Student IV Year, NLSIU, Bangalore.

1 M.P. Jain, Indian Constitutional Law, IV Edition (1987), 561.
2 *All India Reserve Bank Retired Officer Association v. Union of India.* AIR 1992 SC 767.
3 *Churck Cement Mazdoor Singh v. State of U.P.* AIR 1992 All 88.
4 *Vandava Tiwari v. Allahabad University, Allahabad,* AIR 1991 All 250.
5 *Kap Steel Ltd v. Karnataka Electricity Board,* AIR 1992 Kant 220.
6 *Director General, ICMR v. Dr. Anil Kumar Ghosh,* AIR 1992 NOC 15 (Cal).
7 *Sumer Chand v. Haryana Khadi & Village Industries Board* AIR 1991 P & H 106.
8 AIR 1991 SC 1173.
9 AIR 1992 SC 76.

> body which has some nexus with Government within state. A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of that in the modern concept of Welfare State, independent institutions, corporations and agencies are generally subject to state control.

This does not render such bodies as State under Art.12. The state control, however vast and pervasive, is not determinative. The financial contribution by the state is also not conclusive: the combination of state aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the state may largely point out that the body is State.[10] Since the activities of NCERT are not wholly related to governmental functions, since it is free to apply its income and property towards promotion of its objectives, and as government control is confined only to proper utilisation of the grant given by it which is one of the source of its funds, the Court held that NCERT is not 'State'.

In *Mona Dhand v. State of Rajasthan,*[11] one of the questions which fell for consideration before the Rajasthan High Court was whether St.Angela Sophia Higher Secondary School, a society recognised by the Government of Rajasthan and given 80% aid by the Education Department of the Government of Rajasthan is State within the meaning of Art.12. The High Court held that it cannot be said that philanthropic institutions or educational institutions managed and run by the minorities or private registered societies carry on the state function. "Authority" as under any other authorities in Art.12 must be performing public duty. In this case, no duty was cast on these institutions to admit everybody who applies. the Court remarked: *"Mere grant of aid does not make it a state under Art 12. Again, mere affiliation with the Board of Secondary Education, Rajasthan, does not make it 'State'.*[12]

The Indian Institute of Bankers was held not covered by the expression "instrumentality of state", and hence a writ of mandamus could not lie against it.[13] Similarly, in *M/S Baroda Cotton Co. Bombay v. A.P. State Frederation of Co-operative Spinning Mills Ltd.*[14] the appellant argued that the Nellore Co-operative Spinning Mills Ltd is 'State' as it is a Government-owned corporation headed by top officials of the state of Andhra Pradesh,

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10 *Ibid.*
11 AIR 1992 Raj 84.
12 Emphasis added.
13 *Ram Parshad v. Indian Institute of Bankers,* AIR 1992 P & H 1.
14 AIR 1991 AP 320

discharging public duties. However, the Andhra Pradesh High Court rejected these arguments, holding that it is neither a state not statutory authority. Hence, a writ of mandamus cannot be issued to the Mill to fulfil its contractual obligations.[15]

A. General

In *Maharshi Avadhesh v. State of Uttar Pradesh,*[16] the release obtained of the then Home-Minister Mufti Mohammed Syed's dauthter in exchange for the release of some hard-core terrorists was under challenge. Discrimination was alleged since the Government had not obtained the release of some other persons abducted. The High Court held that no relief is available since the matter is entirely within the discretion of the Government. The Blue Book Rule which imposed a duty upon states to put up rostrums,barricades, etc., for the protection of the Prime Minister during his election campaign was held to be valid.[17]

The Madhya Pradesh High Court has held that mere omission of specific reference to Article 14 in the writ petition is not fatal, and that when the petitioner complains of infrigement of one or more fundamental rights, the petition cannot be dismissed in limine.[18]

In *Grih Kalyan Kendra Workers Union v. Union of India,*[19] the Supreme Court stated that 'equal pay for equal work' though a directive principle, has assumed the status of a fundamental right, having regard to the mandate of equality under Articles 14 and 16.

In *N.Parthasarathy v. Controller of Capital Issues,*[20] the sale of bulk shares of L & T by public financial institutions was under challenge. The Supreme Court observed that earning more profits should not be the sole consideration for sale. The question whether such sale will lead to usurping of control of a public company by a private monopoly house which is not in public interest must also be considered. The Court ultimately merely stated that it is doubtful whether such sale was in public interest.

In *Mrs. Lalitha Ubhayakar v. Union of India,*[21] Sections 7 and 8 of the Hindu Adoption and Maintenance Act were under challenge. Sec. 7 required the wife to obtain her husband's consent before adopting a child,

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15 *Ibid.*
16 AIR 1991 All 52.
17 AIR 1992 Mad 151.
18 *Sushil Sharma v. The State of Madhya Pradesh,* AIR 1992 MP 79.
19 AIR 1991 SC 1173.
20 AIR 1991 SC 1420.
21 AIR 1991 Kant 86.

whereas a spinster could *suo motu* adopt a child. The High Court held that a married wife and a woman of single status form separate classes, and thus, Sec. 7 is not violative of Art.14.

Section 10(2) of the Gujurat Lokayukta Act which permitted non-disclosure of the complainant and the public functionary to the witness summoned, was challenged as being violative of Art.14 in *Rajendra Manubhai Patel v. State of Gujarat.*[22] The Supreme Court upheld its validity, 'having regard to the nature of investigation and to the need of safeguarding the dignity and prestige of public functionaries against false and frivolous allegation'. Further, the Court observed that the provision does not discriminate between private witness and public servant, and hence valid.

In *Sardar Singh v. Union of India,*[23] the accused was caught with seven bottles of rum, whereas he had a valid permit only for five. He was sentenced to three months rigorous imprisonment under the Army Act and dismissed from service. Reiterating the doctrine of proportionality, the Supreme Court held that the order is liable to be set aside being severe and arbitrary.

In *Major G.S. Sodhi v. Union of India,*[24] however, when a delinquent army officer was awarded punishment of removal from service under the Army Act and he pleaded that other officers found guilty of similar offences were awarded lesser punishment, the Supreme Court held that it is for the Court Martial to decide the nature of sentence.

The Karnataka Cinema (Regulation) Act, 1964 prohibits the location of semi-permanent cinema in a town or city with a population of more than 50,000. The High Court upheld its constitutionality on the ground that it is in public interest, and that such a town or city could admit a permanent cinema.[25]

Under the A.P. Foreign Liquor and Indian Liquor Rules, there is a restriction of distance of a liquor bar as regards location from schools and places of public worship. However, this Rule was not made applicable to bars to be established in cities having more than three lakhs population. The Andhra Pradesh High Court held that such a classification is not unreasonable.[26] In *Doongaji and Co v. State of Madhya Pradesh,*[27] the Supreme Court held that though nobody can claim as against the state, a

22 AIR 1992 SC 10.
23 AIR 1992 SC 417.
24 AIR 1991 SC 1617.
25 *State of Karnataka v. Javeed Hyder,* AIR 1991 Kant 235.
26 *K. Rajendra v. Superintendent of Excise, Khammanu,* AIR 1991 AP 263.
27 AIR 1991 SC 1947.

right to carry on the business or trade in intoxicants, once the state decides to part with such a right to others, it has to be done consistent with principles of Art.14.

The Kerala Land Assignment Act, 1960 contains a provision restricting the Government to offer land which was previously acquired to the erstwhile owner only and for the same price. The Kerala High Court held that this was discriminatory because it shuts down the rights of all other persons who may be entitled to assignment of land and because offering it back at the same price is highly unjust to the erstwhile owner.[28]

Under the Motor Vehicles Act, the stage carriage permits are granted to private operators under a liberalization policy. The Supreme Court held that this does not violate Art.14 since the object is to encourage healthy competition and eliminate corruption.[29]

In *Janabai Govind Surve v. State of Maharashtra,*[30] the Bombay Motor Vehicles Rules' validity was under challenge. The Bombay High Court held that the Rule in so far as it imposes restrictions on the right of female claimants to receive and deal with the amount of compensation is *ultra-vires* Sec. 111-A of the Motor Vehicles Act and violates Article 14.

Section 24 of the Electricity Act, 1910 provides for a facility of paying electricity dues by instalments. In *AP State Electricity Board, Hyderabad v. M/S Andhra Cements Ltd Dachepalli,*[31] the Consumer Company was running into volumes of arrears. The Court held that the fixation of instalment at the rate of Rs.75 lakhs per month was arbitrary because this amount was not even sufficient to cover the monthly bill of the Company. The U.P. Electricity Board levied an additional charge on unpaid amounts at 25.5% per annum under Sec. 49 of the Electricity (Supply) Act, 1948. This was challenged in *Modi Industries Ltd (Steels) Modinagar, Ghaziabad v. Executive Engineer, Electricity Distribution Division, Modinagar.*[32] The High Court held that the additional charge was not a penalty, but only a device to ensure timely payment. It was neither arbitrary nor unconscionable. The same Act also provides for fuel cost adjustment charges, the validity of which was challenged in *M/S Hindustan Zinc Ltd v. A.P. State Electricity Board.* [33] The Supreme Court held that the classification of consumers and applying charges only to High Tension Consumers is neither unreasonsble nor discriminatory since they form a distinct class.

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28 *M. Bhaskaran Pillai v. Kerala,* AIR 1992 Ker 86.
29 *Mithilesh Garg v. Union of India,* AIR 1992 SC 443.
30 AIR 1991 Bom 333.
31 AIR 1991 AP 350.
32 AIR 1992 AP 350.
33 AIR 1991 SC 1473.

In *M/S International Data Management Ltd v. State of Utter Pradesh,*[34] the order of the Government directing Government Departments to purchase specified electronic goods only from the subsidiary company of a company owned and controlled by the State government was held not to be violative of Art.14. In *Canara Bank v. M/S Taraka Prabhu Publishers Private Limited,*[35] the A.P. High Court held that in order to recover a loan, a bank can transfer amount deposited in the current account to its loan account for set-off. This right arises out of contract and does not violate Art. 14.

B. Education

An order of cancellation of examination and debarring a student for allegedly adopting unfair means based on no evidence is liable to be quashed.[36] Section 62 of the Karnataka State University Act, 1976 empowers the syndicate to debar students involved in malpractice. The Karnataka High Court however held that there being no guidelines, punishment should not be a deterrent one. It should be reformative. Thus, debarring for 10 semesters was held to be most arbitrary, unreasonable and excessive.[37] In *Mohammad Azaz v. Mahyamuk Shiksha Parishad, U.P.*[38] the awarding of punishment for mass copying to some, and letting of others, awarding of higher punishment to some and minor punishment to some was held to be discriminatory action. However, a distinction between students representing against punishment and one not representing at all was held to be permissible. Similarly, the punishment of rustication against a student charged of lighter misconduct and students charged of serious misconduct being awarded lesser punishment was declared discriminatory.[39] Forty-five days time is prescribed in Kerala for revaluation and communication, but there was delay of eight months. As a result, a student could not sit for her M.A. examination. The Kerala High Court held that the student is entitled to be indemnified for damage ensuing from arbitrary act of the University.[40] The U.P. High Court has held that a candidate who has passed two - year degree course in B.Sc. from the Kashmir University cannot be denied admission in the Allahabad University. Such a denial is a violation of Article 14.[41] In *Renu Tyagi v. State,*[42] the Uttar Pradesh High Court held that withholding of results of some students on the charge of mass copying

34 AIR 1991 All 369.
35 AIR 1991 AP 258.
36 *Patel Jagrutiben Kalabhai v. Gujurat Secondary Education Board,* AIR 1992 Guj 45.
37 *Shivashankar Tallur v. Mysore University,* AIR 1991 Kant 169.
38 AIR 1991 All 362.
39 *Ajai Kumar Mittal v. Vice Chancellor, Rourkee University,* AIR 1991 All 177.
40 *University of Kerala v. Sandhya P. Pai,* AIR 1991 Ker 396.
41 *Vandana Tiwari v. Allahabad University,* AIR 1991 All 250.
42 AIR 1991 All 126.

based on mere suspicion, while declaring the results of other similarly situated students violates Article 14. In *Punjab University v. Ashwinder Kaur,*[43] it was held that giving weightage of 5% marks to the wards of employees of the University for admission to M.Lib. course is arbitrary and discriminatory. In *U.P. Junior Doctors' Action Committee v. Dr.B. Sheetal Nandwani,* [44] it was held that to comply with Art. 14, admission to post graduate course in medical colleges should be based on a selection test and not on MBBS results alone.

C. Taxation

Section 3 of the Karnataka Tax on Profession, Trades, Calling and Employment Act provides for levy of profession tax on lawyers. It consists of a classification based on lawyers practising within urban areas and those within districts, and also on the basis of number of years of practice. In *Shivananjudappa v. State of Karnataka,*[45] the classification was held to be based on intelligible differentia. Similarly, in *M/S Jyothi Video Theatre v. State of Haryana,*[46] the Punjab Entertainment Duty Act which permitted levy on video shows on more than one basis was held not to be discriminatory. In *M/S Jain Exports Pvt Ltd v. Union of India,*[47] reduction of duty on certain imported goods by the Central Government but not for other importers was held to be a discrimination. The Court held that other importers were entitled to pay duty at the concessional rate.

D. Principles of natural justice and Art.14

In the *Cantonment Board, Dinapore v. Taramani Devi* [48] it was held that once a decision upsetting a grant of sanction for the erection of building is given, it is obligatory to give hearing to the owner/lessor/ occupier as well as the Cantonment Board. In view of the ever-expanding scope of Art.14, no order shall be passed at the back of a person when it entails civil consequences. However, the same Court held in the *U.C.C. v. Union of India*[49] that the principles of natural justice should not degenerate into a set of hard and fast rules, and that there should be circumstantial flexibility in consequences of non-compliance. Similarly, in *Aditya Rotor Spin(P) Ltd Kanpur v. UP State Electricity Board* [50], the

43 AIR 1991 P & H 166.
44 AIR 1992 SC 671.
45 AIR 1992 SC 231.
46 AIR 1992 P & H 48.
47 AIR 1992 SC 1721
48 AIR 1992 SC 61.
49 AIR 1992 SC 248.
50 AIR 1991 All 196.

Board's power to disconnect electric supply without hearing was held not to be arbitrary since it was not unguided. Again, in *Andhra Civil Construction Co v. Government of India, Ministry of Shipping and Transport, New Delhi,*[51] the reservation of power to reject all offers in a tender, without assigning any reasons was held to be valid. But in *Indrajit Singh v. State of U.P.,*[52] the suspension of licence under the Arms Act, 1959 on a ground not mentioned in the show cause notice was held to be violative of principles of natural justice.

E. Service/employment and Art.14

Under the RBI Pension Regulation, a pension scheme was introduced, and all the bank employees who retired on or after 1.1.1986 were made the beneficiaries. This cut-off date was challenged as arbitrary in *All India Reserve Bank Retired Officers' Association v. Union of India.*[53] The Supreme Court held that compassionate ground, i.e., preference given to dependents of Government employees who die in harness amounts to reasonable classification.[54]

In *Shri Harishinh Pratapsinh Chavda, Gandhinagar v. Shri Chimanbha J.Patel,*[55] the removal of the Chairman of the Gujarat Water Supply and Sewarage Board was under challenge. The Court held that the appointment is political in nature. It is on the basis of subjective satisfaction on the part of state Government. It is left to the State government to decide the qualifications as well as determination of office. Such a policy decision is not violative of Art. 14.

In *Om Prakash Goel v. Himachal Pradesh Tourism Development Corpn Ltd Shimla,*[56] the petitioner who was an accountant in the Respondent's office, received a termination order stating that his services were no longer required. However, persons junior to him were retained in service. This Order was held to violate Art. 14.

Rules 3 and 4 of the M.P. Rules under the Medical Council Act provided for the selection of candidates for appointment as House Officers in Medical Colleges. The Rules provided for cent percent reservation for institutional candidates. This was held to be discriminatory and violative of Art.14. [57] In *Anand Bihari v. Rajasthan State Road Transport Corporation,*

51 AIR 1991 Mad 119.
52 AIR 1991 All 228.
53 AIR 1992 SC 767.
54 AIR 1991 Pat 90.
55 AIR 1991 Guj 115.
56 AIR 1991 SC 1490.
57 *Smt. Mitali Choudhary v. State of M.P,* AIR 1991 SC 724.

Jaipur,[58] the services of some bus drivers were terminated on the ground that they had developed eye-sight below the standard required. However, no altenative employment was offered to them. The Supreme Court held that the action of the Corporation was not justified.

The Government of India (Department of Personnel Training) Office Memorandum provided for promotion under the 'sealed cover' procedure. An employee who was found guilty of misconduct was not promoted. The Court held that an employee has no right of promotion. He has only a right to be considered for promotion. To qualify for promotion, the least that is expected for an employee is to have an unblemished record. Thus such an employee cannot be placed on par with other employees, and treating his case differently is not discriminatory.[59]

Article 15

In *Omana Oomen v. FACT Ltd,* [60] the employers used Sec.66(b) of the Factories Act, which was made for the benefit of the women workers, to their disadvantage. Sec.66(b) excludes employment of women in any factory, except between the hours of 6 a.m. and 7.p.m. The employer eliminated the female candidates for the posts of Technicians as they have to work in three shifts, two of which are night shifts. They contended that because of Sec.66(b) they canot employ female technicians. The Kerala High Court rejected this contention and pointed out that Sec.66(b) so as to enable women employees to work between 5 a.m. and 10 p.m. So, it is possible to accomodate two shifts during that period. The only reason mentioned for eliminating women from employment is therefore unsustainable. Hence, such elimination violated Art.15 of the Indian Constitution.

Promoting the objective of gender justice contained in Art, 15(3) of the Constitution, the Andhra Pradesh High Court in *Toguru Sudhakar Reddy* v. *Govt of A.P*,[61] upheld the provision in Andhra Pradesh Co-operative Societies (Amendment) Act of 1991 which provided for the nomination of women to the management Committee of the Co-operative Societies. The Court upheld the provision as a valid legislative measure designed to protect and promote the interests of women and ensure their participation more effectively in a greater measure in the Co-operative Movement. Therefore, it does not suffer from the vice of arbitrariness forbidden by Art.14 of the Constitution.

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58 AIR 1991 SC 1003.

59 *Union of India v. K.V. Janakiran*, AIR 1991 SC 2010.

60 AIR 1991 Ker 129.

61 AIR 1992 AP 19.

Art.15(4) has been subject matter to umpteen number of judicial attacks. This was not a simple matter as sociological and economic considerations came into play in evolving proper criteria for its determination. The problem arose because Art.15(4) lays down no criteria to designate backward classes, it leaves the matter to the states to specify backward classes. The Courts have been asked to go into the question whether the criteria used by the state are relevant or not. From the several judicial pronouncements concerning the definition of 'backward classes', several propositions emerge. Firstly the backwardness envisaged by Art.15(4) is both social and educational backwardness and not either social or educational. Secondly, poverty alone cannot be the test of backwardness in India. Thirdly, backwardness should be comparable to Scheduled Castes and Scheduled Tribes. Fourthly, caste may be a relevant factor to determine backwardness, but it cannot be the sole or even dominant criterion. Fifthly, poverty, occupation, place of habitation, all contribute to backwardness and such factors cannot be ignored.

In the light of previous rulings of the Supreme Court on reservation to 'backward classes', the Himachal Pradesh High Court upheld the reservation in *Asheesh Sharma v. H.P. University*[62] where certain panchayats were identified as backward areas and seats were reserved for the candidates belonging to these areas. The number of exams they had to clear was also reduced. The petitioners contended that such reservation was not sustainable in law as it was not possible to hold that the large number of panchayats, which have been declared to be backward areas, were all both socially and educationally backward. The Court added that the requirement that the area should be both socially and educationally backward presupposes that a candidate who claims the benefit of coming from such an area for being considered should show that he was associated with that area to such an extent that he may be treated to be handicapped in some measure on that account. The Court viewed it to be reasonable in view of the condition prescribing a minimum number of exams to be passed by them also. The Court was propounding the social justice concept in upholding such reservations. In another case,[63] the Allahabad High Court upheld the admission of a candidate belonging to S.C./S.T. category with 40% marks saying that law permits such classification.

The A.P. High Court stressed on a uniform policy on these reservations. In *Dileep Damodaran v. Secretary of Govt Education Dept*,[64] the A.P.

62 AIR 1991 HP 39.
63 *Dr. Anupam Gupta v. The Secretary of Medical Health*, AIR 1992 All 3.
64 AIR 1991 AP 194.

High Court says that in so far as the general policy of reservations is concerned, be it in favour of S.C, S.T, B.C. or any other categories like N.C.C. or the defence personnel, it is necessary to have some form of uniformity with regard to the percentage prescribed by the authorities. It cannot be left to the universities to determine various percentages in accordance with their own assessment of the situation of reservations required for reserve categories of persons.

The special provision for S.C, S.Ts under Art.15(4) is not confined to the area of educational institutions alone, though majority of the cases deal with them. In *Jagdambe Niwad v. Punjab National Bank,*[65] the words in the Government notification providing for exemption from payment of court fees by the persons belonging to S.C. or S.T. was given a liberal interpretation. Though the word used is 'plaint', it has been held to include a memorandum of appeal. The Court says that 'appeal' is an extension of suit, therefore, 'plaint' and 'memorandum of appeal' are to be treated as pleadings of the same genre and the notification applies to both.

Article. 16

Art.16 has been invoked along with Art.14 in order to attack the arbitrary terminations or removals from public employment. In the case of *Om Prakash Goel v. Himachal Pradesh Tourism Development Corporation*[66] the Supreme Court held that Art.16 of the Constitution was violated because the adhoc services of the appellants were terminated arbitrarily while the other surveyors who were junior to him were retained. The termination order was quashed. In the case of *Shankaresan Dash v. Union of India* [67] the Supreme Court held that the candidate does not get any right to appointment by mere inclusion of his name in the list. The appellant was selected in the Central Civil Services (C.C.S) Exam held by Union Public Service Commission for Indian Police Service. His position in the merit list was not high enough to secure him a post in IPS and he was offered appointment to the Delhi, Andaman & Nicobar Police Service. Later, vacancies arose in IPS. The seats in the reserved category were filled, but not the general category. The appellant by a request prayed that these posts were also to be filled up and that he should be appointed. This was turned down. The Supreme Court, on appeal held that no right under Art.16 was violated merely because of the inclusion of his name in the list. The final selection is subject to the satisfactory report on the character, antecedent and suitability of the candidate.

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65 AIR 1992 MP 35.
66 AIR 1992 SC 1490.
67 AIR 1991 SC 1612.

The Court in its zeal to control arbitrariness in the matters of employment has evolved various guidelines in the selection of candidates. One of such attempts has been to fix a maximum percentage of marks that could be allocated for *viva-voce* or interviews. Thus, in *Ashok Kumar Yadav v. State of Haryana*[68] and in *Mohinder Sain Garg v. State of Punjab*[69] the Supreme Court held that only 15% of the total marks can be alloted for *viva-voce*. Following this the Supreme Court struck down as invalid the allocation of 50 marks for interview and 100 for written exam in the Selection of Assistant Engineers for the Public Works Department in *Sri Ashok v. State of Karnataka*.[70] Similar was the decision in *Munindra Kumar v. Rajiv Goel* [71] and in *Dr. Faizullah Peer v. Union of India*.[72]

A question arose which was similar to that of *D.S.Nakara v. Union of India*[73] in *All India Reserve Bank Retired Officers Association v. Union of India*[74] wherein a Pension Scheme was introduced in lieu of Contributory Provident Fund to the bank employees who retired after 1.1.86. This benefit was not given to the employees who retired prior to 1.1.86. This cut-off date was challenged as being arbitrary, artificial or whimsical. Reiterating the principle in *Nakara's case,* the Supreme Court held that whenever any rule or regulation having statutory flavour is made by an authority the choice of cut-off date which has necessarily to be introduced to effectuate such benefits is open to scrutiny by the courts and must be in tune with Art.14. In other words, the classification is to be based on an intelligible differentia and on rational considerations which bears a nexus to the purpose and object thereof. But, the Court seems to have differentiated the present case to arrive at a different conclusion. The Court says that when an employer introduces an entirely new scheme which has no connection with the existing scheme, different considerations enter the decision-making process. One such consideration may be the financial implications of the scheme and the extent of capacity of the employer to bear the burden. The Court further emphasized: "The cut-off date 1.1.86 is not arbitrarily fixed by the Bank authorities. They had not acted mala fide with a view to deprive those who had retired on or before 31st. Dec. 1985 of the benefit of the pension scheme but it was not practicable to extend the benefit to such retirees." The fact that service records of persons retired prior to the cut-off date were not available also justified the reason for not

68 AIR 1987 SC 454.
69 (1990) 4 JT SC 704.
70 AIR 1992 SC 80.
71 AIR 1991 SC 1607.
72 AIR 1991 All 309.
73 AIR 1983 SC 130
74 AIR 1992 SC 167.

extending the benefit to those who had retired.[75]

Art.16 allows classification for the purpose of employment on rational grounds which have intimate nexus with the object. In *Jagannath v. Union of India*,[76] the classification of compositors of Govt. of India press into Grade - I (Highly skilled) and Grade II (Skilled) based on experience arising out of length of service was held not bad. It was held that "experience itself is a merit and it can be a valid basis for classification." In a skilled job requiring special techniques, it would be reasonable to measure the standards of skill by length of experience. This is not violative of Articles 14 or 16.

The reservations which can be made under Art.16(4) has been the subject of numerous cases. The State can make special provisions and Art.16(4) is an exception to Art.16(1). The courts have been upholding the reservations for S.Cs and S.Ts as backward class are not adequately represented in the opinion of the state. Various statutory rules have been framed providing for special concessions to S.C and S.Ts not just at the stage of recruitment, but also in promotions. In *Controller and Auditor General v. Mohan Lal Mehrotra*[77] a circular issued by CAG for the purpose of reservation for S.C.s and S.Ts in the promotion was upheld. The statutory rules for the posts of accounts officers did not provide for any reservation to S.Cs and S.Ts. So, the circular was challenged. The High Court held that the administrative instructions contained in a circular on its own did not make any provision for the proposed reservation in pursuance of the policy-decision. The method of promotion was provided in the statutory rules. So, it is not open to the Govt. to supplement the statutory rules to fill up the gaps. This could be done only by amending the statutory rules. The Supreme Court reversed this and held that the Govt. could direct the reservation by executive orders. The administrative order cannot be issued in contravention of the statutory rules, but it could be issued to supplement the statutory rules.

In contrast to the earlier case, where reservations were made in promotions also for the S.Cs and S.Ts by a circular, in this case it was held that S.C and S.T. candidates are to be treated equal to the other candidates

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75 In *B.P. Singh v. D.G. Ordanance Factory & Others* (AIR 1991 SC 1805), the teachers in Defence department challenged the memorandum fixing their retirement age at 58 years as discriminatory as the other government departments have it at 60 years. The memo allowed the teachers already in service prior to 1.4.89 the benefit of 60 years. Held, this was not discriminatory.

76 AIR 1992 SC 126.

77 AIR 1992 SC 2288.

after they get into the service. In *Mohan Kumar v. Union of India,*[78] the second proviso to Rule 4 of the Civil Service exam rules, where every candidate already in the Civil Service but intending to appear in the next exam has to resign from the service in order to appear so, was challenged on the ground that it is not applicable to S.C. or S.T candidates. The Supreme Court rejected this contention and held that in the normal course, a candidate belonging to the S.C or S.T category can enjoy all the benefits under the rules and regulations. But, the restriction imposed by second proviso is only for a specified category of candidates by treating all such candidates at par and without making any exception to the candidates belonging to S.C. or S.T. Once they get through one Common Entrance test and are allocated to a service based on their rank and performance, and brought under the one and the same stream or category, then they too have to be treated among all other regularly and lawfully selected candidates and there cannot be any preferential treatment at that stage on the ground that they belong to S.C or S.T.

Article 19

Art.19(1)(a) to (g) of the Constitution guarantees to the citizens of India six fundamental freedoms. These various freedoms are necessary to promote certain basic rights of the citizens. According to the Supreme Court, it is possible that a right does not find express mention in any clause of Art.19(1) and yet it may be covered by some clause therein.[79] This gives an additional dimension to Art.19(1). These freedoms are not absolute. Accordingly, Clauses (2) to (6) of Art.19 lay down the grounds and purposes for which a legislature can impose 'reasonable restrictions' on these rights.[80]

Art.19(1)(a) - Art. 19(a) guarantees to all citizens the right to 'freedom of speech and expression'. This Article has been invoked to protect the freedom of press. Any action adversly affecting the press, might violate Art.19(1)(a). The proprietors of presses invoke 19(1)(a) more often than not. In *Canara Bank v. Taraka Prabhu Publishers Ltd* [81] the petitioners, the publishers of "Udayam" Telugu daily newspaper had borrowed huge sums of money from the Canara Bank. When they failed to repay the loan, the bank exercised its right to set-off and transfered the money from the current a/c to the loan a/c. The petitioners contended that it violated Art. 19(1)(a) and Art.21 of the Private Company. The A.P. High Court rejected this argument as having been extremely far fetched. The Court said that

78 AIR 1992 SC 1.

79 *Maneka Gandhi v. India,* AIR 1978 SC 597.

80 M.P. Jain Indian Constitutional Law, Tripathi, 1989 p 523.

81 AIR 1991 AP 258.

the proper law to be applied is the contract law and the right of set-off claimed by the banks cannot be denied on the pretext that the transfer will result in the negation of the activities of the petitioners in publishing the newspapers, weeklies, etc.[82]

Art.19(1)(e)

In *Louis v. Union of India* [83] the petitioners who were foreign nationals challenged the orders asking them to leave the country. On their contention that foreigners also enjoy some fundamental rights, the Supreme Court reiterated that the fundamental rights of the foreigners is confined to Art.21 for life and liberty and does not include the right to reside and settle in this country. It also stressed that the power of the Government of India to expel foreigners is absolute and unlimited, as held in *Haus Muller of NurenUmger v. Superintendent, Presidency Jail, Calcutta.*[84] There is no provision in the Constitution fettering this discretion.

Art. 19(1)(g)

Art. 19(1)(g) guarantees to all citizens the right to practise any profession or to carry on any occupation, trade or business. Under Art.19(6), however, the State is not prevented from making a law imposing, in the interests of the general public, reasonable restrictions on the exercise of the above right. In the light of the state economic policies, this is one right which is invoked the most.

In *Ashoka Marketing Ltd. v. Punjab National Bank*[85] the words public premises contained in Section 2 (e) of the Public Premises (Eviction of Unauthorised Occupants) Act of 1971 came up for consideration. The petitioners contended that if 'premises used for commercial purposes' are included, it would violate Art.19(1)(g). The Court rejected this contention and held that the Act serves a public purpose viz., by making available for use, public premises after eviction of persons in unauthorised occupation. There is no reason to assume that such a need will not be there in respect of commercial premises, and it is not necessary to confine it to only residential premises.

In *Hans Raj Bhartiys & Co. v. Union of India,*[86] the order imposing restriction on sale of free sugar by one wholesaler to another and reducing

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82 *See* also *Dainik Bhaskar v. Madhusudan Bhargava,* AIR 1992 MP 162.
83 AIR 1991 SC 1886.
84 AIR 1955 SC 367.
85 AIR 1991 SC 855.
86 AIR 1991 Del 83.

the period of turning over of stocks from 10 to 7 days was challenged as violative of Art.19(1)(g). The Court rejected this contention and upheld the order as the intention of such imposition was to keep the continued flow of sugar in the market so that the consumers may not suffer. This regulatory measure is in the supreme public interest and also with a view to prevent hoarding and black-marketing and to ensure equitable distribution and availability of sugar at fair prices in the open markets. Therefore, the order is reasonable and not violative of Art.19(1)(g).

In *Modi Industries Ltd.* v. *Executive* Engineer,[87] where additional charges at rate of 25.5% were prescribed on unpaid amount of electricity bill, it was contended that it violated Art.19(1)(g). The Court said that it could not be termed as penalty, but only a device to ensure timely payment when the same was applicable to consumers who were big industries whose bills for electicity ran into several crores per month and as such was neither arbitrary nor unconscionable.

In *M/s International Data Management Ltd v. State of U.P.*,[88] the Secretary to Govt. of U.P addressed a letter to the heads of Govt. departments, public corporations and other local bodies asking them to obtain electronic goods from M/s Uptron (Indian) Ltd alone. This the Allahabad High Court held not to be violative of Art. 19(1)(g) of the petitioners. The Court held that the other industries were free to carry on their business. There is no fundamental right in the petitioner company to compel the Govt. to purchase their products. No such right flowed from Art.19(1)(g). Nor was there any other statutory provision.

In certain types of trade and business the courts have held that there is no absolute right to carry on trade. The State can impose restrictions in public interest. One such situation arose in *Goodwill Paint v. Union of India*.[89] The Poisons Act, 1919 by Sec.5 gave power to the State Govt. to include any substance as poison for the purpose of restriction to be imposed on the possession or for sale. The Supreme Court upheld such a provision on the ground that it enables the State Govt. to make rules generally to carry out the purposes and objects of the Act. The nature of the trade in poison is such that nobody can be considered to have an absolute right to carry out the same. It is a business which can be termed even as inherently dangerous to the health and safety of the society in view of the rampant misuse and sale to the poor, weak and helpless as an intoxicant.

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87 AIR 1991 All 351.
88 AIR 1991 All 369.
89 AIR 1991 SC 2150.

Another of such type of trade is one of 'liquor' or 'intoxicants'. In *Doongarj Co. v. State of Madhya Pradesh,*[90] the appellant has licence to carry on the trade to distil rectified spirit and for wholesale supply of country-made liquor. By tenders, the Govt. became the licencee and it dispossessed the petitioner. The petitioner challenged the dispossession of his distillery. This was upheld by the Supreme Court which reiterated once again that "there is no fundamental right to a citizen to carry on trade or business in liquor".

Another area of strict regulation is in drugs and medicines. In *Balwant Rai v. State of J & K,* [91] the petitioner was a practitioner of Ayurvedic and Unani medicine. The Govt seized certain drugs from his premises. He sought for a Writ of prohibition to quash seizure and contended that Art.19(1)(g) was violated. The J & K High Court, held that the provisions and Rules made under the Act are in public interest at large to ascertain purity and standard of drugs and medicines for the public health. Hence, it is not violative of Art.19(1)(g) and is a reasonable restriction.

The State has been imposing more and more restrictions on the activities which tend to deceive the public and can affect public health. In *Subhodaya Chit Fund(P) Ltd v. Director of Chits,*[92] Sec.12 of the Tamil Nadu Chit Funds Act, 1961 imposed a condition that cash security was to be deposited. This was upheld by the Supreme Court as needed in public interest.

In *Kailash Chandra Sharma v. State of Madhya Pradesh,* [93] the M.P. High Court upheld a provision for the conservation and preservation of forests. With this object in view, the State Govt. declared certain areas to be prohibited areas and that no saw mills and saw pits be operated in that area. This was upheld by the Court to be in public interest of conservation of forests and environment. There is no fundamental right in any citizen to carry on business wherever he chooses absolutely. The executive authority can impose restrictions in public interest.

The problems arising out of nationalisation of state monopoly and denationalisation have also been the subject matter of judicial attention. In *Kanmula Seshama* v. *Bharat Petroleum Corporation Ltd* [94] the A.P. High Court upheld Sec.5(1) and (2) of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 as the Act was basically and essentially

90 AIR 1991 J&K 20.
91 AIR 1991 J&K 20.
92 AIR 1991 SC 998.
93 AIR 1991 MP 175.
94 AIR 1991 AP 268.

necessary for giving effect to the objects of the State policy. This is in implementation of the policy of progressively securing the ownership and control of the production of nation's petroleum resources and distributing them to subserve the common good. This is protected by Art.31-C inasmuch as they are enacted to give effect to the State policy in Articles 39(b) and (c).[95] In contrast to this decision the Supreme Court upheld privatisation in *Churk Cement Mazdoor Sangh v. State of U.P.*[96] The writ petitions called in question the validity and legality of the sale by the Govt. of U.P. of 51% shares in a wholly Govt. owned Public Sector Corporation U.P. State Cement Corp. Ltd, in favour of Dalmia Industries. The Company was a sick unit and the Govt. felt that it was not possible to redress the situation by rehabilitation. The Supreme Court upheld the action of the Govt. The Court said: "It is true, that on the basis of the provisions in Art.19(6), nationalisation must be deemed to be in public interest. But, from this it does not follow that any and every act of denationalisation or privatisation is *per se* contrary to public interest." Indeed, in a given case, privatisation may be in public interest. So long as the decision is arrived at by the Govt. bonafide, the Court cannot sit in judgement over it. Nor is the decision violative of Arts. 38 and 39. In *Ravinder Nathu v. State of Himachal Pradesh,*[97] the H.P. High Court upheld the State monopoly created in Resin Products as permissible under Art.19(6). The earlier cases of *Cooverjee v. Excise Commissioner*[98] and *D.Satyanarayana Murthy v. APSRTC* [99] was reiterated.

In *Gowri Shankar v. State,*[100] the State govt's notification that any person can be a notary for only 6 years or 2 terms was sought to be impugned being arbitrary and against public policy. The Court held it to be against public policy saying, "It will be manifestly against public interest, if one who has accumulated experience of 6 years is scuttled merely for giving new job opportunities to other persons. In a recent Supreme Court decision in *Soudhan Singh v. New Delhi Municipal Corp.*[101] the judgement of *Sodan Singh v. N.D.M.C.*[102] was reiterated. The Court felt that Arts.14, 19(1)(9) and 21 are violated if permits to trade on streets and footpaths in Delhi are refused. 'Street trading' is a fundamental right under Art.19(1)(g), but it is subject to reasonable restrictions. This right does not

95 *See also, S. Kanakaraj v. Govt. of Tamil Nadu,* AIR 1991 Mad 182, and *Maharaja Tourist v. State of Gujarat,* AIR 1991 SC 1650.
96 AIR 1991 All.
97 AIR 1992 HP 20.
98 AIR 1954 SC 220.
99 AIR 1961 SC 82.
100 *See also, State of Karnataka v. Javeed Hudes,* AIR 1991 Kant 235.
101 JT 1991(2) SC 190.

extend to a citizen occupying or squatting on any specific place of his choice on the pavement regardless of the right of the pedestrains to make use of the pavement. The Court permits a citizen to hawk on the street pavements by moving from one place to another without being stationary.

Article 20

(a) Art.20(1)

Art.20 has three clauses. Art.20(1) provides that no person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, not be subjected to a penalty greater than that which might be inflicted under the law in force at the time of the commission of the offence. This article and the fundamental right involved was upheld in *Souri Devraj Ghai v. State of Gujarat*[103] by the Supreme Court. This was a case of dowry death where the father of the deceased filed an application for committing the case to the Court of Session for trial for an offence punishable under Sec.304-B, I.PC. This section was introduced on 19.11.1986, whereas the offence was committed on 13.8.86. The respondent resisted such an application under Art.20(1). The Court agreed with his contention saying that Sec.304-B is a substantive provision creating a new offence and not merely a provision effecting a change in procedure for trial of a pre-existing substantive offence. It is not a rule of evidence, but creates a new offence. So, Art.20(1) prohibits such application of Sec.304-B to an offence committed before its insertion in I.P.C.

(b) Art.20(3)

Art.20(3) provides a right to a person not to be compelled to be a witness against himself. In *Delhi Judicial Service Association v. State of Gujarat,*[104] the question whether Art.20(3) was applicable to contempt proceedings came up. The Police Officers arrested a Chief Judicial Magistrate and undermined his dignity because of which contempt proceedings were initiated against them. A Commission was set up for this purpose. The Commission invited affidavits, recorded statements and examined witnesses. The police officers contended in their affidavits that such a procedure amounted to compelling them to be witnesses against themselves. The Court rejected this argument and held that "Art.20(3) is applicable only if three conditions are satisfied—(1) the person must be accused of an offence, (2) the element of compulsion to be a witness should be there and

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102 (1988) 4 SCC 155.
103 AIR 1991 SC 2173.
104 AIR 1991 SC 2176.

(3) it must be against himself. The mere issue of notice or pendency of contempt proceedings do not attract Art.20(3) as the contemnors against whom notices were issued were not accused of any offence. The contempt proceedings are *sui generis* and has peculier features which are not found in criminal proceedings. In this view Art.20(3) is not attracted.

In another case of *Rajendra Manubhai v. State of Gujarat,*[105] the petitioners unsuccessfully attempted to challenge the action of the Lokayukta in summoning them to remain present as witnesses along with documents. This they maintained violated their right under Art.20(3) as the identity of the complainant, the public functionaries involved and the nature of the allegations made are not disclosed. The Court held that "the mere apprehension of likely implication due to material being revealed during investigation will not justify the petitioners and Art.20(3) is not intended to guarantee protection to such persons who are not accused of an offence."

Article 21

Article 21 of the Constitution which protects the 'right to life' of an individual is the most expanding right in its scope. 'Right to life' is not mere animal existence, but includes the right to live with freedom and dignity. The Supreme Court has widened the scope of Art.21 to include the 'right to livelihood'.[106]

In *State of Bihar v. P.P.Sharma*[107] criminal proceedings were initiated against the Chairman of Bihar State Co-operative Marketing Union Ltd. for the purchase of sub-standard fertilisers, cheating and criminal conspiracy. The Chairman contended that the criminal proceedings were initiated to harrass him and therefore, his right to life and livelihood were affected. The Court rejected this contention and held that the accused should bring to the notice of the Court of the personal bias and his reasonable belief of malafides in investigation by pleading and proving the material facts. If he stands by till the charge-sheet was filed, it must be assumed that he has waived his objection. He cannot turn around after seeing the adverse report to plead the alleged malafides. Hence, it is not violative of Art.21.

In *Louis v. Union of India*[108] the Supreme Court held that the fundamental rights of the foreigner is confined to Art.21 and does not include the right to reside and settle in India.

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105 AIR 1992 Guj 10.
106 *Olga Tellis v. B.M.C.* AIR, 1986 SC 180.
107 AIR 1991 SC 1260.
108 AIR 1991 SC 1886.

In *Bimal Prasad Das v. Bijayananda,* [109] a public-spirited advocate of the Orissa High Court Bar Association filed an application challenging the call given by the Chief Minister of Orissa in newspapers to beat corrupt officials, after taking permission from him. The petitioner contended that it is violative of Art.21. The Court held that as the basic idea behind the C.M.'s call for beating up corrupt officials was to instil a fear psychosis in their mind by making them known that the Govt. would not tolerate corruption and strong remedial and disciplinary measures would be taken in these cases. This is in no way violative of the rule of law.

Rendering 'speedy justice' has also been included in 'right to life'.Any delay in the execution of death sentence entitles it to be commuted under Art.21. In *Shivaji Jaising v. State of Maharastra* [110] and also in *Daya Singh v. Union of India,*[111] the death sentence was commuted because of the delay in the consideration of the mercy petition filed with the President. The Court, however, did not express any precise and decisive opinion as to fixed period within which a mercy petition should be disposed of.

By an expansive interpretation of Art. 21, the victims of riots were awarded compensation in *Indupuri General Store v. Union of India,*[112] where the petitioners all belonging to Sikh community, suffered enormous losses in the communal riots which took place in Jammu. They demanded compensation from the Govt. The Court held: the term 'life' used in Art.21 is not only restricted to the mere nominal existence but extends to the inhibition against its deprivation to all those limits and faculties by which life is enjoyed. It also includes right to livelihood. As and when life and property is taken away by any individual or organisation, a duty is cast upon the state representing the will of the people to compensate the victims by granting adequate compensation. On their failure to protect the life, liberty and property of the citizens, state is under a constitutional obligation to compensate the victims adequately. It cannot be said that the state was under no obligation to compensate the victims of communal riots.[113]

In *Delhi Development Horticulture Development Employees Union* v. *Delhi Administration,*[114] the petitioners were workmen receiving daily wages who sought their absorption as regular employees under Delhi

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109 AIR 1992 Ori 10.

110 AIR 1991 SC 2147

111 AIR 1991 SC 1548.

112 AIR 1992 J&K 11.

113 *See also Delhi Development of Horticulture Employees Union v. Delhi Administration,* AIR 1992 SC 789.

114 *Ibid.*

Administration. The respondents contended that they were employed on daily wages with a clear understanding that the schemes under which they were employed had no provision for regularisation of any workmen. The Central Government decided to discontinue the scheme. The Union wanted to apply the ratio in *Olga Tellis Case* accoring to which the right to life would include within itself the right to livelihood. The Court, making a realistic assessement of Art. 41 of the Constitution of India said that the right to work within limits of its economic capacity and development and the framers of the Constitution thought it prudent not to do so without qualifying it. However, the Court gave direction to the Delhi Administration to give preference in the case of vacancy in the regular posts.

Article 22

Article 22 of the Constitution falls under the broad perview of the fundamental right to freedom, but to be more specific, this article deals with protection against arrest and detention in certain cases. Art. 22(5) confers two inportant rights on persons detained under preventive detention law :

1. the right to be supplied the grounds of his detention; and
2. the right to be given an early opportunity of making an effective representation against the order.

With reference to the scope and content of Art. 22(5), judicial activism of the Supreme court came out very clearly in *Amir Shah Khan v. I. Hminglians* [115] where the apex court said, "when a person is placed under detention he has certain handicaps and if he makes a request that a representation prepared by him may be forwarded to the Central Government as well as the State Government for consideration after taking out copies thereof it would be a denial of his right to represent to the Central Government, if the detaining authority as well as the State Government refuse to accede to his request and omit to forward his representation to the Central Government." Thus the Supreme Court widened the scope of the right of the detenue to represent against the order.

A similar trend was discernible in *Anil Vats v. Union of India* [116] where the Supreme Court held that where the person proposed to assist the detenue was present at the relevant time and place, the refusal of friend's assistance on ground that the detenue is a graduate would be violative of Art. 22 (5) and would render the detention order invalid. The Court came

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115 (1991)4 SCC 39 at 42.
116 AIR 1991 SC 979.

to this conclusion based on the disturbed mental and physical condition of the detenue in custody. Another ground for invalidating the detention order was given in *Julia Jose Mavely v. Union of India* [117] where the Supreme Court held the detention under the COFEPOSA Act as violative of Art. 22 (5) of the Constitution owing to the undue and unexplained delay of 28 days in forwarding comments of sponsoring authority. But in *Kamarunnissa v. Union of India* [118] the Supreme Court was inclined to condone the delay in the service of order to the detenue by eleven days, on the ground that the delay was due to time spent in getting certain documents translated in detenue's language and five out of eleven days were holidays. The Court opined that it was not sufficient to say that the detenue was not supplied with the copies of the documents in time on demand but it must further be shown that the non-supply has impaired the detenue's right to make an effective, meaningful and purposeful representation. On echoing somewhat similar sentiments the Supreme Court spoke in *Adbul Sathar Ibrahim Manik v. Union of India,* [119] where it was held that if the detaining authority merely refers to the bail application and the order refusing bail in the narration of events and has not relied upon them, then the failure to supply copies of the same to the detenue cannot affect his right of being afforded a reasonable opportunity guaranteed under Article 22 (5) of the Constitution. It was left to the Court to examine whether in a given case the detaining authority has casually or passingly referred to such documents or relied upon them. In *Union of India v. Mohammed Ahmed Ibrahim* [120] the respondent detained under Sec. 3 of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act 1974, contended that certain documents which formed the basis of the satisfaction of the detaining authority were wholly illegible and unreadable and hence constituted a denial of effective representation under Art. 22(5). The High Court was of the opinion that there was no justification for any such opportunity. The Supreme Court set aside the order of the High Court and remitted the matter for fresh consideration in accordance with facts of the case.

Articles 23 and 24 of the Constitution guarantee the right against exploitation by prohibiting traffic in human beings, forced labour and employment of children in factories, etc. Article 23 embodies two declarations. First, that traffic in human beings, begar and other similar forms of forced labour are prohibited, and second, that any contravention of the prohibition shall be an offence punishable in accordance with the law.

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117 AIR 1992 SC 139.
118 AIR 1991 SC 1640.
119 AIR 1991 SC 2261.
120 AIR 1992 SC 778.

The *Bandhua Mukti Morcha v. Union of India* [121] was considered as a landmark case on this issue where the apex court held that the kind of labour which existed in the stone quarries was bonded labour and was hence violative of Art. 23 of the Constitution which prohibits such labour. But since the condition had not improved despite the Court's judgement, a letter was addressed to the Supreme Court complaining about prevalence of bonded labour system in Faridabad District of Haryana State, wherein the stone quarries workers were living in most inhuman conditions. This letter was treated as a writ petition under Article 32 of the Constitution by the Supreme Court in *Bandhua Mukti Morcha v. Union of India.* [122] The Court, finding the necessity of an indepth investigation into social and legal aspects of the problem appointed a Committee to look into the problem. The Report submitted by the Committee indicated inhuman living and working conditions in quarries, deprivation of amenitites and ecological problems. The Court referred to available literature on material aspects; took into account the report of the Committee and also took note of the position that the Presidential Ordinance of 1975 for abolition of bonded labour and the subsequent parliamentary legislation in 1976 were seeking to implement the mandate of Article 23. Owing to the existence of this practice for centuries and other related factors the Court did not treat the writ petition as disposed of by its judgment and the application survived for further monitoring. The Court issued several directions to the Central Government, State of Haryana and various other authorities with the aim of improving the living and working conditions of the stone quarry workers. The petition was disposed of directing that the State of Haryana shall ensure that people who have been identified numbering about 2000 are continued in work with the improved conditions of service and facilities as given by the Court and such of those who wanted to go back to their native areas be treated as released from bondage. The Court also directed that appropriate action must be taken in accordance with Government of India's scheme forthwith.

Articles 25 and 26 which should be read together, protect matters of religious doctrine or belief as well as acts done in pursuance of religious-rituals, ceremonies, etc. These articles serve to emphasise the secular nature of Indian democracy which the founding fathers considered should be the very basis of the Constitution.[123]

In order to claim the rights given under both these articles, it is imperative to know about the applicability of these articles. The Calcutta

121 (1984) 3 SCC 161.
122 (1991)4 SCC 177.
123 V.N. Shukla, Constitution of India, Eastern Book Co., Lucknow 1988, p. 143.

High Court in *Commissioner of Police v. Acharya Jagadishearandu*[124] interpreted the word religion appearing in Article 25. It said that the wording in Article 25 does not refer to 'a religion' but to 'religion' without any qualification. The absence of the word 'a' means that the reference in the article is to religion in general. A practice to be 'religion' within the meaning of Art. 25 (1) need not be adopted by all members of a religion and cannot be denied if it is shown to be performed as an act of faith by a religious denomination. The words religious denomination came to be interpreted in *State of Tamil Nadu v. Velampatti Nadar Uravinmuraiku Pathiayapatta.* [125] The Madras High Court while interpreting the words 'religious denomination' occuring in Article 26 said that the words 'religious denomination' must take their colour from the word 'religion' and if this be so this expression must also satisfy three conditions:

1. it must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to spiritual well being i.e., a common faith;
2. common organisation ; and
3. designation by a distinctive name.

After having given the definition for the words 'religious denomination' the Court went to the facts of the case and concluded that since there was no oral or documentary evidence on record to prove that members of Vilampatti Hindu Nadar community had a system of belief or doctrines or religious tenets peculiar to themselves other than those common to the Hindus in general, it is not a 'religious denomination' under Art. 26 of the Constitution.

The interpretation of Article 25 and 26 was sought to be made clearer by the Calcutta High Court in *Commissioner of Police v. Acharya Jagadishwarananda Abadhata* [126] where the Court opined that the right of religious denominations under Art. 26 (b) may be termed as organisational rights as distinct from personal rights guaranteed under Art. 25. The Court felt that a matter of religion does not mean to be a matter accepted and practiced by the entire religion of which the denomination may form a part. Therefore the Anand Margis who are followers of Ananda Marg were held entitled to claim protection under Articles 25 and 26 of the Constitution for performance of the *Tandava Dance* in public procession as a part of their religion. The Court also observed that it could not be said that by

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124 AIR 1991 Cal 263.
125 AIR 1991 Mad 233.
126 AIR 1991 Cal 263.

reason of recentness of the practice to perform *Tandava Dance* in public procession by Anad Margis, it could not form part of religion or be a matter of religion.

Articles 31-1; 31B and 31C

Articles 31A, 31B and 31C save certain laws as given under each of these articles, from being declared as invalid on grounds of violation of certain fundamental rights. Article 31A of the Constitution saves laws providing for acquisition of estates etc, Article 31C saves laws giving effect to certain directive principles. The validity of three different laws was upheld taking refuge under the above mentioned articles.

In *Kannula Seshamma v. M/s. Bharat Petroleum Corporation Ltd. Madras* [127] Section 5 of the Burmah Shell (Acquisitions of Undertakings in India) Act, 1976 came to be challenged as violative of Articles 14 and 19 of the Constitution. The Andhra Pradesh High Court upheld the vaildity of the Section while referring to the decision of the same High Court in *Mustafa Hussain v. Union of India,* [128] where this Act was declared as not *ultra vires* Articles 14 and 19. The division bench in this case arrived at the aforesaid conclusion on the basis that, the provisions of Sec. 5 (2) and Sec. 7 (3) of the Act are basically and essentailly necessary for giving effect to the objects of the State Policy in Article 39 (b) and (c) of the Constitution and hence they recived protection of Art. 31 (C).

The Kerala High Court seemed to have taken similar opinion in *Elizabeth Samuel Aaron v. State.* [129] While upholding the constitutional validity of Super Clays and Minerals Mining Company (Pvt) Ltd. (Acquisition of Undertaking) Act, 1983 the Court said :

> Article 31 C gives protection in respect of a law giving effect to the ploicy of the State relating to all or any of the principles laid down in Part IV of the Constitution. It is obvious from the provisions of the Act that it is one falling under Clause (b) of Article 39, to secure that the ownership and control of china clay are distributed as best to subserve the common good. It is now established by decisions of the Supreme Court in *State of Tamil Nadu v. Abu Kavur Bai* [130] and *Trinsukhia Electric Supply Co. Ltd.* v. *State of Assam* [131] that there is "distribution" within the meaning of Art 39(b) when the legislative

127 AIR 1991 AP 268.
128 AIR 1981 AP 283.
129 AIR 1991 Ker 162.
130 AIR 1984 SC 326.
131 AIR 1990 SC 123.

measure is one of nationalisation and that such a law is eligible for, and entitled to the protection under Art. 31 C. The Act is therefore saved from any challange under Articles 14, 19 and 31C of the Constitution.

The validity of Section 15 of Rajasthan Ceiling on Agricultural Holding Act (11 of 1973) was upheld in *Gurbax Singh v. State of Rajasthan.* [132] This section empowered the State Government to direct the ceiling authority to re-open the case for determining the ceiling area in accordance with the provisions of the Act. The Supreme Court was of the opinion that since this Act sought to implement agrarian reforms, it was protected under Articles 31A and 31C of the Constitution.

In *Assam Sillimanate Ltd v. Union of India* [133] an argument was advanced on behalf of the company to the effect that if the compensation is not only illusory but producing negative result then the protective umbrella of Art. 31C is not available to the impugned law. The Supreme Court replying in the negative held that as and when Art. 31C is attracted, the alleged attack with regard to illusory nature of the amount does not survive at all for consideration. If the law fulfils the conditions adumberated in Art. 31C, no question of compensation arises because the said article expressly excludes not only Art. 14 and 19 but also Art. 31. When Art. 31C comes in, Art. 31 goes out.

Article 32

Article 32 was described by Dr. Ambedkar as "the very soul and the very heart of the Constitution. Our courts consequently remain flooded with a wide variety of cases arising under Article 32 of the Constitution.

The judicial trends with regard to access to justice have been classified under broad categories for the sake of clarity.

A. Cases under preventive detention law

The Supreme Court in *the Additional Secretary to the Government of India and Ors v. Smt. Alka Subhash Gadia and Anr,* [134] while interpreting its power to review the order of detention under Art. 32 said that the jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy was available. The Supreme Court then gave grounds on which courts have interfered with them at pre-execution

132 AIR 1992 SC 163.
133 AIR 1992 SC 938.
134 JT 1991(1) SC 549.

stage, where Courts are *prima facie* satisfied that (i) the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The Court then made it clear that the refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power but prevents their abuse and the perversion of the law in question.

Another interesting case which arose on this point was *Vivek Baid v. Chief Minister.* [135] Here the petitioner's father was an editor of a daily newspaper who was detained by the Sikkim Police. He filed a writ petition under Art. 32 alleging violation of his fundamental rights under Art. 19, and also that when he was arrested, he was repeatedly assaulted by the Sikkim Police. The Court, after considering all circumstances directed that the detenue be admitted in All India Institute of Medical Sciences for checkup and medical treatment the expenses of which were to be borne by the State of Sikkim.

B. Cases where PIL petitions were accepted by the Supreme Court

With the growing concept of judicial activism and the human rights doctrine, the courts have diluted the strict application of the principle of *locus standi* and are now accepting Public Interest Litigation (PIL), specially after the decision in *S.P. Gupta v. Union of India.* [136] This trend was found to continue even during the period of this survey. In *S.C. and W.S. Welfare Association v. State of Karnataka* [137] the Supreme Court, while upholding the validity of the PIL filed by an association representing the interests of the slum dwellers, said:

> Where a member of the public acting bonafide moves the court for enforcement of a fundamental right on behalf of a person or class of persons who on account of poverty or disability or socially or economically disadvantaged position cannot approach the court for relief, such member of public may move the court even by just writing a letter.

In *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*[138]

135 1991(2) SCALE 1172.
136 1981 Supp. SCC 87.
137 (1991)2 SCC 604.
138 (1991)3 SCC 347.

the Supreme Court accepted a PIL filed against the lessee of limestone quarrying in Doon Valley area on grounds of violation of conditions laid down by the Court, thus damaging the area and the environment. The Court upheld the PIL filed by the resident of a particular locality in *Bangalore Medical Trust v. B.S. Muddappa.*[139] In this case an open space reserved for park under a development scheme was unilaterally converted into a hospital site in favour of a public body by the Development Authority at the instance of the Chief Minister. In *Banwase Seva Ashram v. State of Uttar Pradesh,* [140] a PIL filed on behalf of the *adivasis* and other backward people, using forest as their habitat and means of livelihood, was accepted by the Supreme Court. This PIL was filed against the action of the State in declaring part of the land as reserved forest and starting acquisition and other eviction proceedings in respect of the other part. The action of the State was held to be violative of Art. 21 of the Constitution and the Court gave further directions for early compliance with the earlier directions of the Court. The *locus standi* of "Sub-Committee on Judicial Accountability" and the Supreme Court Bar Association to maintain proceedings for removal of Supreme Court Judge on grounds of misbehaviour etc. came to be questioned in *Sub-Committee on Judicial Accountability* v. *Union of India.* [141] The Court upholding the *locus standi* of the petitioners to sue opined that the matter was of such nature and the constitutional issues of such importance, that from any point of view the petitioners satisfy the legal requirements of the standing to sue.

In *Gudalure M.J. Cherian & Ors. v. Union of India & Ors.* [142] a petition under Article 32, in public interest was filed by three prominent Christians regarding the alleged rape of two nuns at Gajraula in Uttar Pradesh. Kuldip Singh J, directed the CBI to hold further investigations.

The only case where the PIL was not accepted was *Janata Dal* v. *H.S. Chowdhary.*[143] In this case the maintainability of a PIL filed under Article 32 in connection with the Bofors Gun deal case, came in for consideration. The Court while rejecting the PIL observed:

> It is most relevant to note that none of the appellants before this Court save the Union of India and CBI is connected in any way with the present criminal proceeding initiated on the strength of the first information report which is now sought to be quashed by Mr. H.S.

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139 (1991)4 SCC 54.
140 (1992)1 SCC 117.
141 AIR 1992 SC 320.
142 JT 1991 (4) SC 535.
143 (1991)3 SCC 756.

Chowdhary. Although in the FIR the names of three accused are specially mentioned none of them has been impleded as a respondent to these proceedings by any one of the appellants. Therefore, under these circumstances, one should not lose sight of the significant fact that in case this Court pronounces its final opinion on the issues other than the general issues raised by the appellants as public interest litigants, without hearing really the affected persons, such opinion may, in future, in case the investigation culminates in filing a final report become detrimental and prejudicial to the indicated accused persons who would be totally deprived of challenging such opinion of the apex court, even if they happen to come in possession of some valuable material to canvass the correctness of such opinion and consequently their vested legal right to defend their case in their own way would be completely nullified by the verdict now sought to be obtained by these public interest litigants.

C. Cases pertaining to right to equality in service jurisprudence

In *K.S.P. College Stop-Gap Lecturers Association v. State of Karnataka*[144] an order of the Education and Youth Services Department of State of Karnataka provided that the teachers appointed temporarily for three months or less shall be paid a fixed salary which was ten rupees less than the minimum payable to the regular employees. This order was challanged as being violative of Art.14 by way of a writ petition. The teachers sought regularisation of their services by invoking principle of equitable estoppel arising from implied assurance due to their continuance, as such, for years with a break of a day or two every three months. The Court held fixation of such emoluments as violative of Art.14 and issued certain directions. A similar situation was witnessed in *Sandeep Kumar v. State of Uttar Pradesh.* [145] Here the writ was filed by degree holders in Engineering who were employed on daily rated basis under U.P. Bridge Corporation but were paid less than the regular degree holders. The Supreme Court held such a pay structure to be violative of the Constitution. But with regard to the issue regarding regularisation in service, the Supreme Court refused to issue directions, since it was a project for a particular purpose. The Court however directed that the employees should be considered for permanent vacancies when they occur on the basis of seniority.

But in *All India Judges Association v. Union of India,* [146] in response

144 1991(2) SCALE 285.
145 AIR 1992 SC 713
146 AIR 1992 SC 165.

to an application under Art. 32 of the Constitution, the Supreme Cout issued directions for setting up of an All India Judicial Service and for bringing about uniform conditions of service for members of the subordinate judiciary throughout the country.

D. Cases where epistolary jurisdiction was invoked

In *Banahdu Mukti Morcha* v. *Union of India,* [147] a letter addressed to the Supreme Court complaining about prevalence of labour system in Faridabad District of Haryana State wherein the stone quarries workers were living in most inhuman conditions, was treated as a writ petition under Art. 32 of the Constitution. In the present case the two main issues which were raised were: (i) whether an application under Art. 32 was maintainable, particularly when no allegation of infringement of petitioner's fundamental right was made and (ii) whether a letter addressed to the Court could be treated as a writ petition and be proceeded with in the absence of support by an affidavit or verification. The Court answered in the affirmative to both the issues, and directed the State Government to act as a Welfare State and ensure that workers continued in work with improved conditions.

In another case, *Rajangam v. State of Tamil Nadu,* [148] a letter petition received from the District Beedi Worker's Union was treated as an application under Article 32 of the Consitution and notice was ordered initially to three factories referred to in the said letter and later to other beedi manufacturing units within the State. In the letter, complaint was made about manipulation of records regarding employees, non-payment of appropriate dues for work taken, failure to implement the provisions of the labour laws, etc. The Court appointed a social organisation for making investigation and submitting its report to the Court. The Supreme Court issued directions on the basis of the two schemes, one prepared by the petitioner and the other by the State of Tamil Nadu.

E. Miscellaneous cases

Under this category, cases of varied nature are analysed with the aim of showing the vast potentialities of Article 32.

In *Suraj v. Union of India,* [149] an application under Article 32 of the Constitution was made by 55 persons claiming the benefit of the scheme of pension for Freedom Fighters. Most of the petitioners produced material

147 (1991)4 SCC 177.
148 (1992)1 SCC 221.
149 1991(2) SCALE 532.

to show that they had participated in Arya Samaj Movement which according to them had been equated with the freedom struggle. According to them, as a consequence of such participation, they were sentenced to imprisonment for terms exceeding six months. While they were undergoing sentence, without their praying for a remission, a general amnesty was declared by the Nizam on his birthday and sentence was reduced and petitioners were set free. Allowing the writ petitions, the Supreme Court held that each of the petioners satisfied the condition for earning the benefit of pension and the fact that while undergoing sentence which was for a period beyond six months remission had been granted and they were left off earlier would not take away their right to earn pension.

In *M.C. Mehta v. Union of India,* [150] the Supreme Court accepted the application filed under Art. 32 asking for issuing appropriate directions to cinema exhibition halls to exhibit slides containing information and messages on environment free of cost; directions for spread of information relating to environment in national and regional languages for broadcast thereof on the All India Radio and exposure thereof on the television, and also for making environment as a compulsory subject in schools and colleges for a general growth of awareness.

In *Shanti Prasad Agarwalla v. Union of India,* [151] a suit against foreign Consulate General was sought to be filed for eviction for which consent of the Central Government as per Sec. 86 of the Code of Civil Procedure was sought. The Central Government refused to grant permission on political grounds. In response to this, a writ petition was filed seeking relief for quashing the communication of the Central Government. While granting the writ petition the Supreme Court opined:

> . . . in the instant case we are unable to appreciate what political considerations weighted with the Central Government for rejecting the application. We have no other alternative but to quash the impugned order and remit the matter to the Central Government for taking a fresh decision in accordance with law after giving an opportunity to the petitioners of being heard.

The Supreme Court in *Shakuntala Modi v. Om Prakash Bharuka* [152] accepted an application filed under Art. 32 for transfer of the case instituted by the respondent before Guardian Judge, Delhi, to the Court of District Judge, Dibrugarh, where an earlier petition filed by the petitioner was pending. This was done as the Court felt that the nature of both the

150 AIR 1992 SC 382.
151 AIR 1991 SC 814 at 815.
152 AIR 1991 SC 1104.

proceedings was such that it should be heard by the same court. Besides, the Court also said that since there was no suggestion by the respondent that financial difficulties prevented proper prosecution of proceedings prejudice to the respondent cannot be assumed from the mere fact that he would have to undertake journey.

In *Madhu Kishwan v. Bihar,* [153] two petitions were filed under Art. 32 challenging the provisions of Chota Nagpur Tenancy Act, which confines succession to property to the male line, by contending that the provision is discriminatory against women, and therefore, *ultra vires* the equality clause in the Constitution. The Court was of the view that with regard to Scheduled Tribes and their properties exclusion from inheritance would not be appropriate. But instead of disposing of the petitions, the Court adjourned the hearing for three months and directed the State of Bihar to immediately take into consideration their order.

By means of a writ petition under Art. 32 the petitioner challenged the validity of the order of the Chief Election Commissioner altering the date of elections for the Lok Sabha and also for the State Legislature in Punjab. In *R.S. Chib v. Election Commission of India* [154] the Supreme Court dismissed the writ on the basis of a catena of decisions of the Supreme Court, where power of the Chief Election Commissioner was upheld.

F. Cases where writ jurisdiction of Supreme Court was refused

In *Subodh Nautiyal v. State of Uttar Pradesh,* [155] the Supreme Court rejected the petition filed by the petitioner under Art. 32 seeking direction for admission to a Medical College. This stand was taken by the Court in view of earlier orders of Supreme Court holding Medical Council of India to be entitled to prescribe requisite qualification. More so when decision was made four months after commencement of course and in earlier orders Supreme Court had indicated that course should commence on particular date and admissions must be over before that date.

The Supreme Court in *Nityananda Kar v. State of Orissa* [156] rejected the writ petition challanging the year of allotment with reference to Orissa Administrative Service Class II (Appointment by Promotion, Transfer and Selection). The Court took this view because a Full Bench decision of the High Court in a writ petition stated that the year of allotment should not be disturbed and also because a special leave petition against it was

153 1991(2) SCALE 794.
154 1991(2) SCALE 285.
155 AIR 1991 SC 1131.
156 AIR 1991 SC 1134.

dismissed by the Supreme Court. The Supreme Court said that in the light of the above facts the petition was settled and should not be disturbed.

Through a writ petition, mala fides and bias were alleged against the Army Officer who had ordered summary of evidence in a Court Martial proceeding in *G.S. Sodi v. Union of India.* [157] The Supreme Court rejected the writ petition on the ground that Court would not make roving enquiry into the allegations as the officer in question was concerned with preliminary enquiry and not with court martial. Hence allegations of bias against him would not affect court martial proceedings.

Another case where the writ petition was rejected was *M/s. Dooganaji and Co. v. State of Madhya Pradesh.* [158] In this case a writ petition was filed under Art. 32 to grant license to manufacture liquor. The Supreme Court held that the writ petition would not be maintainable as the petitioner had not submitted any tender in terms of the new policy for manufacture of liquor and the licence according to the new policy were already granted to other parties who were not impleaded. The Supreme Court also opined that it could not direct the State Government to create a new policy of receiving private applications or to direct the Commissioner of Excise to come out with a new supply area and grant licence to the petitioner.

The petitioner in *Rajesh Kumar Maheswari v. Union of India* [159] prayed for a Writ of Certiorari to quash the letter written by the Government of India to the President of Delhi Stock Exchange regarding increasing the membership and dilution of share holding of the said Exchange. The petitioner contended that in an earlier writ petition, an assurance was given to Supreme Court that there would be hundred percent expansion in favour of member of public but by allowing induction of other members of authorised assistants of stock exchange in addition to hundred percent membership of public, would be contrary to the commitment made to the Supreme Court. The Supreme Court after examining the facts concluded that the dilution by way of transfer to authorised assistants is valid and in accordance with the assurance given to the Supreme Court "as the said assurance was that there would be a hundred percent expansion in favour of the members of the public and there were 125 members and 125 members were to be taken from the public."

The Supreme Court rejected a writ petition with the plea that with reference to the inter country adoption, Indian citizenship should continue

157 AIR 1991 SC 1617.
158 AIR 1992 SC 488.
159 AIR 1992 Delhi 68.

until the adopted child attains the age of majority and is legally competent to opt, in *Laxmikant Pandey v. Union of India.*[160] The Supreme Court held such a petition as not tenable on grounds that such a step would run counter to the need of quick assimilation and may often stand as a barrier to the requirements of the early cementing of the adopted child into the adoptive family.

In *Ranjit Singh v. Union Territory of Chandigarh* [161] the Supreme Court rejected a writ petition seeking a direction of the Court that the two life imprisonment sentences awarded to the petitioner shall not run concurrently. The Supreme Court held that the writ petition was not maintainable as the petitioner's incarceration was a result of a valid judicial order against which there could be no valid claim to infringement of any Fundamental Rights.

In *Gurumukh Singh v. Amar Singh,* [162] the Supreme Court rejected a writ petition pleading the declaration of a contract as void.

The petitioner in *Delhi Judicial Services Association, Tis Hazari Court v. State of Gujarat,* [163] challenged the authority and jurisdiction of the Commissioner in collecting evidence and recording findings against him.

The Supreme Court rejected the plea and said that since the Commissioner had been appointed by the Supreme Court itself to hold inquiry and submit his report to the Court, he had full authority to record evidence and to cross examine witnesses and to collect evidence on behalf of the Supreme Court. The Court also said that since the Commissioner had considered evidence as well as circumstances, his was a well reasoned finding and could be accepted in absence of convincing material before Court asking for its rejection. In *Daya Singh v. Union of India*[164] wherein a mercy petition was filed before the Governor after dismissal of the earlier petition and consequently stay of execution of sentence was ordered, the mercy petition remained pending for two years in absence of reasonable explanation. A writ petition was then filed under Art.32 of the Constitution. The Court, rejecting the prayer made in the letter, said that though it felt that pendency of mercy petition for two years amounted to considerable delay, yet going by the decision in *Triveniben's* case,[165] the only relief a convict awaiting execution of death sentence can get from the Supreme Court on the ground of delay is the conversion of the death sentence into that of life imprisonment.

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160 AIR 1992 SC 118.
161 AIR 1991 SC 2296.
162 (1991)3 SCC 79.
163 AIR 1991 SC 2176.
164 (1991)3 SCC 61.
165 (1989)1 SCC 679.

LAW OF EDUCATION

L. Viswanathan *
N. L. Mitra **

Introduction

Education has become one of the most litigative areas. [1] Though the character of the litigation in the educational front remains almost same, in the last decade, but in a critical review like this, there may be some variations from year to year. As for example, litigations on medical education during the eightees, specially on the rules of admission were very high, so much so, that in the previous year's journal, [2] medical education was given a special focus. Such special focus may be necessary in some years, otherwise a general pattern of discussion may be maintained. Such a general pattern of discussion shall help the readers to easily identify the decisional development in specific areas. The discussion is divided into :

i) admission including all litigations on reservations and preferences;

ii) management which contain decisional laws on affiliation, regulation, permission and autonomy;

iii) examination, promotion and merit list which contain decisional landmarks in the area of university examinations and management relating to it ; and

iv) services - this includes the development of decisional laws on the question of administrative service regulations and interpretation of law controlling services in the academic bodies - both teaching and non teaching.

It is practically impossible to discuss the salient features of each and every decided case law. As such, we shall try to explain a few landmark cases where there have been a march of the law and decisions of important cases have been tabulated with brief facts and the ratio decided. This, we hope, will enable the readers to quickly refer to cases required for their individual enquiry.

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* Student IV Year, NLSIU, Bangalore.
** Faculty Memeber, NLSIU, Bangalore.

1 (1991)2 MOL 23.

2 *Ibid.*

Admission

Validity of reservation on the basis of the backwardness of the area

In *Asheesh Sharma v. Himachal Pradesh University, Simla* [3] a provision for reservation for admission to Medical Colleges for candidates coming from backward areas was contested. The University ordinance, interalia prescribed that a candidate who had passed two out of three school examinations namely, primary, middle level and the matric, from the backward area, would be qualified for applying for the reserved seat. The Himachal Pradesh High Court held that such a provision is constitutionally valid and reasonable because an applicant passing two such examinations from such areas would suffer from some inherent deficiency on account of the backwardness of the area.

Preference for rural services

In *Rajkumar Pandita v. State of J & K & Others,* [4] the Court held that whereas credit given to rural services of medical graduates for admission to the post-graduate courses was not reasonable but a subsequent stipulation modifying the earlier conditions of admissions violated natural justice. The question came up again in *Dr. Snehalatha Patnaik v. State of Orissa.*[5] Here the Court held that a weightage upto 5% of marks for rural services for five years for the applicants of post-graduate medical education was justified. Similarly, the Gauhati High Court held in *Herambu Kumar Sharma v. State of Assam* [6] in an *obiter* that a promissory bond for serving the rural areas in the State on completion of the medical course was not discriminatory, specially because large tracts of rural areas of Assam inhabited by tribals having meagre medical facilities would warrant the imposition of such conditions.

Right of the University to determine its own reservation quotas for SC/ST and BCs

The Andhra Pradesh High Court observed in *Dileep Damodaran* v. *Secretary to Government* [7] that the question of reservation is related to an overall national policy and therefore cannot be left in the hands of the University to determine its quota of reservation. It was necessary, according to the Court, to have some form of uniformity in this regard and therefore

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3 AIR 1991 HP 39.
4 AIR 1989 J & K 37.
5 JT 1992 (1) SC 365.
6 AIR 1991 Gau 1.
7 AIR 1991 AP 194.

must be decided at the national and state governmental level.This is one of the grounds in which University's autonomy has been completely demolished. Whereas it is true that the question of reservation has a national significance but the role of a University in fulfilling the aspiration of the people in the local area within the jurisdiction of the University should also not be undermined. Universities located in areas of highly discriminative development have their own responsibility. As such, though a low water mark in the name of uniform national policy is laid down, Universities may also be allowed to frame up their policy regarding social responsibility towards the society in which they are located. In *Dr. Anupam Gupta v. Secretary Medical Health, Lucknow,* [8] the Allahabad High Court held that any concession given to S.C./S.Ts in respect of marks to be obtained at the Joint Entrance Exam for admission to the State Medical and Engineering Institutions was justified on the ground of encouraging advancement of education to these category of people.

Other important decisions on reservation/preferences

Case	Facts	Ratio
1. *Punjab University v. Ashwiner Kaur.* [9]	Weightage given to employees	The provision for employee's sons is bad in law, being discriminatory.[10]
2. *Vimish Jain v. Union of India.*[11]	Degree of handicapped considered for admission within the quota instead of marks secured in the qualifying exam.	Held discriminatory and invalid. Merit inter se has to be considered for seats reserved for a particular category.
3. *Laksmi Reddy v. Bangalore University.*[11a]	Sufficient reserved category candidates not available. Seats not filled up, alloted to general category candidates.	Seats available can be filled up by general category candidates possessing requisite qualification.

8 AIR 1992 All 3.
9 AIR 1991 P&H 166.
10 Refer also to (1991)2 MOL 34.
11 AIR 1991 P&H 222.
11a AIR 1991 Kant 182.

Criteria of Selection

The Supreme Court and High Courts in various cases [12] applied their mind of the relative importance of written test and *viva voce* test and their relative emphasis as an admission criteria. It has been generally accepted, not without reasons, that higher the emphasis on *viva,* greater would be the risk of arbitrariness. In *Fazullah Peer v. Union of India,* [13] the Allahabad High Court was confronted with the same problem once again. The facts of the case are that the Indian Veterinary Research Institute sought admission for its doctoral programme. The selection was to be based on criteria of 40% on written test, experience and 30% of *viva.* Following the earlier decisions and the line of argumant, the Allahabad High Court held that an allocation of marks for *viva voce* exceeding 15% would be unreasonable on the ground of its susceptibility to be abused and applied arbitrarily.

Other important case on this issue of criteria of admission

Case	Facts	Ratio
Km. Vandana Tiwari v. Allahabad University.[14]	Application seeking admission to M.Sc. course only from graduates passing 3 years degree course challenged by a graduate passing 2 year degree course.	Violative of Art.14 being discriminatory and arbitrary. University cannot deny higher education on the ground of tenure of the course.

Filling up of vacant seats in P.G. Medical Course

The courts have been very liberal in granting petitions on the ground[15] of filling up of vacant seats, going to the extent of suggesting that in filling up of such seats, "merit cannot be insisted upon with same strictness which is followed at the time of regular admission". [16] The decision seems to be providing scope for discrimination. Vacant seats need also be filled up in the same manner as the seats are initially filled up on consideration of merit.

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12 *Ajay Hasia v. Kalid Mujib* AIR 1981 SC 487; *Ashok Kumar v. U.P.* AIR 1987 SC 457.

13 AIR 1991 All 309.

14 AIR 1991 All 250.

15 *See Dr. Jeerak Almost v. Union of India* AIR 1988 SC 1812, *Dr. Ambesh kumar v. Union of India* AIR 1980 SC 400.

16 *Lalchandra v. V.C. Banaras Hindu University,* AIR 1991 All 183; *Dr. Anupam Gupta v. Medical Health Services, Lucknow* AIR 1992 All 3.

Creation of additional seats

The question of creating additional seats in medical and technical courses is intricate because the same requires a prior extension of infrastructural facilities. Under Section 11 of the Medical Council Act 1986, the power is vested with the Indian Medical Council to permit additional seats. In *Vinayshankar v. Director General of health Services*,[17] the state government filled up the seats earmarked for the All India quota with local students. The Supreme Court however observed that the students thus admitted irregularly may be obsorbed by creating additional seats. It however opined that the Indian Medical Council cannot be compelled by such a decision to permit an increase of seats without applying its mind.

Other cases on the issue of creating additional seats

Case	Facts	Ratio
a. *Dr.V.P.Goswami v. State of M.P.*[18]	According to the rules issued by the M.P. Govt., there was a limit on number of seats for P.G. course in Medicine. This rule was rendered ineffective by actions of the State government itself. The petitioner asked for creation of additional seats.	Medical Council cannot be directed to create additional seats without considering financial implication.
b. *Dr. P.S.Patgaonkar v. State of Maharashtra.*[19]	A representation was made that admission to Ph.D courses in Medicine would be on the basis of total marks obtained in the final M.B.B.S. Exam.	Creation of additional seats impracticable and admission to be made on the basis of of total marks in the final M.B.B.S.

Miscellaneous rulings

a. *Dr. Fazullah Peer v. Union of India*[20]	Application for admission entertained but admission rejected on the ground that appliation not for-	Accepting the application and acting upon it showed that there was no infirmity and

17 AIR 1991 SC 710.

18 AIR 1991 MP 28.

19 AIR 1991 Bom 381. Seats would be created for admission on the basis of concerned subjects without taking permission from the Medical Council, not after consulting the University.

20 *Supra* n. 13.

		warded through proper channel.	rejecting the application afterwards though the application topped the list was arbitrary.
b.	*Dr. Pramod Kumar Joshi v. Medical Council & others.*[21]	Petitioner, a house staff in Pediatrics denied admission. Admitted candidates violating regulations of the Indian Medical Council.	Though the Court acceded that there is merit in the application but since the course was almost complete, the Court could not grant any remedy. The Court could have asked the respondent to admit the petitioner in the next course which was not done.
c.	*Jasbir Singh v. Dean M.G.M.E.M.S., Maharashtra.*[22]	Postal delay in delivery due to change of address, admission sought afterwards.	Denial of admission not illegal or discriminatory.
d.	*Prashant v. Gujarat University.* [22a]	The admission rule for post-graduate medical studies provided a clause that applicants passing out of U.G. Medical Examination in the 1st or 2nd attempt would be eligible for the P.G. course. This was contested.	The Court thought that such a stipulation to maintain high standards in medical education is justified provided the phrase in the rule "irrespective of his actual appearance" would constitute to mean "irrespective of his actual appearance provided that non appearance is not a result of reasons beyond his control."

21 (1991)2 SCC 679.
22 AIR 1991 SC 330.
22a AIR 1991 Guj 23.

e.	*U.P. Junior Doctors Action Committee v. Dr. Sheetal Nandwani.*[22B]	Admission secured on the basis of the production of a fake order of a court.	Cancellation of such admission would not require the application of natural justice.

Management

Temporary recognition to private Technical Institution by the All India Council for Technical Education

The A.I.C.T.E. provided a guideline for fulfilment by private technical institutions for granting approval, under the Technical Education Act, 1987. The Council gave a preliminary approval to the Technical Institution founded by the Noorul Islam Educational Trust and asked the Institution to fulfil certain conditions for final approval. The Madras High Court, after examining the Technical Education Act, 1987 found no provision for a temporary or preliminary approval to act as a mid-way house until final approval. The Court was also unhappy with the guidelines laid down. It held that it was imperative on the part of the A.I.C.T.E. to lay down norms in this regard. [23]

Fate of students in unrecognised institutions

The Supreme Court in *Nageshwaramma v. State of A.P.*[24] decided categorically that the students who have undergone training in a private teacher's training institute established without permission, cannot be permitted to appear at the examinations by invoking Article 32/Art.226. The reason was obvious. In that case, if the students thus admitted in unauthorised institutions were permitted to appear in the examination, the Court would be materially encouraging and condoning the unauthorised establishment and operation of unauthorised institutions. It is perhaps quite puzzling to understand the decision of the Full Bench of the Madras High court in *Fathima*[25] where the Court permitted such students of unrecognised institutions to appear for the examination, subject to the ultimate settlement on the question of recognition. The position of law is presently settled to the extent that students of unrecognised institutions are not to be allowed to sit for the examinations as that would naturally mean the entanglement of the Judiciary on the question of recognition. In *Bhartiya Veterinary Educational Society and Others v. State of Karnatak & Others* [26] the

22b AIR 1991 SC 909.

23 *Noorul Islam Educational Trust v. Govt. of Tamil Nadu,* AIR 1991 Mad 141.

24 AIR 1986 SC 1188.

25 *Fathimas Secondary Grade Teacher Training Institute v. State of Tamil Nadu,* AIR 1992 Mad 1.

26 AIR 1988 Kant 293.

Karnataka High Court followed the same tradition as laid down in *Nageshwaramma.* [27] It held that the Court cannot direct any University to admit or hold examination for students of such unaffiliated colleges. What the Court can do perhaps in such a situation is to award compensation to the students who have been befooled by the management of the unrecognised institutions and direct to return the money taken from such admitted students. In *State of Tamil Nadu v. St. Joseph's Teachers Training Institute,* [28] the Supreme Court has reiterated its old stand and provided no scope for any doubt on this settled principle.

Every system has a self-mechanism of grievnace remedial process. As such, in every University system itself, there is a grievance remedial machinery. One of the fundamental principles that the Judiciary generally follows is to strengthen such inbuilt remedial process and not to indulge in adventurism and confusion through the process of weakening the inbuilt system. [29] In *Secretary to Education Department, Government of Andhra Pradesh v. Society of St. Ann's Mehdipatnam,* [30] the Andhra Pradesh High Court has very rightly decided that a writ of mandamus does not lie on the question of granting permission or affiliation. There is a legislative policy involved in the matter of granting application based on the need of the locality or basis of sufficient number of students seeking admission. Granting of affiliation is also a quasi-judicial action of a competent authority. As such, the validity of the decision of an authority can be questioned on that ground. The application for affiliation of the institution cannot be rejected without giving an opportunity of being heard and without recording the reasons for rejection.

Can the Court issue a writ of mandamus on the question of granting autonomy ?

Under the present U.G.C. guidelines, colleges fulfilling certain conditions and standards can be granted autonomy by the University Council. In *Meenakshi College for Women v. University of Madras,* [31] the Madras High Court held that autonomy is not a matter to be demanded by the college. Therefore, the college cannot seek a writ of mandamus to compel the syndicate to confer autonomy on the college. It is the responsibility of the

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27 *Supra* SCC. 24.

28 (1991)2 n. 343.

29 *See* Mitra, University News, "A critique of Judicial Review of Examination Rules"; University News, Monday, June 24, 1991 pp5 and *See* also *Rati Ram Singh Yadav v. Principal, Govt. Polytechnic & Others,* AIR 1990 MP 129.

30 AIR 1991 AP 331.

31 AIR 1991 Mad 32.

syndicate. It is the syndicate's power to carefully examine the conditions of the college and its standards to confer autonomy. The Court can however direct the syndicate to consider an application but cannot compel autonomy to be granted.

Other important decision on management

	Case	Facts	Ratio
A.	*Sathya Shankar Sheti v. Mangalore University.* [32]	Student expelled on the complaint of a member of the teaching staff, there being a complaint filed with the police and the principal on mis-behaviour by the student.	Material difference was found between the two complaints and and the Court found it probable for the management to frame charges to take action. As such the act of the college was found unjustified.

Examination

Revaluation in admission test

There was a provision in the ordinance relating to conduct of admission test to Medical Colleges providing that no application for revaluation of answer script would be entertained. This provision was contested on the ground of unreasonableness by Ashish Sharma against the H.P. University. In an admission test, where results were required to be prepared with quickness and precision, any application for revaluation might create sufficient confusion for the preparation of results in time. As such, the Court held that such a provision in the ordinance was not against natural justice. [33]

Revaluation in University examination and consequences

Presently in University administration, specially in the examination process, a lot of litigation arise out of undue delay. In *University of Kerala v. Sandhya P. Pai,* [34] an examinee applied for revaluation of paper according to the provisions made by the University within 45 days after the results. But the University was not able to finalise it in eight months time. As a result the student was unable to appear for the post graduate exam. The Court held that the University was liable to pay damages.

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32 AIR 1992 Kant 79.
33 *Supra* n.3.
34 AIR 1991 Ker 396.

Can the court intervene in the valuation process ?

Valuation of answer scripts is an academic appraisal and the University teachers examining the answer scripts are required to be free of any intervention or aggression. It has been rightly observed in *Dr. S.S. Rane v. University of Bombay* [35] that the Courts "do not have the qualification to rule upon the advisability or otherwise" of alloting marks in any division or subdivision of an answer to a question. As such, the Court held that it would be inappropriate to intervene in the evaluation systems until the Court was satisfied that the marking gradation was deliberately made favouring a person or there has been scope for arbitrariness.

Miscondct in the examination hall including mass copying

	Case	Facts	Ratio
a.	*Mrs. Annie v The Sarvajana Educational Society.*[36]	The college exceeded the authorised limit of the intake, and the college gave a false certificate about it. The result of the University examination was held up.	The students were not entitled to the equitable and discretionary remedy under Art. 226.

Comment : The Court perhaps could distinguish such a fraudulent statement from the college authorities with that of a petition from unaffiliated institutions. Whereas in *Nageshwaramma* [37] the Court was very rightly rigid in not allowing students to sit for University examinations. But in the present case, the Court could have allowed equitable remedies to the students specially because the students were not supposed to know the prescription for quota of admission. Nor they have become a party by violation in the act of fraud. In such occasions the institutions and the management should be appropriately punished by the authorities of the University. But the students could be spared of such actions of fraud.

b.	*Raj Kumar v. State Board of Technical Education.* [38]	Grace marks were allowed for passing the exam but not given for clearing compartmental examination.	The award of the grace mark in a situation when the candidate is in the margin of passing is not discriminatory and hence valid.

35 AIR 1991 Bom 240.
36 AIR 1991 Kant 148.
37 AIR 1986 SC 1188.
38 AIR 1991 P & H. 1.

c.	*K.N. Singh v. Board of High School & Intermediate Exam. U.P.*[39]	A writ petition was filed by the principal on the ground of alleged inconvenience of the students on the allotment of examination of students.	Application rejected on the ground of having no *locus standi*.

Comment : The principal of an institution can represent the cause of his students provided the grievance alleged is general in nature like inaccessibility, inordinate distance or even ill-equipped provisions for maintenance in the examination centre and security of the students.

d.	*Shri Bhairavi Nath v. Central Board of Education.* [40]	Cancellation of result and rustication on the ground of allegation of mal-practice in the exam.	Such a high degree of punishment not only affects the right of the student as an examinee but also involves his right of reputation. Therefore he must be given fair and natural justice which would include adequate opportunity of knowing the allegation against him and answering the same.

Comment : Rustication being a very severe punishment endangers the life of the student concerned and should be made with utmost care. In an ordinary event of malpractice in examination, the ordinary punishment should be sufficient which is equivalent to cancellation of examination; with severity, which may even go upto disallowing to appear in the examination for a couple of years. In such a situation, the best option is to strengthen the University system. [41] In this regard one may refer to *Shivshankar Tallur v. Mysore University* [42] where the Court very rightly observed that the punishment shall not be a deterrent one but shall also be in the nature of a reformative one, so that a student who was held guilty should not be frustrated and become anti-social.

e.	*Piarra Singh v. Punjab University*[43]	Examination Centre was cancelled by the V.C.,	Held: no violation of natural justice

39 AIR 1991 All 381.
40 AIR 1992 Del 232.
41 *Supra* n. 29.
42 AIR 1991 Kant. 169.
43 AIR 1991 P&H 242.

		in the exercise of his emergency power and re-examination directed to be held.	since there was no need for extending natural justice to each candidate.
f.	*Ajay Kumar Mittal v. Roorkee University.*[44]	Evidence of misconduct was collected against a student and a show cause notice was served.	The show cause notice was in violation of natural justice on account of not providing the gist of the evidence in spite of specific regulations made.
g.	*Board of Technical Education U.P. v. Dhan wantri Kumar.*[45]	A notice was served by the University on the examinee about some misconduct and afterwards the examination was cancelled.	The notice must not be vague and must be clear and specific terms on the charge requiring explanations. A reasonable opportunity must also be accorded. Since the court thought that proper notice was not given, cancellation was held invalid and the University was asked to publish the result.

Comment : Unless malpractice in the University examination centre is detected and caught red handed, it is always necessary that the respective University Committee should look for details and serve notice giving reasonable opportunities of hearing. [46]

h.	*Ram Janam Ram v. Kul-Sachiv/Pariksha Adhikashak, Allahabad University*[47]	The examination of a student was cancelled on the charge of the candidate having possessed written documents during the examination period.	Since the disciplinary committee without applying their mind and establishing the connection between the copies and the examinee had cancelled the examination on the basis of a formal report mechanically filled in, the cancellation was held to be invalid.

44 AIR 1991 All 179.
45 AIR 1991 SC 271.
46 *Rajkumar Singh v. University of Allahabad,* AIR 1991 All 307.
47 AIR 1991 All 322.

Comment : It has been pointed out by a writer that courts in India by and large try to resolve examination disputes without looking into the sociological setup. [48] When some written documents are seized from an examinee in an examination hall, the requirement of an adversarial process is required to be restrained in favour of the internal University set up. Otherwise the consequence would be that the structural inbuilt strength would fall into pieces and the existing judicial system will be incapable of handling the mass of litigation. Except on the argument of natural justice, the court might have to take secondary role in such cases of violations of University Regulations. Even the issues of natural justice might also be required to be looked into with caution specially when the charge is gross violation of examination rules including mass copying. It may be noted that litigations on mass copying and examination rule violations were very popular in some states like U.P. and Bihar, which necessarily indicates the sociological set up and inappropriate assessment of the same in deciding individual litigation. In case the inbuilt system is not strengthened the whole examination system might lose its credibility. Of course in *Renu Tyagi v. State of U.P.*,[49] the Allahabad High Court held that when the University withheld the result of some students on the charge of mass copying and declared the results of some others similarly situated, there was a violation of Art.14. Here the Court perhaps did not apply its mind in assessing the responsibility of those in mass copying in the effort of strengthening the inbuilt structures. From that point of view the stand taken by the Punjab and Haryana High Court in *Piarra Singh* [50] is more realistic. In *Sushma Das v. Baord of Secondary Education,* [51] Orissa, the Court has very rightly held that cancellation of the examination by the University was justified since it was made on the report of the flying squad of the University which had clear evidence of mass copying by the students in the examination hall. According to the Calcutta High Court, alleged misconduct in the examination hall justifying cancellation should be directed in the exam hall itself and before the answer book is deposited. [52] This seems to be an oversimplification in the assessment of the fact situation. As an *obiter* the rule seems to be not unjustified. But those who have experience in the examination can understand. Sometimes such a misconduct can be clearly detected even afterwards. And only because the candidate could not be allowed to escape the justiciable punishment. But, of course, where the student was detained

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48 *Supra n.* 29.
49 AIR 1991 All 126.
50 *Supra* n. 43.
51 AIR 1991 Ori 303.
52 *W.B. Council for Higher Secondary Education v. Roushanara,* AIR 1991 Cal 310.

for four years on the allegation of malpractice, the Court was justified in giving the ruling in favour of the student. Not only because of the failure of specific averment by the Board but also because punishment was more vindictive than reasonable. [53]

Services

Service litigations are generally covered in the administrative law section. But since University and institutional service regulations have so distinctive features of its own and these institutional litigations are still litigated in High Courts, some of the marching decisions are discussed here. In *Dhawan Vir Singh Tomar v. the Administrator, Delhi Administration & Others,* [54] the appellant was a senior teacher with lecturer qualification. But he was declared as surplus and transfered to another institution. A person junior to him in the earlier institution was promoted to the selection grade. The Court wondered as to how a person who was senior and better lecturer qualified was declared surplus. If any staff is required to be declared as surplus it is the junior most one who is to be declared as such. Anyway, the transfer was already effected. The Court decided that under Rule. 47(4) of the Delhi School Education Rules, 1973 he was entitled to carry his seniority to the school where he was posted. As such he cannot lose his seniority. As such, the by-passing of the senior was wrong and he was asked to be in the same position from the date his junior was placed therein.

Another important decision on natural justice was in *All Manipur Regular Post Vacancies Substitute Teacher's Association v. State of Manipur.*[55] Many teachers were serving in the State in substituted/ad hoc position. When the question of regularisation came the government wanted to go for fresh appointment without considering *ipso facto* the long service creditably done by many incumbents of these substituted or ad hoc teachers. The association went to Gauhati High Court on a writ petition. The High Court gave no interim relief but only issued *rule nisi.* In appeal, the Supreme Court initially directed the State to regularise their services but the State was unable to do it due to many intermediary situation like selections were made in several posts in some of which old incumbents were selected but in many of which new hands were selected and the same communicated also to the applicants. In the situation, on a contempt charge, again the Secretary of Education Department appeared in person and the Court examined the difficulties of the State and gave the following

53 *Patel Valabhai v. Gujarat Secondary Education Board,* AIR 1992 Guj 45.
54 AIR 1991 SC 1924..
55 AIR 1991 SC 2088.

guidelines for regularising/selecting teachers :

(a) Teachers putting in five years' or more in service to be regularised subject to their fulfilling minimum qualification without allowing DPC interview;

(b) Teachers putting in less than five years job to be regularised;

(c) 23 ad hoc teachers already selected to be appointed immediately retaining their seniority;

(d) All ad hoc/substituted teachers to continue in service unless the selection was completed;

(e) Persons already selected for vacancies now to be occupied by continuing teachers were to be appointed in additional/newly sanctioned posts;

(f) Direct recruits would be ranked lower in the seniority list; and

(g) All litigation between the parties to be disposed of/withdrawn.

This was a very comprehensive order given by the Supreme Court looking into the nature of the litigation and requirement of natural justice. In fact if persons are allowed to work for five years in ad hoc situation, justice demands automatic regularisation. One of the implications of this decision would be that in such a situation a person would be appointed from time to time with some gap in the period. Such an avoidance should be detected and if found only as an attempt to escape from such natural course of action, be seriously dealt with. Persons substantially serving for five years even with annual gap of one/two days every year should be situated similarly for regularisation.

Another interesting decision given by the Supreme Court is in *Union of India v. Professor S.K. Sharma.* [56] This was an appeal against the decision of Central Administrative Tribunal. In this case, Prof. S.K. Sharma officiated in the Senior Scale Professorship almost from the date of his promotion to the Junior Scale Professorship. In the automatic promotion also at least three year's continuation in the junior post was necessary. On an application earlier Prof. Sharma was allowed to draw salary in the senior scale from the date of his ad hoc appointment. On 29.9.73 he was selected by the U.P.S.C. in the senior scale but demanded his seniority to be counted w.e.f. 28.6.69 i.e., date of his ad hoc/officiating appointment. The Court held that seniority was to be counted from the date of regular appointment and not from the date of ad hoc appointment. In this regard the Court actually followed its earlier stand. [57]

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56 AIR 1992 SC 1188.

57 *Masood Akhtar Khan v. State of M.P.*, (1990) 4 SCC 24 and *D.N. Agarwal v. State of M.P.* (1990)2 SCC 533.

JUDICIARY

*T. Devidas**
*L. Viswanathan***

Introduction

Under a controlling Constitution like ours, the role of the judiciary, one of the organs of state power, is vital: it is to preserve and protect the Constitution and to maintain the constitutionally designed balance among the various organs of state power. And, to play this role, independence of the judiciary is a basic must. To maintain the scheme of separation of functions as delineated by the Constitution it is also necessary that the judiciary exercise utmost self-restraint. It is also crucial to preserve the confidence in this institution that only men of honesty and integrity are appointed to it to dispense justice. The study of decided cases that follows assumes all these as essential.

Appointment of judges

In *Subesh Sharma v. Union of India*[1] a three judge Bench of the Supreme Court desired reconsideration by a larger Bench the law laid down in *S.P. Gupta v. Union of India*,[2] per majority, that the constitutional requirement would be answered if the opinion given by the Chief Justice of India was given due consideration. The judges in *Subesh Sharma* were of the view that the position of the Chief Justice of India in the consultative process[3] stood whittled down. The Bench was of the view that the consultation should have been read in the context of the scheme of separation of powers under the Constitution. According to them, to vest the power solely with the executive, the only requirement being to bestow such consideration on the result of consultation as it may consider necessary was an oversimplification. The Government may not be bound to appoint as judge one recommended by the judicial wing. But the government can appoint one disapproved, or not recommended by the Chief Justice of the State and/or the Chief Justice of India as the case may be would be wholly inappropriate and would constitute an arbitrary exercise of power. The

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* Faculty member, NLSIU, Bangalore.
** Student IV Year, NLSIU, Bangalore.

1 AIR 1991 SC 631.

2 AIR 1982 SC 149.

3 Art. 124 (2) and 217(1) prescribe consultation with the Chief Justice of India as a condition precedent for the appointment by the President of Judges, except the Chief Justice of India.

Bench was of the view that the Chief Justice of India should have preponderant say.[4]

Another aspect on which the Bench wished to depart from the holding in *S.P. Gupta* was on the question of justifiability of the matter of strength of the judges. The Court pointed out that the strength of judges should be adequate to meet the workload on the Court and must remain constantly under review in order that commensurate judge-strength is provided. The Court suggested that steps shared be taken to determine the strength in a pragmatic manner on the basis of felt need for, if judge man-power is totally inadequate, the necessary consequence would be sluggish enforcement of the rule of law. [5]

The interpretation of the expression "Judicial Office" in Art. 217 (2) (a) of the Constitution came up for consideration before the Supreme Court in *Kumar Padmaprasad v. Union of India.*[6] The Supreme Court held that the expression had to be understood in the scheme of Chapters V and VI of Part VI of the Constitution and meant judicial office as defined in Art. 236(6). The judicial service in a State is distinct and separate from the other services under the executive. A member of the judicial services performs exclusively judicial functions and is responsible for the administration of justice in the State. A person holding the office of Legal-Remembrance cum-Secretary, law and judicial Departments, Mizoram, was therefore holding a non-judicial office under the control of the executive. As the previous offices held by him were not judicial offices even in the generic sense, but were under executive control. The Court held he was not qualified to be appointed judge of a High Court.

In *Deen Dayal v. Union of India*[7] the Andhra Pradesh High Court ruled

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4 The problem of arbitrary exercise of power would be met by Art. 14. The difficulty felt by the Bench stems from the fact that the President does not exercise his independent judgement in the manner of selecting judges under the model of government we have been working. Art. 60 requires the President to take oath to preserve, protect and defend the Constitution and the Council of Ministers, collectively, have been given the task of advising the President. The executive power that is involved in appointing a judge is vested in the President by Art. 53(1) and is available elsewhere only by his delegation of it. The judicial amendment of the Constitution which pronounced it as Westminster model seems to be the reason for the unsatisfactoriness in the exercise of executive power.

5 The Supreme Court having found state non-action or state inaction as state action for the purpose of Part III of the Constitution and amenable to judicial review (*See Malini Jain* AIR 1991 SC) failure to provide adequate judge-manpower can be expected to be held an abuse of discretion through failure to take relevant factors into consideration. Sluggish enforcement of the rule of law would automatacally deny the equal protection of the laws, denying justice, and these would violate the basic structure of the Constitution.

6 AIR 1992 SC 1213.

7 AIR 1991 AP 307.

that the principle of reservation does not apply in the case of appointment of judges. It also ruled that under Art. 124 (3) (a) no distinction could be made between judges of the High Court of a State or of a Union Territory.

Removal

In *Maharshi Audesh v. State*[8] the petitioners sought, interalia, a direction in the nature of a writ of mandamus seeking the removal of a judge of the High Court on the ground of the abduction of the Union Home Ministers daughter. The Court however ruled that such a direction cannot be granted[9] even if it is assumed that the role of the judge would amount to a misbehaviour within the meaning of Art 124(4) of the Constitution.

During the Ninth Lok Sabha, a notice was given by 108 members for a motion for presenting an Address to the President of India for the removal of Justice V.Ramaswami, a sitting Judge of the Supreme Court. The Speaker of the Lok Sabha proceeded to constitute a Committee consisting of Mr. Justice P.B. Sawant of the Supreme Court, Mr. Justice Desai, Chief Justice of the Bombay High Court, and Mr. Justice. O. Chinnappa Reddy a distinguished jurist, n terms of S.3(2) of the Judges (Inquiry) Act, 1968. In *Sub- Committee on Judicial Accountability v. Union of India* [10] the question that was asked was whether the motion lapsed on the dissolution of the Lok Sabha. The Supreme Court held that the effect of Art. 124 (5) and Art. 118 and Sections 3 and 4 of the Judges (Inquiry) Act, 1968 is that the motion shall be kept pending till the Committee constituted for the purpose of making an investigation into the grounds on which the removal of the judge was proposed, submitted its report, and if the Committee found the judge guilty, the motion shall be taken up for consideration. The Court held that the making of allegations, initiation of the proceedings, investigation and proof of misbehavior or incapacity of judge are governed entirely by the law enacted by Parliament under Art. 124 (5) and these are not proceedings in Parliament. Parliament comes into the picture, when the motion for removal of the judge on the ground of proved misbehavior is moved. The Judges (Inquiry) Act. 1968 was found constitutionally valid and the Court ruled that while admitting a motion and constitution of a Committee for investigation, opportunity of hearing the judge whose conduct is in question is not necessary. The Court

8 AIR 1991 All 52.

9 If it would qualify as misconduct for the purpose of Art. 124(4), it would seem imperative that the command of Art. 256 of the Constitution should be respected and if such conduct was not forthcoming from the custodian of the constitutional value scheme, the Court can have come in, policy control, to get the Constitution obeyed.

10 AIR 1992 SC 321.

held that during the stage of inquiry into the alleged misbehaviour or incapacity of a judge, a stay on the discharging of judicial functions cannot be granted. The entire constitutional scheme including the provisions relating to the process of removal of a judge has to be taken into consideration. The Court found the scheme to be that unless the alleged misbehaviour or incapacity is proved in accordance with Art. 124 (5) and a motion is made, because of the prohibition under Art. 121, there cannot be any discussion of the conduct of a judge even in Parliament which has the power of removal. Such being the scheme, any discussion of the conduct of a judge is impermissible elsewhere according to law, except during the investigation by the Inquiry Committee under the statute. Any interim direction restraining the Judge from functioning judicially was found impermissible. The same matter was pressed again in *Krishnaswami v. Union of India.* [11] The Supreme Court was asked to stay the proceedings under the Judges (Inquiry) Act on the following grounds:

(i) non-application of mind by the Speaker while admitting the motion by not considering any material available before him;

(ii) the power under Sec. 3(2) of the Act, enabling the Speaker to constitute a committee for investigation should be exercised according to established judicial practice after consulting the Chief Justice of India;

(iii) principles of natural justice were not followed in as much as copies of documents were denied to the judge on unsustainable grounds; and

(iv) when the Constitution Bench decided the case, the proceedings which took place in the House of the People were not before it, which are now available and which clearly indicate that the Speaker himself was alive to the fact that he was constitutionally obliged to place the notice before the House, and his decision was to depend on the collective wisdom of the House.

The petitioner's request for reconsideration of the previous decision was referred to the Chief Justice for constituting a Constitution Bench to hear it but request for the stay of the earlier decision was refused.

Conditions of service

In *All India Judges Association v. Union of India* [12] the Supreme Court

11 1992 (1) SCALE 484.
12 1991 (2) SCALE 969.

was moved under Art. 32 on the question of service condition of the subordinate judiciary. The petitioners desired the setting up of an All India Judicial Service and uniform conditions of service for the members of the subordinate judiciary. The Supreme Court gave the following directions to the Union of India:

(i) an All- India Judicial Service be set up and appropriate steps in this regard are to be taken;

(ii) steps should be taken to bring about uniformity in designation of officers both on the Civil and Criminal sides by 31 of March 1993;

(iii) retirement age of judicial officers should be raised to 60 years by December 31,1992;

(iv) when Pay Commissions are set up, the question of appropriate pay scales for judicial officers should be specifically referred to them;

(v) a workng library should be provided at the residence of every judicial officer;

(vi) residential accommodation has to be provided to every judicial officer;

(vii) every District Judge and Chief Judicial Magistrate should have a state vehicle and arrangement for a pool vehicle, allowance for a two wheeler and loan facility for the same;

(viii) an in-service institution at the Centre and State levels was to be set up within one year.

Cntempt of court

In *V.C. Shukla v. T.N. Olympic Association* [13] the Madras High Court held that under Art. 215 a contempt proceeding is a proceeding of special jurisdiction of a Court of Record and the contemnor is not an accused as in a criminal case, although sometimes so described. The rules of proof beyond reasonable doubt and such other rules of procedure have been extended to a contempt proceedings only to emphasize that as a Court of Law and a Court of Record they must act fairly and give an opportunity to the contemnor. Only in that sense are contempt proceedings quasi-criminal proceedings, otherwise they are proceedings of a summary nature

13 AIR 1991 Mad 323.

and the courts evolve their own procedure.

This view was affirmed by the Supreme Court in *Delhi Judicial Service Association v. State of Gujarat,* [14] popularly known as the Naddiad case.

Power of the Supreme Court to punish for contempt of subordinate courts

In the *Delhi Judicial Service Association* case the Supreme Court held that as a Court of Record under Art. 129, it had the power to punish for contempt of itself as well as for the contempt of subordinte courts. In the Court's view the expression "including the power to punish for contempt of itself" in Art. 129 was not restricting but extending. Being a superior court it had inherent jurisdiction to punish for contempt of sub-ordinate courts. The Court was of the view that such a reading was necessary to protect the subordinate judiciary which forms the very backbone of the justice delivery system at the grass root levels and to preserve the confidence of the people in the efficacy of the courts.

The Supreme Court took the position that under Sec.19 of the Contempt of Courts Act, it has appellate jurisdiction did not deprive it of its inherent jurisdiction[15] under Art. 129 of the Constitution. This inherent power was rested on the Supreme Court to correct the errors of subordinate courts and the corresponding duty to protect and safeguard the interests of the subordinate courts. This power, the Court held, was to be sparingly used when an action affects administration of justice or when the entire judiciary is affected.

The position taken in the *Naddiad* case was reiterated by the Supreme Court in *Pritam Lal v. High Court of Madhya Pradesh.*[16] The Court held that the powers of the Supreme Court and the High Courts as Courts of Record cannot be restricted and trammeled by ordinary legislations including the Contempt of Courts Act, 1971. What was constutionally vested could not be abridged by statutes, the Court observed. The Code of Criminal Procedure was held not applicable in contempt of court cases before the High Court, which could adopt its own procedure which was fair and reasonable and which would inform the contemnor of the charge and afford

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14 AIR 1991 SC 2176.

15 The Court had in *Raja Soap Factory v. S.P. Shantaraj,* AIR 1965 SC 1449 held that the inherent power of the High Court under S.115 of the Code of Civl Procedure read with S.24 to transfer to itself proceedings from a subordinate court lawfully seized of it could not be exercised to confer jurisdiction. In *Board of Revenue, U.P v Vinay Chandra,* AIR 1981 SC 723, the Supreme Court had held that while exercising power under Art. 215,the court's finding mentioned in the Contempt of Courts Act, 1971 alone could be considered.

16 Air 1992 SC 904.

him a reasonable opportunity to defend himself.

Power to do complete justice under Art. 142

In the *Naddiad* case the Supreme Court has held that no legislative enactment of the Union or the State can limit or restrain the power of the Supreme Court under Art. 142 of the Constitution, but while exercising the power the Court had to take into consideration the statutory provisions regulating the matter in dispute. The Court had in *Premchand Garg v. Excise Commissoner* [17] held that in order to do complete justice between the parties, an order under Art. 142 had not only to be consistent with the fundamental rights guaranteed by the Constitution but also with the substantive provision of the relevant statutory laws.

Again, in *Union Carbide Corporation v. Union of India* [18] a Constitution Bench of the Supreme Court ruled that no prohibition or limitation or other provision in ordinary laws can *ipso facto* act as prohibitions or limitations on the constitutional powers of the Court under Art. 142. The prohibitions should be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. The apex court held that in exercising powers under Art. 142 and in assessing the needs of "complete justice" of cause or matter, it will take note of the express prohibitions in any substantive statutory provisions based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly.[19] The Court observed that the prohibitions would not relate to the powers of the Court under Art. 142 but only to what is or is not complete justice of a cause or matter, and in the ultimate analysis of the propriety of the exercise of the power.[20]

Whether a judge of the Supreme Court or High Court is a public servant

K. Veeraswami v. Union of India [21] saw the Supreme Court held that a judge of a superior court was a public servant within the meaning of Sec.21 of the Indian Penal Code which covered every judge including every person empowered by law to discharge, whether by himself or as a

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17 AIR 1963 SC 996.

18 AIR 1992 SC 248.

19 Any limiting or ousting clause operates only this way. Perhaps, by resting it on "some fundamental principles of public policy" the Court seeks to keep the door of judicial review open.

20 Judicial review being essentially policy control, altering the policy governing a cause or matter will alter the scope of the policy control itself.

21 JT 1991 (3) SC 198.

member of a body of persons, any adjudicatory functions. The provision in Sec.2 (a) of the Prevention of Corruption Act, 1947 was held wide enough to include judges of the Supreme Court or High Courts and the President was the authority competent to sanction their prosecution under the Act.

Arrest of a judicial officer

In the *Naddiad* case, the Supreme Court laid down certain "minimum safegurd" which must be observed in the case of arrest of judicial officers.

(i) If a judicial officer is to be arrrested, the District Judge or the High Court Judge as the case may be should be intimated and informed about the fact of arrest.

(ii) In the event of any urgency, a formal or technical arrest may be made.

(iii) The arrested judicial officer should not be taken to a police station without the prior order or directions of the District and Sessions Judge of the concerned district, if available.

(iv) Facilities for communication with the members of his family, legal advisors, and judicial officers should be provided.

(v) No statement could be recorded, nor a *panchnama* drawn up, nor any medical tests conducted except in the presence of the legal advisor or judicial officer.

(vi) Handcuffing is prohibited. However, if violent resistance is offered, or there is immediate danger to life or limb the person resisting may be overpowered and physically arrested.

(vii) The burden is on the police to establish the necessity for such an action.

(viii) An immediate report should be sent to the District and Sessions Judge concerned as also to the Chief Justice of the High Court.

These were, in the opinion of the Court, necessary to avoid arrest and humiliation of presiding officers of courts by the police on flimsy and manufactured charges[22] which would affect the administration of justice.

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22 It is a welcome stand against arbitrary exercise of the power of arrest. It is hoped that the apex court lays down similar safeguards for ordinary citizens at least on the lines of the United States Supreme Court's requirements in *Escobedo* 387 U.S.478 and *Miranda* 384 US 436.

Judicial independence

Kihoto Hollon v. Zaichllu[23] saw the Supreme Court by a narrow majority of 3:2 strike down para 7 Schedule X of the Constitution, as introduced by the Fifty-second Constitutional Amendment which provided for a bar on the jurisdiction of the courts, on the reasoning that ratification in accordance with Art. 368 (2) was not obtained for the amendment. The Court held that the finality sought to be given to the decisions of the Speaker/Chairman by para 6(1) of the Schedule did not detract from or abrogate judicial review under Arts. 136, 226 or 227 on grounds of violation of constutional mandates, mala fides, perversity, or violation of principles of natural justice. To axe para 7, the Court resorted to the doctrine of severability[24]. It held that while exercising power and discharging functions under the X Schedule, the Speaker/Chairman acts as a tribunal adjudicating upon rights and obligations under the Schedule and their decisions are amenable to judicial review.

23 1991 (2) SCALE 960.

24 It is a moot question whether the doctrine of severablity can be used to confer competence basically. In matters covered by Art. 241, or Clause (b) of Art. 368 proviso, the power to amend the Constitution would seem to be with not less than half the number of States of the Union and the President of India, Parliament performing the function of finalising only the text of the amendment proposal. It would have been more in conformity with the power arrangement if the amendment was held invalid for not answering the condition laid down by Art. 368 proviso.

MINORITIES AND THE LAW

V. Vijaya Kumar *

The State of Bihar has become the first State in the country to accord legal status to its Religious and Minorities Commission which has been in existence for nearly twenty one years through an executive order. The Bill for this purpose was passed by both the Houses of the State Legislature and received assent of the Governor, Mohammed Shafi Qureishi. Prof.Jabir Hussain has been appointed as the acting Chairman of the Commission. Some of the important features of the Act are as follows.[1]

(a) This Act seeks to ensure that religious and linguistic minorities get what the Constitution guarantees them.

(b) The Commission under the Act has been empowered to examine various safeguards provided under the Constitution as well as the laws passed by the State for the protection of minorities in the State and to make necessary recommendations for the effective implementation of such measures.

(c) The Commission will have the authority to review the implementation of policies and schemes for the welfare of the minorities as also for the protection of their rights.

(d) The Commission will also have the powers to make suggestions for ensuring, maintaining and promoting communal harmony and submit periodic reports, at prescribed intervals, to the State government.

(e) The Commission can inquire into complaints from individuals or those based on information received through "any reliable source" about violation of the rights of the minorities and ensure their security.

(f) The Commission will take all necessary steps to protect a minority community's place of worship, graveyards and other such places against encroachment.

(g) The Commission can be authorised by the State Government to inquire into any specific matter or case under the Commissions of Inquiries Act, 1952. At the same time, the Commission too can ask any government agency to investigate a case on its behalf.

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* Faculty Member, NLSIU, Bangalore.

1 Deccan Herald, dated August 26, 1991.

For the purpose of conducting enquiries "the Commission may require any public servant or any other person who, in the opinion of Commission, is able to furnish information or produce documents relevant to the investigation to produce copies of such documents." Non-compliance of the directions of the Commission by any public servant "shall render him liable to disciplinary action on the recommendations of the Commission."

One may doubt the need for such a Commission under the State legislation in the presence of the 'Central Minorities Commission' established by the Janata Party during 1977-80. However, it is necessary to note that in the light of continued atrocities over the minorities in almost entire Indian territory, the Central Commission can do very little to protect the interest of the minorities. Even the presence of a State Commission is not a solution as lot depends on how it exercises the power in protecting the rights and interest of the minorities. In this sense, the Bihar legislation and the resultant Commission would certainly set an example for the other States to follow, particularly those States where atrocities against minorities are prevalent.

On the judicial front, a limited number of cases have been reported. Yet the most important, relevant and controversial judgement was delivered by the Supreme Court in interpreting Articles 29 and 30 of the Constitution. The threshold classification, adopted in the previous year is followed in analysing the judicial trend with regard to the minorities' rights under Articles 29 and 30 of the Constitution.

Eligibility criteria

In the *Rayalaseema Navodhaya Minorities Christian Educational Society, Cuddappah v. State of Andhra Pradesh,*[2] the Andhra Pradesh High Court was asked to decide on the validity of certain eligibility criteria stipulated by the State. Before analysing the case, a brief summary of the facts is necessary to be mentioned here. The petitioner-society was registered under the Societies Registration Act, 1860 and belonged to the Christ Church, a Church of South India. It was established with the object of establishing Primary, Upper Primary Schools, Technical-Vocational Schools and College of Education. The petitioners filed an application for permission to establish a College of Education in Cuddapah on August 12, 1988. On receipt of the application the government called for a report from the District Education Officer, Cuddapah on November 10, 1988. On December 12, 1988, the government rejected the application on the ground that the

2 AIR 1992 AP 54.

government was consolidating the existing institutions in that year and therefore no permission would be granted for the academic year 1988-89. The petitioner contended that the government had granted permission to other institutions during the same period and also cotended that there was no College of Education established by minority group in Cuddapah and Anantapur Districts. The petitioner filed another application on April 28, 1989 seeking the reconsideration of government's order. In the meantime, the government had issued G.O. Ms. 526 Education (Rules) dated December 21, 1988 proclaiming Andhra Pradesh Minority Educational Institutions (Establishement, Recognition and Regulation) Rules, 1988.

On October 24, 1989, the Court by an interim order directed the government to pass orders on the representation of the petitioner which was rejected by the government on the ground that the management failed to fulfil statutary conditions for establishing the College. On February 8, 1990, the Court passed another interim order directing the government to inform the petitioner within two weeks thereof as to what were the conditions the petitioner had to fulfil. The petitioner had to fulfil those conditions within four weeks thereafter. The government was directed to grant permission on the fulfilment of those conditions. Till then, it has to continue as a non-minority institution. The government did not pass orders within the said period and hence a contempt petition was filed by the petitioners.

On November 16, 1990, by issue of a memo, the government had directed the Director of School Education to conduct an inspection and submit a report relating to the fulfilment of conditions prescribed by the government as pre-conditions for permission to establish the college. The report of the Regional Director of School Education revealed the following:

(a) Library is inadequate;

(b) There is no model school attached to the institution;

(c) The ten acres of land for the construction of buildings is far away from the college premises; and

(d) The number of staff appointed has not been mentioned.

The petitioner would not agree to fulfil all these conditions and only promised to satisfy them in due course.

On behalf of the petitioner, it was submitted that the grant of recognition of minority status to the institution must be made without waiting for grant of permission under Section 20 of the Andhra Pradesh Education Act, 1982 as amended in 1987. The Advocate-General submitted that the need

for establishment of educational institutions is the prime consideration in the matter of grant of permission to open new educational institutions and that has to be the most important consideration in the case of applications by minority educational institutions as well. He further said that the conditions laid down in Section 20 of the Act of 1982, before and after its amendment, are statutory pre-conditions and non-compliance with such conditions can only result in the rejection of the application for permission. According to him, Rule 3 of the Minority Recognition Rules indicates that only after permission to establish educational institution is granted need the question of recognition of minority status under those rules be considered.

On behalf of petitioner, it was contended that the petitioner would comply with conditions (a) and (b) mentioned above, (c) is arbitrary and (d) can be complied with only after the college is established. However, it was pointed out on behalf of respondent that in the light of its experience that most of the institutions which were granted permission subject to such promises of fulfilment are yet to perform their promises.

The Court was also convined in this case that the competent authority was right in refusing to act on the basis of the undertaking given by the petitioner. The Court held that the insistence on condition (d) mentioned above is a permissible regulation on the right to establish and administer educational institutions. The Court also opined that if an educational agency files an application for establishment of a minority educational institution, the applicant has to satisfy the competent authority of the need for establishment of such an institution by positive and affirmative evidence. The averments contained in the application and its annexures hardly made out such need for establishment of a college of Education in Cuddapah. Thus the court held that the minority institutions are subject to regulations and Section 20 of the Andhra Pradesh Education Act and the rules which prescribe certain conditions are pre-conditions and must be fulfilled to the satisfaction of the authorities. The Court upheld the actions of the authorities in this case as valid and held that they are right in rejecting the application of the petitioner.

In *State of Tamil Nadu v. Vilampatti Nadar Uravinmuraikku Pathiapatta A.V. M.Marimuthu Nadar Melnilaipallivin Managing Committee, Vilampatti*[3] the High Court of Madras was asked to decide whether the Hindu Nadar community of Vilampatti does constitute a religious denomination or not. In order to hold that a particular community constitutes a religious denomination within the meaning of Article 26, it must be proved that the

3 AIR 1991 Mad 233.

said community has a system of beliefs or doctrine which the members of the community regard as conducive to their spititual well being. It is also essential that the members of that community must have common religious tenets peculiar to themselves other than those which are common to the entire hindu community. The Court's attention was drawn to the decision of the Supreme Court in *S.P. Mittal v. Union of India*[4] where the majority of the judges laid down the following three tests for finding out whether a particular body of persons is a religious denomination or not:

(a) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to the spiritual well being i.e., a common faith;

(b) Common organisation; and

(c) Designation by a distinctive name.

The Supreme Court itself applied this test in *Jagadishwaranand v. Commissioner of Police, Calcutta*[5] and held that "Ananda Marga" appears to satisfy all the three conditions and can be treated as a religious denomination. Another case decided by the Madras High Court itself was also brought to notice. Thus, in *Assistant Commissioner, Hindu Religious and Charitable Board, Salem v. Nattamai K.S. Ellappa Mudaliar*[6] the Court held that the "Senguntha Mudaliar" community of Taramangalam cannot claim to be a religious denomination.

In the instant case, there was absolutely no evidence on record either oral or documentary to prove that the members of the Vilampatti Hindu Nadar community have a common faith, that is to say a system of beliefs or doctrines or religious tenets peculiar to themselves other than those that are common to hindus in general. Based on these reasons, the Madras High Court held that the Hindu Nadar community of Vilampatti is not a religious denomination in order to get the benefits of article 26 of the Constitution. As such, the Court further held that the educational institutions established by them (Hindu Nadars of Vilampatti) were not entitled for the benefits mentioned under Articles 26 and 30 of the Constitution.

In *St. Stephen's College v. The University of Delhi*[7] a Constitution Bench of five judges was asked to decide on three important questions of law, the first being whether St.Stephen's College is a minority run institution or not. St.Stephen's College was founded in 1881 as a

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4 AIR 1983 SC 1.
5 AIR 1984 SC 51.
6 AIR 1987 Mad 187.
7 1991 (2) SCALE 1217.

Christian Missionary College by the Cambridge Mission in Delhi in collabration with the Society for the Propogation of the Gospel (S.P.G.). Originally, the College building was housed in hired permises paid for by the S.P.G. The new building was constructed by the S.P.G. and was opened on December 8, 1881. Later in 1913 it was registered as a society and a constitution was formulated on November 6, 1913 which was adopted by the S.P.G. Standing Committee and by the Cambridge Committee. The constitution as it stands today again maintains the essential character of the college as a Christian college. The management of the college is being looked after by the Supreme Council and the Governing Body, the members being members of different Christian churches. The Principal of St.Stephen's College is appointed by the Supreme Council and he must be a Christian belonging to the Church of North India. The immovable property of the College has been vested in the Indian Church Trustees. Based on all these facts, the Constitution Bench unanimously held that St.Stephen's College is a minority run institution.

Right to administer

The scope of the right of a minority to manage and administer the institution was once again the main frame of reference before the Supreme Court in *Manohar Harries Walters v. The Basal Mission Higher Education Centre, Dharwad.*[8] In this case, the appellant was appointed in 1968 as a lecturer-in-chemistry in the respondent-college, and was promoted as a senior lecturer in 1971. After this a series of disputes ensued between him and the respondent Society which resulted in the suspension of the appellant with effect from July 2, 1975. A domestic inquiry was instituted against him on the charges of insubordination and other misconduct. A retired District Judge was appointed as the Inquiry Officer and he held the appellant guilty of charges levelled against him, as a result of which he was dismissed from service with effect from January 10, 1976. On February 9, 1976, the appellant filed an appeal to the Educational Appellate Tribunal against the order of his dismissal under Section 8 of the Karnataka Private Educational Institutions Act, 1975. The Tribunal by its order of November 26, 1979 allowed the appeal and directed the Society to reinstate the appellant. The Society had not urged before the Tribunal that, it being a minority educational institution, the provisions of the Act were not applicable to it. Then the Society preferred a writ petition to the High Court of Karnataka. The appellant also preferred a writ petition against the order of the Tribunal insofar that it did not consider his prayer for back

8 AIR 1991 SC 2230.

wages. Both the writ petitions were heard by a single judge of the Karnataka High Court. It is important to note here that the Society contended for the first time that the Act was not applicable to it because it was a minority educational institution. The High Court allowed the writ petition of the Society and held that the Act of 1975 was not applicable to it.

The Court relied on the decision of a division bench of the same Court in *Anjuman Mani-E-Muslimeen, Bhatkal v. Educational Appellate Tribunal for Uttara Kannada*[9] and dismissed the petition of the appellant. Then the writ appeal by the appellant was dismissed *'in limine'* by the division bench of the same High Court. Then the appellant moved the Supreme Court.

It is also relevant to note that the Supreme Court had decided many cases on similar issues. In *Frank Anthony Public School Employees Association v. Union of India*[10] the Supreme Court held that the right guaranteed to minority educational institutions by Article 30(1) is not invaded merely because a Tribunal is constituted under an Act to hear appeals against the order of dismissal, removal or reduction in rank of an employee in the service of a minority institution. The division bench of the Supreme Court reiterated the same in *Y. Theclamma v. Union of India*[11] which also gets reflected in several decisions of the Court in subsequent years.

The main question in the instant case being that the Karnataka Act of 1975 was not applicable as it violated rights under article 30(1) of the Constitution. The Supreme Court after referring to series of cases set aside the impugned decision of the High Court. However, the Supreme Court found that the High Court had not considered the other points raised by the respondent society as well as the appellant in their respective writ petitions. Hence, the Court remanded the matter to the learned single judge of the Karnataka High Court for decision on the said points and allowed the appeal.

In *St. Stephen's College v. University of Delhi*[12] the minority institutions, St. Stephen's College as well as Allahabad Agricultural Institute, claimed the right to admit their candidates by preference or by reservation and even to their exclusion of all others and that such a right flows from the right

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9 ILR (1981) 1 Kant 304.
10 AIR 1987 SC 311.
11 AIR 1987 SC 1210.
12 *Supra*, 7.

to establish and administer educational institutions guaranteed under Article 30(1) of the Constitution. However, it was argued for the University and the students' union that since both the institutions are receiving State aid, the institutional preference based on religion is violative of Article 29(2) of the Constitution. These institutions further claimed that they were established for the benefit of their community and if they are prevented from admitting their own candidates, the purpose of establishing the institutions would be defeated.

The Court felt that the issues involved in this case are most difficult and complicated and are seemingly not covered by any authority of the Court. The determination of the issue mainly depends upon the constitutional compass of Articles 29(2) and 30(1) of the Constitution. The Court referred to *Father W. Proost v. State of Bihar,*[13] *Ahmedabad St.Xavier's College* v. *State of Gujarat*[14] and *Re. Kerala Education Bill*[15] where the Supreme Court had said that the minorities can establish institutions to conserve their distinct language, script or culture or for imparting general secular education or for both the purposes. However, in *Re. Kerala Education Bill,* the Court also pointed out that the minorities cannot establish educational institutions only for the benefit of their community. In the instant case, the Court pointed out that it is now accepted jurisprudence and practice that the concept of equality before the law and the prohibition of certain kinds of discrimination do not require identical treatment. Equality means relative equality, namely the principle to treat equally what are equal and unequally what are unequal. To treat unequals differently according to their inequality is not only permitted but required.

In the light of these principles and factors and in the absence of any judicial authority on this matter, the Supreme Court had come to the following conclusion. The Court held that the "minority aided educational institutions" are entitled to prefer their community candidates to maintain the minority character of the institutions, subject of course in conformity with the University standard. The State may regulate the intake in this category with due regard to the need of the community in the area which the institution is intended to serve. But in no case such "intake shall exceed fifty percent" of the annual admission. For the remaining portion, admission of other community candidates shall be done purely on the basis of merit. Thus, the Court allowed the writ petition of St.Stephen's College and dismissed the other writ petitions. However, Justice Kasiwal's

13 1969 (2) SCR 73.
14 1975 (1) SCR 173.
15 1959 SCR 995.

dissenting judgement on this issue seems to be a pointer in the right direction. According to him the minority institutions were getting grants in aid from the State and as such they are not entitled to claim any preferential right or reservation in favour of students of the Christian community.

State regulation

The validity of actions of the State in imposing certain rules and regulations on the minority educational institutions was questioned. In the first case, *Rahmania Primary Teachers Training College v. State of Bihar,*[16] the application of the Bihar Non-Government Physical Training Colleges and Non-Government Primary Teachers Education Colleges (Control and Regulation) Act, 1982, to minority educational institutions was questioned. A batch of writ petitions were filed by various religious and linguistic minorities, claiming that the Act of 1982 did not apply to them and as such the conditions laid down for establishing educational institutions and admitting students were also not applicable to them. The full bench of the High Court, after hearing both the parties held the following:

(a) Although the right under Article 30(1) is in absolute terms, the right to establish and administer educational institution may be regulated;

(b) Such regulation must not be such so as to make the rights illusory or to impair it;

(c) Section 2 of the Act in question is prohibitory in nature and as such shall not apply to minority educational institutions;

(d) Admitting students in these institutions is part of administration;

(e) The conditions laid down in the rules framed under the Act of 1982 shall apply to minority educational institutions, both at the stage of establishment and at the time of admitting students. If these are not followed, the Managing Committee may come within the purview of Section 4 of the Act. Before taking any such action, the State must give an opportunity to the founder or Managing Committee of being heard;

(f) For establishing an institution and admitting students, the conditions laid down in the rules need not be fulfilled *in toto,* but must be sufficiently complied with;

(g) If there has been sufficient compliance of the conditions, the government must consider the application for affiliation and that no application for

16 AIR 1992 Pat 1.

affiliation shall be rejected without giving an opportunity of being heard. The reasons for rejecting an application must also be recorded;

(h) No student of an unrecognised institution shall be allowed to appear at any examination for Certificate/Degree in Teaching;

(i) Religious or linguistic minorities cannot be allowed to establish institutions violating rules and regulations and admit students making such institutions *fait accompli* to writ jurisdiction.

In deciding this case the Court observed that the so called establishment of a medical college was in the nature of a financial adventure for the so called Society and its office bearers, but an educational misadventure for the students.

Again, in *Rayalaseema Navodaya Minorities Christian Educational Society, Cuddapah v. State of Andhra Pradesh,*[17] the Andhra Pradesh High Court held that the minority institutions are subject to regulations but such regulations shall not abridge or annihilate the right of the minority community. The Court further observed that the permissible regulations are those that subserve the excellence of the institution as a minority institution rather than advance public interest. Accordingly, the Court held that a training institution sought to be established by minorities in Andhra Pradesh would be subject to regulatory provisions in Chapter IV of the Andhra Pradesh Education Act, 1982.

In *St. Stephen's College v. University of Delhi*[18] the question whether St.Stephen's College as a minority institution is bound by the University circulars or not was raised by the petitioner. The Delhi University issued two circulars. The first circular dated June 5, 1980 has prescribed the last date for receipt of applications for admission. By the second, dated June 9, 1980, all the colleges of Delhi University were directed to admit students solely on the basis of merit determined by the percentage of marks secured by the students in qualifying examinations. On behalf of St.Stephen's College, it was contended that the University cannot direct the college to dispense with its admission programme in the absence of proof of maladministration of the college. The circulars have been challenged on the gound that they are not regulative in nature. On behalf of Delhi University and the student's union it was contended that the circulars were intended to ensure uniformity in the admission dates in all colleges and that it would be beneficial to and in the interests of students

17 *Supra*, 2.
18 *Supra*, 7.

who are seeking admission in different colleges. It was also contended that the circulars were regulative in character and did not violate the rights granted under Article 30(10) of the Constitution. The Court, based on the detailed study of the admission programme of St.Stephen's College, held that the admission programme of the college is not arbitrary and as such, the Court came to the conclusion that St.Stephen's College is not bound by the impugned circulars of the University. Here also, the detailed opinion of the dissenting judgement, by Justice Kasiwal, seems to be in the right direction.

The question of validity of regulatory procedures was raised in *State of Tamil Nadu v. St.Joseph's Teachers Training Institute*[19] along with *State of Tamil Nadu v. Dr.Arupappa Teachers Training Institute.*[20] These two institutions sought recognition from the Director of Collegiate Education for running teachers training courses. They did not fulfil the necessary conditions and hence were not recognised. Inspite of this, they admitted the students who were, at a later stage, not permitted by the Education Department to take their examinations. They moved the High Court of Madras and the full bench adopted a peculiar course to grant relief i.e., the Court on humanitarian grounds directed the State Government and Education Department to hold supplementary examinations with the condition that the declaration of results will be subject to the ultimate settlement of the question of recognition. However, on appeal, the Supreme Court held that the High Court of Madras acted illegally in issuing directions to the government on humanitarian grounds and also held that such directions are destructive of rule of law. On a subsequent question that they are minority educational institutions and they have the right to establish institutions, the Supreme Court held that the 'minority unrecognised institutions' are not entitled to ask the government to grant permission to its students to appear in public examinations held by the government. The right of a minority under Article 30 of the Constitution is subject to the State's right to prescribe regulatory provisions. Thus, the Supreme Court allowed the appeals and the order of the High Court of Madras was set aside.

Thus, except for the decision in *St. Stephen's College* there has been no substantial change in the law concerning the minorities. However, a new interpretation has been given by the Supreme Court in *St.Stephen's* case stating that the minorities can reserve upto fifty percent of the seats in their educational institutions subject to certain regulations, alone stands as a new development in this field. Whether such a development is in the right direction or not depends on how effectively and positively such a development could be properly utilised by the minority educational institutions.

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19 1991 3 SCC 87.
20 *Ibid.*

IV. CRIMINAL LAW

Protection of life, liberty and property of the citizens assume the major function of any modern State. Criminal Law has always been utilized to achieve these objectives. Unfortunately, in modern days, we find the instrumentalities of the State themselves as perpetrators of violence against the citizens. The recent report of Amnesty-International on *"India : Torture, Rape and Death in Custody"* is a clear indication of violence against citizens by the State authorities in India. The review of cases on custodial death tries to highlight the approach of the Indian courts on this issue. This also forms the focus of the review of the cases under terrorism and the law.

Another area included in this section is the review of cases on socio-economic offences. In the light of the introduction of the new economic policy in India, the laws relating to Prevention of Corruption Act, Prevention of Food Adulteration Act and Essential Commodities Act assume much importance. Attempt is made to find out the trends of the judiciary in the changed circumstances.

Narcotic Laws – The Narcotic Drugs and Psychotropic Substances Act 1985 and The Prevention of Illicit Traffic in Narcotic Drugs and Psychotopic Substances Act, 1988 – reflect both national and international concern in this area. To tackle this amazing problem new methods in criminal law have been introduced in these legislations which call the courts to take on challenging tasks. The attempt in the review of cases in this area is the highlight of the steps taken by the courts in this regard.

There are few more important areas in criminal law which we could not include because of reasons beyond our control. Those areas will be covered in the next issue.

CUSTODIAL DEATHS AND THE LAW

*P. Srikrishna Deva Rao**

One of the significant developments during the period of survey was the release by Amnesty International of a report on *India : Torture, Rape and Deaths in Custody*,[1] listing 415 cases of custodial deaths. The Amnesty report has received widespread attention from official quarters and a serious discussion among human rights groups in India. Amnesty charged that "torture has become a daily routine in every Indian state whether arrests are made by police or para-military forces." Amnesty has accused the judicial and executive magistrates, who conduct the inquest, and the doctors who perform post-mortem examination. The whole manner of the investigatory procedure was 'perfunctory' in bringing the guilty police officials to conviction. Hence, it is important to review the judicial decisions to find out how far the judiciary respondend to safeguard the rights of the citizens in police custody.

Custodial deaths have to be viewed seriously because of the fact that they are committed by persons who are not only expected but bound by the laws to protect and safeguard the life and liberties of the citizens.[2] The Supreme Court has expressed its grave concern at the increasing number of custodial deaths in India.[3]

The decision of the Supreme Court in *the Supreme Court Legal Aid Committee Case*[4] extended the concept of custodial death from torture to lack of attention given to the person taken into custody. In this case, a public interest litigation was initiated by the Supreme Court Legal Aid Committee, based on a photograph and information published in the *Illustrated Weekly of India,* about the inhuman behaviour meted out to Mahesh Mahato in police custody.

The victim, Mahesh Mahato had been injured when several passengers of a railway train were looted and beaten up by a crowd. Mahesh had received serious injuries and had to be taken to hospital for treatment. The railway police of Bihar carried the unconscious victim to the hospital, tied

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* Research Scholar, NLSIU, Bangalore.

1 *India : Torture, Rape & Deaths in Custody*, Amnesty International, London, March 1992.

2 *See*, for a brief analysis, *Lock-up deaths and the Law* (1992).

3 *Mohan Lal Sharma v. State of UP*, (1989)2 SCC 600.

4 *Supreme Court Legal Aid Committee v. State of Bihar*, 1991 SCC(Cri)639 and (1991)3 SCC 482.

to the foot board of a rikshaw.[5]

The Supreme Court was surprised that the Bihar State had not considered it appropriate to take a serious view of the matter. The Court felt that if appropriate attention had been given and timely medical care had been provided, the life of the victim could perhaps have been saved. The Supreme Court further observed that it is an obligation of the police, particularly after taking a person into custody, to ensure appropriate protection including medical care if such person needs it.[6] The Supreme Court concluded that the gross negligence of the police had led to the death of Mahesh Mahato and directed the State to pay compensation of Rs. 20,000/- to the legal representatives of the victim.

In *Bhagawan Singh's Case,*[7] the deceased, Joginder Singh was brought from a hotel for interrogation along with three others, for smuggling narcotic powder. It was alleged that he was brutally tortured in the interrogation room of the CIA, a special wing of the Punjab Police. The case of the prosecution was that the unconscious deceased was taken in a car but he expired on the way and the dead body was thrown into a river and the same could not be recovered during investigation.

The Superintendent of Police, while conducting investigation, found the walls of the interrogation room stained with blood but could not trace the dead body. The three other persons brought along with the deceased were also beaten and serious injuries were inflicted on them. Later they were released and medically examined. The doctor's examination revealed a number of injuries caused by a blunt weapon.

The three persons taken along with the deceased for interrogation were the direct witnesses for the arrest and torture of the deceased. The Trial Court accepted the version of the prosecution only to the extent that the injured witnesses and deceased were kidnapped from the hotel. It rejected the rest of the prosecution case and accordingly convicted them only under Sec. 365 of the IPC for two years' imprisonment. The High Court, however, took a different view and convicted the appellants to life imprisonment. The High Court rightly observed that "when once it is proved that the injured witnesses along with the deceased were kidnapped, confined and beaten up and later, if the dead body was not to be traced, the only inference that can be drawn is that the accused also

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5 The Supreme Court has said several times that incarceration will not make a person a non-person and devoid of rights. But the horrible state in which Mahesh was carried in rikshaw tied with a rope to the foot board like an animal illustrates the inhuman behaviour meted out to the victim.

6 *Ibid* at p.640.

7 *Bhagawan Singh v. State of Punjab,* JT 1992 (3)SC 216.

caused the death of the deceased.[8]

On appeal, the Supreme Court examined the responsibility of the police during investigation and observed:

> It is the legitimate right of any police officer to arrest and interrogate any suspect on some credible material, but it is needless to say that such an arrest must be in accordance with the law and the interrogation doesn't mean inflicting injuries . . . Torturing of a person and using third-degree methods are of a medieval nature and they are barbaric and contrary to law. The police would be accomplishing behind their closed doors precisely what the demands of our legal order forbid . . . It is pity that some police officers have not shed third-degree methods even in modern age. They must adopt some scientific methods rather than resorting to physical torture. If the custodians of law themselves indulge in committing crimes, then no member of society is safe and secure. If police officers who have to provide security and protection to the citizens indulge in such methods, they are creating a sense of insecurity in the minds of citizens. It is more heinous than a game keeper becoming a poacher.

The Supreme Court, while confirming the life imprisonment concluded that

> If a person is in police custody then what has happened to him is peculiarly within the knowledge of the police officials who have taken him into the custody. When the other evidence is convincing enough to establish that the deceased died because of injuries inflicted by the accused, the circumstances would only lead to an irresistible inference that the police personnel who caused his death must also have caused the disappearance of the body.

Custodial death: role of doctors

The doctor plays a vital role in the investigation of custodial deaths. The post-mortem examination is very important evidence of scientific examination carried out to assist identification and prosecution of the

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8 It is very interesting to note that, in *Ramsagar Yadav's* case (AIR 1985 SC 416) Chandrachud CJ pleaded for an amendment of law relating to burden of proof in cases of lock-up deaths recognising the difficulty of getting evidence. In response to the Supreme Courts judgment, the Law Commission of India has submitted its 113th report on '*Injuries in Police Custody*' in 1985 and recommended the insertion of Sec. 114-B in the Indian Evidence Act to place the burden of proof on the policeman. But unfortunately it has not yet become a law.

guilty. But in reality, doctors face a lot of criticism that they connvive with police to shield and protect the guilty police officials.

Jagat Singh's case reveals the manner in which post-mortem examinations were conducted by the premier medical institute of India, the All India Institute of Medical Sciences, Delhi. This was a public interest litigation filed before the Supreme Court questioning the manner in which the post-mortem examinations are conducted by junior medical assistants and graduates without experience at the AIIMS, Delhi.

The Court directed that post-mortem examination should be conducted by the Medical Officers attached to the Department of Forensic Sciences in AIIMS, Delhi or persons holding equivalent positions in respect of conducting post-mortem within local limits of Delhi.

CUSTODIAL VIOLENCE AND COMPENSATORY JURISPRUDENCE

*P. Srikrishna Deva Rao**

Custody is not defined either in procedural or substantive laws. The terms custody and arrest are not synonymous. In every arrest there is a custody but not vice versa. The custody begins with initial point of detention and as soon as the police uses his authority to restrain the suspect or accused from moving on his way. But generally, the police station or premises of any station house are considered as custody.

The police investigation starts with arrest of a person on suspicion in connection with some or other offence. Many persons taken to police custody complain about torture. Whenever the state takes a person into custody then the state is responsible for the care, well being and guardianship of that person. If anything happens to that person it is the failure of the state to meet that responsibility. A police officer who causes injury whether inside or outside the lock-up is not only liable for prosecution but also liable to pay compensation for violation of fundamental rights of the accused or suspect.

As Upendra Baxi has rightly pointed out, "what is truly striking about India is the lack of respect for rule of law not just by the people but also by those who make and enforce them."[1] But when the state itself violates the fundamental rights, it reflects on the very concept of rule of law. The state has a legal duty to protect its citizens and therefore should assume the responsibility of compensating victims of criminal violence. The legal duty is based on the contract between the state and citizen, a breach of which occurs when the state fails to protect the citizens from criminal injury. The compensation is seen as a "tangible expression of the state's sympathy and concern for those who, through no fault of their own, suffer unjustifiable invasions on their personal integrity."[2]

The post-emergency period created a tremendous awareness about the flagrant violation of fundamental rights, may be due to the change of "the class composition of the victims of torture or the elites of the society also

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* Research Scholar, NLSIU, Bangalore.

1 Upendra Baxi, The Crisis of the Indian Legal System, Vikas Publishing House, Delhi, 1982, 95.

2 Veitch E and Miers'D, Assault on the law of Tort' (1975) 38 Mod. LR 150.

3 Mohammed Ghouse, 'Pre-trial Criminal Process and the Supreme Court', Indian Bar Review, Vol. 13(1)1986 p.44.

were subjected to torture. The Supreme Court was so eager to correct its past mistakes to retain its legitimacy."[3] It was only in the eighties the Supreme Court started directing the state governments to pay compensation to the victims.

The question of state liability to compensate for the infringement of fundamental rights was for the first time raised before the Court in *Khatri*, the famous *Bhagalpur Blindings case*[4] and *Veena Sethi*[5]. *Rudul Shah*[6] is the first case where the Supreme Court exercising the writ jurisdiction under Art.32 of the Constitution heralded a new era of compensatory jurisprudence in Indian legal history. The newly forged weapons of the Court were sharpened by innovative compensatory jurisprudence burst forth after *Rudul Shah.*[7]

This paper presents a critical review of the dicisions of Supreme Court and various High Courts on compensation ordered in custodial violence cases during January, 1991 to June, 1992.

Now it is a well settled law that, for violation of the fundamental rights by the state instrumentalities, compensation must be awarded. But the question unresolved was: Who is to pay the compensation ? Whether the violator police or the state government ? If police is responsible for violation of legal or fundamental rights of detenue, then there is no reason why he should not be made personally liable ? Why should the state pay from the tax payers' money for lawlessness of police ? Whether the personal liability of policemen to compensate will deter committing crimes to control the crimes committed by others ? Will it bring down the lawlessness in law enforcement ? The courts tried to unravel some of these questions during the period of this survey.

In *Susheelamma's*[8] case, the Karnataka High Court was convinced

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4 *Khatri v. State of Bihar,* AIR 1981, SC 928. In *Khatri,* the Court maintained: "Why should the Court not be prepared to forge new tools and devise new remedies for the pupose of vidicating the most precious of the fundamental right to life and personal liberty?"

5 *Veena Sethi v. State of Bihar,* AIR 1983 SC 339. In this case, Justice Bhagawati obseved that the question would still remain to be considered whether thse prisoners are entitled to compensation from the state government for their illegal detention in contravention of Art.21 of the Constitution.

6 *Rudul Shah v. State of Bihar,* AIR 1983 SC 1086. The Court found that its refusal to pass order of compensation in favour of the petitioner will be doing mere lip-service to fundamental right to life and personal liberty which the state govt. has so grossly violated. The Supreme Court, therefore, ordered Bihar State to pay Rs. 35,000 to Rudul Shah for being illegally detained in prison for 14 years even after acquittal.

7 *See, Sebastian M. Hongray v. Union of India,* AIR 1984 SC 571, *Bhim Singh* AIR 1986 SC 494, *Oroan, Ramakonda Reddy* AIR 1989 AP 235, *Saheli* AIR 1990 SC 513, *PUDR v. Police Commissioner Delhi* (1989) 4 SCC 730.

8 *Smt. Susheelamma v. State of Karnataka,* 1991 Cri. LJ 2436.

about the illegal detention of petitioner's husband and nephew in police custody without even a formal complaint or registration of case against them. The police on the other hand flatly denied their arrest. The Court felt that the SI misguided the Court and the detenu-victims were deprived of their personal liberty under Art.21. Hence, to meet the ends of justice, the Court directed the SI to pay Rs.2,500/- personally to the detenues.

More than awarding compensation, the Court's humanistic response towards the sufferings of the detenues at the hands of the police is to be well appreciated. The Court felt the pinch of the mental agony and 'custodial trauma' the suspects have undergone in police custody. The Courts rarely endure the sufferings of the people and recognised the fact that the imprisoned are also human beings and just not mere docket numbers. The Court observed:

> Look at the agony caused to two persons by their being taken to custody. Look at the suffering they have undergone by way of beating. Look at the loss of earning. Look at the poor women being obliged to seek the recourse by way of Habeas Corpus spending sizeable amount in engaging a counsel. All this wouldn't have happened but for the improper action of the SI.[9]

The *Aslam's*[10] came up before Supreme Court on the basis of a press photograph of a 12 year old boy, Aslam being handcuffed in Aliganj Police Station of Lucknow. This case was brought to the notice of the Supreme Court by Indira Jaising, a senior advocate of Supreme Court. In this case, the SHO had admitted that the child is alleged to be the brother of a habitual thief and hence he handcuffed the child. The Court expressed its regret that though it had laid down in *Prem Shankar's case* in 1980 that even prisoners are not to be normally handcuffed yet violation of the judgment goes on. Therefore, the Court ordered a sum of Rs.20,000/- to be paid to the extent of Rs.18,000/- by Uttar Pradesh State and Rs.2,000 by constable personally from his salary for Aslam's benefit.

The above two cases held the police personally liable for violation of fundamental rights and for inflicting injuries on the detenue and hence ordered the police to pay the compensation from their salaries. But, the Supreme Court in *State of Maharashtra v. Ravikant S. Patil* [11] set the clock a little back. This case came out of an appeal by Maharashtra State against

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9 *Ibid* at p. 2438.

10 Reported by Krishna Mahajan *'Legal Perspectives': SC v. Home Ministry*, Hindustan Times, 28.3.91.

11 (1991) 2 SCC 373. Also See Raju Ramachandran, *State of Mharashtra v. Ravikant S. Patil* : The Inspector absolved, (1991)2 SCC p.8.

the Bombay High Court order directing the Inspector of Police to pay Rs.10,000/- by way of compensation to the respondent, an undertrial prisoner, on the ground of violation of fundamental right under Art.21. It further directed that an entry should be made in his service record.

The facts of the case are that the police arrested the respondent on an allegation of involvement in a murder case. He was arrested and a local paper carried a news item which stated that the respondent undertrial prisoner was taken in a procession from police station through main squares of city for the purpose of investigation. The respondent was handcuffed and both his arms were tied by a rope and was taken through streets, and the same was not in dispute. The respondent filed a writ petition seeking a censure of police officer and to award damages. A division bench of Bombay High Court held the police inspector responsible for subjecting the undertrial prisoner to an unwarranted humliation, indignity and accordingly directed him to pay compensation and was also censured.

The Supreme Court disagreed with some of the findings of the High Court. It felt that police inspector cannot be made personally liable. "He has acted only as an official and even assuming that he has exceeded his limits and thus erred in taking the undertrial handcuffed, still we do not think that he can be made personally liable."[12] Therefore, the Supreme Court modified the orders of High Court and directed the State of Maharashtra to pay compensation of Rs.10,000. Regarding adverse entry in his service record, the Court found considerable force of argument that, adverse entry can not straight away be made without giving inspector of police an opportunity of being heard.

The decision of the Supreme Court absolving the inspector is very disappointing, erroneous and a retrogressive approach of the Court. If it is proved beyond doubt that the police officer is responsible for committing an unconstitutional act then why should he escape from personal liability?

Army atrocities and compensation

The following three cases of Gauhati High Court illustrate the atrocities of army on the people of Assam in the name of curbing the ULFA activities.

In *Bacha Bora's* [13] case, the petitioner complained against the arrest and detention of his sons aged 19 and 21 by the army authorities on the allegation that the two were accomplice in the ULFA activities. She

12 *Ibid* at p. 374.

13 *Bacha Bora v. State of Assam*, 1991 Crl.LJ. 2782.

alleged that both were tortured and kept in illegal detention for more than two weeks. The medical reports indicated that the wounds were simple in nature caused by a blunt weapon.

The Gauhati High Court was convinced that "there is definite assertion that army personnel assaulted the two.... It is further ordered and directed that the respondents shall see that in future no such violation of Constitution or legal rights of the citizens are permitted to be committed by army personnel." [14] Hence the Court directed the respondents to pay Rs.5000/- each as monetary compensation in the nature of palliative.

Purnima Barua's case [15] is also about the arrest and detention of the petitioner's son by army authorities on suspicion of his close connections with the ULFA. The Gauhati High Court found that petitioner's son was detained illegally by army authorities at least for two days in violation of his fundamental rights. But, surprisingly the Court just awarded a paltry sum of Rs. 200/- inspite of the proof of illegal detention.

In *Niloy Dutta* [16] case, an advocate of Gauhati High Court read a news item in open court about two young women being taken to custody by army for interrogation of their suspected involvement with the ULFA. Among the two females, one aged about[16] was a High School student and another girl of 20 a Higher Seconday School student. The Court *suo motu* took it up as a PIL case.

The Court discussed at length Art. 20(2) and Art. 22(1) and (2) and Sec. 160 Cr. P.C., especially the proviso to Cl (1) of Sec. 160 Cr. P.C. regarding the rights of accused women. The Court stated that a woman is not to be requistioned by the army for attendance at any place other than the women's residence as provided in Sec. 160 (1) of Cr. P.C. ... When a female is arrested for interrogation or investigation by army, they have to hand over the person after arrest to police and she cannot be taken again into custody by army officials. It is ironical that, inspite of the infringement of the females' legal and constitutional rights, the Court never thought of awarding any compensation and just closed its hands. In fact, there is no rationale or conceptual basis for the award of compensation. The lack of rules, Act or guidelines for award of compensation has been left to the arbitary discretion of the judiciary in awarding compensation.

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14 *Ibid* at p. 2785.

15 *Smt. Purnima Barua v. Union of India*, 1991 Crl. LJ 2675.

16 *Niloy Dutta v. Dist. Magistrate, Sibsagar*, 1991 Crl.LJ 2933.

Custodial death and compensation :

Sebastian Hongray is the first case in which for the first time, Rs. one lakh compensation was awarded to each of the widows of the victims.

This was follwed by a number of cases[17]. *The Supreme Court Legal Aid Committee*[18] case illustrates the inhuman behaviour meted out to Mahesh Mahato in police custody. The victim Mahesh had been injured when several passengers of a railway train were looted by a crowd and beaten up. He had received serious injuries. The Railway Police of Bihar carried the unconscious victim to the hospital, tied to the foot board of a rickshaw. The Supreme Court felt that if appropirate attention had been given and timely medical care had been provided, the life of the victim could perhaps have been saved. The Court concluded that the gross negligence of police had led to the death of Mahesh Mahato and directed Bihar State to pay compensation of Rs. 20,000/- to the legal representatives of the victim.

In *R S Sodhi's*[19] case (popularly called as "Pilibhit Killings" case), where the police pulled out ten young Sikhs from the bus carrying Sikh pilgrims back home and took them to an adjoining jungle in a police van where they were shot dead. The Supreme Court ordered the UP State Govt. to deposit an amount of rupees five lakhs within August 1991 in the Court Registry, out of which Rs. 50,000/- would be paid to next of kin of the deceased victims. Later, the State government moved a review petition stating that it would demoralise the police. Hence, the Court modified its earlier order reducing the amount to Rs. 20,000/- and the balance of rupees threee lakhs to be deposited with Court's Registry. If the next of kin were finally found entitled to the remaining Rs. 30,000/- each, the same would have to be paid and if not, it would be refunded to UP state Government.

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17 *See, Luthukula v. Risheang Kishing,* AIR 1989 (Gau.) 182. Petitioner's husband was apprehended by army and his whereabouts were not known. Court granted Rs. one lakh assuming he is dead; *PUDR v. Commsrr. of Police, Delhi* (1989) 4 SCC 730, Court awarded Rs. 50,000/- for death of Ram Swaroop. *Lalith v. DGP, Madras,* disappearance from custody; *Saheli v. Commissioner of Police, Delhi* AIR 1990 SC 513, Court granted Rs. 75,000/- as damages for the death of petitioner's son.

18 *Supreme Court legal Aid Committee v. State of Bihar,* 1991 SCC(Cri) 639 and (1991)3 SCC 482.

19 *R. S. Sodhi's PUCL v. State of UP,* 1991 (2) SCALE 463.

NARCOTICS LAW

*S.V. Joga Rao**
*Sumita Arora***

The present review pertaining to Narcotics Law[1] takes within its fold the judicial pronouncements relative to diverse issues, namely, non-compliance of procedural formation relating to arrest, search and seizure, bail, and also the intricate issue of burden of proof in case of possession of contraband drugs.

Possession of drug - meaning

This question came up in the case of *Zebeda Khatoon v. Assistant Collector of Customs.*[2] Though the Sessions Court found the accused guilty, the High Court allowed the appeal and acquitted her. The Court gave the following reasoning for the acquittal:

> Where the accused lady is said to be the owner of the house which is occupied by her son-in-law, her adult sons and two daughters, in view of the number of occupants of the house and in particular the number of male persons and the quality of drugs seized it becomes doubtful if the accused can be held to be in exclusive conscious possession of it which alone makes her liable.

Possession - burden of proof

Who has to prove the possession of the drug? This question came up for consideration in two cases. In *Salamat Ali v. State,* [3] the accused was apprehended and opium was found in a plastic-bag [which was in his possession]. A sample was taken and it was sealed. The results were positive and accordingly he was convicted by the Sessions Court. The accused appealed on the ground that, according to secs.8 and 18 of the Act the prosecution is under an obligation to conclusively prove the factum of prosession and it had failed in the instant case to do so. While responding positively to this contention, the Court acquitted the accused and held:

> Though minor discrepancies do not affect the case, here the occurence

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* Faculty Member, NLSIU, Bangalore.
** Student IV year, NLSIU, Bangalore.

1 The period of survey is 1991-92 and the relevant legislation in this regard is The Narcotic Drugs and Psychotropic Substances Act 1985. References hereinafter to the Act are to this Act.

2 1991 Cri. L.J. 1392, D.P. Hiramath B. Jaganatha Hedge, JJ.

3 1991 Cri L.J. 1991, K.L. Shriasta,J.

> is dated 26 November 1988 and the witnesses were called on 27 April, 1989. The evidence of the departmental witnesses is discrepant on the point as to whether the 'Panch' witnesses had accompanied the police party from the hotel near the Police Station or they had been summoned after the police party had reached the spot. The evidence is also discrepant as to the place where the appellant was apprehended and the distance to which he had to be pursued.So in this case there were major discrepancies which lead to the prosecution not having the conclusive evidence to prove it.[4]

In *Lachho Devi v. State* [5] *charas* was recovered from Lachho Devi and it was sent for testing. The argument of the accused was that the samples of the seized material were tampered with before they were examined in the Central Lab., and so on this basis she was entitled to the benefit of doubt. The High Court acquitted her and observed:

> In case of seizure of *charas* where evidence led by the prosecution did not prove all links that the case property was not tampered with by any one till the samples were deposited in C.F.S. L. for analysis, it can be said that prosecution has failed to prove beyond doubt on record that recovery effected from the appellant was of *charas* and so the accused is entitled to benefit of doubt and acquittal.[6]

Bail

Can Sec.167 (2) proviso (a) of the Cr.P.C. be extended to Sec.37 or Sec.12 of the Act relating to bail? [7] This issue was discussed in *Prahlad v. State of Maharashtra,*[8] where the accused was found possessing 490 Kgs of *'ganja'*. The house number where it was seized from did not disclose whether he was the owner, lessee or licensee of the house. The Court held that Sec. 167 (2) proviso (a) could not be extended to Sec.37 and therefore bail was not granted. The Court held:

> Sec. 37 has incorporated its independent scheme for grant of bail for the offences punishable under the Act. Bearing in mind the specific object of the Act, i.e., to make the law more stringent, also to

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4 In another case, *Sodda Somana v. State,* 1991 Cri. L.J. 2185, the court held that Sec. 35 talks about the presumption of the existence of culpable state and the onus is placed on the person found in possession of the narcotic substance to prove that he has not committed the aforesaid offence.

5 1991 Cri. L.J. 293, V.B. Bansal,J.

6 *See* Sec. 54 of 'the Act'.

7 Sec. 37 deals with offences that are cognizable; Sec. 12 deals with restriction over external dealings in narcotic drugs and pyschortopic substances.

8 1991 Cri. L.J. 1537, A.K. Desai,J.

> prevent release of the drug offender on bail on technical ground and the scheme as codified under the Act, privilege under Sec. 167 (2) proviso (a) of the Cr. P.C. cannot *ipso facto* be extended in the matter of grant of bail under Sec.37 of the Act.

The Court also held that the bail could not be granted because of the seriousness of the offences. The fact that the house number was not disclosed would also not make any difference because the 'Panchas' made it obvious that the *'ganja'* was in the possession of the accused. The Court further explained the scope of Sec. 167 of the Cr.P.C. and commented that "Sec. 167 (2) proviso (a) has issued a legislative command to the Court to release the accused on bail in the eventuality of default to complete the investigation within the specified period."

In *Raj Bahadur v. State of U.P.*[9], Sec. 37 (i) and (ii) came up for discussion and the Court observed:

> No person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit such an offence while on bail.[10]

In *Sodda Somana v. State*[11], the petitioners were arrested for the alleged commission of offences and Sections 35,37 and 54 were together brought in question. They were released on bail by the District Judicial Magistrate because he felt that the offences were not punishable with imprisonment for life or death. But the High Court overruled this order and held:

> In view of the mandate contained in Sec.37 bail is not to be granted unless the concerned Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of the alleged offence in case it carries a custodial sentence of 5 years or more.

Search and seizure

The issues relating to powers of search and seizure[12] under the Act came up for consideration in *Surajmal Kanaiyalal Soni v. State of Gujrat.*[13]

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9 1991 Cri. L.J.2239 D. Dubey, J.

10 The court ordered the applicant to be released on bail on his furnishing two sureties and a personal bond on the satisfaction of the court.

11 1991 Cri. L.J. 2185.

12 *See* Ss. 42, 43, 50 and 57 of the Act.

13 1991 Cri. L.J. 1483, P.H. Chauhan and V.H. Bhainria, J.

In this case 50 gms of opium was seized. The question was whether the above mentioned provisions were mandatory provisions and whether the investigation would be vitiated if not complied with. The appellant contended that these provision are mandatory and non-compliance would result in vitiating the proceedings. The Court dismissed the appeal and held that the sentence of ten years rigorous imprisonment and fine were adequate. The reasoning laid down by them was as follows:

> The provisions of Sec.42[14] are applicable in the case in which a building, conveyance or place is to be entered into and searched. If the places are not to be entered into and searched, the provision of Sec. 42 are not applicable.

In this case the search was conducted in public and Sec. 42 was held not to be applicable here. Regarding Sec. 43[15], the Court said:

> It cannot be said that in absence of writing there will be no chance to cross-examine the officer with regard to the factum and contents of the information received and that would cause prejudice to the accused. It is always a question of fact required to be considered in the light of the circumstances and the relevant provisions and to ascertain as to whether prejudice is caused to the accused. Merely because a particular provision is not strictly complied with, the necessary implication may not always be that prejudice is caused to the accused.

Therefore, it held that these provisions were not mandatory and so non-compliance would not vitiate the investigation. Regarding the full report under Sec.57[16] they held that:

> Full report of all the particulars of such an arrest and seizure made in writing is desirable but in the absence of specific provision making it obligatory to submit report in writing, it cannot be said that the report should be in writing, even if it is held that the report is required to be submitted in writing, non-compliance of submitting such a report under Sec. 57 of the N.D.P.S. Act by itself would not vitiate the investigation and the trial.

However, in respect of Secs. 41,42 and 53,[17] the Court said:

> They are mandatory and non-compliance of which may vitiate the

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14 Relates to the the power of entry, search,seizure and arrest without warrant of authorisation.

15 Deals with 'power of and arrest in public places'.

16 Deals with 'report of arrest and seizure'.

17 Deals with the scope of compliance regarding the authorisation to officer to search and seizure.

trial or the proceeding and ultimately conviction if the seizure or arrest is made by the person who is not duly authorised to do it, any further proceeding after that should also be considered as ineffective and *per se* vitiating the trial and conviction.

In *Lacho Devi v. State*[18] the appellant claimed that the proceedings under Secs. 42 and 43 were not complied with and further contended that the investigating officer did not reduce it to writing prior to the raid and therefore an adverse inference could be drawn against the prosecution. The Court held that it was not obligatory on the part of the investigating officer to put it in writing.

In *Raju Prasad Gupta v. State*[19] the appellant was convicted by the Additional Sessions Judge for an offence punishable under Sec. 20 of the Act for having in his possession 18 kgs of *charas* without any licence or permit. As a result he was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. one lakh and in default of payment undergo rigorous imprisonment for another year. The counsel for the appellant argued that Secs. 42-50 of the Act were complied with.[20] Counsel also argued that as there were no independent witnesses to corroborate the testimony and so the prosecution should fail.

The Court acquitted the accused and held that Secs. 42-50 were mandatory provisions. Laying emphasis on Sec. 50 the Court held that, "this provision must be taken as an imperative requirement on the officer intending to search and take the persons to be searched before a gazetted officer or magistrate." On the second point the Court opined that it "should look for independent corroboration to the testimony of the official witnesses. Once the evidence of the public witness is rejected the prosecution necessarily has to fail only on the evidence of the police witness." So the failure of corroboration from the witnesses also played an important role in the acquittal of the accused.

In *Ismail v. State of Kerala,*[21] the Circle Inspector, on instructions from the Assistant Commissioner of Police, entered a room where he found the first accused sitting on a cot with a plastic container having 1.25 kg of hashish. Two other men also present and all three were arrested. The first accused was prosecuted under Sec. 8 (c) and the other two under Sec. 8 (c)

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18 1991 Cri. LJ. 2793.

19 1991 Cri. LJ. 2899.

20 Particularly the rule that information received from a person in respect of the offence punishable under the Act, the officer who receives it should put it down in writting and also send copy of the same to the superior officer.

21 1991 Cri. LJ. 2945, S. Padmanathan, J.

read with Sec.29 of the Act. The first accused again argued that there was a non- compliance with Secs. 42-50 (1), and 52 (1) and 57 of the Act which would vitiate the case of the prosecution. But the Court, while rejecting this argument, held:

"Non-compliance of these provisions would not vitiate the case of prosecution because the said provisions are not intended as technical defences, on which the prosecution must fail for that reason alone."

In another case, *Om Prakash v. State,*[22] secret information was received by the Sub Inspector that Om Prakash was dealing in *charas.* Nakabandi was arranged and he was apprehended with a bag in his right hand which has 500 gms. *charas.* The accused argued that there had been a non-compliance with the requirement of the secret information to be reduced to writing. The court held that this non-compliance was not fatal because the search was carried out at a public place and not in any building or conveyance.

Arrest and search

In *Sebeda Khatoon v. Assistant Collector of Customs*[23] the interpretation relating to Secs. 52,54 and 57 came up for consideration.

The appellant argued that these are mandatory provisions. Here the Court, agreeing with this reasoning, added:

Whenever any person makes an arrest or seizure under this Act he shall, within 48 hours after such arrest or seizure report to his immediate official superior.

> This document can be used for the purpose of cross-examination in defence . . . it will also bring to an end the possibility of improving the prosecution version after that time. If these provisions are not strictly complied with the prosecution must fail but the same cannot be said with respect to the remaining provision incorporated in Secs. 52 (2) and (3).[24]

In *Surajmal Kanaiylal Soni v. State of Gujarat,*[25] the issue as to whether, according to Sec. 50, it was obligatory on the arresting authority to make an offer to the person who is to be taken before the specified

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22 1991 Cri. LJ. 2980, S.C. Jain, J.

23 1991 Cri. LJ. 1392.

24 This confers an added advantage to the accused because he can defend himself at the earliest opportunity.

25 1991 Cri. LJ. 1483.

Gazetted officer or the Magistrate, came up for consideration. The Court held:

> It cannot be said that the provision makes it obligatory on the authorised officer to make the offer to the person to be taken before the specified Gazetted Officer or Magistrate and in the case no such information is given or offer made, the mandatory provisions are violated making, *per se* fatal the prosecution case.

In *Salmat Ali v. State,*[26] the question which arose in this regard was whether, when grounds of arrest were not informed to the accused, the entire proceedings would be invalidated.

In *Raju Parshad Gupta v. State*[27] the appellant argued that he wasn't given the opportunity of being searched before a Magistrate or a Gazetted-Officer and the Court took this fact into consideration. It explained:

> The accused was not searched in his presence nor any recovery of *charas* made in his presence. No offer of being searched before a Gazetted Officer or a Magistrate was made to the accused. In these circumstances it would not be safe to accept the evidence of the police witnesses as trustworthy to hold the accused was found in possession of contraband.

In *Om Prakash v. State*[28] the same defence was taken up by the appellant. The Court again observed:

> It has to be seen whether the accused was apprised by the searching officer of his right to make a choice to be taken before a Gazetted officer or a Magistrate as he is to be searched for having a contraband in his possession. If the accused is not made aware of his right before the search it can be said that prejudice has been caused to the accused warranting the acquittal for non-compliance of Sec. 50 of Act.

However, in this case the accused himself had declined the offer to be searched in accordance with Sec. 50, the Court felt that only subsequent detention, consequent to such arrest, would be invalid. The entire proceedings would not be affected. So the Court held that it did not warrant an acquittal.

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26 1991 Cri. LJ. 1991.
27 1991 Cri. LJ. 2899.
28 1991 Cri. LJ. 2980 S. C. Jain,J.

Tampering with evidence

This issue as a basis of acquittal was discussed in *Mauruddin Kasim Mulla v. State of Maharashtra.*[29] In this case, packets in which samples were collected as evidence, were sent to the chemical analyser but were never secured back and so were not produced before the Court for identification. The Court held that the conviction was not to be sustained and that the accused was entitled to an acquittal.

In order to establish the entire link between the seized articles and the report of the chemical analyser stating that the analysed articles were contraband articles, it was absolutely necessary to have identified before the Court, as a substantive piece of evidence, the packets in which the samples were collected and were sent to the chemical analyser.

In *Mohd. Asif v. State,*[30] the accused was found in possession of 100 gms. of heroin and charged under Secs. 21 and 55. The accused argued that there had been tampering of evidence and so he was not guilty. But the Court held that the investigating officer prepared sealed parcels and after making an enquiry the S.H.O. also affixed his seal which was there on the Central Forensic Science Laboratory. Next the case was given to the head constable for safe custody, so there was complete compliance with the requirements under Sec.55 of the Act. The Court further added:

> In case where link evidence is missing to prove that the sealed parcels were not tampered with, the court has to give the benefit of doubt to an accused but in this case we have positive evidence that the sample parcels were not tampered with by anyone till they were examined in the C.F.S.L.

Abetment

This issue came up for discussion in *Ismail v. State of Kerala.*[31] The first accused was found in possession of *hashish* and the other two were dealers of narcotic drugs who had abetted the first accused for its sale to them. Here the Court held that abetment is also a crime.

8. Illicit traffic in Narcotic Drugs and Psychotropic Substances Act 1988

Under this topic both the cases which are discussed involve the petitioners challenging their decisions on the ground of reasonably long

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29 1991 Cri. LJ. 1699 M.L. Daulat and Vaidya, J.

30 1991 Cri. LJ. 2524.

31 1991 Cri. LJ. 2945.

delay in disposal of the representations filed.

In *Laiphrakpam Ongbi Geeta Devi v. State of Manipur,*[32] Sec. 3 of the Act was challenged. Here, the petitioner was the wife of Lai Parakpam, who was detained under Sec 3 under the orders of the Home-Secretary of the Government of Manipur. She argued that there was an unreasonably long delay in the disposal of the representation filed by the detenue. The jail authorities had taken 59 days to forward the representation to the State Govement. The Court held that there was no justification for the long delay, which vitiated the detention order, and said:

> There is no dispute about the fact that there is no time limit fixed for disposal of the representation. But equally undisputed is the well settled law on the subject that the representation of a detenue should be considered and disposed with the utmost expedition.

In another case, *Mohd. Ashfaq v. Union of India,*[33] the State Government of Rajasthan, exercising its power under Sec. 3(1) of the Act, decided to detain Mohd. Ashfaq in order to prevent him from the activities of keeping, concealing, transporting and disposing of smuggled goods being narcotic drugs. The petitioner wanted the order quashed because there was an extra ordinary unexplained delay in dealing with the representation of the petitioner, on account of which he said the detention order should be considered illegal. Here the Court accepted the petition on the ground that there had been an unexplained, extraordinary delay in dealing with representation of the petitioner on account of which the detention order was violative of the provisions contained in Art. 22 (5) of the Constitution. The petitioner was therefore released.

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32 1991 Cri. LJ. 2311, Dr. B.P. Sarah and H.K. Sema, JJ.

33 1991 Cri. LJ. 2615 V.B. Bansal, J.

SOCIO-ECONOMIC OFFENCES

Nikhil Nayyar *

A. ESSENTIAL COMMODITIES ACT

The Essential Commodities Act, 1955 acquires an important place in India especially since the introduction of the radical economic changes over the past few months. The period under review has not witnessed much activity in this area of law with around a dozen cases being reported.

Definitions

Courts had an opportunity to consider some definitions under various control orders.

Formulation : In *Blakrishna Pillai v. M/s Matha Medicals*[1] the respondents were prosecuted for collecting an amount in excess of the retail price fixed for the sale of Largactil and Thipnotex tablets. The High Court held that these tablets were only bulk drugs and not formulations and therefore, the Drug (Price Control) order was inapplicable. Reversing the decision the Supreme Court held that the definition of formulation under the order is very wide and includes even one bulk drug where that one bulk drug by itself is treated a medicine. Hence the medicines Largactil and Thipnotex were within the purview of the order.

Lactogen : In *State v. Dindayal Agarwala*[2] cases of packed lactogen (infant formula) were seized. It was contended that baby food as defined in Schedule I of the Orissa Baby Food Licensing Order, 1966 included, inter alia, only lactogen and did not include lactogen (infant formula) since it was not specifically provided for. The Orissa High Court rejected the contention and held that lactogen (infant formula) comes within the term 'Lactogen' even though 'Lactogen' was available in a number of varieties.[3]

License for carrying on business

The government has the power to regulate by licenses the conduct of business in essential commodities. In *Musasilal Jhunjhunwala v. State of*

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* Student V Year, NLSIU, Bangalore.

1 1991 Cri.LJ 692. For the scope of the definition of 'Sugar' I*Gopal Prasad v. State of U.P.* 1991 Cri. LJ 2845.

2 1991 Cr.LJ 2786.

3 *Ibid.* p. 2789.

Bihar [4] the appellant applied for a grant of license under the Bihar Trade Articles (Licenses Unification) Order. He was allotted a license number and his license was neither rejected nor were the defects in his application pointed out. Believing that he had not committed any illegality he continued to apply and pay license fees but the license was not granted. He was prosecuted for carrying on business without a license. Quashing the proceedings against the appellant the Court said that the appellant was not to be blamed. The Court observed :

> We fail to understand why the appellant should be prosecuted when he on his part has done everything for obtaining the license. The appellant is legitimately entitled to the license which has been withheld from him.[5]

The Court directed that the appellant be granted a license forthwith.

Confiscation and seizures

In *Jayant Kumar Sharma v. State of M.P.*[6] the appellant had a permit to sell food grains at a place 'K' at the weekly bazaar. He lifted the food grains from the Food Corporation of India at 'B' and stored the goods at 'B' since he had no shop at 'K'. The police seized his grains on the ground that he was concealing them. He was convicted and sentenced to one year's imprisonment. The Supreme Court acquitted the appellant accepting his statement that the food grains were kept in 'B' due to the lack of transport. The Court also said that since the appellant had made no attempt to sell the grains at 'B' it could not be said that he had concealed the food grains for sale in the black market.

In *Mariappa v. State of Karnataka,*[7] paddy and rice was seized from the petitioner who challenged the order of seizure. Under clause 12(1) of the Karnataka Rice Procurement (Levy) Order, 1989 read with S.3(2) (j) of the Essential Commodities Act, the condition precedent for the act of seizure is the existence of a reason to believe that a contravention of the said order has taken place or may take place. The High Court held that the seizure was illegal as neither the Mahazar nor any record disclosed the exsistence of a reasonable belief prior to the seizure. The Court held that existence of a reasonable belief is a condition precedent for the seizure and recording the grounds for the search is mandatory. Whenever a seizure is

4 1991 Cri.LJ 450. *See also State of Orissa v. Arjuna Das* 1991 Cri.LJ 3275, where it was held that retrospective renewal of licenses was not permissible.

5 *Ibid.* p. 450-1.

6 AIR 1991 SC 1501.

7 1991 Cri.LJ 1167.

challenged the burden will be entirely on the authority to show that he reasonably believed that there was a likelihood of a contravention or that there was a contravention. In the instant case the petitioner was entitled to restoration of his articles or money equivalent according to the prevailing market price.

In *Selvan v. State*[8] the accused purchased paddy without a valid permit and attempted to remove it in lorries. The goods were seized but the copy of the Mahazar was not supplied. The Madras High Court held that since clause 5(3) of the Tamilnadu Paddy (Restrictions on Movement) Order, 1982 which stipulated that search and seizure must be in accordance with Sections 100 and 165 of the Code of Criminal Procedure, was not followed. The confiscation of the paddy could not be upheld.

In *H.N. Dharmendrappa v. State of Karnataka*[9] the search of the petitioner's shop under the Karnataka Cement Control Order, 1983 was challenged on the ground that a Police Officer had no authority to conduct the search. The Court relying on *Satyanarain Musadi v. State of Bihar*[10] held that according to Section 10 of the Essential Commodities Act an officer in charge of a Police Station may, without the order of the Magistrate, investigate into the offence according to the procedure prescribed by Chapter XII of the Code of Criminal Procedure.

Section 6-A of the Essential Commodities Act permits the Collector in certain circumstances to confiscate the essential commodity that has been seized. Further, under Section 6-A(2) he may order that the seized goods be sold if he is of the opinion that the essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest to do so. In *Mariappa v. State of Karnataka*[11] paddy and rice was seized. The Deputy Commissioner purporting to act under Sec.6-A(2) directed the sale of the commodities without seeing the goods since he believed that they are likely to get decayed. The Deputy Commissioner did not refer to any public interest that warranted exercise of his power and he relied solely on the report of the Tahsildar. The Court struck down the order as there was non-application of mind by the Deputy Commissioner and because it felt that paddy is not perishable under normal circumstances.

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8 1991 Cri.LJ 1942.
9 1991 Cr.LJ 2262.
10 AIR 1980 SC 506.
11 *Supra* n.7.

Offences by firms and companies

In *Mohammad Ibrahim v. State*[12] kerosene was supplied to a consumers' cooperative society in which the President and Secretary held their positions in an honorary capacity and had only overall control. The kerosene was sold in the black market and illegal gain was made by falsifying the accounts. Reiterating that a cooperative society is a company for the purposes of Section 10 of the Essential Commodities Act, the Madras High Court held :

> Prosecution will have to prove that the offence was committed with the consent or connivance, or is attributable to any neglect on the part of any director, manager, secretary or other officer. The actual consent or connivance need not be established and it is enough if the prosecution proves that the offence is attributable to any neglect on the part of the accused. S.10 does not refer to any degree of negligence ... as distinct from derelection of duty.[13]

On the facts of the case it was held that neglect was attributable to the President and the Secretary of the Society and the requirement of Section had been fulfilled.

Trials and sentencing

Trial : In *Phalguni Dutta v. State of West Bengal*[14] the accused was arrested for selling sugar without a license. By the time the chargesheet was filed and the Special Court took cognizance of the case nearly three years had elapsed. The accused contended that since the case was triable as a summons case under Section 12-AA(1)(f) of the Essential Commodities Act and Section 262 of the Code of Criminal Procedure, the proceedings should be quashed as the chargesheet had been submitted after the expiry of six months from the date of his arrest. The Calcutta High Court upheld his plea and held that the combined effect of Section 12-AA(1)(f) of the Act and Section 262 of the Code is that though a case relating to an offence punishable under Section 7(1)(a)(ii) of the Act is a warrant case, when it is being tried before the Special Court in a summary way it turns to be a case triable as a summons case, within the meaning of Section 167(5) of the Code. Since in this case the chargesheet was submitted by

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12 1991 Cr.LJ 1385.

13 *Ibid.*, p.1347. *See* also *State of Orissa v. Arjuna Das, Supra* n.4, where it was held that a manager who sells on behalf of the owners, does not come within the scope of Section 10. Also *A.K. Thorat v. J.B. Apradh* 1991 Cr.LJ, 1719.

14 1991 Cri.LJ 565.

the police two and a half years after the arrest of the accused and investigation was not completed in six months, the accused was discharged.

Sentencing : In *State v. Dindayal Agarwala*[15] the accused was convicted under Section 7(1)(a)(ii) of the Essential Commodities Act for selling baby food in violation of the Orissa Baby Food Licensing Order, 1966. Since seven years had elapsed from the date of commission of the offence, the second accused was sentenced till the rising of the court and a fine of Rs.5000 levid since the delay was not due to his conduct.[16]

In *State of Orissa v. Arjuna Das*[17] the offence was committed 10 years prior to the date of judgment and since the prosecutor had been negligent in trial the Court exercised its power under Section 7(1), prior to its amendment in 1981, and did not award the sentence of imprisonment.

Summary

The cases under review have not raised any questions of seminal importance. By and large the courts have stuck to the well established positions in law. There seems to be a conflict between the Madras High Court and the Orissa High Court as to whether a manager is covered by Section 10. The courts have also been vigilant that strict procedural requirements are complied with in search and seizure operations.

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15 *Supra* n.3.

16 Section 7(1)(a)(ii) provides for a minimum imprisonment of three months, which may be extended to seven years along with fine.

17 *Supra* n.4.

B. PREVENTION OF CORRUPTION ACT

The Prevention of Corruption Act seeks to uphold the basic values of constitutional government - an honest bureaucracy, free from corruption and turpitude. The period under review has seen the courts fairly active in this branch of the law with the Supreme Court itself handing down about half a dozen opinions.

Applicability of the Act : Who is a 'public servant' ?

The courts in this regard have given a liberal construction to the Prevention of Corruption Act (hereinafter 'The Act') to substantially widen its scope.

In *K. Veeraswami v. Union of India,* [1] the question that came up before the Supreme Court was whether a judge of the Supreme Court or the High Court can be considered as a public servant under the Act. In this case, a former Chief justice of the Madras High Court was sought to be prosecuted for being in possession of property disproportionate to his known sources of income. In a landmark decision, the Supreme Court by a majority of 4:1 held that "there is no law providing protection for judges from criminal prosecution.[2]" The Court held that the definition of a public servant in Section 21 of the Indian Penal Code is wide enough to include Judges of the Supreme Court and the High Courts. The Court, speaking through Justice Shetty, opined :

> The expression 'Every Judge' used in the third category of Section 21 indicates all Judges and all Judges of all Courts . . . A Judge of the Superior Court cannot therefore be excluded from the definition of public servant.[3]

It was further contended that Section 6 of the Act cannot cover the Judges of the High Courts and the Supreme Court since they are not employed in connection with the affairs of the Union. It was contended that Section 6 applies only to such public servants where there is a relationship of master and servant between them and their employer. The Court rejected the contention and observed that Clause (c) of Section 6 has to be read *ejusdem generis* to Clause (a) and Clause (b) of Section 6. The Court observed that there is hardly any relationship of master and servant

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1 (1991) 3 SCC 655.
2 *Ibid,* pp. 706-7.
3 *Ibid,* p. 697.

in some of the categories in Section 21 of the IPC.[4]

Whether an employee of the Nationalized Bank could be considered as a public servant was the inssue in *M.P. Kini v. State,* [5] The accused, an Assistant General Manager in Canara Bank, conspired with the proprietors of two firms and discounted bills which were false. The question arose whether an employee of a Nationalized Bank came under the purview of the Act. The Court held that since the entire share capital of the Canara Bank, by virtue of Section 3 (3) of the Banking Companies Act, 1970, is vested with the Central Government, it is a government company within the meaning of Section 617 of the Companies Act. Consequently, every person in its services is a public servant. Dissenting from the view of the Delhi High Court in *Oriental Bank of Commerce v. Delhi Development Authority,*[6] the Andhra Pradesh High Court held that since the provisions of the Banking Regulation Act and the Banking Companies Act were in addition to and not in derogation of any law for the time being in force, it could not be said that the definition of 'public servant' given in Section 21 of the Indian Penal Code is excluded. Further relying on State of *M.P. v. M.V. Narasimham,* [7] the Court held that even though Clause 12 of Section 21 is later in point of time to the date when the definition of 'public servant' was borrowed by Section 2 of the Act, the extended definition has to be given affect to. [8]

Investigation of offences

Many issues came up for consideration regarding investigation. The most important was the question of disclosure of offence in the FIR for prosecuting the accused. In *A.K. Batra v. State of Punjab,* [9] allegations were made against the petitioner that he had purchased a plot of land and built a home on it and had also purchased a motorcycle and a car. It was alleged that he had spent more than his known sources of income. The High Court quashed the F.I.R. on the ground that there were no specific allegations, in the F.I.R., that a building that was constructed by the petitioner was on his wife's plot or that the income of the wife too was taken into consideration while holding that he made or spent money in excess of his known sources of income or that of his wife. The Court took a different stand as to the disclosure of offence in the F.I.R. in *S.S.*

4 *Ibid,* p. 695.
5 1991 Cri.LJ 272.
6 1982 Cri.LJ 2230.
7 AIR 1975 SC 1835.
8 1991 Cri.LJ 272.
9 1991 Cri.LJ 118.

Ahluwalia v. Delhi Special Police Establishment. [10] In this case, the F.I.R. clearly recited that the information had been received through a reliable source and that the accused had been indulging in corrupt malpractices and had amassed assets disproportionate to his known sources of income and it was mentioned that he was in possession of costly jewels and gadgets. On the question whether the F.I.R. disclosed the offence under the Act, it was held that the F.I.R. clearly disclosed the offence under Section 5(1)(e) of the Act and was, therefore, valid.

Another question considered by the Court was regarding the interpretation of Sec.5-A. This section stipulates that only Police Officers above a certain rank may investigate offences under the Act or offences under Sections 161, 165 and 165-A of the Penal Code. No officer below such rank can investuigate an offence unless so ordered by a magistrate.[11] In *State of Haryana v. Bhajan Lal,* [12] a complaint was made to the Chief Minister against Bhajan Lal that he had acquired properties by misusing his power and position as a Cabinet Minister and later as Chief Minister of Haryana. The Chief Minister's Secretariat referred the case to the Director General of Police who in turn endorsed it to the Superintendent of Police (Hissar) for necessary action. On the basis of the endorsement by the S.P., a case was registered and investigated by the Station House Officer. The accused contended that this violated the mandatory provisions of Section 5-A. The Supreme Court, while laying down that strict compliance with Section 5-A is absolutely necessary, observed :

> The Superintendent of Police or any police officer of above rank while granting permission for a non-designated police officer in exercise of his power under the second provision to Section 5-A(1), should satisfy himself that there are good and sufficient reasons to entrust the investigation with such police officer of a lower rank and accord his reasons for doing so . . . . The exception should be for adequate reasons which should be disclosed on the face of the order.[13]

The Court held that the Superintendent's direction to the Station House Officer was not clothed with the requisite authority.

In *K. Veeraswami v. Union of India,*[14] the appellant challenged the

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10 1991 Cri.LJ 2583.

11 Further, any offence under Section 5(1)(e) cannot be investigated save by an order of a police officer not below the rank of a Superintendent of Police.

12 AIR 1992 SC 604.

13 *Ibid.,* p.634.

14 *Supra* n.1.

legality of the charge sheet filed against him. He contended that a public servant is entitled to an opportunity before the investigating officer to explain the alleged disproportionality for which he cannot account. It was further contended that the investigating officer is required to consider his explanation and the charge sheet filed must contain such averment. The Supreme Court however rejected this view and opined that the investigating officer is only required to collect material to find out whether the offence alleged appears to have been committed. He may examine the accused or seek his clarification. However, he is not required to give the accused an opportunity to account for the excess of assets, for that would be "elevating the investigating officer to the position of an enquiry officer or a judge."[15]

Sanction for prosecution

The philosophy behind the requirement of a sanction for prosecution was re-emphasized in *K. Veeraswami v. Union of India.*[16] A sanction is not meant to afford protection to a public servant from criminal prosecution. It is only to protect the honest public servant from frivolous and vexatious prosescution.

Who can accord sanction ?

In a significant march of the law, the Supreme Court in *K. Veeraswami v. Union of India,*[17] liberally construed Section 6 of the Act and held that though Parliament has the power to remove Judges of the High Courts and Supreme Court, by virtue of Article 124 (4) and (5), for the purposes of the Act, the President of India is the competent authority to give previous sanction for the prosecution of such Judges. Shetty J. observed :

> It is not necessary that the authority competent to give sanction for prosecution or the authority competent to remove the public servant should be vertically superior in hierarchy in which the office of the public servant exists . . . All that is required is that the authority must be in a position to appreciate the material collected against the public srvant to judge whether the prosecution contemplated is frivolous or speculative.[18]

Sanction requires application of the mind

The law is settled that grant of sanction is not an idle formality or an

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15 *Ibid.*, p.715.
16 *Ibid.*, p.693.
17 *Ibid.*
18 *Ibid.*, p. 704. *See also, Virendra Pratap Singh v. State of U.P.*, 1991 Cri.LJ 2964.

acrimonius exercise but a solemn and sacrosanct act which intends to protect officials from frivolous prosecution. In *Bhagirathi Routray* v. *State of Orissa,* [19] the appellants allegedly misappropriated government money entrusted to them. The Deputy Secretary to the Government addressed a letter to the Chief Conservator of Forests (the sanctioning authority) directing him to grant sanction. A draft sanction order was also enclosed for adoption. The High Court held that the sanctioning authority had complied with the "veiled direction to grant sanction" given by the Deputy Secretary. The Court struck down the order as it had been passed mechanically and at the behest of higher officials.

In *State of Tamilnadu v. Damodaran,* [20] the following materials were placed before the sanctioning authority - statements recorded under Section 162 of the Code of Criminal Procedure, the F.I.R. in original and the proceedings of the trap. The Supreme Court held that all relevant material had been placed before the sanctioning authority and the authority had applied his mind.

An interesting question arose in *Harekrishna Patnaik v. State of Orissa.* [21] The sanctioning authority perused the relevant records produced by the Investigating Officer and passed the sanction order. The sanctioning authority admitted that the sanction was accorded only on the basis of the report of the Superintendent of Police, but the report was not produced. The Court held that while it is ideal that a report, if it forms the basis of the sanction, should be placed in evidence, yet the absence of that would not necessarily mean that the facts were not before the sanctioning authority. If the prosecution can establish that the materials were placed before the authority, the sanction is valid.

Questions relating to presumptiom and proof

In *Pallania Pillai v. State,* [22] the appellant was tried for the offence of accepting bribe for giving a telephone connection. The accused, an employee of the Telephone Department, alleged that the amount was paid as donation for the Union Conference. The prosecution raised the presumptiom under Section 4 of the Act. The Court held that to raise such a presumption, it is sufficient if the prosecution proves the receipt of the money. The burden of proof which the Section casts on the accused would be satisfied if he

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19 1991 Cri.LJ 209. *See also, Prithi Pal Singh v. State of Punjab,* 1991 Cri.LJ 2541; *V.M. Kharkhanis v. State of Maharashtra,* 1991 Cri.LJ 3146.

20 AIR 1992 SC 563.

21 1991 Cri LJ 462. *See also, B.A. Sayed v. State of Gujarat,* 1991 Cri L J 1269.

22 1991 Cri.LJ. 1563.

established his case by preponderance of probabilities. Further, the Court held that the need for corroborating the evidence of the trap witness or the attesting witness could not be relegated to a strait-jacket formula.

In *K. Veeraswami v. Union of India,* [23] the Supreme Court reiterated the principle and held that in case of an offence under Section 5(1)(e) of the Act, it is for the prosecution to prove that the accused or any person on his behalf has been in possession of pecuniary resources or property disproportionate to his known sources of income. When that onus is discharged by the prosecution, it is for the accused to account 'satisfactorily' for the disproportionality of the properties possessed by him. This evidentiary burden can be discharged "on the balance of probabilities". The burden is not so onerous as the one placed on the prosecution.[24]

In *State of Kerala v. Sabastian Jacoc,* [25] an employee of a co-operative purchased rice but did not account for it in the books. The Court held that the very fact that the rice was purchased in the name of the store and not accounted for indicated corrupt or illegal means or otherwise abusing official position. Further proof was not required to make out a case under Section 5 (1)(d).

Trials and sentencing

The prevention of Corruption Act provides for a minimum mandatory sentence which may be awarded only in special cases.[26] However, courts have not approached this provision with any consistency. In *D.K. Joshi v. State of Maharashtra,*[27] the accused, 58 years old, as a result of his dismissal, forfeited his pension rights, gratuity and other benefits. Since he had suffered physically and mentally during the trial, he pleaded that he may only be fined. The Bombay High Court held that imprisonment is "inevitable and compulsory" and mandatory as per the terms of Section 5(2) though it could be reduced for special reasons. Consequently, on the facts of the case, only a token sentence was awarded.

An important principle was laid down in *V.M. Waikar* v. *State of Maharashtra.*[28] Here, the accused was a senior Advocate and a Special Police Prosecutor who collected Rs.10,000 from the complainant to bribe

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23 *Supra* n.1.

24 *Ibid.*, pp. 713-14.

25 1991 Cri.LJ 2636.

26 Section 5(2) of the Act provides for a term of imprisonment which shall not be less than one year but which may extend to seven years. For any special reason to be recorded in writing, the sentence may be reduced.

27 1991 Cri.LJ 2097.

28 1991 Cri.LJ 3163.

the Judicial Magistrate. On affirming his conviction, the High Court held:

> Where the object of an offence was essentially directed at the making of money, if the law courts were to clearly indicate that not only the illegal gains but much more than the amount in question will be taken away from those who indulge in such offences, in my view the ends of justice will be adequately served.[29]

Since eight years had elapsed during the course of which judicial proceedings had been going on, the Court deemed it fit to reduce the term of imprisonment from two years (rigorous) to one day but imposed a fine of Rs.35,000. Similarly, the second accused, the advocate's clerk was fined Rs.10,000.

Miscellaneous

In *R.C. Jain v. State of M.P.*,[30] partners of four transport companies applied for a bank loan which was sanctioned. Subsequently the accounts were withdrawn, trucks were not supplied and forged documents were submitted to the bank to show that trucks were supplied. the High Court upheld the conviction of the partners of the firms and the bank official. Relying on *State of West Bangal v. Mammal,* [31] the Court laid down that private individuals who are found grabbing public funds in conspiracy with the active connivance of public servants are also liable for such corrupt practices under the Act.

Another important facet of the Supreme Court's ruling in *K. Veeraswami v. Union of India* [32] is that the Court held that Parliament's power of removal under Article 124(4) and the power to prosecute under Section 5 of the Act are mutually exclusive. Thus, the prosecution of a Judge for criminal misconduct before his removal by Parliament for proved misbehaviour is unobjectionable.[33]

Summary

The developments of the year under review are undoubtedly over-shadowed by the far reaching decision in Veeraswami's case. The major developments can be summarised as follows :

(i) Judges of the High Court and the Supreme Court are public

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29 *Ibid.*, p.3176.
30 1991 Cri.LJ 2957.
31 AIR 1977 SC 1772.
32 *Supra* n.1.
33 *Ibid.* p. 706.

servants and are subject to the Prevention of Corruption Act;

(ii) Employees of nationalized banks are public servants;

(iii) The otherwise mandatory provisions of Section 5-A can only be deviated from if adequate reasons are given in writing;

(iv) An investigating officer is not required to give an accused the opportunity to account for his excess of assets;

(v) The President of India is the authority whose sanction must be obtained before prosecuting a Judge of the High Court and the Supreme Court;

(vi) If relevant reports, based on which the sanction was accorded, are not placed in evidence, the sanction is valid if the prosecution can establish that the materials were placed before the sanctioning authority;

(vii) Where the subject of an offence is to make money, the fine imposed will be higher than the money sought to be made by illegal means;

(viii) Private individuals can also come within the purview of the Act if they act in connivance with public servants; and

(ix) Parliament's power of removing a Judge under Article 124(4) and the power to prosecute under the Act are mutually exclusive.

C. PREVENTION OF FOOD ADULTERATION ACT

The Prevention of Food Adulteration Act, 1954 (hereinafter called the Act) is an important legislation as it tries to ensure the supply of unadulterated foodstuffs to the consumers. The non-implementation of the Act could affect the health of the nation. Therefore, the Act seeks to prevent adulteration of foodstuffs and the manufacture, storing and sale of adulterated foodstuffs for human consumption. It has been suggested that to eradicate this anti-social evil efforts should be made to see that the objects and purpose of this law is not defeated and for this purpose narrow and pedantic, literal and lexical construction of the statute which is likely to leave loopholes should be discouraged.[1]

Significantly, in the period under review, though the Courts have been fairly active, the bulk of the cases have dealt with interpretations of various Rules (made under the Act) and sections.

Definitions

Food: Section 2(v) of the Act defines 'Food'. In *Shivaraj Tobacco Co. v. State of Madya Pradesh*,[2] the High Court observed that 'food' is defined very widely and covers every article used as food and every component which enters into it and even flavouring matter and condiments. Thus there could be no doubt that *Pan Masala* is 'food'.[3]

Adulterated: Sec.2(ia) of the Act defines the scope of the word adulterated. In *State of Punjab v. Kewal Krishan*[4] a sample of the 'Saunf' sold by the respondent revealed living and dead insects. It was contended that under Section2(ia)(f) in addition to the food article being insect infected it is further necessary to prove that the food article is otherwise unfit for human consumption. The Court rejected the contention and relying on *Delhi Municipality v. Tek Chand Bhatia*[5] held that a plain reading of the said provision revealed that if food is insect-infected then it was not necessary to further prove that it is otherwise unfit for human consumption.

Interpretation of food adulteration rules

The process of testing a sample and the related procedures form an

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1 *Muralidhar v. State of Maharashtra*, AIR 1976 SC 1929.
2 1991 Cri. LJ 156 (MP).
3 For 'Supari' *See, Food Inspector, Palakkad v. M.V.Alu* 1991 Cri. LJ 2174 (Ker).
4 1992 Cri.LJ 742 (P&H).
5 AIR 1980 SC 360.

important part of the scheme of the Act. The Prevention of Food Adulteration Rules, 1955 deal with the administrative aspects. Rule 7(3) prescribes that the Public Analyst shall within a period of 45 days from the date of receipt of sample for analysis deliver his report of the analysis to the Local Health Authority. In *Food Inspector, Cannanore v. M.Gopalan,*[6] a Full Bench of the Kerala High Court held that Rule 7(3) is only directory in nature. This however does not give the Food Analyst a free hand to be leisurely. Sukumaran J. opined[7]:

> In any given case, a delay which was found to have caused prejudice will enable the accused to plead successfully for an acquittal. Whether the acquittal is merited would depend upon the totality of the circumstances. No hard and fast rule can be laid down.

It was held on facts that a delay of one day was not sufficient to warrant an acquittal.

Under Rule 9-A the Local Health Authority is to forward a copy of the analysis to the accused immediately. Interpreting the word 'immediately' the Supreme Court in *Rajendra S/o Ram Ratan v. State of Madhya Pradesh*[8] relied on its earlier decision in *Tulasiram v. State of Madhaya Pradesh*[9] and held that it conveys a sense of continuity rather than urgency. The report must be forwarded at the 'earliest opportunity' so as to facilitate the exercise of the statutory right under Sec.13(2). The Court further held that non-compliance with the rule is not fatal. However in *Ahmed Dadabhai Advani v. State of Maharashtra*[10] the Supreme Court took a slightly different view. The Court opined that 'immediately' as in Rule 9-A 'has to be appreciated in the context of the facts and circumstances of each case bearing in mind the purpose for furnishing the report'. Since the Local Health Authority failed to send the report promptly the conviction was set aside.

A ticklish area in this subject relates to the standards that are applicable to certain foods. In *Food Inspector Palakkad v. M.V.Alu,*[11] it was observed by the Kerala High Court that though no standard is fixed for supari there is no justification to add a prohibited item (in this instance, saccharine). The High Court observed[12]:

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6 1991 Cri.LJ 1783 (Ker) : AIR 1991 (Ker) 240.

7 *Ibid* p. 1790.

8 1991 Cri. LJ 2497 (SC) : AIR 1991 SC 1757.

9 1984 Cri. LJ 1731.

10 AIR 1991 SC 1079.

11 1991 Cri LJ 2174 (Ker). *See State of Punjab v. Gulshan Rai* 1992 Cri. LJ 873 (P & H).

12 *Ibid* p. 2179 For the pre-1988 position *See Shivaraj Tobbacco Co. v. State of Madhya Pradesh,* 1991 Cri. LJ 156 (MP) at pp. 159-160.

Even before Rule 47 was amended in 1988, it provided that saccharine or any other artificial sweetener shall not be added to any article of food except where it is permitted in accordance with the standards laid down in Appendix 'B'. Under the amended Rule 47, there is a total prohibition except as allowed by the proviso. Thus either before or after amendment, supari is not an item in which saccharine is permitted.

In *Food Inspector, Pattambi Circle v. K.P.Gokuldas*[13] the issue was whether the standards applicable to 'flavoured milk' will be applicable to 'rose milk'. The Kerala High Court held that milk which is pasteurized, sterilised or boiled and contains edible colours and cane sugar, will cumulatively make out the ingredients of the definition of 'flavoured milk'. If rose milk contains the ingredients of 'flavoured milk' the fact that it is called 'rose milk' will not extricate it from the designation 'flavoured milk' referred to in the appendix, for which standards are prescribed.

Procedure for taking food samples

Various High Courts dealt with the issue of the correct method of collecting a sample of a food article so as to ensure that the sample is homogeneous in character.

Curd: The Orissa High Court in *Ramachandra Sahu v. State of Orissa*[14] held that it "is settled position in law that so for as the collection of sample of curd is concerned the proper manner and method is that the curd should be divided vertically and the one entire component should be taken, churned and then divided into three parts." Thus as there was no evidence as to whether the curd was vertically divided and churned in order to make it a true representative of the sample, the accused was entitled to be acquitted.

Supari: In *Food Inspector, Palakkad v. M.V.Alu,*[15] the sample purchased was in three large packets having identical label declarations, each packet containing small packets with identical labels. The Food Inspector sampled each large packet without opening them or the small packets. The Court held that Sec.11(1)(b) was not violated merely because he did not open the

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13 AIR 1991 (Ker) 204 (FB).

14 1991 Cri. LJ NOC 18 (Ori). *See also Shew Chander Mathu v. State of Assam* 1992 Cri. LJ 1022 (Gau) where it was held that compliance with Rule 14 of the Prevention of Food Adulteration Rules, 1955, as to the manner in which samples are to be taken, is mandatory.

15 1991 Cri. LJ 2174 (Ker). For the procedure for collecting sample of cumin *see, P.C.Jain v. State of West Bengal* 1991 Cri. LJ 2912 (Cal). For oil, *see Nagar Swasth Adhikari, Agra v. Ram Ratan* 1991 Cri. L J 1805 (All).

packets and mix the powder to make the sample homogeneous.

Report of the Public Analyst

Sec.13(2) of the Act requires that a copy of the analysis report of the Public Analyst should be sent to the accused to give him the opportunity of getting the sample analysed by the Central Food Laboratory. The section confers a valuable right on the accused to prove his innocence by getting the sample analysed by the Central Food Laboratory. Any delay in furnishing the report would make the right an illusory one.[16] In *Bidyadhar Jena v. State of Orissa*[17] the Court held that the requirements of Sec.13(2) are mandatory. Consequently a mere despatch of the document without proof of service is not sufficient compliance of the requirements of law.

In *P.A. Venkatasubba Rao* v. *State of Andhra Pradesh*[18] the accused neither filed a petition requesting to send the sample to the Central Food Laboratory nor was such a petition rejected on the ground that no case was instituted. Since no prejudice was caused to the accused, the contention that he was not given any opportunity to file a petition was rejected.

Offences by companies

In *Food Inspector, Palakkad v. M.V.Alu,*[19] it was held that under Sec.17 of the Act when an offence is committed by a company every person who was in charge of the company and responsible for the conduct of the business at the time when the offence was committed could be penalised. It was further held that it is incorrect that only the persons nominated to be in charge of and responsible to the company alone could be liable.

In *Prakash Chand Jain v. State of West Bengal,* [20] the accused was a partner of a firm. Discussing the liability of the partner under Sec.17 the Calcutta High Court, speaking through Bhattacharjee, J. opined:[21]

> . . . the *sine qua non* for the operation of the section to rope in such a one is the commission of the offence by the company or the firm. Where, as here, the firm, though arraigned as a co-accused, was discharged, and, therefore, commission of any offence by it stands

16 *Ramachandra Sahu v. State of Orissa* 1991 Cri. LJ NOC 18 (Ori).
17 1991 Cri. LJ 2700 (Ori). For a slightly different view *see Gopal v. State of Madhya Pradesh* 1992 Cri. LJ 259 (MP).
18 1991 Cri. LJ 115 (AP).
19 1991 Cri. LJ 2174 (Ker).
20 1991 Cri. LJ 2912 (Cal).
21 *Ibid* p. 2913.

not proved, the conditions precedent for the application of the section squarely falls through and the section can no longer show its head.

Since the firm was discharged the accused could not be convicted solely on the ground that he was incharge of the business.

Sanction for prosecution

In *A.K.Rao v. State of Andhra Pradesh,* [22] the High Court dealt with a situation where the order sanctioning prosecution was passed mechanically without application of mind. For an order to be valid under Sec.20 "the sanctioning authority must first state what is adulterated as per the report of the public analyst and what are the reasons for granting the sanction in the light of the public interest." The Court held that if there is any lacuna in the sanction order, then the entire prosecution vitiates.

An interesting question arose in *Rattan Lal v. State of Himachal Pradesh.*[23] In this case there was some disparity between the report of the Public Analyst and the Director, Central Food Laboratories with respect to the non-fat solid content in the milk sample. It was contended that a fresh sanction was required. The High Court held that where the variation in the contents of the reports is of a nature which does not alter the specie of the offence for which the offender is being prosecuted, there is no necessity of obtaining a written consent afresh after the receipt of the report of the Central Food Laboratory. However, where the nature of the offence is such that it completely alters the specie of the offence, in the sense of altering the nature of adulteration for which prosecution was initially launched, fresh application of mind is necessary before the prosecution can continue.

Trial of offences and sentencing

(a) Separate trial

In *Shailendra Kumar Jain v. State of U.P.*[24] the accused committed an offence under Sec.16(1)(c) of the Act by refusing to give a sample of a certain item of food material. He was also charged under various sections of the Indian Penal Code. The Court held that since both offences were distinct and separate under the provisions of different Acts, they are to be tried separately.

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22 1991 Cri. LJ 227 (AP).
23 1991 Cri. LJ 3302 (HP).
24 1991 Cri. LJ 2969 (All).

(b) Procedure

In *Subhas Chand v. State of Haryana,*[25] the petitioner was tried by warrant procedure instead of being tried summarily as provided by proviso (2) to Sec. 16A. The High Court rejected the plea to set aside the conviction and held that no material prejudice was caused to the petitioner by following warrant procedure and such an omission would amount to a mere irregularity which is curable under Sec.465 of the Code of Criminal Procedure.

A petty vendor was tried for selling adulterated milk. It being an offence under Sec.16(1) the accused was to be tried summarily. The accused appealed against his conviction and the Sessions Court remanded the case for a fresh trial. However, since the time that the Sessions Court had decided the case 12 years had elapsed. The Rajasthan High Court in *Mansingh v. State of Rajasthan*[26] held that the order of remand was improper.

(c) Sentencing

In *State of Orissa v. K.Rajeshwar Rao,* [27] the offence was committed in 1976. Under the unamended Act no mandatory minimum sentence was prescribed. Since 15 years had passed from the date of offence the Supreme Court held that the ends of justice would not be served by sending the respondent to prison. However, a fine of Rs.500/- was imposed. In *State of U.P. v. Akhtar* [28] the respondent was convicted for adulterating milk and was sentenced to one year's regorous imprisonment and a fine of Rs.2000/-. On appeal the Sessions Judge reduced the term of imprisonment till rising of the Court and reduced the fine to Rs.1000/-. The Allahabad High Court held that the Sessions Judge was not correct in reducing the sentence as there were no special reasons for passing such order. However since 17 years had elapsed from the date when the sample had been taken the respondent was not required to serve the minimum sentence but the fine of Rs.2000/- was reimposed.

A different view was taken in *Devraj v. State of M.P.*[29]. Here the crime was committed nine years prior to the decision of the High Court and the applicant was an old man. Yet, the Court held that no sentence lesser than the lower minimum could be imposed.

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25 1991 Cri. LJ 2481 (P&H).
26 1991 Cri. LJ NOC 20(Raj).
27 1992 Cri. LJ 300 (SC).
28 1992 Cri. LJ 204(All). *See* also *State of M.P. v. Nanhelal* 1992 Cri. LJ 257 (MP).
29 1991 Cri. LJ 2439 (MP).

Warranty

In *P.A.Venkata Subba Rao v. State of Andhra Pradesh,* [30] the petitioner was prosecuted for selling adulterated turmeric powder. When questioned about the source of supply of the food article the accused failed to disclose the name and address of the person from whom he had purchased it. The source was disclosed after considerable delay and even then the original cash memo was not filed. In the light of these facts the Court held:

(i) there is no mandatory duty cast on the Food Inspector to find out the source of supply and to implead the said vendor, particularly when the information is not given immediately;

(ii) the petitioner is not entitled to the benefit of warranty;

(iii) on a reading of Section 19 and 20A, it is evident that the burden is on the accused to produce the warranty and prove that he purchased the food article under warranty. Merely filing a photostat copy of the cash memo in the court does not discharge the accused's burden of proof.

Miscellaneous

In *State of Orissa v. K.Rajeshwar Rao,*[31] the respondent was found to have sold adulterated cumin but was acquitted on the ground that his father was the owner of the shop. The Supreme Court reversed the decision of the High Court and convicted the respondent. The Court held that *mens rea* is not an essential ingredient under the Act. Justice K.Ramaswamy observed:

> The essential ingredient is sale to the purchaser by the vendor. It is not material to establish the capacity of the person vis-a-vis the owner of the shop to prove his authority to sell the adulterated food exposed for sale in the shop.[32]

Summary

Some of the important developments in the law relating to the prevention of food adulteration may be summarized as follows:

(i) Rule 7(3) is merely directory in nature.

(ii) There seems to be some apparent contradiction in the decisions of the Supreme Court regarding the interpretation of Rule 9-A of

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30 1991 Cri. LJ 115 (AP).
31 *Supra* n. 27.
32 *Ibid,* p.302.

the Prevention of Food Adulteration Rules.

(iii) If mixing an item is prohibited under the Act there is no justification to add it to an item for which there are no prescribed standards.

(iv) The Standards applicable to 'flavoured milk' will be applicable to 'rose milk'.

(v) The requirement of Sec.13(2) is mandatory and any delay in furnishing the report of the Public Analyst could vitiate the prosecution.

(vi) If there is a disparity between the report of the Public Analyst and the Director, Central Food Laboratory a fresh sanction for prosecution may be warranted which depends on the facts of each case.

TERRORISM AND THE LAW

*Dr. N.S. Gopalakrishnan**

The Terrorists and Disruptive Activities (Prevention) Act, 1987 being a relatively new piece of legislation of its variety, there are few interesting developments of law in this area though the number of cases decided on various aspects of this legislation are very few. The period of survey of cases witnessed development of law in the area of definition and jurisdiction of High Court.

Who is a terrorist?

The definition of this concept "Terrorists and Disruptive Activities" being very wide in nature, it has been a problem for the apex court of this country to give proper interpretation to limit the abuse of power by the enforcement authorities.

In *Erram Santosh Reddy v. State of A.P.*[1] the Supreme Court gave a slightly broader interpretation to the concept as compared to its earlier decisions.[2] In this case it was alleged that the accused was creating terror amongst the people with an intention to overawe the Government by using fire arms, bombs, etc. While the police conducted a raid in this place where the accused were staying, they hurled a bomb with a view to kill the police. On surrender of the accused on police encounter, a case under the TADA was filed and the accused were convicted by the Designated Court. On appeal it was aruged before the Supreme Court that since there were no facts to prove that the accused did any act to terrorise the people of the locality, they could not be convicted under the provisions of the TADA. Relying on the evidence that the accused hurled a bomb on the police and recovered fire arms from them, the Court negatived the above contention and observed:

> That being so, the ingredients of Sec.2(f) as well as Sec.3(1) are attracted. Sec.3(1) is very wide and covers any act which strikes terror in the people or section of the people would attract the said provisions. *The fact that the appellants were armed with the fire-*

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* Faculty Member, NLSIU, Bangalore.

1 AIR 1991 SC 1672 (S. Ratnavel Pandian and K. Jayachandra Reddy, JJ.).

2 *See Niranjan Singh Karm Singh Punjabi v. Jitendra Bhimraj Bijja* AIR 1990 SC 1962 and *State of Punjab* v. *Sukhpal Singh* 1990 SCC (Cri)1.

> *arms as well as explosive substance and also hurled a bomb on the police who were in the premises would go to show that the offence of the appellant was to strike terror in his people including the police.* [3]

To the submission that the accused were not terrorists since the bomb had not caused any injury to any one, the Court added:

> It must be remembered that Sec.2(f) lays down that the 'terrorist act' is within the meaning of sub-section (1) to Sec.3 and expression terrorist shall be construed accordingly. Therefore, the meaning of the 'terrorist' has to be gathered from Sec.3(1). *That being so, the facts established by the prosecution would go to show that these appellants were armed with the fire-arms as well as explosives came within the meaning of 'terrorist'.* Hurling the bomb at the police and other literature recovered from their possession in addition would show that they were indulging in 'terrorist acts' and, therefore, accordingly they came within the meaning of the word terrorist.[4]

The Same line of reasoning was followed by the Court in *Kathula Somulu v. State of A.P.*[5] The observation of the Court is quite pertinent:

> The fact that these appellants were found in this group of other persons in the forest area and were seen running away after seeing the police and coupled with the recoveries of the explosive substances including the country made fire-arms would lead to the inference that the appellants, along with others were engaged in conspiracy or in an attempt to commit or abet the 'terrorist act'.[6]

It appears that the Court is looking at the acts of the accused, its nature and gravity and not its actual physical consequences on the people to find out whether the accused is a terrorist.

Power of the High Courts under the TADA

(a) *Illegal remand orders*

A very interesting question came up before the Rajasthan High Court

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3 AIR 1991 SC 1672 at p.1674 (emphasis added).

4 *Ibid.* (emphasis added).

5 AIR 1991 SC 1556 (S. Ratnavel Pandian and K. Jayachandra Reddy, JJ). In this case, the appellants, members of CPI (ML), were arrested by the police from the forest area on their return from the forest after a raid to arrest a group of people who were planning to attack a village. Based on the recovery of firearms from them they were punished by the Designated Court for an attempt to commit terrorist act.

6 *Ibid* pp. 1556-1557. Conviction and sentence upheld.

in *Chamn Lal Jain v. State*[7] in the nature of a Habeas Corpus petition regarding the power of the High Court to intervene in cases where there is total violation of the provisions regarding remand under the Cr.P.C. and TADA. In this case, based on an FIR filed by the police on 19.11.1990, a search was conducted on the residential place as well as business place of D.P. Gupta and recovered a sizeable stock of explosives. The accused were arrested under the TADA in December, 1990 and were kept under custody. The investigation remained incomplete and the police could not file a charge sheet. On 5.6.1991, three out of the four accused were produced before the Chief Judicial Magistrate and asked for the extension of remand. D.C.Gupta, one of the accused, was not produced. The case was posted for 19.6.1991 for production of case diary and application for extension of remand. On 19.6.1991, since the police failed to produce case diary and the accused, D.C. Gupta, the other accused, prayed for a discharge. It was argued by the public prosecutor that only the Designated Court had the power to discharge the accused since it was a case under the TADA. The case was sent to the Designated Court by the CJM for further orders and was posted on 21.6.1991. The accused were remanded to judicial custody. On 21.6.1991, the Designated Court observed that the CJM has all the powers under S.20(4) of the TADA and sent the case back to the CJM the same day. Neither the case diary nor the public prosecutor appeared before him. The accused were remanded to judicial custody till 4th July, 1991. The CJM wrote to the DG of Police for the production of report. It was in this background that a writ petition was filed before the High Court challenging the remand orders passed by the lower courts as violative of S.167(2) of the Cr.P.C. It was contended before the High Court that the orders passed were illegal and the detention of the accused unlawful. This was countered by the State stating that even though the orders were illegal, there was no unlawful detention since the accused were detained based on judicial orders. It was also contended that the High Court has no power to entertain any petition since the jurisdiction was taken away by the TADA. After examining various cases, the Court observed:

> On a careful study of the entire case law we are of the opinion that a distinction has to be drawn between illegal detention and the judicial custody under an illegal order. The Chief Judicial Magistrate, who has passed the order of remand, had the jurisdiction to grant remand, of course, in accordance with law. If his order is not in consonance with law a remedy lies to the next higher court under the

7 1991 Cri. L J 955.

> provisions of the Code of Criminal Procedure or the TADA and extraordinary jurisdiction cannot be invoked when the remedy is available under the Code itself.... Whether the order remanding to jail is legal or illegal is to be looked into by the next higher court in the hierarchy of the courts, more particularly in the cases under the TADA when jurisdiction of this Court is completely ousted by the legislature. The accused have remedy of approaching Hon'ble Supreme Court for redress of their grievance... We, therefore, though *do not approve of the manner in which the orders have been passed, yet are not inclined to interfere with the order in extraordinary jurisdiction.*[8]

While dismissing the Habeas Corpus petition, the High Court directed the investigating agency to complete the investigation as expeditiously as possible.

It is interesting to note that the Gauhati High Court took a different view in this regard in *Sampatmall Jain v. State of Assam.*[9] The Court, after examining the Supreme Court decision in *Usmanbhai* [10] regarding the power of the High Court to interfere with the orders passed by the Designated Court, inter alia observed:

> Thus, it would appear that though this Court has no power to grant bail under Cr.P.C, reading Section 19 of the Act and the law laid down by the apex court, I hold that powers of this Court under Section 482, Cr.P.C. against the order of the Magistrate under Sec.167, Cr.P.C. has not been taken away. In other words, if the High Court finds legal flaw in a remand order, necessary orders or direction except granting of bail can be passed by the High Court by exercising powers under Section 482, Cr.P.C. This is in addition to the powers of the High Court under Arts. 226 and 227.[11]

The Court went further and observed:

"... I may add that if this Court finds that the Designated Court or Magistrate by exercising powers under Cr.P.C. is not acting in accordance with law, suitable direction can be given by this Court." [12]

It appears that in the light of conflicting opinions by various High

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8 *Ibid* p. 961. (emphasis added).
9 1992 Cri.LJ 919. For facts see *infra*.
10 AIR 1988 SC 922.
11 1992 Cri.LJ 919, 929 (S.N. Phukan, J.).
12 *Ibid.*

Courts with reference to the power that can be exercised by the High Courts in cases connected with the TADA, a detailed judgment from the Supreme Court is the desideratum.

(b) Non-disclosure of the offence in the FIR

The Gauhati High Court in *Sampatmall Jain's* case[13] examined the duty of the Designated Court with reference to the acceptance of FIR and passing of orders during investigation of an offence under the TADA. In this case, the petitioner was arrested on 15.2.92 in connection with a kidnapping case. The FIR filed on 6.11.90 did not disclose the name of the accused or a case under the TADA. On 13-2-92, the police officer made a request to the CJM to add Ss.3 & 4 of TADA in the above case which was allowed. The accused was arrested on this ground. The order of the CJM was challenged before the High Court on the ground that the offence under the TADA was not disclosed in the FIR and it was included without applying the mind. It was also contended that the CJM had no power to add the case under TADA. After analysing the provisions of the TADA and the case law, the Court observed:

> Although the jurisdiction of the High Court in respect of this judgment and order etc., passed by a Designated Court has been taken away, but the constitutional powers of this Court under Article 226 and 227 of the Constitution are always available as has been laid down by the apex court and the Gujurat High Court, as well as this Court. Accordingly, this Court is duty bound to direct all the courts and tribunals within the jurisdiction of this Court to implement the law laid down by the apex court. Therefore, I hold that on receiving the First Information Report, the first duty of the Designated Court is to apply its mind to the said report and other materials made available and shall take a decision keeping in view the above ratio laid down by the apex court and other courts whether prosecution should be allowed to rope in a person under the Act and in so doing, the Designated Court is duty bound to record its satisfaction or otherwise as to whether the offence disclosed in the First Information Report could be dealt with under the normal law of the land and whether the govt's law enforcing machinery has failed. It is needless to say that before passing the order, the Designated Court may hear the Public Prosecutor and the persons accused of the offence. If the

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13 1992 Cri.LJ 919. There were two revision petitions in this case against the orders of the Chief Judicial Magistrate. In both the cases the provisions of TADA were included in the FIR subsequently without receiving any evidence regarding the commission of the offence under the Act.

> Designated Court is of the opinion that no *prima facie* case has been made out under the Act, the Designated Court may transfer the case to any other court having jurisdiction under the Cr.P.C. This has to be done promptly as this sword of Damocles need not be kept hanging unnecessarily without any point or purpose.[14]

As to the question whether the CJM had the power to include the offence of the TADA which was not mentioned in the FIR, the Court opined:

> Such an order allowing the investigating agency can be passed only by the Designated Court and not by any other criminal court. In allowing the investigating agency to add any provisions of the Act, it is the duty of the Designated Court to examine very carefully all the materials produced before the Court and a speaking order has to be passed....[15]

The Court in the present case set aside the orders passed by the CJM including the offence under the TADA on the ground that the order was not a speaking order and that the materials available did not disclose an offence under the Act. The Court also held that the CJM had no power to do the same.[16]

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14 *Ibid.* p.928.
15 *Ibid.*
16 *Ibid.* p.30.

V. ENVIRONMENTAL LAW

*Nandan S.Nelivigi**
*Poojitha, M.G.**

Introduction

The remarkable increase in the number of cases involving weighty concerns relating to environment, decided by the Indian courts in the last one and a half years is in keeping with the growing importance which the need for environmental protection has been gaining in the recent past. Judicial intervention in the field of environmental law has been unparalleled in its creativity.

The survey covers the cases involving environmental issues decided by the Supreme Court and the various High Courts in India between January 1991 and May 1992, as the previous March of the Law has not provided an environmental law update. A section on the innovative legislative action is also included in this survey.

Landmark decisions like *Municipal Council, Ratlam v. Vardhichand,* AIR 1980 SC 1622; *M.C. Mehta v. Union of India,* AIR 1988 SC 1037 (Tanneries Case); AIR 1988 SC 1115 (Municipalities Case); and *Rural Litigation and Environment Kendra, Dehradun v. State of Uttar Pradesh,* AIR 1985 SC 652, have heralded a new era of environmental jurisprudence in India.

Few fields have developed as rapidly and as vastly as that of environmental law in the recent years. Several important developments have led to this growth. By the Forty-Second Amendment to the Indian Constitution Articles 48-A and 51-A (g) were inserted. By the same amendment, the entries of forests, population control and family planning were transferred from the state list to the concurrent list. The special statutes like the Air Act, the Water Act and the Environmental Protection Act, along with the amendments enabling stricter compliance with the law have further strengthened environmental law. But so far, it is the judiciary which has played the pivotal role in interpreting and ensuring the compliance with environmental laws.

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* Students V Year, NLSIU,Bangalore.

Right to wholesome environment

Subhash Kumar v. State of Bihar[1] signifies an important milestone in the development of environmental law in India. It heralds the emergence of the right to clean and unpolluted environment as an integral part of the fundamental right to life enshrined under Article 21. The Supreme Court in this case was considering a petition under Art 32, seeking the issuance of writ or direction to concerned authorities and the Tata Iron & Steel Co Ltd to stop forthwith discharge of slurry/sludge from its washeries into Bokaro river. Justifying its exercise of jurisdiction under Art 32, the Court held :

> Right to life is a fundamental right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art. 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.[2]

However, on facts, the petition was dismissed for failing to establish a *prima facie* case in favour of the averments made therein. The decision clearly articulated the right to a wholesome environment which the Supreme Court though on earlier occasions implicity recognising it, had failed to expressly articulate.[3] Thereby, the Supreme Court approved the earlier decisions of the High Court of Rajastan,[4] Andra Pradesh,[5] Kerala[6] and Himachal Pradesh,[7] to the same effect.

Development vis-a-vis environment: judicial approach

a) *Power Plant*

When the Government decides to set up a development project, like the construction of a large dam or a nuclear or thermal power plant, a complex variety of considerations account for the decision making. Invariably, a large number of people are affected by such projects in different ways. Can the Court, in such situations, question the propriety or validity of the decision taken by the Government? This issue confronted the Supreme

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1 JT 1991 (1) SC 77, K.N.Singh and N.D.Ojha, JJ.

2 *Id.*at 82.

3 *See, Rural Litigation & Entitlement Kendra, Dehradun v.State of UP. AIR* 1988 SC 187, *M.C.Mehta,* Union of India, AIR 1988 SC 1037, at 1048 [Ganga Pollution (Tanneries) Case]. *M.C.Mehta v. Union of India,* AIR 1987 SC 1086 (Shriram Gas Leak Case).

4 *L.K.Koolwal v. State of Rajasthan,* AIR 1988 Raj 24.

5 *T.Damodar Rao v. The Special Officer, Municipal Corpn of Hyderabad,* AIR 1987 AP 171,180.

6 *Madhavi v. Tilakan,* 1988 (2) Ker. L.T.730,731.

7 *Kinkri Devi v.State of Himachal Pradesh,* AIR 1988 HP 4,9, *see* (1990) 1 MOL 268.

Court in *The Dahanu Taluka Environmental Protection Group and Anr. v. BSES Co Ltd & Ors.*[8] The petitioners two environment protection groups, objected to the clearance by the State of Maharashtra and the Union of India, of a proposal of the Bombay Suburban Electricity Supply Co. Ltd. (BSES) for the construction of a thermal power plant over an area of 800 hectares in Dahanu, Maharashtra. The Bombay High Court, after requiring the Govt. of India to meet all the, objections of the petitioners, dismissed the petition on the Governments reaffirmation of its earlier stand.[9] In rejecting the application for special leave petition under Article 136 of the Constitution, the Court referred to the self-imposed restrictions of a Court in considering such an issue, as set out by the Court in *RLEK v. State of U.P*[10] and *Sachidanand Pandey & Anr v. State of West Bengal & Ors.*[11] The Court observed that betterment of the conditions of living of the people and the necessity for preservation of social and ecological balances, avoidance of deforestation and maintenance of purity of the atmosphere and water free from pollution, were considerations primarily concerning the Governments. Such considerations were to be taken into account in the light of various factual, technical and other aspects that may be brought to its noice by various bodies. Then the Court held :

> The Court's role is restricted to examine whether the Government has taken into account all relevant aspects and has neither ignored nor overlooked any material considerations nor been influenced by extraneous or immaterial considerations in arriving at its final decision.[12]

Hence it concluded that under these circumstances, its power to reconsider the decision of the High Court under Art 136 was very narrow. However, in this case, owing to the far-reaching impact that the setting up of the thermal power plant was likely to have to lives of the citizens, the Court went through all the objections raised by the petitions again.

The petitioners' principal objection was that the Government decided to proceed with the project, inspite of a disapproval of the project site by an Environmental Appraisal Committee(EAC) appointed by the Central Government. That, according to the petitioners, indicated the non-application of mind by the Government. The Court repelled the arguement by pointing out the opinion of another Expert Committee appointed by the State

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8 JT 1991 (2) SC 1, S.Ranganthan, S.C.Agarwal and N.D.Ojha, JJ.

9 *Bombay Environment Action Group v. State of Maharashtra,* AIR 1991 Bom 301, S.C.Pratap and A.V. Savant, JJ.

10 AIR 1987 SC 359.

11 AIR 1987 SC 1109.

12 *Supra*.n.8 at 2.

Government, approving the proposal.[13] Further, certain conditions imposed by the Government for the establishment of the Plant stood to show the application of mind by the Government. In addition, the opinion of EAC could not be considered as binding on the Government.

By way of a second objection, the petitioner contended that the decision to set up the Plant in Dahanu was in violation of the Government's "Environmental Guidelines for Thermal Power Plants". In response to that the Court accepted the explanation offered by the Government that the guidelines issued in that regard were intended to be applicable in varying situations, all over the country.

Hence, requisite deviations to suit the specific circumstances might be necessary.[14]

(b) Town planning and zoning

Can an Urban Development Authority, which is 'State' for the purpose of Part III of the Constitution of India, divert the use of land reserved for environmental purposes, which is socially useful, for another socially useful purpose, viz., the construction of a hospital? The Supreme Court dealt with this issue in *Bangalore Medical Trust* v. *S. Muddappa*[15].

In this case, a site near the Sankey Tank in Rajmahal Vilas Extension in the City of Bangalore was reserved as an open space in an improvement scheme adopted under the City of Bangalore Improvement Trust Act, 1945. The Act was replealed by Sec 76 of the Bangalore Development Authority (BDA) Act, 1976, which provided that any action taken under the 1945 Act shall be deemed to have been done or taken under the 1976 Act. The open space had been reserved for a public park. However, pursuant to the orders of the State Government dated 27.5.76 & 11.6.76 and by its resolution dated 14.7.76, the BDA alotted the open space in favour of the appellant, a medical trust, for the purpose of constructing a hospital. This allotment was challenged by the petitioners who were residents of the locality on the ground that it was contrary to the provisions of the Act, the scheme sanctioned thereunder, and the legislative intent to protect and preserve the environment by reserving open space for 'ventilation', recreation and playgrounds and parks for the general public. The appellants argued that the allotment was purely an administrative action taken by BDA, and that in the absence of any evidence of mala fide, the impugned decision was impeccable. They further argued that the decision to allot the site for a hospital rather than a park is a matter within

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13 *Id.*at 3

14 *Id.*at 4-5.

15 AIR 1991 SC 1902.Dr.T.K.Thommen and R.M.Sahai, JJ.

the discretion of the BDA. As the hospital is not only an amenity, but also a civic amenity under the Act, the decision, it argued, was justified.

The Supreme Court, while deciding the case, referred to Sec. 16(1) (d), inserted by an amendment in 1984, which provides that every development scheme shall provide for the reservation of not less than 15% of the total area of the layout for public park and playgrounds, and an additional area of not less than 10% of the total area of the layout for civic amenities. The court noted that this provision treats public parks and playgrounds as a different or separate amenity or convenience from a 'civic amenity'. The Court held that any unauthorised deviation from the duly sanctioned scheme by sacrificing the public interest in the preservation and protection of the environment by means of open space for parks and playgrounds and 'ventilation' will be contrary to the legislative intent, and an abuse of the statutory power vested in the authorities. The Court further relied on Sec.38-A which reads : "The authority shall not sell or otherwise dispose of any area reserved for public parks and playgrounds and civic amenities, for any other purpose, and any disposition so made shall be null and void". The Court stated that though Sec. 65 empowers the Government to give such directions to the BDA as are, in its opinion, necessary or expedient for carrying out the purposes of the Act, it is not an unrestricted power. The object of the direction must be to carry out the object of the Act, and not contrary to it. The Court went into the orders and resolution and held:

> These documents leave no doubt that the action of the Govt. and the BDA have been inspired by individual interests at the costs and to the disadvantage of the general public ....Protection of the environment, open spaces for recreation and fresh air, playgrounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern, and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the Act by establishing the BDA. Furthermore, it would be in direct conflict with the Constitutional mandate to ensure that any state action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens.[16]

Justice Sahai remarked that :

> the absence of open space and public park, in the present day when urbanisation is on the increase, rural exodus is on large scale and congested areas are coming up rapidly, may give rise to health

16 *Id.*at 1913.

> hazards. May be that it may be taken care by a nursing home. But it is axiomatic that prevention is better than cure. What is lost by removal of a park cannot be gained by establishment of a nursing home.[17]

The Supreme Court set aside the orders and resolution diverting the user of the said land.

In *V.Lakshmipathy v. State of Karnataka*[18] the residents of a particular locality in Bangalore complained of pollution caused due to the violation of town planning and zoning schemes. The petitioner questioned the change in the use of land in residential locality by establishing and running factories, work-shops, manufacture of greases and lubricating oils by distillation process and also production of inflammable products by some of the respondents. The petitioner alleged that the provisions of the Karnataka Town and Country Planning Act, 1961 had been violated and the establishment and running of the industries in the area are contrary to the Outline Development Plan and joinng of land use as dictated by statute. The problem of pollution caused due to the escape of offensive and unwholesome pollutants continued unabated owing to the inaction of concerned governmental agencies.

The Court found that the change in the land use, complained of was in contravention of the Karnataka Town and Country Planning Act, 1961, the Outline Development Plan and the Regulations thereunder and held that all consequential action relating to such violation in land use were void and illegal. The Court also found that Section 35, and 505 of Karnataka Municipal Corporation Act, 1976, Section 6 and 10 of Urban Land (Ceiling and Regulation)Act. 1976 and Sec.32 of Bangalore Development Authority Act had been violated. None of the authorities concerned who had been impleaded as respondents had either denied the existence of pollution or explain what measures had been taken in order to curtail pollution. Hence the Court held that the allegations relating to the existence of environmental pollution were substantial. The Court issued a writ of mandamus, directing the Bangalore City Corporation and its Health Officer to abate the pollution complained of; Bangalore Development Authority was also directed to stop operation of the industrial units and to carry out the lay-out work in accordance with law and remove all encroachments in public lands and roads in question. Permissions, licences and certificates of change in land use issued in contravention of the statutes were declared to be void and illegal.

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17 *Id.* at 1916.

18 AIR 1992 Kant.57, H.G.Balakrishna,J.

The concerned authorities were directed to implement the order of the Court within sixty days from the date of receipt of a copy of the said order.

(c) Nuisance by faulty drainage

In *Ajay Construction & Ors v. Kakateeya Nagar Co-operative Housing Society Ltd & Ors*[19] the construction of multi-storeyed flats had been permitted by the Hyderabad Urban Development Authority subject to the condition that no effluent should be allowed to be discharged outside the septic tanks and that soakage pits be put up for this purpose. However, subsequently, the Municipality granted permission, without adequate notice to anyone, to connect the sewarage of the flats to the underground Municipal Pipeline meant for rain-water and cattle-wash of the locality. This resulted in the sewarage water flowing from the multi-storeyed building to the Osmania University Pipeline which resulted in tremendous air-pollution near the University Student's Hostel and the NCC Camp. The inmates of this hostel protested against the foul smell and the insanitary conditions prevailing in the area. The University blocked the outlet of the drainage pipeline into the University drain by constructing a wall. The result of this blockage was that the sewerage from the flats was getting accumalated at a point just outside the University wall and was formed into a big cess pool within the area of the University. Due to the deposits of the night-soil and other sediments, there was tremendous air and water pollution which made the life difficult for those who were living in the said area.

The petitioners prayed for the issuance of a writ of mandamus declaring the order of the commissioner of Uppal Kalan Municipality permitting the appellants to connect and drain out the water flowing from the soakage pit of the building to the existing drain as being void and illegal. The Court held :

> The permission granted by the Municipality for connecting the sewarage pipeline of the builder to the under ground Municipal pipeline is illegal as no one can be permitted to pollute the atmosphere of an area by letting out offensive material from his premises .. It is incumbent upon the builders and those who are engaged in the construction work to comply strictly with the approved plans for drainage system. If there is any infringment of the approved plans, then the liability of the person concerned, who is in charge of the building operations, is of an absolute nature. There is an absolute liability on the part of those who are engaged in construction work,

19 AIR 1991 AP 294,Sardar Ali Khan and M.N.Rao,JJ.

particularly of multistoried structures, not to commit nuisance by letting out effluent from their drainage system.[20]

However, the High Court, in the circumstances directed the Municipality not to disconnect the sewage pipelines from the underground Municipal pipeline for a period of one month. In the meantime, the builder would have to ensure that the septic tank and soakage pits become operational and no discharge be let out from their premises into the outside area. After the expiry of one month period, the sewage pipeline would be severed by the Municipality and if any violation were to be committed after that by the inmates of the flats by letting out the sewarage outside their premises, they would be liable for such action, civil or criminal, as the case may be, which may be taken against them.

(d) Polluter pays

The *Dehradun Valley Limestone Quarry Litigation*[21] has been one of the most complex litigations that the Supreme Court has faced. The litigation has tremendous significance in understanding the power and limitations of the Judiciary in tackling environmental problems. The dispute arose out of limestone quarrying carried out by private miners in the Doon Valley, which caused disastrous damage to the surrounding environment[22].

The Supreme Court played an activist role in this litigation, essentially conducting a comprehensive environmental review and analysis of the national need for mining operations located in the Dehradun valley. In addition, the Court provided for funding and administrative oversight of reforestration of the region[23].

By its order dated 30.8.1988,[24] the Court ordered the stoppage of all mining activity in the valley, except in respect of three mines, whose period had not yet expired. A further exception was made in favour of a fourth mine, whose lease period had not expired, as the Court was informed that the mine was located outside the municipal limits of Dehradun and also

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20 Emphasis added.

21 *Rural Litigation and Entitlement Kendra, Dehradun v. State of U.P.* The Supreme Court has issued numerous opinions and orders in this case of which the principal orders are of March 12, 1985, AIR 1985 SC 652; May 13,1985 SC 1259; Sept.30,1985, 1985(2) SCALE 906; Dec 18,1986, AIR SC 359; Oct 19,1987,AIR 1987 SC 2426; Aug.30,1988,AIR 1988 SC 2187; Dec.16,1988, AIR 1989 SC 549; and May 4,1990,JT 1990(2) SC 391.

22 *See*, for details (1990) 1 MOL 266.

23 For an excellently concise synopsis of the major rulings in the case, *See* Armin Rosencranz, Shyam Divan, Martha Noble, Environmental Law & Policy in India: Cases, Materials & Statutes, 1st Edn., Tripathi, (1991), at 228-230.

24 *Supra* n 21.

outside the forest area. The counsel for the said miner had undertaken not to carry out any mining operations and to restore vegetation over the area immediately and ensure full forest growth. The Monitoring Committee, set up by the same judgement, was to supervise the afforestation programme to be undertaken by the miner. This Monitering Committee was also entrusted with the responsibility of ensuring the maintenance of ecology and environment. The judgment also provided the Monitoring Committee with funding by ordering that 25% of the gross profit of the remaining mines be deposited in a fund controlled by the Committee. It was then brought to the notice of the Court that the mine was within the Municipal limits of Mussoorie.[25]

During the inspections conducted by the Monitoring Committee, it found that the said miner had not complied with any of the undertakings given by his counsel. It was found that mining activity was continued in violation of the court order prohibiting the same. The Committee also recorded that nothing was done by the miner to reafforest the land, in order to comply with his undertaking. All these facts were brought to the notice of the Supreme Court by the Committee.[26]

Responding to this application, the Supreme Court ordered the miner to pay to the fund of the Monitoring Committee a sum of rupees three lakhs within two months from the date of the order.[27]

The order represents a novel method of checking environmentally degrading activities. The setting up of the committee, making provision for its expenses and continuing supervision of the implementation of its decision indicate the inclination of the Supreme Court to be unhindered by practical limitations and constraints arising out of its character as a dispute resolution organ, in effectively handling complex problems.

In a similar Order[28] issued by the Supreme Court in furtherance of its decision in *M.C. Mehta v. Union of India* [Ganga Pollution (Tanneries) Case], it extended the time required by Riparian Industries of Ganga to file their affidavits by 4 weeks. The Supreme Court noted that according to a Report submitted by the Regional Officers, Uttar Pradesh Pollution Control Board, 4 tennaries (Out of 18 who had been directed to be operated), had though taken advantage of the Order dated 1.11.1991 for operating their tanneries and discharging their trade effluent, were not operating their primary treatment plant. Hence, the Supreme Court directed that these 4 tanneries be closed. The closure of two other Companies was ordered as

25 *See* Order dt.16-12-1988,AIR 1989 SC 594.

26 I.A.No.21 of 1990.

27 *Rural Litigation and Entitlement Kendra, Dehradun & Ors v. State of U.P. JT 1991(5) SC 232, Ranganath Misra, CJI and Sawant, J.*

28 1992 (1) SCALE 196, N.M.Kasliwal and M.Fathima Beevi, JJ.

their applications for modifying the amount of contributions had been rejected by the PCB and since no objection of any such order of the Board had been filed by these Companies.

(e) Provision of land and electricity for the relocation of Industry

In *Surendra Kumar Singh v. State of Bihar*[29] two stone-crushing industries appealed to the Supreme Court under Article 136 against the interlocutory order of the High Court of Bihar.

The High Court had directed that, as the three hills–Ramshilla, Prethilla and Brahmyoni had been declared protected monuments, no stonecrushing industry should be allowed to be located within a distance of half-kilometer from the area so declared, and any stone-crushing industries located within such half km. area should be shifted. The present petitioners had been asked by way of an interlocutory order to shift, though they were not within the half km area. In the meanwhile, the High Court had directed the petitioners in its final order to shift in order to prevent the desecretion of hills and in view of the fact that they had been alloted a separate area some distance away, for carrying on their business. Hence the Supreme Court confirmed the final order of the High Court.

On the request of the petitioners, the Court further directed the authorities of the State Electricity Board to supply electricity at the alternative site, in order to facilitate the shifting of the industries of the two petitioners.

Fundamental duty to protect the environment

Environmental education

Article 51A of the Constitution enumerates various fundamental duties to be discharged by every citizen. Though the Article declares the duties to be obligatory, the articulation of the specific duties is in such broad terms that they seem to be merely hortatory in nature. But the Supreme Court has, for the first time, given directions to enforce the duty under Article 51A(g) in a remarkable case, *M.C. Mehta v. Union of India.*[30]

The decision is of seminal importance in terms of its implications. The most striking aspect of the decision is that the jurisdiction of the case was not triggered by the existence of any dispute or alleged violation of any fundamental right. The Court passed certain Orders in response to an

29 AIR 1991 SC 1042.

30 JT 1991(4) SC 531, 1991(2) SCALE 1181, Ranganath Misra,CJI,GN Ray, and A.S.Anand, JJ,decided on 22.11.1991.

application filed in public interest under Article 32.

The decision is also peculiar for the reliefs it granted in the case. After an examination of the imperative need to protect the environment, the Court issued a number of directions. Following is a summary of the directions.

(i) The Union of India was asked to give directions to the State Governments and Union Territories to enforce, as a condition of licence of all cinema halls, touring cinemas and video parlours, an obligation to exhibit, free of cost, at least 2 slides/messages on environment in each show undertaken by them. Failure to comply with the Orders is to be a ground for cancellation of the Licence.

(ii) The Ministry of Environment was directed to come out with appropriate slide material on various aspects of environment and pollution within two months.

(iii) This material is to be circulated directly to the controllers who are the licensing authorities for the cinema exhibition halls, for compliance.

(iv) The Union Ministry of Information and Broadcasting was directed to start the production of information films on aspects of environment and pollution. One such film should be shown, *as far as practicable,* (emphasis added) in one show everyday by the cinema halls, and the Central and State Governments were directed to ensure compliance of this condition from February 1, 1992.

(v) Doordarshan, both national and state centres, and All India Radio were directed to take steps to broadcast programmes on environment and pollution, everyday for 5-7 minutes and for longer periods, once a week, from February 1, 1992 onwards.

(vi) The Central Government and University Grants Commission were directed to consider the feasibility of making the study of environment a compulsory subject at every level in college education. Compulsory education on environment in a graded way, was directed to be enforced by all state governments and every Education Board connected with education, in education upto the college level. By the next academic year, this direction is to be complied with.

The source of the power of the Central Government to give directions to the State Governments is not specified. Apparently, it is Article 256 of the Constitution.

It must be pointed out that none of the respondents opposed the prayers of the petitioners in any way. In fact, the Attorney General offered many suggestions and willingly consented to abide by the directions.

(b) Control of vehicular pollution

In *M.C. Mehta v. Union of India & Ors,*[31] the Supreme Court again made a reference to Articles 51A(g) and 48-A. An application was filed under Art.32 in public interest, seeking the issuance of directions for closing down of hazardous industries located in the densely populated areas of Delhi and for regulation of air pollution caused by automobiles operating in the area as also the thermal units generating power for the Delhi Electric Supply Undertaking.

The Court addressed itself merely to the problem of air pollution by vehicular traffic. The Court thought that the measures taken by the Transport Authorities under the Motor Vehicles Act of 1989 to check vehicular pollution were not adequate and "the challenging task of pollution control would not be successfully dealt with that way".[32] Therefore, the Court, on the suggestion of Ministry of Environment and Forests, directed the constitution of a Committee to look into the problem of vehicular pollution in Delhi and for devising methods for solution of the problem. The Court itself named the members of the Committee. The Court also accepted the recommendations of the Ministry regarding the terms of reference of the Committee, which ranged from assessing available technology in the world for low-cost alternatives for operating vehicles to the making of specific recommendations on legal regulations required for controlling pollution[33].

In pursuance of the above directions, the Supreme Court issued further directions regarding vehicular pollution.[34]

The Court observed that heavy vehicles operating in the City being the buses, trucks and defence vehicles constitute the main contributing factor to pollution. Hence, the court found it necessary that more attention be directed against these vehicles. The Court ordered that particulars of the prosecution said to have been undertaken should be made available to the court so that it would be in a position to appreciate the steps taken and its effectiveness. Therefore, the Court directed the Delhi Administration to place before it a complete list of the prosecutions launched against the vehicles for causing pollution by infringement of the various requirements of the law with particular reference to the vehicles, the nature of the vehicles, dates of prosecution, the nature of offences for which prosecutions have been launched and the result, if any, of such prosecutions from 1.4.1990. Similarly,

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31 JT 1991(1) SC 620, Ranganath Misra, CJI, M.H.Kania, and Kuldip Singh, JJ,dt 14.3.1991.

32 *Id.* at 623.

33 Terms of reference are reproduced in the Judgement, *Id.*at 625.

34 *M.C.Mehta v. Union of India,* AIR 1991 SC 1132,R.Misra CJI, M.N.Venkatachalaiah, A.M.Ahmadi,JJ.

the Court directed that particulars of the vehicles whose registration was said to have been suspended be provided. In supplying the above-mentioned particulars, the Court required that the classification as to whether the vehicles belong to the Delhi Administration or the Central Government., or the public sector undertakings and/or the public transport system should be specified. The Court ordered that Rules 115(6), 126 and 127 of the Motor Vehicles Rules should be made operative from 1.4.1991.

The Court suggested that the Environment Ministry carry out appropriate experiments with the aid of the device claimed to have been brought out by the National Environment Engineering Research Institute, Nagpur, to find out its effectiveness within two months from the date of Orders, and that in case it is found to be effective, steps be taken to ensure that every vehicle which is manufactured after a particular date (may be from 1.4.91 or 1.7.91), to have that device as an in-built mechanism to reduce pollution. The Court ordered the examination of the fact whether vehicles which are already operating can also adopt the said device, and that the Ministry would place the material for consideration before the Court.

Interpretation of statutes

Forest laws

Section 82 and 83 of the Forest Act, 1927 came up for consideration before the Supreme Court in *Jogendralal Saha v. The State of Bihar,*[35] the petitioner, having entered into a contract with the State of Bihar for appropriating certain forest produce, had failed to pay the contract money due to the Government. The Government initiated proceedings for the recovery of the unpaid money, under Section 82 and 83 of the said Act, by sale of the forest produce. The petitioner, relying upon the decisions of various High Courts, contended that the remedy was that of an unpaid seller under the Sale of Goods Act, 1930 and not under the relevant provisions of the Forest Act, 1927. The Supreme Court rejected the contention of the petitioner on the ground that the Forest Act, 1927, being a special enactment, excluded the application of the Sale of Goods Act. Hence, overruling the earlier decisions of the High Courts[36], the Court held that the recovery could be made under Secs. 82 and 83 of the Forest Act, and that there was no need to fall back upon provisions of the Sale of

35 AIR 1991 SC 1148.

36 *Firm Gobardhan Das v. Collector of Mirzapur,* AIR 1956 All.721; *Dewan Chand v. State of U.P.* AIR 1971 All.200; *State of U.P v. Dewan Chand,* 1973 All. L.J.309; *Nanak Singh v. State of U.P,* 1987 All-L.J. 183; *Bala Datt v. Union of India,* AIR 1963 MP. 205; *J.A.Dalmat v. State of Mysore,* AIR 1965 Mys.109; and 1981 Pun LJ 14.

Goods Act. The same principle has been followed by the Madhya Pradesh High Court as well.[37]

Proceedings for constitution of "Reserved Forest"

In *Banwasi Seva Ashram v. State of U.P* [38] the Supreme Court had directed the Record Officer & Forest Settlement Officer to relax the procedural rigours of Sec. 4 and Sec. 6 of the Forest Act, 1927 (the Act) and adopt a suitable procedure that would adequately safeguard the rights and interests of the Adivasis and Banavasis living in Mirzapur District of U.P. before constituting a reserved forest therein.

Thereafter, the claim as contemplated under Sec. 6(c) were to be received as provided by the Statute. The findings of the Forest Settlement Officer (FSO), along with the requisite papers were to be placed before the Additional District Judge of the Area, even if no appeal was filed and the same was to be scrutinised as if an appeal had been taken.

After elaborate procedure for publishing the notification under Sec. 4 of the Act, the FSO passed the Orders, constituting the claims of several persons. He accepted the claims of some persons and excluded the same from the area to be notified as reserve forest under Sec.20. As per the directions of the Supreme Court, the orders of the FSO and the entire records were placed before the Additional District Judge. The latter, by the impugned order, set aside the orders passed by the FSO and rejected the claims of all persons which had been accepted by the FSO.

The U.P. Legal Aid and Advice Board, Lucknow which was authorised by the Supreme Court to look after the cases of *Banavasis* and *Adivasis,* challenged the order of the Additional District Judge before the High Court.[39] Upholding the order of the FSO, the High Court responded to each objection taken by the Additional District Judge, as follows :

(i) Treatment of oral objections raised by the affected persons at par with the written objections and consideration of the rights of every person whether he has filed the objection or not, on the basis of their claims to possession noted in survey and record operation, were held to be in confirmity with Sec. 7 of the Forest Act, 1927.

(ii) The FSO had excluded some area from the notification under Sec. 20, on the basis that the rights over such land have already been recognised by the competent court. Government records contained entries to that

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37 *State of M.P v. Thakurlal,* AIR 1991 MP 259.

38 AIR 1987 SC 374.

39 *UP Legal Aid & Advice Board v.State,* AIR 1991 All 281.

effect. In those circumstances, exclusion of such area was held to be justified.

(iii) Sec. 8 of the Forest Act, 1927 only confers power on the FSO to enter into any land by himself or authorise any officer to survey and demarcate the land. This Section also confers powers of civil court on the FSO in the trial of such suit. According to the Court, the aforesaid powers could be availed of as and when deemed expedient and necessary. Mere conferral of the powers of the Civil Court would make it obligatory for the FSO to frame issues in all cases.

(iv) The FSO had left some area to be vested in Gaon Sabha as it was found not fit for being declared as reserve forest, because land was situated between agricultural holdings of persons residing there. By virtue of Secs. 6 and 117 of the UP Zamindari Abolition and Land Reforms Act, it was held that such land could be lawfully left in favour of Gaon Sabha.

(v) That the applications and objections moved by the claimants were not stamped as required under law, was held to be a technical and procedural discrepancy. The extinction of the rights of Banavasis and Adivasis on those grounds were held to run contrary to the spirit of directions issued by the Supreme Court.

(vi) Certain discrepancies in the order of FSO, like granting of rights to dead persons, granting of rights to persons other than those whose names are recorded, were directed to be rectified after giving opportunity to the concerned parties.

(vii) The FSO was directed to decide such cases within six months from the date the certified copy of the Court's Order was placed before him.

In furtherance of its decision in *Banaswasi Seva Ashram* v. *State of U.P.* the Supreme Court has been issuing directions for the implemtation of its decision. In one such order,[40] the Supreme Court noted the slow pace of implementation of its previous orders and directions regarding preparation of land records, identifications of forest land and final action under the Forest Act.

It was pointed out to the Supreme Court that Mr.R.P.Pandey, one of the Commissioners had been staying at Allahabad, and did not find it convenient to shift to the site. In response to this, the Court stated :

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40 *Banwasi Seva Ashram v. State of U.P.*,1991(2) SCALE 261 Ranganath Misra, CJI and Kuldip Singh,J.

> We do not think much of his services can be utilised if he is allowed to stay at Allahabad. It would, therefore, be necessary to substitute him by appointing some other judicial officer as Commissioner.

The Court directed Shri Prem Singh, Retired District Judge of the State to be appointed as one of the Commissioners.

The Senior Advocate for the State of U.P. assured the Court that immediate steps would be taken to comply with all the directions excepting the requirement of depositing Rs.20 lakhs with the Secretary of the Commission. The Court therefore modified the amount of Rs.20 lakhs to Rs. 5 lakhs in view of the assurance that more funds can come on requisition, without any loss of time.

The Court suggested to the Chief Secretary that he may revive the Monitoring Committee which had been abandoned. The Court also requested Mr. Justice Loomha to continue supervising the work so that the monitoring at the spot could appropriately be cross-checked. He was requested to send monthly reports to the Court.

By another order,[41] the Supreme Court finally disposed of the proceedings and the monitoring process so far as the National Thermal Power Corporation Ltd (NTPC) is concerned.

NTPC argued that it was in actual/symbolic possession of 1375 acres of land, and the project construction was in progress. It further stated that apart from 1375 acres, the NTPC has yet to obtain possession of 465 acres of land which is reserved forest under Sec. 20 of the Forest Act. The petitioners argued that the actual possession of the whole of the area (of 1375 acres) is not with the NTPC, and that the Adivasis/land owners are still in possession of their respective holdings.

The Court remarked that in view of its earlier directions (dated 20-11-1986), and lands which have been declared as reserved forests under the Act are not subject matter of the writ petition. However, the Court noted that in the instant order, they were concerned with 1004 acres of land which is the subject matter of Sec. 4 notification of the Forest Act. The Court pointed out that it has to ensure that the rights of the oustees are determined in their respective holdings and they are properly rehabilitated and adequately compensated.

Hence, the Court directed that the following measures to rehabilitate the evictees who were in actual possession of the lands/houses etc., be

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41 *Banwasi Seva Ashram v. State of U.P & Ors*, JT 1992(2) SC 421 = 1992(1) SCALE 407, Kuldip Singh, P.B.Sawant and N.M.Kashiwal, JJ.

taken by the NTPC in collaboration with the State Government.

(i) The NTPC and the State Government were ordered to submit a list of the evictee claimants to the District Judge, Sonebhadra before April 15, 1992, who shall be the authority to finalise the list of the evictees.

(ii) One plot of land measuring 60' x 40' to each of the evictee-families was ordered to be distributed for housing purpose through the district administration.

(iii) Shifting allowance of Rs.1500/- and in addition, a lumpsum rent of Rs.3000/- towards housing were ordered to be given to each evictee family.

(iv) Free transportation for shifting is to be provided.

(v) The Court ordered the payment of a monthly subsistence allowance equivalent to the loss of net income from the acquired land, to be determined by the District Judge, Sonebhadra, subject to a maximum of Rs. 750/- for a period of 10 years.

(vi) The Court ordered the reservation of unskilled and semi-skilled posts in the project for the evictees subject to their eligibility and suitability.

(vii) The evictees are to be offered employment through the contractors employed by the NTPC, and the jobs of contractors under the administration of NTPC are to be offered to the evictees.

(viii) The shops and other business premises within the NTPC campus are to be offered to the evictees.

(ix) The NTPC was directed to operate self-generating employment schemes such as carpentry training, carpet-weaving, sericulture, masonry, dairy farming, poultry farming and basket weaving.

(x) The Court directed NTPC to provide facilities in the rehabilitative area like pucca roads, wells, handpumps, drainage system, schools health centres, Panchayat Bhavan, electricity connections, bank, sports centres etc.

The Court directed the Deputy Commissioner, Sonebhadra to supervise and ensure that the above rehabilitation measures directed by the Court are fully compiled with. The Court issued further directions as regards compensation in respect of lands, crops, etc.[42] The Court directed that the District Judge, Sonebhadra, (who is the authority to determine the compensation in respect of land, crop, house and any other legitimate claim based on

42 For details, *see id.* at pp.424-425.

existing rights of the oustees) decide finally all the compensation claims expeditiously preferably before March 31,1993 and that the orders passed by the District Judge shall be treated as the orders under Sec. 17 as amended by the UP Act of 1965.

With the above directions, the Court finally closed the proceedings in respect of the lands in possession of the NTPC.

In *Dr. Kota Shivram Karanth & Ors v. State of Karnataka,*[43] the main complaint of the petitioners was that an area of 30,000 hectares of reserve/ minor forest and C and D class lands had been handed over to a Joint Sector Undertaking called the Karnataka Pulpwood Ltd for the purpose of developing the area as a plantation for producing raw material for the paper industry. The petitioners contended that the conversion of the land for the said purpose would upset the ecological balance of the area and affect the livelihood of persons who depend on the produce of the forests. One of the other complaints was against the formation of a Joint Sector company to take it over.

However, during the pendency of the petition, the State Government produced an affidavit with a Government Order dated 24.10.1991, stating that a decision had been finally taken by the State Government to wind up the aforesaid Karnataka Pulpwood Ltd. Therefore, the Supreme Court noted that the petition had become infructuous. The Court, however stated that it is open to the petitioners to agitate individual complaints, if any before the appropriate statutory authorities.

(b) Water (Prevention and Control of Pollution) Cess Act, 1977.

The Water (Prevention and Control of Pollution) Cess Act, 1977 (or the Water Cess Act) is a fiscal statute intended to provide a source of revenue to meet the expenses of the Pollution Control Boards. If an industry falls within any entry of the Schedule I of the Act, it is liable to be levied cess according to the Act. The Act which provided for a 70% rebate for an industry which sets up suitable pollution treatment plants[44] upto 1992, reduced the rebate to 25%.[45]

Item 15 of Schedule I of the Water Cess Act, which speaks of industries which manufacture "vegetable products" came up for interpretation in two cases. *Harrisons Malayalam Ltd* v. *Kerala State Pollution Control*

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43 JT 1992(3) SC 167, Dr.T.K.Thommen and S.C.Agarwal, JJ.

44 Sec.7.

45 For details, *See* Part B of this chapter: Changes in the Legislative Field- Amendments to the Water Cess Act.

Board & Ors,[46] and *M/s Saraswathi Sugar Mills v. Haryana State Pollution Control Board & Ors.*[47]

In the former case, the issue was whether, 'latex'[48] is a vegetable product. The petitioner was a Company owning 23 rubber and tea estates in Kerala and two in Tamil Nadu. The company consumed water by utilising its own water sources in the various estates. There had been no levy of water cess on the company. But for the first time a notice was issued to the company by the Pollution Control Board directing the petitioners to affix water meter and furnish details of the water consumed every month.

The petitioner submitted that it was not carrying on any business in any specified industry so as to attract the provisions of the Water Cess Act.

Upholding the petitioner's contention, the Kerala High Court held that the words "vegetable products" must be construed neither in a technical sense nor from the botanical point of view. It should be understood as understood in common parlance. Though 'vegetable products' is not defined in the Act, it is a phrase of every day use, and so must be construed in its popular sense. The Court therefore noted that if the popular meaning is given to 'vegetable products', it is impossible to say that latex is a vegetable product. Hence, the petitioner was held not liable to be taxed for the water used in the process of latex in rubber plantation. The Court further emphasised that being a fiscal statute, the Water Cess Act should be strictly interpreted.

In the latter case, the primary issue before the Supreme Court was whether the industries which manufacture sugar from sugarcane are covered by entry 15 of the Schedule to the Water Cess Act. In the decision under appeal, the Allahabad High Court had held that sugar mills will come within the meaning of "processing vegetable products industry" in Entry 15 on the ground that the word "vegetable" has been used in opposition to the expression "animal" and that it could not be given the meaning of vegetables which are kept on the dining tables for dining purposes, and it has a wider amplitude. The High Court was further of the view that in interpreting the word 'vegetable' one has to keep in mind the object for which the Cess Act was made. The Court noted that sugar industry is one of the main sources of causing water pollution, and since the object of the Water Act 1974 and the Water Cess Act is to control water pollution, and

46 AIR 1992 Ker. 168, Varghese Kalliath,J.

47 1991(2) SCALE 913; J.T 1991(4) SC 220.

48 Latex is a milky juice secreted by certain plants such as the rubber tree.

since the entries are to be given a wider meaning, sugar industry would be covered by the Act.

The Supreme Court in reversing the decision of the High Court, held that in order to bring an industry within any of the entries in Schedule I, it has to be seen what the end product produced by that industry is. The Supreme Court stated that sugarcane is not a vegetable though it may be an agricultural product. If the botanic meaning of vegetable as referring to any and every kind of plant life is to be given, then some of the industries listed in Schedule I like paper industry and textile industry, and even chemical industry which are covered by the other entries could also be brought within Entry 15. The Supreme Court clarified that the Cess Act is not an enactment to regulate and control pollution, but a fiscal measure to raise revenue for augmenting the resources of the Pollution Control Boards. The Court remarked that *afortiori,* the manufacture of alcohol from molasses could not be considered to be an industry within Entry 15. However, both the decisions have been impliedly nullified by an amendment to Entry 15 in 1992, whereby vegetable products has been made to include all agricultural products and their wastes.[49]

In *Rajasthan State Electricity Board v. The Cess Appellate Committee & ars,*[50] the main issue was whether an industry wishing to avail of the rebate under the Water Cess Act for installing a plant for treatment of sewage or trade effluent has to obtain the Pollution Control Board's consent under Sec. 25(1) of the Water Act, 1974.

Answering in the negative, the Supreme Court held that Sec. 7 of the Water Cess Act as well as Rule 6 of the Water Cess Rules did not envisage the Board's consent under Sec. 25(1) of the Water Act as *sine qua non.*

Under Sec. 7, the consumer has only to show that he has installed a plant for the treatment of sewage or trade effluent, and that it functioned successfully during the relevant period, to earn rebate. The Court held that Sec. 25(1) operates in a different field and has nothing to do with a plant installed for the treatment of a trade effluent, although the grant of consent to a new outlet can be conditional on the existence of a plant for the satisfactory treatment of effluents to safeguard against pollution of the water in the stream. Again, this aspect of the decision has been nullified by an amendment to Section 7 in 1992.[51]

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49 For details, *See* Part B of this chapter: Changes in the Legislative Field Amendments to the Water Cess Act.

50 AIR 1991 SC 597, S.Ranganathan and A.M.Ahmadi, JJ. The Court remarked that *afortiori,* the manufacture of molassess from alcohol could not be considered to be an industry within Entry 15. However, both these decisions have been impliedly nullified by an amendment to Entry 15 in 1992, whereby vegetable products include all agricultural products and their wastes.

51 For details, *See* Chapter on Changes in the Legislative Field-Amendments to the Water Cess Act.

Another issue was whether temperature of the water consumed by 'the State Electricity Board from the river before it is released back into the river is below 40°C, the minimum prescribed under the Minimum National Acceptable Standards published by the State Board. The Supreme Court held that it is necessary for the Assessing Authority to decide

(i) whether water discharged from the condensor cooling plant can be said to be a "trade effluent" by reason only of the fact of its temperature being above the prescribed standard;

(ii) whether but for the treatment given to it as described by the appellant and set out above, such water would have to be discharged in the stream or river at a temperature above 40°C; and

(iii) whether the arrangement made by the Electricity Board, therefore, be described as a plant for the treatment of a trade effluent.

The Supreme Court remitted the matter to the Assessing Authority for deciding the question whether rebate should be granted.

(c) *Wild life protection*

The Government of Rajasthan had issued about 400 mining privileges to various persons, in and around the area now popularly known as the "Sariska Tiger Park". The area is declared as a "Game Reserve" under the Rajasthan Wild Animals and Birds Protection Act, 1951. It is also notified as a Reserved Forest under the Rajasthan Forest Act, 1953. The Area is again declared as a sanctuary under section 35 of the Wild Life Protection Act, 1972. In *Tarun Bharat Sangh, Alwar v. Union of India,* [52] the petitioner brought the public interest action for the enforcement of the aforesaid statutory notifications. The petitioner alleged that the mining activity in the area, tends to degrade and diminish the ecology of the area, besides constituting a threat to the habitat of wild life.

The Court held that the grant of mining privileges by the Government was inconsistant with the notification declaring the areas as a "Game Reserve", as a 'Sanctuary' and as a 'Reserved Forest'. The Court issued an interlocutory order prohibiting mining operation of whatever nature in the said area.

That the notification issued under the Rajasthan Forest Act, 1953 contemplated an inquiry as to "the nature and extent of the rights of the State Government and of private persons in or over the forest land", it was held, had nothing to do with the mining privileges claimed by the

52 AIR 1992 SC 514, M.N.Venkatachalaiah and K.Jayachandra Reddy,JJ.

respondent miners[53]. None of the miners had claimed any private right in the said area.

Since there was some doubt as to which of the mining operations were carried on within the protected area, the Court appointed a Committee consisting of the authorities of the State and some experts to enforce the statutory notification and the orders of the Court, and to prevent devastation of the environment and wild life within the protected area. The committee was also asked to assess the damage done to the environment, ecology and wildlife by mining activity carried on in the protected area and make recommendations to the Court as to the remedial measures, including measures for restoring the land to its original form and for reafforestation, and also make its assessment and recommendations as to the possible financial outlays necessary for such restorative and reafforestation schemes and the agencies through which such schemes should be implemented.[54] The Committee was asked to act expeditiously in this regard.

There has been an amendment to the Wildlife Protection Act the details of which are given in Part B of this chapter: Changes in the Legislative Field.

(d) Bhopal Gas Leak Case

The review petition challenging the settlement reached between the Union Carbide Corporation (UCC) and the Union of India, dated 14th and 15th of February 1989 came up before the Supreme Court.[55] The said settlement required the UCC to pay the Union of India 470 million dollars by 31st March 1989. The settlement order also ordered the transfer of all civil proceedings to the Supreme Court and they were held concluded in terms of the settlement. Further, all the criminal proceedings related to the gas leak disaster, pending in any courts in the country were quashed. Subsequent to the recording of the settlement, the Supreme Court dealt with and upheld the validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, in *Charanlal Sahu's Case.*[56] Though Union of India did not assail the earlier settlement, it supported the review petitions challenging the settlement. The various contentions raised in the review petitions and the holding of the Court on each one of them are summarised below:

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53 *Id.*at 516.

54 *Id.*at 518

55 *Union Carbide Corporation v. Union of India,* AIR 1992 SC 248, Ranganath Misra, C.J.,K.N.Singh,M.N.Venkatachalaiah,A.M.Ahmadi, and N.D.Ojha,JJ.

56 *Charanlal Sahu v. Union of India,* AIR 1990 SC 1480.(hereinafter referred to as *Charanlal Sahu's Case).*

(1) The first contention was that the Court had no jurisdiction to withdraw and dispose of the main suits and the criminal proceedings in the course of hearing of appeals arising out of an interlocutory order in the suits. The Court, it was urged, has no power to withdraw the proceedings except in accordance with Article 139-A of the Constitution and the conditions enabling the application of Art. 139-A did not exist in the case.

The Court replied that the power to withdraw the proceedings was not exhausted by Article 139-A. According to the Court, Art.136 read with Art.142, gave the power to the Court to withdraw, any cause or matter and do justice in a given case. In the opinion of the Court, Art.136 vests the Court with very wide power for due and proper administration of justice. This when read with Art. 142 (1), which states that "the Supreme Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any case pending before it...", enables the court to withdraw any proceedings that might necessarily and reasonably be connected with such matter so as to do "complete justice" in a given case [57]. It was held that this power could be exercised in respect of both civil and criminal proceedings. Hence, the contention was rejected.

According to Order XXIII, Rule 3B of the Code of Civil Procedure, 1908 any compromise can be reached in representative suit only with the consent of the court and after giving notice to all persons interested in the suit. It was contended that the case involved a representative suit and before the settlement, notices were not served on persons interested in the suit.

The Court placed reliance on *Charanlal Sahu's Case,* and accepted that the case involved a representative suit.[58]

It was pointed out that *Charanlal Sahu's Case* did not lay down that provisions of O.XXIII,R.3B,C.P.C,applied *proprio vigore,* but that the principles of natural justice underlying the said principle were not excluded. It was then noticed that *Charanlal Sahu's Case* had not declared the settlement void, even though the principle underlying O.XXIII, R.3B, had been satisfied. The Court had merely observed that such a settlement may be wrong, but it would not now be necessasry to issue notice. The Court in this case, viewed the pronouncement in *Charanlal Sahu's Case* as to what the consequences of non-compliance are as conclusive and not open for consideration by the Supreme Court. [59] The Court also pointed out that Sec.112 of C.P.C., *interalia* provides that nothing contained in that Code

57 *Id* at 273.

58 *See,* Order XXIII,Rule 3B,Explanation(d),C.P.C.

59 AIR 1992 SC 248 at 275.

shall be deemed to affect the powers of the Supreme Court under Art.136 or any other provision of the Constitution or to interfere with any rules made by the Supreme Court.[60] Under Order 32 of the Supreme Court Rules made under Article 145 of the Constitution, O.XXIII, R.3B of C.P.C. is not one of the rules expressly invoked and made applicable. The Court further held that in relation to the proceedings and decisions of Superior Courts of ultimate jurisdiction, imputation of nullity is not quite appropriate.[61]

It was next contended that the termination of criminal proceedings and the granting of immunity from future criminal proceedings against the UCC, or any of its officials was illegal and hence invalid.

The Court treated the termination of Criminal Proceedings as an issue distinct from the granting of immunity against any future criminal proceedings. The termination could not be construed as compounding, as it was not in conformity with Sec.320(9) of Cr.P.C. as the offences were non-compoundable offences. Nor could it be termed as withdrawal of prosecution under Sec.321 of Cr.P.C., as the settled legal tests for permitting such withdrawal were not sastisfied. Even if inherent powers under Sec.482 to quash any proceedings were invoked, the grounds for such quashing did not obtain. The power under Art.142(1) to do 'complete justice' could not be exercised so as to be inconsistent with express statutory provisions of substantive law or those of the Constitution; .[As held in *Prem Chand Garg v. Excise Commissioner.*[62]] The Court clarified that the exercise of power under Art.142 could not be limited by any provision in an ordinary statute. The holding in *Premchand Garg v. Excise Commissioner* [63] was held to be only an *obiter dictum.* The Court further observed as follows:

> . . . in exercising powers under Art.142 and in assessing the needs of 'complete justice' of a cause or matter, the apex court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition (relates to this)... the ultimate analysis of the propriety of the exercise of power.[64]

The Court noted that it had the power and jurisdiction under Art.142 to terminate the criminal proceedings. The termination of the invitations of Union of India was construed as vesting power to withdraw prosecution,

60 *Id.*at.275-276.
61 *Id.*at 276.
62 AIR 1963 SC 996 at 1003.
63 *Id.*
64 *Supra*, n. 59 at 279.

with the aid of the principles of Sec.321 Cr.P.C. [65] But on the merits the Court opined that there were no justifiable grounds to permit such withdrawal. In view of the seriousness of the offences involved, the Court concluded that termination of proceedings needed to be set aside.[66] As a logical consequence of this order, the immunity granted against future criminal proceedings was also set aside.[67]

(4) Petitioners then contended that it was clear that a part of the consideration for the payment of 470 million dollars was the stiffling of the prosectuion and, therefore, unlawful and opposed to public policy. It was urged that by virtue of Sec.23 Indian Contract Act the considerations being contrary to public policy the agreement, ie., the settlement was void. Hence, the consequent order could be set aside on the same grounds on which the agreement could be set aside.

The Court held that the doctrine of stifling of prosecution applied only to a situation where private party took the administration of criminal justice out of the hands of the Judges and settled the question whether a particular offence has been committed, on its own. The Court noted that in this case the Union of India, as the *Dominus Litis,* consented to the quashing of the proceedings.[68] The Court also made a distinction between the "motive" for entering into agreement and the "consideration" for the agreement. In as much as the dropping of criminal proceedings was only a "motive" in the instant case, the doctrine of stifling of prosecution was held to be inapplicable.[69] Hence the Court concluded that the settlement was not hit by S.23 or S.24 of the Contract Act.

(5) The petitioners contended that the settlement was bad for not providing for a 're-opener clause', with a view to account for the future manifestation of the toxic harm in the victims. The infirmity, according to the petitioners was further compounded by the Court's failure to give 'fairness-hearing' to the victims, which is a must in every mass-tort case in the U.S.A.

The Court countered the contention by pointing out that in an action for negligence, damages must be and are assessed once and for all.

Hence, the absence of a re-opener clause was held not to vitiate the settlement. The Union of India was presumed to have had the future

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65 *Id.* also *See. id* at 287.
66 *Id.* at 280.
67 *Id.* at 283.
68 *Id.* at 287.
69 *Id.* at 288.

manifestation of toxic harm in mind while entering into settlement.[70] With respect to the 'fairness-hearing' the Court replied that any right to hearing could exist only by virtue of Sec. 4 of the Bhopal Gas Disaster (Processing of Claims) Act 1985 (the Act). But, that right was not analogous to the 'fairness-hearing' followed in the U.S.A. Under Sec. 4, the Union of India is only obligated to have due regard to the views expressed by the victims. Hence, the settlement was not vitiated for want of 'fairness-hearing' procedure preceeding it.[71]

(6) The next contention related to the question as to what should happen to the compensation paid by the UCC in the event of the Court setting aside the settlement. The petitioners argued that the UCC should not be allowed to take back the money in such an eventuality.

But, the Court repelled the contention and held that in the event of setting aside the settlement, the UCC shall be entitled to have their funds remitted to them back in the United States, together with such interest as has accrued thereon.[72]

(7) The last contention the petitioners urged was that the settlement be set aside on the ground that the settlement-amount was totally inadequate. In addition certain other minor points were also put forward.

The petitioners contended that a large number of claims had been brushed aside under the Act on the ground that despite service of notices they did not respond and appear for medical documentation. The contention did not survive in view of the assurance given by the Government that the genuine claimants could still make their presentation.[73]

It was also contended by the petitioners that the whole exercise of medical documentation was faulty and was designed and tended to exclude genuine victims. This contention was rejected as not having been substantiated by the petitioners.

A further apprehension was expressed on behalf of the petitioners that the settlement fund may be insufficient to meet the totality of the claims which were to be awarded in the future. In response, the Court draw the attention of the petitioners that even the liability of the UCC had not been conclusively established.[74] It examined the areas of lifting of corporate veil and, the controversy as to the admissibility of scientific and statistical

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70 *Id.* at 292, 294.
71 *Id.* at 294.
72 *Id.* at 296.
73 *Id.* at 303.
74 *Id.* at 306.

data in the quantification of damages without resort to the evidence as to injuries in individual cases, without however, pronouncing on any one of them. Cognisant of these factors and aware of the requirement to retain the benefit of the settlement to the victims, the Court held as follows:

> . . . it is however necessary to ensure that in the perhaps unlikely event of the settlement fund being found inadequate to meet the compensation determined in respect of all the present claimants, those persons who may have their claims determined after the fund is exhausted are not left to fend for themselves. But, such a contingency may not arise having regard to the size of the settlement fund. If it should arise, the reasonable way to protect the interests of the victims is to hold that the Union of India, as a Welfare State and in the circumstances in which the settlement was made, should not be found wanting in making good the deficiency, if any.[75]

The Court made it clear that impostition of the obligation on Government of India to make good any deficiency in the settlement was not to hold that it was a joint tort feasor, but an obligation arising out of the fact that it is a welfare state.

Referring to the arguments of the petitioners that the principle enunciated in the *M.C. Mehta Case*[76], requiring the compensation amount to be proportionate to the capacity of the defendent to pay must be applied, the Court thought it unneccessary to give any opinion on that principle. Any relevance of the principle would have been only in strict adjudication.[77]

The Court also made other incidental orders to the following effect:

(a) For an expeditious disposal of the claims a time bound consideration and determination of the claims are necessary. (Directions were issued).

(b) In the matter of administration and disbursement of the compensation amounts determined, the guidelines contained in the judgement of the Gujurat High Court in *Muljibhai v. United India Insurance Co.*(1982 (1) 23 Guj.LR 756) are required to be taken into account and, wherever appropriate, applied. Union of India is also directed to examine whether an appropriate scheme under the Unit Trust of India

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75 *Id.* at 308, Venkatachalaiah, J.The leading judgement was delivered by Venkatachaliah, J.Ahmadi J. differed on this point. He was against saddling the Indian tax-payer with the additional burden of making good the short fall in the settlement fund.

76 *M.C.Mehta v.Union of India*, AIR 1987 SC 1086.

77 *op. cit.* at 309.

Act could be evolved for the benefit of the Bhopal victims.

(c) For a period of 8 years, facilities for medical surveillance of the population of the Bhopal exposed to MIC should be provided by periodical medical check-up. For this purpose a hospital with at least 500 beds strength, with the best equipment and facilities should be established.The facilities shall be provided free of cost to the victims at least for a period of 8 years from now. The State Government shall provide suitable land free of cost.[78]

(d) In respect of the population of the affected wards, (excluding those who have filed claims), Government of India shall take out an appropriate medical group insurance cover from the Life Insurance Corporation of India for compensation to those who, though presently asymptomatic and filed no claims for compensation, might become symptomatic in future and to those later-born children who might manifest congenital or parental MIC-related afflictions. There shall be no upper individual monetory limit for the insurance liability. The period of insurance shall be for a period of eight years in future. The number of persons to be covered by this group shall be about one lakh persons. The premia shall be paid out of the settlement fund.

(e) On humanitarian consideration and in fulfilment of the offer made earlier, the UCC and UCIL should agree to bear the financial burden for the establishment and equipment of a hospital, and its operational expenses for a period of eight years.[79]

In conclusion, the settlement reached between the UCC and the Union of India was upheld, subject to the modifications pointed out earlier.

PART B

Changes in the legislative field

There have been atleast three major developments on the legislative front. The Parliament has enacted the Public Liability Insurance Act, 1991, primarily with a view to insure/protect the potential victims of accidents in hazardous industries. On the eve of the Earth Summit, wide-ranging amendments were made to the Wild Life (Protection) Act, 1972. The Central Government also issued a notification making prior environment impact assessment compulsory for a number of activities. These three

78 *Id.* at 313, Venkatachalaiah, J.Ahamdi,J.,understood this direction to be merely recommendatory.

79 *Id.* at 313, Venkatachalaiah, J.Ahmadi, J., understood this direction to be merely recommendatory and not linked with the settlement.

developments have been briefly surveyed in the following section along with other amendments to the environment-related enactments.

a. Public Liability Insurance Act, 1991.

The Public Liability Insurance Act, 1991(PLI Act)[80] provides that the owner of a hazardous industry is liable to give relief to the persons other than the workmen, affected by accidents occuring in the industry[81]. Every owner is expected to take out an insurance policy to cover the aforesaid liability, before handling any hazardous substance[82]. The claimant shall not be required to plead and establish that the death, injury or damage was due to any wrongful act, neglect or default of any person[83]. By an amendment it has been provided that the amount of insurance policy shall not be less than the equivalent to paid-up capital of the undertaking handling any hazardous substance. The relief that is to be given for different injuries has been mentioned in the schedule. The Public Liability Insurance Amendment Ordinance, 1992 provides for the establishment for Environment Relief Fund, which shall be utilised for payment relief under award made under the Act[85]. The Act lays down the procedure for claiming relief, and also prescribes a period of 3 months from the date of receipt of application within which endeavour shall be made to dispose of the claim.

b. The Wild Life (Protection) Amendment Act, 1991[86]

The Wild Life (Protection) Act, 1972[87] (hereinafter referred to as the Wild Life Act) was enacted by virtue of resolutions passed by a number of State Legislatures enabling the Parliament to enact the said law, under Article 252 of the Constitution.

The Constitution (42nd Amendment) Act, 1976 transferred the subject matter of "protection of wild animals and birds" from the State List to the Concurrent List[88], thus paving way for the Parliament to enact a law for the protection of Wild life.

The sailent features of the Amendment are highlighted below:

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80 1991 CCL Part II p 45.

81 The PLI Act, S.3(1).

82 *Id.*S.4(1).

83 *Id.*S.3(2).

84 *Id.*S.2A Sec.3 of the Public Liability (Amendmt.) Ordinance, 1992 CCL Part II 180.

85 Sec.7A inserted in PLI Act.

86 Act No.44 of 1991; Received the assent of the President on 20.9.1991; Act Published in *Gaz. of India*,20.09.1991 Part II S.1,Ext.p.1(No.60). For Statement of Objects & Reasons, See *Gaz. of India*, 10.1.1991 Part II S.2,Ext p.21. (No. 4.) Sec. 1991 CCL Part II. p. 118

87 Act LIII of 1972.

88 Entry 17B, List II, Schedule VII, Constitution of India, 1951.

The Act is now made applicable to the whole of India, except Jammu & Kashmir.

Protection of plants

The Wild Life (Protection) Amendment Act, 1991 (hereinafter referred to as the 'Amending Act') widens the scope of the Wild Life Act by bringing within its purview, the protection of certain plant species, specified in the newly introduced Schedule VI of the Wild Life Act. Chapter IIIA is introduced for this purpose[89]. Wilfully picking, uprooting, etc., of the specified plants have been prohibited[90], except for special purposes like education, scientific research, display in herbarium of any scientific institution or propagation by a person or institution approved by the Central Government[91]. However, special concession has been made in favour of tribals, to pick, collect or possess the specified plants in their district, but outside sanctuaries, national parks and closed areas[92]. Even cultivation of or dealing with the specified plants wihout licence has been prohibited[93].

Prohibition of hunting

By the substitution of the old Sec.9 by the new Section 9, no licence can now be granted for hunting any wild animal specified in Schedule I, II, III and IV to the Wild Life Act[94]. Hunting is permissible, only if any wild animal becomes dangerous to human life or is so disabled or diseased as to be beyond recovery, and for education, research and such other purposes[95]. Hence, even the game reserves, wherein hunting was permissible in accordance with the licences, have now been abolished[96]. Consequently, all provisions which accommodated the concept of licenced hunting have been suitably modified, substituted or if necessary, omitted.

Central Zoo Authority

Chapter IV-A has been introduced to enable the Central Government to constitute a body to be known as the Central Zoo Authority. Its functions

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89 Sec.13 of the Amending Act.
90 Sec.17A added to the Wild Life Act.
91 Sec.17B added to the Wild Life Act.
92 Proviso to Sec.17 inserted in the Wild Life Act.
93 Sections 17C and 17D inserted in the Wild Life Act.
94 Section 9 of the Amending Act.
95 The Wild Life Act.Ss.11 and 12.
96 Sections 2(13) and 36 of the Wild Life Act. Ss 11 and 12. Words 'game reserve', have been omitted from all the provisions in which they appeared.

include the supervision of zoos, specification of minimum standards for the upkeep and maintenance of zoos, recognising or derecognising of zoos, identification of endangered species of wild animal for their protection and development, co-ordination of training of zoo personnel, co-ordination of research in captive breeding and educational programmes for the purposes of zoos, etc[97]. A fund to be known as the Central Zoo Authority Fund is to be constituted to finance the activities of the Authority[98]. The 'Fund' will receive grants and loans from the Central Government and such other sources as may be decided by the Central Government. The Authority is to prepare an annual report which should be placed before the Parliament[99]. No zoo can be operated without the recognition of the Central Zoo Authority.

Sanctuaries and National Parks

Any area, other than reserve forest and territorial waters can be declared by the State Government as a sanctuary or a national park.[100] If an area within the reserve forest or territorial waters is proposed to be declared as a sanctuary or national park, prior concurrence of the Central Government is necessary[101]. The boundaries of a sanctuary or a national park cannot be altered except on a resolution passed by the Legislature of the State concerned.

Other Provisions

There is a provision for appointing a Honorary Wild Life Warden in each district[102]. The Wild Life Advisory Board will now have experts and representatives of tribals as its members[103]. It is explicity mentioned that one of the duties of the Wild Life Advisory Boards shall be to advise the State Government in relation to the measures to be taken for harmonising the needs of the tribals and other dwellers of the forest with the protection and conservation of wild life.

The word 'cattle' has been substituted by the word "livestock" throughout the Wild Life Act. The Chief Wild Life Warden has the duty to take steps for the immunisation against communicable diseases of the livestock kept

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97 Sec.38C inserted in the Wild Life Act.
98 Sec.38E (2), inserted in the Wild Life Act.
99 Sec.38 F and Sec.38 G inserted in the Wild Life Act.
100 Sec.15 of the Amending Act.
101 Proviso to Section 26A, inserted in the Wild Life Act.
102 Sec.6.(ii) of the Amending Act.
103 Sec.7.(ii) of the Amending Act.

in or within five kilometers of a sanctuary. If and only if livestock is immunised, it can be grazed in a sanctuary.[104]

Protection is envisaged for elephant tusks by prohibiting the sales purchase or any dealing with respect to ivory imported into India or "an article made therefrom"[105]. The earlier exemption granted to animal articles or trophies made out of feathers of peacocks from restrictions on transfer of and dealings in animal or animal article under Sec. 43 and 44 of the Wild Life Act, has now been confined only to "tail feathers of peacock and articles made therefrom"[106]. A provision has been inserted to prohibit teasing or molesting any wild animals or littering the grounds of sanctuary[107]. Restrictions have been imposed on the transportation of wild animals, animal articles and specified plants[108].

The penal provisions have been tightened by making the punishments and penalties more stringent.

Environment Protection Act, 1986 and Rules

Protection of Coastal area

The Ministry of Environment and Forests has issued a notification under Sec.3(2)(v) read with Sec.3(1) of Environment (Protection) Act, 1986 for the protection of coastal areas from environmental pollution[109]. The Ministry has declared the coastal stretches of seas, bays, estuaries and creeks which are influenced by tidal action (in the landward side) up to 500 metres from the High Tide Line and the land between the Low Tide Line and the High Tide Line as Coastal Regulation Zone (CRZ). Certain activities like manufacturing or handling or storage or disposal of hazardous substances, dumping of municipal wastes, harvesting or drawal of ground water and construction of mechanisms thereof for such purposes, and many other activities have been prohibited in CRZ. The activities which are not prohibited are sought to be regulated by making prior environmental clearance by the Ministry mandatory for the purpose. In addition, the Coastal States and Union Territories are required to prepare Coastal Zone Management Plans identifying and classifying the coastal stretches according to their environmental condition and sensitivity and guidelines have been

104 Sec.33A inserted in the Wild Life Act.

105 "any ivory imported into India and an article made therefrom" has been included within the definition of "animal article" under Section 2(2) of the Wild Life Act.

106 Sections 29 and 30 of the Amending Act.

107 Section 27(4) inserted in the wild Life Act.

108 Section 48 A inserted in the Wild Life Act.

109 Notification No.S.O.944(E), dt. December 15,1990,published in the *Gazette of India*, Extra., Part II ., Section 3(ii),dt 15th December 1990,pp.4-7, in 1991 CCL XVII 37 (Part III).

given for that purpose. The notification also lays down guide lines for beach resorts or hotels or lodging houses in the coastal stretches. Another notification issued by the Ministry under Rule 5(3) of the Environment Protection Rules, 1986 gives additional guidelines for the enforcement of the aforesaid notification[110].

Environment Audit report

A new Rule has been inserted (Rule 14) after Rule 13, making it mandatory for a person carrying on an industry, operation or process requiring consent under Section 25 of the Water Act or under Section 21 of the Air Act or both or authorization under the Hazardous Wastes (Management and Handling) Rules, 1989, to submit an environment audit report for every financial year ending the 31st March to the concerned State Pollution Control Board on or before the 15th day of May, every year, beginning 1991.[111]

Environmental clearance

The Central Government has issued a notification under Sec.3(1) and Sec.3(2)(v) of the Environment (Protection) Act, and Rule 5(3)(9) of the EP Rules,[112] directing that no expansion or modernisation of any existing industry or new projects listed in Schedules I and II shall be undertaken in any part of India, unless it has been accorded environmental clearance by the Central Government or, as the case may be, the State Government concerned. Further, any project proposed to be located within ten kilometers of the boundary of reserved forests, or a designated ecologically sensitive area, or within 25 kilometers of the boundary of reserved forests, or a designated ecologically sensitive area, or within 25 kilometers of the boundary of a national park or sanctuary will require environmental clearance from the Central Government.

The procedure for seeking environmental clearance of projects consists of an Application including an Environmental Impact Assessment Report and an Environment Mangement Plan[113]. Schedule I contains a list of projects requiring environmental clearance from the Central Government, while Schedule II contains that of the State Government. Schedule III

110 Notification S.O.114(E),dt.February 19,1991,published in the *Gazette of India, Extra.*, Part II, Sec.3(ii), dt.20th February, 1991,pp.5-9,in 1991 CCL XVII 125 (Part III).

111 Noti. No.G.S.R 329(E), dt. Mar. 13,1992,published in the *Gazette of India, Extra.*,Part II, Sec 3(i), dt 13th Mar.1992,Sl.No.120, pp 3-4, in 1992 CCL XVIII 178 (Part III).

112 Noti.No.S.O.85(E), dt. Jan. 29,1992, published in the *Gazette of India, Extra.*,Part II,Sec 3(ii), dt 29th Jan, 1992 pp 7-11, in 1992 CCL XVIII 59 (Part III).

113 *Ibid.*

specified the composition of the expert Committees for the Environmental Impact Assessment[114].

Ecomark

By a landmark Notification[115], the Government declared its decision to institute a Scheme on the Labelling of Environment Friendly Products. The Scheme is to operate on a national basis and provide accreditation and labelling for household and other consumer products which meet certain environmental criteria alongwith quality requirements of the Indian Standards for that product. The label is to be known as the "ECOMARK" and is to be of the design to be notified. Accordingly, any product which is made, used or disposed of in a way that significantly reduces the harm it would otherwise cause the environment is to be considered as a Environment Friendly Product.[116]

According to the Government, the objectives for such a step includes:

i. to provide an incentive for manufacturers and importers to reduce adverse environmental impact of products, and

ii. to encourage citizens to purchase products which have less harmful environmental impact.

Three stages lead to the award of the ECOMARK:

1. Steering Committee, set up in the Ministry of Environment and Forests, to determine product categories for coverage under the Scheme;

2. A Technical Committee, set up in the Central Pollution Control Board to identify specific products to be selected and individual criteria to be adopted, and

3. The Bureau of Indian Standards to assess and certify products[117]. Products are to be examined in terms of the following main environmental impacts before the award of ECOMARK:

i. That they have substantially less potential for pollution than other comparable products in production, usage and disposal.

ii. That they are recycled, recyclable, made from recycled products or biodegradable, where comparable products are not.

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114 *Ibid.*

115 Noti no.G.S.R.85(E), dt. Feb. 20,1991, Published in the *Gazette of India*, Part II,Sec. 3(ii), dt. 21st Feb. 1991, pp 4-6, in 1991 CCL XVII 183 (Part III).

116 *Ibid.*

117 *Ibid.*

iii. That they make significant contributions to saving non-renewable resources, including non-renewable energy sources and natural resources, compared with comparable products.

iv. That the product must contribute to a reduction of the adverse primary criteria which has the highest environmental impact associated with the use of the product, which will be specifically set for each of the product categories[118].

Subsequently, the Central Government notified certain criteria for labelling toilet soaps,[119] detergents,[120] paper[121] and architectural paints [122] as Environment Friendly Products.

Amendments to the Water Cess (Prevention and Control of Pollution) Act, 1977.

By the Water Cess (Amendment) Act, 1991, several changes were brought to the Water Cess Act.[123] Firstly, after Sec. 3(2), Sec. 3(2-A) is to be added, whereby any person carrying on any specified industry or any local authority consuming water for domestic purpose liable to pay cess fails to comply with any of the provisions of Section 25 of the Water Act or any of the Standards laid down by Central Government under the Environment Protection Act, Cess is to be calculated and payable at rates to be specified by notification, as the Central Government may specify.

In Section 7 of the principal Act, for the words "70%" rebate, the words "25%" is to be substituted.

Further, a proviso is to be inserted at the end of Sec. 7 of the principal Act. According to this proviso, a person shall not be entitled to any rebate if he or it consumes water in excess of the maximum quantity as may be prescribed in this behalf, or fails to comply with any of the standards laid down by the Central Government under Environment (Protection) Act[124].

The interest payable for delay in payment of cess has been doubled

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118 Ibid.

119 Noti no.G.S.R.705(E), dt. Nov. 15,1991 published in the *Gazette of India, Extra.*, Part II, Sec 3(i), dt.29th Nov, 1991,p2, in 1992 CCL XVIII 86 (Part III).

120 Noti. No.G.S.R 706(E),dt. Nov.15,1991 published in the *Gazette of India, Extra.*, Part II, Sec 3(i), dt.29th Nov.1991,pp 3-42, in 1992 CCL XVIII 87 (Part III).

121 Noti. No.G.S.R.109(E),dt Feb 19,1992,published in the *Gazette of India, Extra.*, Part II,Sec 3(i), dt- 19th Feb. 1992,p.2,in 1992 CCL XVIII 181 (Part III).

122 Noti.No.G.S.R.110(E),dt Feb 19,1992,published in the *Gazette of India, Extra.*, Part II, Sec 3(i), dt- 19th Feb, pp.3-4, in 1992 CCL XVIII 181 (Part III).

123 The Water Cess (Amendment) Act, 1991, No 53 of 1991, 10th Dec,1991, published in the *Gazette of India, Extra.*, Part II, Sec I, in 1992 CCL XVII 115 (Part II).

124 *Ibid.*

from 12% to 24%. In Schedule II to the Act, the cess rates are doubled, and a new rate for "maximum rate" under Sec. 3 (2-A) is also prescribed.

In Schedule I to the Act, which provides the list of industries subject to a cess on water consumed, some changes and a few inclusions have been made. In the entries against Serial No. 10 (Textile Industry), a clarification that it includes cotton, synthetic and semi-sunthetic fibres manufactured from these fibres is made. Similarly, in the entries against Serial No.15 (Processing of animal or vegetable products industry), the processing of milk, meat, hides and skins, all agricultural products and their wastes have been included.[125]

By another Notification[126], an addition has been made to Rule 6 of the Water Cess Rules, 1992 which provides that a consumer shall not be entitled to the rebate if he consumes water in excess of the maximum quantity specified, or fails to comply with any of the provisions of Sec. 25 of the Water Act, or any of the standards laid down by the Central Government, under the Environment (Protection) Act, 1986.

Conclusion

The Judiciary has made significant contributions to the environmental movement in India in the last year. The implications of the clear recognition of the right to wholesome environment as a part of the fundamental right to life by the Supreme Court will undoubtedly be far-reaching. Municipalities and a large number of other concerned governmental agencies can no longer rest content with measures for the abatement and prevention of pollution. They may now be compelled to take positive measures to improve the quality of the environment. This development is further buttressed by the Courts' consistent opposition to alterations in town planning and zoning schemes, that may adversely affect the environment in the towns and cities.[127] This calls for a matching concern for environment on the part of the other governmental agencies.

The Courts have shown tremendous ingenuity in moulding the reliefs to suit particular problems, right from the beginning. The same trend is continued in its decision in the *Vehicular Pollution Cases,*[128] *National Thermal Power Corporation Case,*[129] and the *Banvasi and Adivasi Forest*

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125 *Ibid.*

126 Noti No.G.S.R 311(E), dt Feb 29, 1992, published in the *Gazette of India, Extra.*, Part II Sec 3(ii), dt 5th March, 1992, pp 3-5, in 1992 CCL XVIII 172 (Part III).

127 AIR 1991 SC 1902.

128 *M.C.Mehta v. Union of India,* JT 1991(1) SC 620 and M.C.

129 *Banwasi Seva Ashram v. State of U.P.& Ors.,* JT 1992(2) SC 421.

dweller's case.[130]

The Courts' attempt to enforce the Directive Principle of State Policy contained in Art.48A and the Fundamental Duty under 51A(g), in *M.C.Mehta Cases* [131] adds a new dimension to the power of judicial review. Impact of these decisions will be felt not only in environmental law but in many other fields. It will be of interest to watch the future developments in this direction.

Contrary to its aggressive pro-environmental stance in general, the Supreme Court has exercised striking restraint while dealing with large development projects. Perhaps this is one area in which the Judiciary can do much more than merely deferring to the wisdom of the executive.

Environmentalists would probably consider the holding of the Supreme Court in *M/s Saraswati Sugar Mills v. Haryana State Pollution Control Board* [132] as a retrograde step. The Supreme Court held that the Water Cess Act 1977 is not an enactment to regulate and control pollution, but a fiscal statute to raise revenue for augmenting the resources of the Pollution Control Boards. By its strict interpretation of the entries in the Schedule to the Water Cess Act,1977, the Supreme Court has restricted the scope of the Act. It may be necessary for the legislature to act in this direction, so as to try and work out the technique of economic incentives to control pollution.

In the *Bhopal Gas-Leak Disaster Case* the Supreme Court overstrained itself in upholding the settlement reached earlier. In the face of the criticism that it lost an opportunity to evolve an effective legal regime for protecting the environment and the people from the hazardous activities undertaken by multinational corporations, the Court drew the curtain on the long drawn controversy.

But, by and large the developments of the year have given a considerable boost to the country's environmental movement.

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130 *U.P.Legal Aid and Advice Board v. State,* AIR 1991 All.281.

131 *M.C.Mehta v. Union of India,* JT 1991(4) SC 531 and *M.C.Mehta v. Union of India,* JT 1991(1) SC 620.

132 1991(2) SCALE 913.

VI. FAMILY LAW

The Family Laws of any society being a reflection of its molecular structure and stability assume a very high importance. During the period under review, though statutory contribution was meagre, a notable piece of legislation (being the amendment to the Indian Succession Act) in the area of intestate succession among Parsis has come into operation. Besides, judicial pronouncements both of the apex court and the various High Courts highlighted many of the salient aspects of areas such as marriage and matrimonial remedies, adoption, maintenance and property relations. A few aspects which require special mention are the decisions of the High Courts pertaining to presumption of the validity of marriage by long and continued cohabitation, right of the second wife to claim maintenance, legal capacity of the adopted child, effect of adoption and further clarification of the directions given in *Lakshmi Kanth Pandey's Case* with respect to inter country adoption. On the whole, many noteworthy decisions have emerged during the period.

MARRIAGE AND DIVORCE

*M.K.Ramesh**
*Diviya Kapur***
*Leena Chacko****

Introduction

A wide ranging variety of cases were decided by the courts of law in the year under review. They dealt at length with interpretation of statutory provisions, amplification and classification of intricate expressions of law and laying down of precedents in addition to following the old precedents. The major areas brought under judicial scrutiny include – validity and annulment of marriage; divorce, matters of jurisdiction and procedure, the question of maintenance and the like. There were a few legislative efforts also that concerned extension of the operation of Family Courts Act, 1984 to a number of States.

Quite a few decisions deserve special mention for their sheer novelty of interpretation of existing law; rational re-affirmation of precedents; taking of bold initiatives in judicial law-making and expressions of judicial exasperation. The last mentioned situation is presented by the *Joseph John Carvollo's Case.*[1] In that case the judge found himself on the horns of a dilemma, either to follow a bad precedent or to break-free from the shackles of it. Like Lord Campbell, who in *Beamish v. Beamish* [2] found enough reasons not to follow the ratio in *R. v. Mellish* [3] but felt helpless as he had no alternative but to succumb to the rigour of the doctrine of precedent, we find his Lordship of the Bombay High Court following his English brethren. After logically pointing out the irrationality of a decision, of the Division Bench of the same Court, that would lead to inconvenient and illogical results, his Lordship feels helpless but to follow the same with the hope that the case would go up in appeal to the Supreme Court and things would be set right there. The year also brings to focus a decision of the Madras High Court (concerning validity of marriage)[4], which refused to follow a bad precedent laid down by the Delhi

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* Faculty Member, NLSIU, Bangalore.
** Student IV Year, NLSIU, Bangalore.
*** Student V Year, NLSIU, Bangalore.

1 *Infra* n. 63.
2 (1861) 9 H.L.C. 274.
3 (1844) 10 Cl. & F. 534.
4 *Infra* n. 15.

High Court in an earlier case - a precedent not persuasive enough for the Court to feel compelled to follow.

The significance of customary ceremonies in establishing and validating a marriage was forcefully brought out in a couple of cases.[5] A number of cases[6] decided during the year clarify the point when and under what circumstances the non-disclosure of certain material facts vitiate a nubile alliance. Another useful decision[7] comes out with a very rational interpretation of the provision "unfit for marriage and procreation of children" to mean "unfit for marriage and/or procreation of children" - a judicial construct which is both imaginative and just.

Adultery, cruelty and desertion were brought under the microscope of judicial scrutiny this year also and the interpretations given to them in a number of cases[8] enriched the legal literature to that extent.

The right of residence of the wife against the estranged husband and also against the alienee of the husband's property got recognised by the Calcutta High Court in a case.[9] In another significant decision,[10] the tenancy rights of the wife over a house - the place of residence of the entire family before divorce - even after divorce, also was recognised.

On the whole, the year presented a plethora of cases on family law matters projecting a kaleidoscope of judical activism, farsightedness, imaginative interpretation, helplessness and regret.

Validity of marriage

S.P.S. Balasubramanyam v. Suruttayan [11] concerned presumption of marriage. The Supreme Court reiterated the principle that the fact of cohabitation of a man and a woman for a number of years under the same roof raised the presumption of marriage between the two. The case was heard on an appeal from the Madras High Court, which had earlier held the marriage as non-existent. Since no other evidence existed to destroy the presumption of marriage, the highest Court also held that the children born to them as legitimate. In *Khiteswar Phukan v. Sowala Gogor* [12] the Gauhati High Court amplified the proposition that the one who claims to have married another to plead and prove the marriage as having taken

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5 *Ibid* n. 12 & n .13.
6 *Infra* n.22, n.24 & n. 25.
7 *Alka Sharma'a Case, Infra* n.27.
8 *Infra*, n. 30, n.33, n.36, n.38, n.42, n.43, n.44, n.46, n.47, n.48, n.49, n.50 and n.51.
9 *Basudeb Dey Sarkar v. Chhaya Dy Sarkar*, AIR 1991 Cal 399.
10 *Infra*, n.83.
11 AIR 1992 SC 756.
12 AIR 1991 Gau 61.

place by customary rites and ceremonies. A petition for judicial separation and an application for maintenance *pendente lite* were made based on a claim of marriage in the case. The Court held that there was no scope for speculation and inference in such matters and the factum of marriage had to be established by proper pleading and requisite evidence.

Marriage is valid only if the ceremonies of marriage undergone are in accordance with the customary practices of either of the parties. The customary marriage "Kareva" among the agricultural tribes involves the marriage of a widow with the brother or some male relative of the deceased husband. Such a marriage does not require performance of any religious ceremonies. In *Garja Singh v. Surjit Kaur,*[13] the marriage was claimed to have been celebrated in the "Kareva" form by a mere distribution of gur and sugar and there existed no relationship, as required under the customary law, between the bride and the deceased person (who was alleged to be her husband). The claim of marriage was rejected by the Punjab and Haryana High Court as the requisite customary practice were not fulfilled to validate such a union.

When no specific evidence is made available for having performed essential ceremonies of marriage like *saptapadi,* mere living together of a man and woman does not serve as proof of valid marriage under the circumstances. This was the principle laid down in *Santi Deb Berma v. Kanchan Prava Devi.* [14] The case concerned the second marriage of the appellant to one Namita Ghosh during the subsistence of a first valid marriage. The respondent filed a criminal complaint and the trial court convicted the appellant sentencing him for one and half years rigorous imprisonment and with a fine of one thousand rupees. On an appeal before the Additional District Sessions Judge he was acquitted. The High Court, on a criminal appeal, convicted the appellant for bigamy on the ground that he and Namita Ghosh were living together as husband and wife. The Supreme Court, on being approached, decided as above by holding mere cohabitation in the absence of any other cogent proof did not establish the existence of a marriage.

The decisions handed down by the highest court in the cases of *Bala Subramanyam* and *Santi Deb Berma* concerning presumption of marriage appear to contradict each other. However , a closer scrutiny of the cases reveals a very rational approach adopted by the Court to two different set of facts. The latter concerned second marriage and the Court requiring

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13 AIR 1991 P & H 177.
14 AIR 1991 SC 816.

sufficient proof to establish it as bigamy (as it carried penal sanction attached to it), while the former referred to a monogamous relationship and the Court's decision was a logical extension of the statutory provision. Further, no evidences existed in the former to destroy the presumption of marriage and in the latter non-performance of *saptapadi* was considered sufficient as not to raise a presumption of marriage. Obviously, the Supreme Court required a weightier proof to establish the existence of a marital relationship so as to amount to bigamy in the latter case.

In *Packia Raj v. Subbammal,*[15] the petitioner wanted a dissolution of marriage on the ground of adultery.[16] The Court held that the dissolution of marriage can take place only when a valid marriage subsisted. It was claimed to be a "seerthirutha" marriage in this case. But, such a marriage can take place only among the Hindus.[17] Here, one of the parties was a Christian. The "marriage" was not valid according to Christian law as this was not a Christian marriage.[18] The marriage also did not conform to the requirements of Special Marriage Act, 1954.[19] Hence, the Court held that the question of obtaining a decree of divorce on the said ground did not arise at all as the alleged marriage was no marriage at all. Thus, the Court did not follow the Delhi High Court decision in *Pramila v.Rajnish Kumar*[20] which considered sufficient if one of the parties happened to be a Christian and that the form of marriage as irrelevant to invoke the provisions of the Indian Divorce Act, 1869 for the dissolution of marriage.

Annulment of marriage

If, at the time of marriage, the wife is pregnant by some person, other than her husband, the marriage would be voidable and may be annulled by a decree of nullity[21]. However, no application for annulment of marriage shall be entertained if the petitioner was, at the time of marriage, aware of the facts alleged and the marital intercourse had taken place with his consent subsequent to its discovery by him. This was laid down in *C.S.Rangabhattar v. C.Choodamani.* [22] In this case the petitioner, after the death of his wife and after having undergone vasectomy contracted a fresh marriage. The respondent within five months of her marriage with the petitioner delivered a male child. With the full knowledge of the fact of

15 AIR 1991 Mad 319.
16 S. 10, Indian Divorce Act, 1869.
17 S. 7A of Hindu Marriage Act (Tamil Nadu Act XXI of 1967).
18 Indian Christian Marriage Act.
19 First Proviso to S.4 of the Act.
20 AIR 1979 Del 78.
21 S. 12 (1) (d), Hindu Marriage Act, 1955.
22 AIR 1992 AP 103.

her pre-marital pregnancy the petitioner had sex with his wife. The husband approached the District Court for a nullity decree on the ground of pre-marital pregnancy of the wife. The Court refused to grant the desired relief. On an appeal, the Andhra Pradesh High Court confirmed the lower court's decision by holding as above.

Where a widower with children from first marriage underwent vasectomy and got remarried without disclosing the fact of vasectomy to his second wife, such act amounts to fraud of such a nature as to vitiate consent for marriage and the second wife will be entitled to seek divorce on that ground.[23] Elaborating the proposition of law the Kerala High Court opined in *P.J.Moore v. Valsa*:[24] "If non-disclosure relates to a fact which has material impact on one of the very purposes of nubile alliance that may amount to fraud which vitiates the consent expressly or impliedly given by one party for the marriage. Vasectomy is such a material fact as to taint the consent for marriage due to its non-disclosure." Here, the husband revealed the fact of having undergone vasectomy to his second wife thirty months after their marriage. He also assured her that he would undergo recanalisation. He, however, changed his mind under the pretext that such a course was against the Pentecostal faith to which he had subscribed after having got himself into the membership of the Assemblies of Church of God.

In *Sarla Bai v. Komal Singh*[25] a petition for annulment of marriage on the ground of fraud[26] was filed. It was contended that the non-disclosure of the alleged fact of the wife suffering from heart disease since birth, at the time of marriage amounted to fraud. The decree prayed for was not granted as the Court felt that such a non-disclosure did not establish fraud as to entitle one to get a nullity decree.[27] This observation of the Court was in line with an earlier decision of the Supreme Court.[28]

The condition for obtaining a nullity decree under Sec. 5 (ii) (b) of the Hindu Marriage Act, 1955 came up for interpretation in *Alka Sharma v. Abhinesh Chandra Sharma*.[29] The provision referred to unsoundness of mind of either party to marriage as to render that party "unfit for marriage

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23 S. 19 Indian Divorce Act, 1869.

24 AIR 1992 Ker 172 at p. 178.

25 AIR 1991 MP 358.

26 S.12 (1) (c), Hindu Marriage Act, 1955.

27 Hence, the case was distinguished from *Ruby Roy v. Sudarshan Roy* AIR 1988 Cal 210; the Court distinguished this case also from its earlier decision in the year in *Alka Sharma v. Abhinesh Chandra Sharma*, AIR 1991 MP 205, as it was a case of schizophrenia known on the first night of the marriage itself.

28 AIR 1951 SC 280.

29 *Supra* n. 27.

and procreation of children." The word "and" here was held to be read as "and/or" . The Court opined the two conditions relating to unsoundness of mind of being unfit for marriage and incapacity for procreation of children could be read conjunctively or disjunctively was the proper and practicable interpretation of the law. The literal interpretation of the provision would lead to the unreasonable consequence of either stating that (i) a marriage partner is fit for marriage although mentally unsound, or that (ii) the partner has capacity for procreation but is not mentally normal. Realising that an insistence on presence of both the conditions for obtaining a nullity decree would lead to the just mentioned ridiculous consequence the Court, in effect, ruled either of the conditions would suffice for obtaining the desired decree. So marriage can be nullified of either or both conditions exist on account of mental disorder making living together of parties highly unhappy.

Divorce

(i) Adultery

It was held in *Mani Shankar v. Radha Devi* [30] that adultery[31] could be proved by a preponderance of probabilities and proof beyond reasonable doubt was not necessary. Thus, when the wife did not deny the authenticity of the letters written to the person she was alleged to have had illicit relation with, adultery was proved. The ruling in *Dastane v. Dastane* [32] that direct proof being rare, circumstantial evidence was enough to constitute adultery, was thus reinforced. A similar decision was also given in *Peter Masih v. Angilla Masih,*[33] where it was held that in a suit based on matrimonial offence there was no necessity and indeed a rare possibility to prove the issue by any direct evidence.[34] In that case the irrebutable evidence of witnesses that the wife was living in a one room accommodation for more than seven months with another person, other than her husband, was considered as sufficient proof of adultery.

Whether husband's attempts at reconciliation, after knowing that the

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30 AIR 1992 Raj. 33.

31 S. 13, Hindu Marriage Act, 1955.

32 AIR 1975 SC 1534; the Court also relied on *Dr. Saroj Sen v. Dr. Kalyan Ray,* AIR 1980 Cal 374.

33 AIR 1992 Del 20.

34 Ss. 10 & 16, Indian Divorce Act, 1869. The position in this regard has been clarified by the Supreme Court in *Earnist John White v. Mrs. Kathleen Olive While (Nee Meade),* AIR 1958 SC 44, wherein it was observed that the standard of proof required in divorce case was different from the one required in criminal cases concerning adultery.

35 S.23, Hindu Marriage Act, 1955.

36 AIR 1992 AP 76.

wife committed adultery, amounted to condonation?[35] This question figured in *Ganta Nagamani v. Ganta Lakshmana Rao* [36] and the Court answered it in the negative. Here, the wife was alleged to have been living in adultery with another man. Despite the efforts of the husband in taking her back, the wife, instead of relenting, hurled several charges of immoral conduct on him. She was also caught having sexual relation with the other man. The husband had then stated that he had made up his mind to divorce her. Under the circumstances, the Court opioned, the reconciliation attempts by the husband did not amount to condonation of marital lapses committed by the wife and he had every right to divorce her on that ground.[37]

T.V.Mathew v. Leelamma Mathew[38] threw up a peculiar situation of the wife dying during the pendency of the proceedings in the High Court for the confirmation of a *decree nisi* passed by the District Court[39] upon a petition of the husband on the ground of adultery committed by the wife. The High Court held that, if one of the parties to the proceedings for dissolution of marriage dies before the *decree nisi* is confirmed by the Court, the entire proceedings abate.[40]

(ii) Cruelty

What amounted to cruelty as to enable one to get a decree of divorce on that score was the thing over which the courts were exercised in a cluster of cases during the year under review. Since the term is not defined in the Hindu Marriage Act, 1955 the answer to the question depends on a number of factors like the character, way of life of the parties, their social and economic conditions, their status, customs and traditions and each case is to be decided on the facts of its own.[41] Thus, it was laid down in *Ramachandra Anand Suryayanshi v. Kalindi Ramachandra Suryavanshi* [42] that when the wife leaves the matrimonial home temporarily during *diwali* period for her parents' house, at the instance of her husband and despite her persistent attempts the husband denies her the right to return to the matrimonial house, the wife cannot be said to have treated the husband with cruelty.

Irresponsible, wild and baseless allegations of lack of manliness and impotency of the husband made in writing without any evidence in support

37 *Ibid* at p.80.

38 AIR 1991 Ker. 121.

39 Under S.16 of Indian Divorce Act, 1869, subject to confirmation by the High Court under S.17 of the Act.

40 The High Court relied on Paydon on Divorce, 8th Ed., at p.435 and *Butterfield v. Butterfield* AIR 1923 Cal 426.

41 *Sukumar Mukherjee v. Tripti Mukherjee*, AIR 1991 Pat 32.

42 AIR 1991 Bom 315.

amounts to cruelty. Holding thus the Bombay High Court went a step ahead when it averred that it was immaterial whether the wife intended to be cruel or not in *Nirmala Manohar Jagesha v. Manohar Shivaram Jagesha.*[43]

In *Vibha Srivatsava v. Dinesh Srivatsava* [44] the husband's plea for divorce on the ground of cruelty was rejected. The facts of the case in brief were, the husband and wife were employed in service at two different places. The wife insisted that she should continue with her service and would also make efforts to adjust her marital life. Such an attitude on the part of the wife was held not amounting to cruelty and not unreasonable. The wife's insistence was born out of a feeling of insecurity that stemmed from the fact that her brother's marriage with her husband's sister had already broken down and she feared if the same fate were to be her's too, then she would be without any support in the absence of employment.

(iii) Desertion

In order to constitute desertion as a ground for divorce there has to be (i) the factum of separation for two years and (ii) a clear intention to bring the cohabitation permanently to an end on the part of the deserting spouse. Further, in so far as the deserted spouse is concerned there should be (i) absence of consent for separation and (ii) absence of such a conduct as to give a reasonable cause to the spouse leaving the matrimonial home to form the aforesaid intent to permanently forsake and abandon the society of the other.[45] This rule was reiterated in *Khanindra Chandra Das v. Kusum Das*[46], *Mohinder Singh v. Harbans Kaur*[47], *Sukumar Mukherjee v. Tripti Mukherjee*[48] and in the case of *Suryavanshi.*[49] In *Elokeshi Chakraborthy v. Sunil Kumar Chakraborty*[50] the Court held the unsubstantiated suspicion that the husband was carrying on a love affair was an insufficient justification for the wife to stay away from the matrimonial home that too when no evidence of respondent misbehaving with the appellant existed. Accordingly, judicial separation on the ground of desertion of the wife awarded to the husband was confirmed by the Calcutta High Court.

What does not constitute sufficient reason for separate living was

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43 AIR 1991 Bom 259.

44 AIR 1991 MP 346.

45 *Lachman Uttamchand Kirpalani v. Meena,* AIR 1964 SC. 40; *Bipin Chandra v. Prabhabti* , AIR 1957 SC 176.

46 AIR 1991 Gau 54.

47 AIR 1992 P & H 8.

48 *Supra.* n. 41.

49 *Supra.* n. 42.

50 AIR 1991 Cal 176.

further elaborated in *Bhavna Adwani v. Manohar Adwani.*[51] An allegation of ill-treatment by the memebers of husband's family, without corroborative evidence, the Court held, did not constitute sufficient reason for the wife to leave the home of the husband. The Court further observed the imposition of a condition that the husband or some elderly person in the family to take the responsibility that she would not be ill-treated in the marital home before she could rejoin her husband as unreasonable and such an expectation could not constitute a good ground for her to refuse to live with her husband. The wife was held guilty not only of wilful neglect in the discharge of her marital obligations towards and of deserting her husband.

(iv)Mutual consent

In *Anjali Hazari v. Ravindra Kishen Hazari,*[52] the Supreme Court held that in a petition for divorce by mutual consent the question of access to their daughter after divorce would be regulated according to the terms and conditions stipulated in the agreement memo filed by the parties before the Court.

(v)Unilateral declaration

In the case of *Mangila Bibi v. Noor Hossain,* [53] the husband in the *kabinnama* delegated unconditional power to the wife, to give divorce *exparte* at her will. The Calcutta High Court held that wife could validly divorce at will under the legislative law [54] even in the absence delegation of unconditional power to wife to divorce by the husband. The ruling in the case reinforced the earlier decision in *Sainuddin v. Latifannessa Bibi.*[55]

Jurisdiction and procedure

The law as to jurisdiction and procedure got elucidated through a number of decisions during the year. In *Anita Lakshmi Narayan Singh v. Lakshminarayan Singh* [56] the trial Court had granted an *exparte* divorce decree in favour of the husband. The wife was unable to make an appearance before the Court as it was impossible for her to meet the expenses of going all the way over to Bombay and stay there in order to

51 AIR 1992 MP 105.
52 1991 (4) SCC 138.
53 AIR 1992 Cal. 92.
54 S.3, Muslim Women (Protection of Rights on Divorce) Act, 1986.
55 AIR 1991 Cal 631; the case was distinguished from *Mst. Zohar Khatoon v. Mohd. Ibrahim.* AIR 1981 SC 1243.
56 1992 (1) SCALE 722.

attend the Court. Since she was condemned unheard, the Supreme Court, on her appeal, set aside the impugned order.

For the application of the Jammu and Kashmir Hindu Marriage Act, 1955 it is required that the marriage ought to have been solemnized within that State.[57] Hence, when a petition for divorce was made, the marriage having taken place in Madras, in *Radha Krishna Nayyar v. Radha,*[58] the Jammu and Kashmir High Court held the peitition as not maintainable. The Court did not have the jurisdiction as the marriage had taken place outside the State.

The operation of *res judicata* in a divorce proceeding was considered in *Sarala v. Nalinakashan.*[59] Here, the issue whether the wife had deserted the husband was held to be barred by *res judicata,* because in an earlier suit for restitution of conjugal rights, the Court's finding was that the wife had been turned out of the house. The difference in relief in previous and later proceedings was held immaterial for *res judicata.* The Court also stated that Order IX Rule 9 of the Civil Procedure Code, 1908 , was applicable to proceedings under the Hindu Marriage Act, 1955 and the husband by filing successive proceedings was guilty of abuse of judicial process.

In *Mohinder Singh v. Gulwant Singh and Others,*[60] a case of bigamy, it was held that the High Court was wrong in going into the question of sufficiency of evidence, as that question could be determined only at the stage of trial, and not at the stage of enquiry.[61]

In *Puspakaran v. Sarojini,* [62] it was held that a pre-matrimonial matter cannot be decided by an arbitrator. It can only be decided by a competent court. Elaborating, the Court said, a judgment or decree in exercise of the matrimonial jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character not as against any specified person but absolutely, could be rendered only by a competent court and it will be a decision *in rem* and not *in personam* only. Such matters cannot be referred to arbitration and decided by arbitrators.

Joseph John Carvalho v. Leila Joseph Carvalho[63] concerned a petition for a decree of nullity filed in the Bombay High Court. The Court held that

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57 Ss. 13 & 21. Jammu & Kashmir Hindu Marriage Act, 1955.
58 AIR 1992 J & K.
59 AIR 1991 Ker 362.
60 JT 1992(1) SC 542.
61 S.202, Cr. P.C. 1973.
62 AIR 1992 Ker 9.
63 AIR 1991 Bom 156.

it had no jurisdiction to entertain the petition. B.N. Srikrishna, J., who delivered the judgement was following the decision by the Division Bench of the same Court in *Dnyaneshwar Sitaram Soholkar v. Surekha Dnyaneshwar Soholkar.*[64] In that case the Division Bench had ruled that in so far as a petition seeking a decree of nullity of marriage on the ground of force or fraud falling within the residuary portion[65] is concerned, the High Court jurisdiction is exclusive. The word "area" in the defnition of the expression "High Court"[66] was given a narrow interpretation as to mean only "that area which was comprised within the original civil jurisdiction of the High Court" and not to cover the entire area of the State. It further laid down that when the parties did not last reside within the limits of original civil jurisdiction of that Court it had no jurisdiction to entertain the petition. Basing on that decision his Lordship in the *Carvalho's* case felt that he had no alternative but to hold that the petition for a nullity decree as not maintainable since the parties last resided together at Vasai, a place outside the territorial limits of the original civil jurisdiction of the Bombay High Court. The judge felt that the Division Bench "unduly" widened the ambit of Section 19 and unfortunately restricted the meaning of the expression "area" in Section 3 of the Indian Divorce Act. The fallout of such an interpretation, the Judge surmised, had cast its dark shadow residing outside the limits of the original civil jurisdiction of the Bombay High Court would be bereft of the remedy of moving the district court within whose jurisdiction they reside or last resided as the concerned District Court would have no jurisdiction to entertain a petition under the residuary portion of Section 19 and the High Court equally, would have no jurisdiction to entertain the petition because of the law laid down by the Division Bench. The Judge said, "... this is the harsh, but probably unintended, fallout of the overwide (Sic)(Proposition ?) made in *Dayaneshwar's Case."*[67] He however felt bound to follow the precedent but position in the law needs to be restated."[68]

In *Modilal Kalaramji Jain v. Lakshmi Modilal Jain,*[69] any decree "under section 25(1) of Hindu Marriage Act, 1955", was held to include an order refusing to grant matrimonial relief. The Court was following the decision in *Sadanand v. Sulochana.*[70] In an earlier case,[71] the same Court,

64 AIR 1984 Bom 310.
65 S. 19, Indian Divorce Act, 1869.
66 *Ibid.*, S.3(1).
67 *Supra*, n. 63.
68 *Ibid*, at p. 161.
69 AIR 1991 Bom 440.
70 AIR 1989 Bom 220.
71 *Shantaram Dinakar Karnik v. Malti Shantaram* AIR 1964 Bom 83.

had held the expression did not contemplate passing of a decree under Sections 9 to 13 (matrimonial reliefs) of the Act. The Court in the instant case held that such an opinion as *per incuriam.*

Tenancy rights

The tenancy rights of the wife over a house was considered by the Gujarat High Court in *Bai Amina v. Abdulrehman Gulam Mohammad Mansuni. Ahmedabad.*[72] The facts in brief were as follows : The husband, wife and their children were living as members of the family of the husband's father (the original tenant) in a house before their divorce. The divorced husband filed a suit against the wife for declaration to the effect that his former wife and the children became trespassers of the house after the divorce. Rejecting the contention of the husband, the Court held that the wife and children were co-tenants of the husband and the divorce did not make them trespassers of the premises. The statutory tenancy right that had inhered in her and the children did not automatically get destroyed or terminated upon a divorce. The tenancy right of the wife continued regardless of the divorce and the same could be terminated only by the landlord. In the absence of such an action on his part, one co-tenant had no right to get an order of eviction against another co-tenant.

Matrimonial property

In order to get a relief under Hindu Marriage Act, 1955[73] for the disposal of property by one spouse, the other spouse must establish that the property belonged to both of them. It was laid down in *Subhash Lata v. P.N.Khanna*[74] that where the property in question concerned articles presented at the time of marriage to the wife alone, joint property right claims could not be put forth as the property belonged exclusively to her alone.

Amendments

Various notifications have extended the operation of the Family Courts Act, 1984 to Assam[75], West Bengal [76], Bihar[77] and Manipur[78]. Besides, the

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72 AIR 1992 Guj 67.
73 S.27, Hindu Marriage Act, 1955, as interpreted in *Shukla v. Brij Makkar,* AIR 1982 Del. 223.
74 AIR 1992 Del. 14.
75 Notn. No. 79/2/86.
76 *Ibid.*
77 *Ibid* S.O. 838 (E).
78 *Ibid.* S.O.91 (E).

Family Courts (Amendment) Act, 1991 has been passed. Under this, a proviso has been added to S.19 of the Act. It states that the subsection shall not apply to any appeal pending before a High Court, or an order passed under Chapter 9 of the Criminal Procedure Code, 1973, before the commencement of the Amendment.

THE LAW RELATING TO MAINTENANCE

Ramdas K.P. *

PART A

Maintenance under the Code of Criminal Procedure, 1973

The Supreme Court in *Yamuna Bai v. Ananthrao* [1] and *Bakulabai v. Gangaram* [2] held that the marriage of a Hindu woman with a Hindu male having a living spouse performed after coming into force of the Hindu Marriage Act, 1955 is null and void and the woman is not entitled to maintenance under Section 125 of the Cr. P.C. 1973.

In *Yamunabai v. Ananthrao,* [3] Smt. Yamunabai was factually married to Ananthrao Adhav by observance of rites under Hindu Law in 1974. Anantrao had previously married Smt. Lilabai who was alive and the marriage was subsisting in 1974. The appellant lived with the respondent husband for one week and thereafter left the house alleging ill-treatment. The appellant made an application for maintenance which was dismissed and the Bombay High Court decided against her.

The appellant contended that the term 'wife' in Section 125 of the Cr.P.C. should be given a wider and extended meaning so as to indclude a woman married in fact by performace of necessary rites or following the procedure laid down under the law. It was argued that the personal law of the parties to the proceedings under Section 125 of the Code should be completely excluded from consideration.

The Supreme Court held that the marriage was a complete nullity in the eye of law and the appellant was, therefore, not entitled to the benefit of maintenance under Section 125 of the Code. For the purpose of the Section, the expression 'wife' means only a legally wedded wife. 'Wife' includes a 'divorcee'; however, a woman cannot be a divorcee unless there was a valid marriage. The personal law of the parties cannot be excluded while dealing with an application under Section 125 of the Code.

Bakulabai v. Gangaram [4] was decided on the same day as *Yamunabai*

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* Student V Year, NLSIU, Bangalore.

1 AIR 1988 SC 644.

2 1988 (1) SCC 537.

3 *Supra.* n.1.

4 *Supra.* n.2.

v. Ananthrao [5] and the decision is similar in both the cases. However, unlike Yamunabai's case, in this case Bakulabai married Gangaram in 1972 and lived with him as his wife for many years and she even begot a son through that marriage.

It is interesting to note that though the Supreme Court held that Bakulabai was not entitled to maintenance, the quantum of maintenance granted by the Judicial Magistrate to Bakulabai and her son remained unaltered.

In 1984, the Judicial Magistrate had granted maintenance at the rate of Rs.100/- per month to Bakulabai and an additional Rs.50/- per month for the minor boy. The Supreme court opined that four years had elapsed since the Magistrate had passed the order during which the value of money had gone down due to inflation and the child had also grown in age. Therefore, the Supreme Court directed the respondent to pay maintenance to the minor son at the rate of Rs.150/- per month from 1988.

It is submitted that though the Supreme Court gave a narrow and literal interpretation to Section 125 of the Code, enhancing the quantum of maintenance was primarily to do justice to Bakulabai though it ostensibly appears that inflation and the age of the child was their inclination for enhancement.

Reading between the line, it would appear that one way of doing justice to the second or subsequent wives would be to grant enhanced maintenance to her children so that it would be sufficient to meet the bare necessities of the second or subsequent wives.

But such a course is inadequate for two reasons. Firstly, the children can get maintenance only during their minority and secondly the second wife may not beget children and it is a well known fact that in rural India, people usually go in for subsequent marriages if they do not beget children in their earlier marriages; the assumption being that it has to be the fault of the woman if the spouses do not beget children.

It is unfortunate that the One Hundred Thirty Second Report of the Law Commission does not deal with this aspect. In April, 1989 the Law Commission of India under the Chairmanship of M.P. Thakkar took up the matter *suo motu* and submitted the Report entitled :

> **Need for amendment of the provisions of Chapter IX of the Code of Criminal Procedure, 1973 in order to ameloirate the hardship and mitigate the distress of neglected women, children and parents.**

5 *Supra*. n.1.

The Law Commission dealt with a large number of issues but failed to consider the plight of the subsequent wives. This situation is extremely unsatisfactory and should be changed either by Parliament or by the Supreme Court. There is still a small percentage which forms a considerable number of people among the Hindus who practise bigamy and depriving the subsequent wives of their maintenance is hardly the right way to prevent it, especially when the Cr.P.C. specifically provides that the prosecution can be launched only at the instance of certain people. In a number of cases the husbands conceal the factum of their first marriage from the second wife. Thus, depriving the second wife of the right to maintenance is extremely unjust. It effectively amounts to allowing the husband to benefit from his own wrong.

During the period under review, the High Courts, in order to do justice to the second wife, have tried to overcome the hurdles laid down by the Supreme Court in the above mentioned cases both by appreciation of facts and by liberal interpretation of law.

Proof of marriage

(a) Strict proof not necessary and presumption of valid marriage by long co-habitation

In *Smt. Phoolo Bai Joge v. Shri. Beero,* [6] the Madhya Pradesh High Court held that unlike matrimonial proceedings where strict proof of marriage is essential, in a proceeding under Sec. 125, Cr.P.C. such standard of proof is not necessary, as it is summary in nature meant to prevent vagrancy. The Court further held that where a man and woman were living together as husband and wife and the husband acknowledged the woman to be his wife and the relatives also treated them as husband and wife, presumption arises that the woman is the legally married wife.

The lower court, Judicial Magistrate First Class, had dismissed the application of Phoolo Bai on the ground that the applicant had failed to establish that she was the legally married wife of the non-applicant. The finding of the learned Magistrate was based on the evidence of the father of the applicant who had stated in his evidence that the applicant's first husband was Parsibo with whom the applicant lived just for 15 days. This witness further stated that the applicant was then married to the non-applicant and both lived together as husband and wife for 15-20 years and that throughout this long period, he treated the non-applicant as his son-

6 1991 Cri. L J 3270. (M P). Strict application of the principle in *Yamunabai v. Ananthrao, Supra* n.1; and *Bakulabai v. Gangaram, Supra* n.2; would disentitle Phoolo Bai Joge to claim maintenance as her marriage with Beero is *void* because she did not divorce Parsibo before marrying Beero.

in-law. The finding was further based on the failure of the applicant to produce any other witnesses in whose presence the alleged marriage was celebrated or the priest who had celebrated the marriage.

On revision, the High Court held that after the first marriage of the applicant with one Parsibo ceased to exist, the applicant was married many years back with the non-applicant and both lived as husband and wife for at least 15-20 years. The non-applicant had acknowledged the applicant as his wife by nominating her for Contributory Provident Fund and also for Gratuity, declaring the applicant to be his wife as far back as 1977. Even the relatives of the non-applicant treated them as husband and wife and so the Court held that the applicant is the wife of the non-applicant, and therefore granted her maintenance.

(b) The second wife can claim maintenance if both spouses belong to a Schedule Tribe

In *Anupama Pradhan v. Sultan Pradhan,* [7] the Orissa High Court held that as proceeding under Sec. 125 of the Code is of summary nature, the intricacies of the law are not required to be gone into and where the man and woman lived together as husband and wife and treated as such by the community and the man treated the woman as his wife, marriage between them has to be inferred for the limited purpose of Sec. 125 of the Code.

The application for maintenance was opposed on the ground that the marriage of the applicant with the opposite party, if there was any, was *void ab initio* according to Sec.11 read with Sec. 5 of the Hindu Marriage Act, 1955 the same having been solemnised during the subsistence of the marriage of the opposite party with Nirupama Pradhan and as such the applicant was not entitled to any maintenance.

On revision, after examining the evidence, the High Court came to the conclusion that the opposite party was not married to Nirupama Pradhan as it could not attach much weight to the uncorroborated testimony of the opposite party and moreover the evidence of the father of Nirupama and also the father of the applicant who was admittedly related to Nirupama clearly showed that Nirupama had never been given in marriage with the opposite party.

The High Court further held that even assuming for the sake of argument that there was any such marriage, the applicant will not be disentitled to maintenance in as much as the Hindu Marriage Act, 1955 does not apply to the parties who are admittedly members of the Scheduled Tribes. In view of Sec.2(2) of the said Act and the fact that the ancient

7 1991 Cri. LJ 3216 (Orissa).

Hindu Law does not forbid a Hindu to marry another wife during the subsistence of any prior marriage, even the second wife can claim the maintenance.

The Court found that the parties remained as husband and wife for a period of about 12 years and during that period the applicant gave birth to two sons and one daughter through the opposite party. Since the man treated the woman as his wife and the community treated them as such and the fact that they lived together for a long period of time, marriage had to be inferred for the limited purpose of Sec.125 of the Code.

(c) The marriage between Christian woman and Hindu male perfomed as per Hindu rites valid for purposes under Sec.125

In *A.A.Balasundaram v. A.Vijayakumari,* [8] the question for determination before the Andhra Pradesh High Court was whether there can be a valid marriage between a Christian woman and a Hindu man, the marriage being perfomed as per the Hindu rites, for the purposes of granting maintenance under Sec.125 of the Cr.P.C. The High Court held that a marriage between a Christian and a Hindu performed as per the Hindu rites with the full consent of both parties cannot be said to be invalid for purposes of claiming maintenance under Sec.125 of the Cr.P.C.

The Court reasoned that the provisions of the Hindu Marriage Act, namely Sections 11 and 12, having been specific in rendering certain marriages void and voidable and being silent as regards the marriage between a Hindu and a Christian, and there being no provision in the Act dealing with such a question, it cannot be held that such a marriage is either void or voidable.

The Court also rejected the contention that according to Sec.4 of the Indian Christian Marriage Act, marriage between two Christians or one of whom is a Christian shall be void, if it is not solemnised in accordance with the provisions of Sec.5 of the said Act; and since it is not admittedly so performed, the marriage should be declared void. The Court stated that the rigour of voidness covered by Sec.4 of the said Act is stressed and attached more to the persons that officiate in the solemnisation of the marriages, and it does not envisage as regards the validity or otherwise of a marriage simpliciter that took place between a Hindu and a Christian.

The Court relied on some old cases [9] and upheld the validity of the

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8 1991 Cr. LJ 2252 (AP).

9 *Kunhiraman Nair .v Annakutty,* 1967 Ker LC 24; *Pahtan Maung v. Ua Jan,* AIR 1939 Rangoon 207; *Smyth v. Urs. Hannah Smyth,* AIR 1951 Cal 293; and *Seethurathinam Pillai v. Barbara Dolly,* (1970) 1 SCWR 589.

marriage for purposes of granting the relief under Section 125 of the Cr.P.C. and observed that at the same time, it is open to the aggrieved party to seek appropriate remedy from the civil court for a declaration that the marriage is void or voidable, insamuch as the finding of the criminal court in these summary proceedings is neither conclusive nor decisive in the civil proceedings that may be initiated.

Meaning of the phrase "unable to maintain herself" in Sec.125(1)

(a) Working as a labourer for mere survival does not amount to the ability to maintain herself

In *Revati Bai v. Jageshwar,*[10] the Madhya Pradesh High Court held that the phrase "unable to maintain herself" would mean the 'means available to the deserted wife' while she was living with her husband and would not take within itself the efforts made by the wife after desertion to somehow survive. Maintenance cannot be denied to a wife on the ground that she refused to earn though she was capable of earning. Inability of the wife to maintain herself cannot be judged in the light of her capacity to make a living. If a lady prefers to survive by begging the same would not amount to her ability to maintain herself.

The High Court quoted with approval the decision in *Salim v. Najima Begum,* [11] where it was held that neither begging by the wife not her being maintained by her relative would be sufficient for this purpose. She herself should be able to maintain her status not below that which she enjoyed in her husband's house.

In the instant case, the learned Magistrate relied on a single statement made by the applicant that she was somehow maintaining herself by working as a labourer and held that the condition of Section 125(1)(a) of the Cr.P.C. that the wife was unable to maintain herself was not proved, and dismissed the application and even the revisional court dismissed the revision application.

The High Court, while examining the facts, found that the applicant was married to the non-applicant for about 40 years and had given birth to four children. The non-applicant had an annual income of Rs.20,000 and that she was driven out of her marital home by the non-applicant about three years before without any reason. In her application she had alleged that she was old and without any support and was, therefore, unable to maintain herself. The High Court stated that the fact that the applicant is

10 1991 Cri. LJ 40 (MP).
11 1980 Cri. LJ 1932 (All).

now about 50 years is also relevant and that if a lady living for 40 long years in such circumstances is thrown out without providing for her maintenance, she would die if she does not do anything to survive and if under such compelling circumstances she works as a labourer, she cannot be said to be possessed of means to maintain herself. The only fact that she was compelled to work as a labourer to survive was, by itself, not sufficient to establish that the applicant was able to maintain herself. The High Court set aside the impugned orders and directed the non-applicant to pay her maintenance.

(b) The potential to earn not a bar

In *Ashok Kumar Singh v. VIth Additional Sessions Judge, Varnasi,* [12] the Allahabad High Court rejected the contention that the applicant was a educated lady who can always get employment and it cannot be said that she had no means to support herself. The Court held that the applicant was not employed anywhere and had no other means to maintain herself, and merely because a woman is educated, she cannot be deprived of her right to get maintenance under Section 125 of the Code.

(c) Ommission to state "unable to maintain herself" not fatal

In *Anusuiya Bai v. Nawaslal,* [13] the Madhya Pradesh High Court held that though the applicant had not mentioned the wordings "unable to maintain herself", it will not debar her from caliming maintenance under Section 125 of the Cr.P.C. and a strict rule of pleadings does not apply. The assertion of the wife that she was not doing anything was sufficient to attract the provisions of Section 125. The omission to state about inability to maintain herself was not fatal and it was only a technical irregularity. The High Court allowed the review application of the wife on the ground that her application for review cannot be dismissed only on the ground that she had not pleaded that she was unable to maintain herself.

Justifiable grounds for the wife to live separately

(a) The factum of second marriage

In *Gangabai v. Shriram,* [14] the High Court reiterated the position that the second marriage on the part of the respondent husband affords a justifiable ground to the applicant to live separately from him and still

12 1991 Cri. LJ 2357 (All).
13 1991 Cri. LJ 2957 (MP).
14 1991 Cri. LJ 1098 (All).

claim maintenance allowance. The revisional court came to the conclusion that the applicant had wilfully deserted the husband and as such she was not entitled to claim any maintenance whatsoever.

On proper appreciation of evidence, the High Court came to the conclusion that the conduct of the wife did not amount to desertion and therefore restored the order of the trial court which awarded maintenance.

(b) Written consent of wife for her husbands's second marriage does not debar to live separately

In *Smt.Anysuiya Bai v. Nawaslal,* [15] the lower revisional court dismissed the application of the wife on the ground that the wife had executed a consent deed for the second marriage of her husband and since she was a consenting party, she was not entitled to live separately and claim maintenance. The Madhya Pradesh High Court held that the fact that the husband has contracted a second marriage and that the husband is staying with that wife and has a son from that wife, itself, may tend to be cruelty to the previously wedded wife and that wife is entitled to live separately and claim maintenance. The Court also observed that the written consent of the applicant does not debar her to live separately for the subsequent conduct and cruelty of the non-applicant with her.

(c) Mere factum of second marriage entitles wife to live separately though the second marriage was due to her fault

In *Mustafa Shansuddin Shaikh v. Shamshad Begum Mustafa,* [16] the question for determination before the High Court of Bombay was whether it was permissible for the Court to deny maintenance to the wife because the husband had contracted the second marriage for the fault of his wife. It was alleged that the wife left the house of her husband without any reasonable cause and the efforts of the husband to bring his wife back to the matrimonial house failed. He served a legal notice to the wife requesting her to return to the matrimonial home and he also instituted a civil suit against the wife claiming restitution of conjugal rights. It was during the pendency of this suit the wife applied for maintenance under Section 125 of the Cr.P.C. and the Magistrate found that on the date of the order, the husband had contracted a second marraige and so the Court held that the wife's refusal to stay with her husband was justified and ordered the husband to pay a monthly maintenance to his wife and daughter.

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15 *Supra* n.11.
16 1991 Cri. LJ 1932 (Bom).

The husband contended that he professed Muslim religion and was entitled to contract a second marriage even during the lifetime of his first wife. He contracted second marriage after a passage of six years from the time the wife left the house and on these facts no fault can be found on the part of the husband for contracting second marriage; and since this was because of the fault of the wife, she was not entitled to live separately and hence cannot claim maintenance.

The High Court held that the proceedings under Sec.125 are of summary nature and the Magistrate is not required to determine which party to the marriage was at fault. The crucial date for ascertaining whether a wife is entitled to live separately and claim maintenance is the date on which the Magistrate passes the order. The Magistrate is not required to examine whether the conduct of the wife in initially leaving the house is wholly irrelevant and the Magistrate must concentrate on the facts and circumstances existing on the date of passing of the order. The Magistrate is duty bound to award maintenance once it is found that the wife is unable to maintain herself and her husband has means but still neglect or refuse to maintain the wife. Accordingly, the High Court upheld the order of the Magistrate granting maintenance to the wife.

(d) Impotency a just ground

In *Ashok Kumar Singh v. VIth Additional Sessions Judge, Varanasi,* [17] the Allahabad High Court upheld that impotency of the husband provided a just ground for the wife to live separately and claim maintenance.

Living separately by mutual consent

(a) Living separately should not be due to some specific or compelling grounds

The husband was suffering from T.B. and the wife offered to live separately in a house situated nearby i.e., only one house was in between the houses where the spouses were residing, and the wife lived in that house separately for 14 years during which time the husband married for the second time. The Karnataka High Court in *Veeranna v. Sumitrabai,* [18] held that this does not amount to living separately by mutual consent within the meaning of Sec.125(4) of the Cr.P.C. and upheld the claim of the wife to reside separately and claim maintenance.

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17 *Supra* n.10.

18 1991 Cri. LJ 774 (Kant).

The High Court relied on *Laisram v. Sakhi Devi* [19] decided by the Manipur High Court which held that the test is to find out if the agreement for separate living and payment of maintenance was the outcome of the desire of both the parties, independently reached by each of them, or if one of the parties was forced to submit by circumstances to such agreement. The separate living must be the result of a deliberate and express agreement between the parties and hence where a wife refuses to live with the husband on some specific ground, such as a cruelty, or the fact that he is keeping another wife, or living separately under an agreement settled by a Panchayat to whom disputes between the parties had been referred, is not living separately by mutual consent. The High Court also opined that the mere fact that the husband took a second wife during the lifetime of the applicant amounted to cruelty which is a justifiable ground for the wife to live separately and claim maintenance.

(b) Bar to claim maintenance extinguished if maintenance not paid which was a condition to live separately by mutual consent

In *Chimata Nagaratnamma v. Chimata Nanthanail,*[20] the husband and the wife entered into an agreement to live separately on the condition that the husband pays the wife Rs.50/- per month. The husband paid this sum for nearly 14 years and thereafter he stopped payment. The wife made an application for maintenance under Section 125 of the Code and the Magistrate granted her maintenance of a sum of Rs.300/- per month. The revisional court set aside the order of the Magistrate relying on *Kamatham Venkatamma v. Kamatham Buruju Ramanna,* [21] which held that the proceeings under Sec.125 of the Cr.P.C. cannot be maintained even if there is a breach of agreement executed between the parties.

The Andhra Pradesh High Court held that even assuming that such agreement is not hit by Section 23 of the Indian Contract Act, 1872 as being opposed to public policy, once the husband violated the terms of the agreement, it follows that there was negligence on his part. Since the husband is held to have neglected to maintain his wife by not paying her the maintenance in terms of the agreement, the wife is certainly entitled to approach the court under Sec.125 of the Cr.P.C. for the said relief.

The Court also rejected the contention of the husband that the wife was not entitled to claim maintenance because they were living separately by mutual consent. It reasoned that in a case where the parties agree to live

19 AIR 1965 Manipur 49.
20 1991. Cri. LJ 291 (AP).
21 1989. Cri. LJ 2416 (A P).

separately on condition of payment of maintenance and the condition of payment of maintenance is violated, the agreement to live separately with consent comes to an end and the bar to claim maintenance will be extinguished.

The Court also rejected the contention that the only remedy open to the wife was to go to the civil court and seek the relief of specific performance of the agreement. The Court opined that merely because the party can approach the civil court, the same is not a bar to claim maintenance under Sec.125 of the Code.

Period of imprisonment

(a) Imprisonment can be for more than one month

In *Ram Bilas v. Bhagwati Devi,* [22] the husband did not make payment to the wife as ordered by the Magistrate and the court committed the husband to jail for 14 months, as maintenance for 14 months was due. While the husband was in jail, he filed a review petition before the Allahabad High Court challenging the order of the Magistrate which committed him to jail on the ground that imprisonment for more than one month cannot be awarded even if maintenance may have been due for more than one month. He relied on *Mohd. Ahmad v. State,* [23] which was decided by the Division Bench of the Allahabad High Court in 1988.

The High Court held that this case was not binding on it because of the decision of five Judges of the Allahabad High Court in the case of *Emperor v. Beni,* [24] where the Court had held that it was the intention of the legislature to empower the Magistrate to award imprisonment for a period of one month in respect of each month's default.

The Court opined that if there is a failure to pay several month's maintenance, then imprisonment will be upto one month for each month's allowance and thus in whole it may be for more than one month; and moreover the Court can order one month's imprisonment even for a part of one month's maintenance. The Court interpreted the phrase "or until payment if sooner made" to mean that the husband may be released even before the expiry of the period mentioned in the order if he pays the amount due, and if he is not released, then he can come to the Court against that order refusing release. The Court also held that sending of

22 1991 Cri. LJ 1098 (All).

23 In this case the Court held that the maximum period has to be one month for any one default and in that case as the order of the Magistrate awarded more than one month's imprisonment, it was held invalid.

24 AIR 1938 All 386.

husband to jail is a mode to induce him to make payment. If he does not make payment and prefers to go to jail, his liability will not cease and even then it will be open to the Court to take steps for the recovery of maintenance. The Court dismissed the review petition thus upholding the order of the Magistrate which committed him to prison for a period of 14 months.

(b) The maximum period of imprisonment cannot be more than 12 months, though a person can claim maintenance for more than 12 months

In *Pokala Brahmanaiah v. Pokala Padma,* [25] the Magistrate had ordered that the husband should be sent to jail for a perid of 24 months as he had defaulted in paying the maintenance to the wife for a period of 24 months. The High Court of Andhra Pradesh, while holding that even though the respondents can file the petition for realisation of the arrears of maintenance within one year from the date of orders in the revison, thus being eligible to claim maintenance for a period of more than 12 months, the maximum period of imprisonment which can be awarded to the petitioner can be only 12 months and consequently held that the order passed by the Magistrate sentencing the petitioner to suffer imprisonment for 24 months to be illegal, and therefore, reduced the period of imprisonment to 12 months only.

Period of limitation to claim arrears of maintenance

(a) The amount becomes due on the date when the order of revision is passed though the revisional court does not grant stay of the Magistrate's order

In *Pokala Brahmanaiah v. Pokala Padma,* [26] the wife claimed the arrears of maintenance for a period of 27 months. The husband contended that the petition is not maintenable as the claim was more than one year. He relied on the proviso to Sec.125(3).

The High Court of Andhra Pradesh found that the wife had applied for the execution of the order of maintenance within one year from which the order of revision was passed; and hence it was within the period of one year on which it becomes due. The Court relied on *Ataullah v. Maimunnisa Begum,* [27] which held that the matter became final only by virtue of the order passed by the Sessions Judge. The application of the wife within one

25 1991 Cri. LJ 607 (AP).
26 *Ibid.*
27 1984 Cri. LJ 1522.

year from the date of the order of the Sessions Judge is within time. The Court in this case also stated :

> The learned cousel, however, submits that in the absence of any stay, nothing prevented the respondents from filing an application earlier. But for the purpose of limitation of one year, the Court connot ignore the fact that the matter was pending by way of revision and the order of maintenance became final only on the dismissal of the revision by the learned Additional Sessions Judge.

The clear implication of such a holding is that even though the stay has not been granted by the Sessions Court in revision, the wife can still file the petition for realisation of arrears of maintenance within one year from the orders in the revision.

(b) The amount becomes due on the date when the order of revision is passed only if the revisional court stays the operation of the Magistrate's Order

In *Lakshman Rao Sakhram Survase v. Smt.Mangala,* [28] the High Court of Karnataka laid down a slightly different rule by laying undue emphasis on the matter of stay granted by the revisional courts. In this case, the Magistrate awarded maintenance to the wife under Sec.125 of the Cr.P.C. and the husband preferred a revision petition before the Sessions Judge. The Sessions Judge granted the stay of the Order of the Magistrate. The wife filed a petition to recover the arrears of maintenance amounting to Rs.17,100/- within one year from the order of the Sessions Judge who dismissed the revision petition of the husband. The Court held that in as much as the husband obtained an order of stay of the Magistrate's order during the pendency of his revision petition which was eventually dismissed, it was not open to the petitioner to contend that the application filed by the wife was more than one year after the order of the Magistrate and hence barred by limitation.

The following observations of the High Court are important to appreciate the full implications of this case :

> But, in none of the above mentioned decisions, there was an order of stay of maintenance order by the revisional court whereas, in the instant case, the petitioner had obtained stay of the learned Magistrate's order in the revision petition filed by him and the said stay became vacated when his revision petition was dismissed ... It is needless to

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28 1990 Cri. LJ 1980 (Kant).

say that during the said period the respondent could not have successfully maintained an application under Section 125(3) of the Cr.P.C. for executing the maintenance order as it would have been dismissed by the learned Magistrate on the ground that the maintenance order has been stayed by the revisional court.[29]

It is submitted that the view taken by the Karnataka High Court in this case is narrow and it would be better if all the courts follow the decision of the Andhra Pradesh High Court in *Pokala Brahmanaiah v. Pokala Padma.*[30]

Waiver of the right to maintenance

In *Golla Seetharamulu v. Golla Rathanamma,* [31] the husband contended that his wife was residing separately since about 10 to 12 years prior to the filing of the petition for maintenance and therefore, she waived her right by keeping herself silent all these years and due to this long spell of time she disentitled herself from claiming any maintenance.

The Andhra Pradesh High Court, speaking through Radhakrishna Rao, J. held that simply because the wife had not claimed maintenance for a long period, it does not mean that she had completely abandoned her right or voluntarily given up her right to maintenance.

Rejecting the contention of the petitioner, the Court opined that the statute has not prohibited any wife to claim maintenance within any period of limitation, and therefore, in revision the petitioner is not entitled to plead that she has waived her right to claim maintenance due to the long lapse of 10 to 12 years after she left his house.

Alteration of the amount of maintenance

(a) No legal bar for alteration in maintenance amount merely because the order was passed on basis of compromise between the parties

In *Jaswant Singh v. Ranjit Kaur,* [32] the husband challenged the legality of the revisional order of the Sessions Judge who enhanced the amount of maintenance on the application of the wife under Sec.127.

The husband contended that the earlier order under Sec.125 of the Code was passed on the basis of the compromise, and, at best the said

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29 *Ibid.* p. 1982.
30 *Supra* n.23.
31 1991 Cri. LJ 1533 (AP).
32 1991 Cri. LJ 3016(P&H).

order would amount to a contract between the parties with the seal of the Court affixed thereon. He submitted that if the aforesaid compromise or contract was to be varied then the wife should have first got that order set aside and thereafter could have again moved for refixation of the maintenance allowance.

The High Court of Punjab and Haryana held that a perusal of sub-section (1) of Section 127 of the Code leaves no manner of doubt that on proof of change in circumstances of any person receiving maintenance under Section 125 of the Code, the Magistrate may make such an alteration in the allowance as he deems fit. There would be no legal bar for alteration in the maintenance allowance already fixed in favour of the wife under Sec.125 of the Code merely because the said order was passed on the basis of the compromise between the parties. Nor would it be obligatory for the wife to first get the order under Sec.125 of the Code set aside and then apply for alteration of the maintenance allowance under Sec. 127 of the Code. The High Court upheld the order of the Sessions Judge enhancing the quantum of maintenance.

(b) The Magistrate cannot lay down conditions such as deposit of arrears before proceedings with the application for alteration of maintenance

In *Ashok Yashwant Samant v. Suparna Ashok Samant,* [33] the High Court held that there is no provision either under Sec.125(3) or Sec.127(1) of the Cr.P.C. to enable the trial judge to proceed with the application for alteration of the amount only on a condition of deposit of part or whole of the arrears. The trial judge has no discretionary or inherent power under the Code, and the inherent powers under Sec.482 are available only to the High Court. The Court opined that in the absence of any provision, the learned judge was wrong in directing the petitioner to deposit the amount of arrears as a condition precedent to proceed with his application for modification of the impugned order.

In this case, the Magistrate had passed an *ex parte* order in favour of the wife granting her maintenance of Rs.500/- per month and right from the date of the *ex parte* order the husband had not paid any amount towards maintenance, though he was sentenced to imprisonment on two occasions and the attachment proceedings had failed because he had no property and when the application of the wife under Sec.125(3) was pending for the recovery of arrears of maintenance, the husband applied for the alteration of the award of maintenance on the ground that he was

33 1991 Cri.LJ 766 (Bom).

getting only a salary of Rs.500/- and he had to maintain his school going children and his mother. The Magistrate held that the application for change in circumstances to alter the maintenance allowance granted by the Court will proceed further subject to deposit of part of arrears. The High Court held this invalid and directed the Magistrate to consider both the applications under Section 127 and 125(3) together.

(c) A minor who is not aggrieved by the order of the lower courts cannot maintain a revision before the High Court

In *Preetpal Singh v. Ishwari Devi,* [34] the Magistrate passed an order under Section 125, Cr.P.C. directing the husband to pay the maintenance of Rs.500/- per month to the wife and Rs.500/- per month to the minor son who was in the custody of the mother, till he attains majority. The husband applied to the Magistrate for altering the award of maintenance on the ground that the son has come to him and so the wife cannot get maintenance for the minor. The lower court held that for the last 3-4 months, the minor son had been with the father. The father was not given custody of the minor by any court and since the time the minor came to the father he has not been receiving any education and also observed that the father has brought the son only to defeat the order of the magistrate.

The Allahabad High Court held that it is a peculiar second revision brought by an ingenious device. The father lost the case in his first revision and then he himself could not file the second revision under Sec.397(3), Cr.P.C. and so he filed a second revision in the name of the minor, Preetpal Singh through his uncle. The Court held that this ingenious device cannot be permitted. Both the Magistrate and the lower revisional court did not pass any order against the minor from which he could have been aggrieved. Whatever orders the Magistrate and the lower revisional court passed were against the father and so the Court held that the son having no order against him cannot maintain this present revision.

The Court also opined that though the father is the natural guardian of his minor son, once the minor is in the custody of the mother, the father cannot take away the minor from the guardianship of the mother except by proper application under Sec. 25 of the Guardians and Wards Act. It is only in proper proceedings that the welfare of the minor can be determined and because of this reason the Court held that since the custody of the minor had not been changed according to law, no relief could be given to the father.

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34 1991 Cri.LJ 3015 (All).

(9) Whether the proceedings under Sec.125, Cr.P.C. are civil or criminal in nature

In *Sk.Alauddin v. Khadiza Bibi,* [35] the above question became relevant in order to decide whether the Magistrate can invoke the inherent powers to recall his earlier order finally disposing a proceeding of this nature, provided sufficient grounds are shown.

The wife filed an application under Sec.125 of the Code and as she was absent, the Magistrate dismissed the case for default. Later, on the petition filed by the wife, the Magistrate allowed the petition and restored the Misc. case to its original number and set aside the order he had passed earlier dismissing the case for default.

The husband contended that as per provisions of Sec.362 of the Cr.P.C. the criminal court cannot alter or review the judgement or final order disposing of a case except to correct a clerical or arithmetical error. He relied on the decision of the Supreme Court in *Bindeshwari Prasad Case,*[36] which held that there is no provision in the Code of Criminal Procedure empowering the Magistrate to review or recall an order passed by him and that this Code does not contain a provision for inherent powers like that of the civil court under Sec.151 of the Code of Civil Procedure.

The Calcutta High Court in this case held that judicial pronouncements of not too distant past indicated that the proceedings for maintenance are in the nature of civil proceedings though the criminal process is applied for the purpose of summary and speedy disposal of such matter in the interest of society and the Court made a reference to the decision of the Supreme Court in *Mst.Jagir Kaur v. Jaswant Singh.* [37]

The Court held that a petition filed under Sec.125, Cr.P.C. is not a complaint and the person who is arrayed as the opposite party is not an accused. The proceeding under Sec.125, Cr.P.C. is a proceeding of a civil nature in which the Magistrate can invoke the inherent powers to recall his earlier order finally disposing a proceeding of this nature provided sufficient grounds are shown.

The order granting interimmaintenance is not an interlocutory order and hence revision is not barred

In *Sunil Kumar Sabharwal v. Neelam Sabharwal,* [38] the Magistrate

35 1991 Cri. LJ. 2035(Cal).
36 *Bindeshwari Prasad v. Kali Singh* AIR 1977 SC 2432.
37 AIR 1963 SC 1521.
38 1991 Cri.LJ. 2056(P&H).

granted interim maintenance at the rate of Rs. 500/- per month to the wife and Rs.300/- per month to the minor son. The husband's revision petition was dismissed by the Sessions Judge on the ground that the order of interim maintenance was not a final order and it was only an interlocutory order, and as such revision was not maintainable.

The Punjab and Haryana High Court held that an order granting interim maintenance is not an interlocutory order and revision thereof is not barred under Sec.397(2) of the Code.

The Court observed that the expression 'interlocutory order' under Sec.397(2) of the Code is to be given a restricted meaning. Orders which are purely procedural, necessary for the progress of the case, such as orders summoning witnesses, adjourning cases etc., are interlocutory. The finality of the case is not a *sine qua non* of an order for being taken out of the category of interlocutory order. The crucial test is that the order must substantially affect the rights and liabilities of the parties either with regard to the case as a whole or any aspect thereof.

The Court opined that under the order the petitioner was saddled with a liability to pay maintenance till it was either finally decided or it was varied. For default in payment of the amount, coercive process could be used against the petitioner. The rights and liabilities of the parties stood determined though it was only till the final decision of the case, and therefore it is not an inter-locutory order.

Sec.125, Cr.P.C. and The Muslim Women (Protection Of Rights On Divorce) Act, 1986

(a) Minor children above two years can claim maintenance under Sec.125, Cr.P.C.

In *Md. Murtaza v. Smt. Kausar Parvin,* [39] the divorced wife on behalf of her two minor daughters, aged 4 $^1/_2$ and 2 $^1/_2$ years claimed maintenance from the husband on the ground that the minor children were unable to maintain themselves and even she was unable to maintain them without the support of the father. The father, in the presence of some respectable persons including the Kazi, had agreed to pay monthly maintenance to the minor children till they attain the age of nine years, at the rate of Rs.125/- per month. Inspite of this agreement, the father had not paid a single paise towards their maintenance from the date of divorce. This forced the wife to claim maintenance for the minor children under Sec.125, Cr.P.C.

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39 1991 Cri.LJ. 3202 (P&H).

and she made it clear in the application that she was not claiming any maintenance for herself, but that she was claiming it only on behalf of her minor children.

The husband contended that Sec.125 of the Code is of a general nature whereas the provisions under the Muslim Women (Protection of Rights on Divorce) Act, 1986 is a special Act, and when there is a conflict between the two, then the special Act shall prevail. If the Act of 1986 is to be correctly interpreted, then the former husband of the divorced wife and for that matter the father of the minor children has no obligation to pay maintenance to the children beyond the period of two years from the date of their birth.

The High Court of Calcutta opined that the Act of 1986 is lamentably silent as to the future of the minor children who have crossed the age of two years. In a Welfare State it can never be the intention of the legislature that the minor children of a divorced Muslim woman should be thrown to the charity of the pedestrians for their survival. The Act of 1986 took special care of the divorced women and at the same time made provisions for maintenance of the minor children till they attain the age of two years. As no provision is made subsequent to that age in the Act of 1986, the mother, as the natural guardian of such unfortunate minor children, shall have to fall back upon the all embracing and beneficial provisions of Sec.125,Cr.P.C. The Court held that it is clear from a comparision of the provisions of Sec.125, Cr.P.C. and the provisions of the Act of 1986 that a minor child crossing the age of two years is not precluded from claiming maintenance from the father, if it can be shown that the child is unable to maintain itself.

The Court also upheld the agreement entered into by the husband in front of respectable people, including the Kazi whereby the custody of the children was given to the mother and the husband was required to pay monthly maintenance of Rs.125/- per month till they attain the age of nine years after which period the mother has to give back the custody of the girls to the father, and directed the husband to pay maintenance to the mother who is the guardian of the minors till then.

(b) Whether the matter can be reopened

In *Sk.Nasiruddin v. Dulari Bibi,* [40] the core question for determination was whether the preceeding under Sec.125, Cr.P.C. is liable to be reopened in view of the provisions in the Muslim Women (Protection of Rights on

40 1991 Cri.LJ. 2039 (Cal). *See* also *Hazi Abdul Khaleque v. Mustt. Samsun Nehar,* 1991 Cri.LJ. 1843.

Divorce) Act, 1986 ?

The wife on behalf of herself and her two minor sons filed an application under Sec.125 of the Code. This application was filed in 1985 and at the time of filing this application she was not divorced from her husband. The Magistrate passed the order dated 19.12.87 directing the husband to pay the wife Rs.250/- per month towards maintenance.

Thereafter the husband filed an application under Sec.127 of the Code requesting the Magistrate to reconsider his order granting maintenance alleging, inter alia, that he divorced the opposite party and had executed a *Talaknama* on 8.12.87 and intimated the latter about it. Since he fell ill after execution of the *Talaknama,* he could neither inform his counsel about the material development in the case nor could produce the *Talaknama* in the Court before disposal of the proceeding. The Magistrate dismissed the application for revision. The revisional court also dismissed the application for revision.

The husband contended that the order of the Magistrate is liable to be set aside because he has failed to take into consideration the Act of 1986.

The High Court of Orissa rejected this contention and held that the provisions of the Act of 1986 do not apply to the facts of the present case and thus upheld the order of the Magistrate.

The Court stated that according to Section 7 of the Act of 1986, every application by the divorced woman under Sec.125 or under Sec.127 of the Act, shall, notwithstanding anything contained in that Code and subject to the provisions of Sec.5 of the Act, be disposed of by such Magistrate in accordance with the provisions of the Act. It opined that on a bare persual of the provisions in Sec.7, the position is manifest that the section applies only to application by a divorced woman under Sec.125 or 127, Cr.P.C. which was pending before a Magistrate on the commencement of the Act of 1986. The application in this present case was filed by the wife in 1985 when on the husband's own admission he had not divorced the wife. Therefore, the requirement that the application under Sec.125 or Sec.127 must have been filed by a divorced woman is not satisfied in the case. Therefore, Sec.7 is not applicable to the proceedings under Sec.125 in the present case.

The husband also contended that according to Sec.127(3)(b) of the Code, the Magistrate shall cancel the order made under Sec.125 of the Code in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, if he is satisfied that the woman has been divorced by her husband and that she had received, whether before or after

the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce. The Court opined that this provision will no doubt help the husband in case he has pleaded in the application filed by him under Sec.127, Cr.P.C. that either prior to or subsequent to the order passed under Sec.125, Cr.P.C. the opposite party received the whole sum which under the customary or personal law, particularly the Act of 1986 was payable to her on her divorce. Since the Court did not find any averment in the application filed by the husband under Sec.127 regarding payment of any sum by the husband to the opposite party, the Court held that the husband has not made out any case for reconsideration under Sec.127 of the Code and therefore he upheld the order of the Magistrate.

PART B

The Hindu Adoption and Maintenance Act, 1956

In *Baby Rashmi Mehra v. Sunil Mehra,* [41] there were two important questions for determination before the Delhi High Court :

i) What are the relevant considerations for fixing the quantum of interim maintenance under Sec.23(2) of the HMA, 1956 ?

ii) Whether income as given in the income tax assessment order should be accepted as income of the husband for the purpose of determining his financial position ?

The wife and daughter of Sunil Mehra had claimed a sum of Rs.2000/- per month each as maintenance and a sum of Rs.2500/- for separate residence in Delhi for them as per the status of the plaintiffs and also to make provisions for the marriage expenses of his daughter. Pending this suit they applied for interim maintenance.

The Court opined that in the matter of determination of quantum of maintenance, no rigid or hard and fast rule could be laid down nor is it possible to lay down any such rule. The High Court relied on *Ekradeshwari v. Homeshwar,* [42] where the Privy Council had observed that maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the conditions and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being of course had to the scale and mode of living and the age, habits and wants and class of life of the parties, and observed that in

41 AIR 1991 Del 44.

42 AIR 1929 PC 128.

this case both the parties belonged to the affluent class of society. Even the admitted assets of the husband would run into millions of rupees and the financial position of the husband appears to be very sound and he appeared to be in the higher income bracket.

According to the wife, the income of the husband is more than Rs.one lakh per month but the husband contended that his total income, even as per the Income Tax returns is Rs. 52,700/- and after various deductions his yearly income would work out to be about Rs.48,000/- i.e., Rs. 4,000/- per month, as per the income tax record. The husband did not file the wealth tax records.

The husband relied on *Kulbushan v. Raj Kumari,* [43] in support of his contention that :

a) Income as given in Income Tax orders has to be accepted; and

b) Maintenance for wife and daughter cannot exceed 25% and 15% of the assessed income respectively.

The High Court did not accept the above contention and held that the Supreme Court did not lay down any such broad propositions and as the Supreme Court was considering the case of a person who was primarily in service (husband was a Reader in Medicine in Medical College, Lucknow and had a limited private practice) and as such did not interfere with the directions fixing a limit out of the total income accepted by the I.T. Department. The Supreme Court in the above case was condsidering appeals from the Allahabad High Court fixing monthly maintenance to the wife and daughter at Rs.250/- and Rs.150/- per month respectively subject to a limit that the husband would not be liable at any point of time to pay more than 25% and 15% of the total income as accepted by the I.T. authorities to the wife and daughter respectively.

The Delhi High Court opined that the fixation of maintenance depends on the facts and circumstances of each case. Whether to accept or not to accept the income of a defendant as given in the income tax order, for purposes of determining the financial position of the defandant will also depend on the facts and circumstances of each case. On this aspect also no broad proposition or hard and fast rule can be laid down. In one case income given in the I.T. order may be accepted and in another it may not be accepted. No rigid formula about that percentage of income should be fixed as maintenance can be laid down. In one case it may be 25% in another it may be 50% or even less or more. The quantum depends upon

43 AIR 1971 SC 234.

the position of the defendant as also on the reasonable demands of the claimants or any other relevant factors.

Taking all the relevant factors into consideration and also the fact that the wife is a young lady of about 27 years of age and the daughter is about four years of age and her school fee is more than Rs.300/- per month, the Court awarded Rs.1400/- to the wife and Rs. 1100/- to the daughter from the date of application.

Wife can enforce her right to maintenance including the right to residence even against the transferee

In *Basudeb Dey Sarkar v. Chhaya Dey Sarkar,* [44] the High Court of Calcutta held that a Hindu wife shall be entitled to maintenance including the right of residence which she can claim against her husband during her life time. She shall also be entitled to live separately from her husband without forfeiting her claim to maintenance subject to the fulfilment of any of the conditions mentioned in clauses (a) to (q) of Sec.18(2) of the Hindu Adoptions and Maintenance Act, 1956.

This case concerned a building jointly owned by two brothers. The wife of one of the brothers was residing in the ground floor of the buiding since her marriage. Due to family troubles, her husband left her and a matrimonial dispute was pending in the court. The husband executed a deed of settlement or trust and absolutely transferred his undivided half share in the suit premises, appointing his brother as the sole trustee for his brother's children and delivered possession of his half share in the building. The brother went to the court to evict the wife on the ground that she was only a licensee and that he had revoked her licence.

The Court held that the deed was a sham transaction created only for the purpose of defeating the claim of the wife and that it was just a device by the husband to get back the property afterwards. The Court held that such a deed is strictly prohibited under Section 4 of the Trust Act.

The Court held that this deed was executed by the husband in favour of his brother without making any provision of maintenance or residence to his wife. The deed was undoubtedly gratuitous in nature to the brother who had clear notice of the right of the wife to claim maintenance and

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44 AIR 1991 Cal 399.

hence according to Section 39 of the Transfer of Property Act, [45] the wife will be entitled to enforce her right of maintenance including residence against the brother who is nothing but a trustee under the deed. The Court held that the brother will acquire interest under the deed subject to the right of residence of the wife.

The Court held that the wife cannot be called a licensee nor a trespasser on revocation of such alleged licence. Her position as a wife remains as before and her right of maintenance including residence therefore remains as before, so long as the same is not terminated in a matrimonial proceeding by a competent court.

PART C

The Hindu Marriage Act, 1955

(a) Even the second wife is entitled to claim maintenance

In *Laxmibai v. Ayodhya Prasad,* [46] the High Court of Madhya Pradesh gave a very wide interpretation to the expression "wife and husband" in Sec.24 of the HMA, 1955. The Court interpreted the words "wife and husband" not only to mean the actual wife and husband but also any person "claiming to be wife and husband". In this case the wife had applied to the Court to grant interim maintenance under Sec.24 of HMA, 1955. The Court rejected her application on the ground that the Court had prima facie evidence that she was the second wife and hence her marriage was void, and as she is not the legally wedded wife, she is not entitled to claim any maintenance.

The High Court after elucidating the objects of the Act held that the lower court should not have gone into the question in detail as the proceedings under Sec.24 are of a summary nature and so the court should award interim maintenance to any person "claiming to be wife or husband" and strict interpretation should not be given to that expression. The Court opined that though such an interpretation may lead to exploitation by a few people who will bring suits to claim such interim maintenance, the Court held that it is no reason to narrow down the interpretation.

The Court went further and held that even though after going into the evidence the Court comes to the conclusion that she is the second wife, the

45 Section 39 of the Transfer of Property Act reads thus : "Where a third person has a right to receive maintenance or a provision for advancement or marriage, from the profits or immovable property, and such property is transferred, the right may be enforced against the transferee if he has notice thereof or if the transfer is gratuitous but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

46 AIR 1991 MP 47.

lower court cannot reject her application for maintenance. The Court opined that Sec.24 not only uses the words "husband and wife" but also "petitioner and respondent" and so strict interpretation should not be given to the word wife. The Court therefore held that even a second wife is entitled to claim maintenance.

(b) Court can increase maintenance amount on proof of altered circumstances

In *Ram Shenkar Rastogi v. Vinay Rastogi,* [47] the trial court allowed the petition of the husband under Sec.13 of the HMA, 1955 after recording a finding, though based upon the admission of the wife, that a case of persistent and repeated cruelty on her part had been established and granted divorce. The court also directed the husband to pay a sum of Rs.200/- per month to the wife during her life time as maintenance.

On proof of change in circumstances, i.e., the income of the husband had increased from Rs.400/- per month to Rs.2,925/- per month, the Family Court increased the maintenance amount to Rs.400/- per month.

The husband appealed against this order. The High Court of Allahabad upheld the order of the Family Court. It rejected the contention of the husband that the decree of divorce was passed on the basis of mutual consent just because the wife admitted the allegation made against her and prayed that a decree of divorce be in favour of the husband, provided the husband paid a sum of Rs.200/- as maintenance allowance during her life time.

The Court held that the Hindu Law recognises that the right of maintenance is a substantive and continuing right and the quantum of maintenance is variable from time to time. Neither the provisions of Sec.11 of the Code of Civil Procedure nor the principles of *res judicata* nor the doctrine of *estoppel* can be invoked to defeat the wife's claim to a higher rate of maintenance allowance under altered circumstances even though on an earlier occasion a maintenance decree had been passed and a certain rate of maintenance had been fixed thereunder. The reason being that such a decree as to the rate of maintenance is not final.

The Court observed that the trial court did not pass any order that the wife will not claim an enhancement of maintenance in future. The Court went further and held that an agreeement not to claim an enhanced maintenance in future is illegal since it not only defeats the provisions of sub-section (2) of Sec.25 but it also frustrates the purpose of giving

47 AIR 1991 All 255.

maintenance allowance. The Court opined that there is no difference between an agreement by a wife not to claim any maintenance at all and an agreement not to claim any enhancement of the rate of maintenance allowance, whatever be the change in circumstances.

(c) Court can modify interimmaintenance on proof of changed circumstances

In *Laxmi Priya Rout v. Kama Prasad Rout,* [48] the High court of Orissa held that the Court can modify the amount of interim maintenance on proof of changed circumstances. The revision petitioner prayed the Court to enhance the interim maintenance on the ground that there was considerable delay on part of the opposite party and also material change in circumstances such as the enhancement of the salary of the husband from Rs.675/- to Rs.2,500/- per month; petitioner suffering from gastric trouble needing extra funds; minor son to be sent to school, etc.

The Court opined that unlike Section 26, Section 24 does not expressly provide that the Court may pass orders for interim maintenance from time to time. But there is no express or implied bar in the provision for the exercise of such jurisdiction in deserving cases and that it was neither legal not just and proper to limit the wide discretionary power to modify its order awarding interim maintenance on proof of changed circumstances.

PART D

The Indian Divorce Act, 1869

Call to update the law and confer equality to women

The High Court of Bombay in *Mrs. Myra Joseph Braz Dias v. Joseph Braz Dias,* [49] referred back to the observations of the Bombay High Court in *Dinesh Mehta v. Usha Dinesh Mehta* [50] on the provisio to Sec.36 of the Indian Divorce Act where the Court observed:

> We are unable to trace any rational basis for this rule which prevents the wife from claiming more than 1/5th, even when her needs, and capacity of the husband warrant awarding larger amount. This amounts almost to a rule of the thumb. Such a provision in the Act of 1869 may have been justified based on the then notions and concepts, as to a women's status and position in the society and her claims against her husband ... This Act does not permit her right to share

48 AIR 1992 Ori. 88.
49 AIR 1992 Bom 142.
50 AIR 1979 Bom 173.

> the husband's earning, like his fortunes or misfortunes, on the footing of equality ...

The Court observed that more than hundred years have fled by after the coming into force of the above enactment. The Indian social scene has witnessed passage of very many enactments seeking to uplift the status and augment the assets of the women, who still suffer from manifold handicaps. The Court called the attention of the supreme law makers of the country to ponder about the removal of all traces of obsolescene in this and other related laws dealing with women.

PART E

Special Marriage Act, 1954

The wife can claim maintenance after the husband's petition for divorce has been dismissed

In *Ramchandra Anand Suryavanshi v. Kalinda Ramchandra Suryavanshi,*[51] the question for consideration before the Bombay High Court was whether the wife can be granted maintenance while dismissing the husband's petition for divorce. In other words, whether the order dismissing the husband's petition for divorce is a decree within the meaning of the provisions of Sec.37 of the Special Marriage Act, 1954.

The Court rejected the contention of the husband that the scheme of the provisions of Sec.37 would contemplate the granting of a relief under a decree which alone empowers the Court to grant permanent alimony and maintenance.

The Court held that the order dismissing the husband's petition is a decree within the meaning of the provisions of Section 37 of the Special Marriage Act, 1954 and consequently, alimony and permanent maintenance can be granted to the spouse who has succeeded while the petition of the other spouse was being dismissed.

The Court also held that the application for interim alimony *pendente lite* can itself be treated as an application for grant of maintenance under Section 37 of the Act and that an application for treating the application for interim alimony as an application for the grant of maintenance under Section 37 need not be in writing and that such an application can be orally made.

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51 AIR 1991 Bom 315.

RIGHTS OF CHILD

Nithya Dorairaj *

The survey mainly covers decisions of the apex court and some important decisions of High Courts during the period of July, 1991 to June, 1992 in the areas of adoption and guardianship.

Adoption

(a) Illattom adoption

In *G.Narayanappa and another v. Government of Andhra Pradesh* [1] the Supreme Court examined the nature of illattom adoption and its special features. Illattom is a customary type of adoption prevailing among certain communities including the Reddys and Kammas of Andhra Pradesh. It consists in the affiliation of a son-in-law to the family in consideration of assistance in the management of the family property. No religious ceremonies are necessary for the validity of such an adoption. Unlike the normal type of adoption, which under prestine law was essentially for religious purposes, no religious significance is attached to an illattom adoption. The legal consequences ensuing from an illattom adoption as laid down by the Court can be stated as follows :

(a) An illattom adoptee is entitled to the full rights of a son, after the death of the adoptive father, who is his father-in-law.

(b) The right is available even as against natural sons.

(c) But during the life time of the father-in-law in the absence of a specific agreement, he has no right to claim partition of the family property.

(d) The illattom son-in-law is not an adopted son. He does not lose any right in his natural family.

(e) The property of the illattom adoptee, including the property he has taken in the adoptive family is inherited by his own blood relations to the exclusion of those of his adoptive father.

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* Student V Year, NLSIU, Bangalore.

1 (1992) 1 SCC 196. It may be noted that customary adoptions like 'illatom adoption' are no longer possible. Sec. 4 of the Hindu Adoption and Maintenance Act, 1956 seeks to repeal all existing laws, customary, statutory or of any other kind, which are inconsistent with the Act, the only exceptions bing those contained in Sec. 10. The said provision saves only prevailing customs and usages in conflict with the stipulation therein that the person taken in adoption shall be unmarried and not completed 15 years of age.

To the question whether, for the purpose of Sec.4A of the Andhra Pradesh Ceiling Act, which imposed ceiling on agricultural land and holding, an illattom son-in-law could be treated as a 'major son', the Court answered in the negative.

(b) Age of adoption

In *Koniba Rama Papal v. Narayana Kondiba Papal,* [2] the issue was whether a person who is above the age of 15 could, in view of Sec.10(iv) of the Hindu Adoption and Maintenance Act could be validly adopted after the statute came into force. Their lordships observed that the provisio to the section permits such adoption provided that there is a custom governing the parties which permits this. The Court held that the existence of a custom in the Bombay State permitting adoption of adults and married persons has been judicially recognised. Hence this need not be proved by the party alleging its existence.

(c) Whether a lunatic can be adopted ?

In *Devagonda Raygonda v. Shamgonda,* [3] the two vital issues which came up for the consideration of the Bombay High Court were :

(i) Whether a lunatic could be adopted; and

(ii) Whether the motive of the person giving or taking the adoptive child is relevant in determining the validity of adoption.

In the instant case, there was an allegation that the adoption was made with a view to deprive the adoptive child of his property right in the family of his birth.

Adverting to the above, Patnakar,J. held that there was no legal incapacity for a lunatic to be adopted. It was also held that the motive of adoption is an irrelevant factor in determining its validity. By virtue of the provision to Sec.12, the property already vested in the adoptive child before adoption, is not divested from him. But he has no vested right in the joint family properties of the family of his birth. The Court further held that the burden of proving the invalidity of an adoption on the ground that there was no giving and taking of the adoptive child is on the person who alleges the same.

(d) Registered document

In *Smt.Chandrani Bai v. Pradeep Kumar,* [4] one of the issues was

2 AIR 1991 SC 1180.
3 AIR 1992 Bom 189.
4 AIR 1991 MP 286.

whether a registered document was necessary to prove the fact of adoption. Speaking through R.D. Sukla, J. the Court held that though the absence of a registered document creates a suspicious circumstance, it is not sufficient to reject other cogent and reliable evidence which proves the fact of adoption.

(e) Rights of the adopted child

Another important legal issue raised in the above case was with respect to the rights of the adopted child in the family of the adoptive parents. Though by virtue of adoption, the adopted child severes his connection in the family of his or her birth, and becomes a child of the adoptive parent, the adopted will not divest any person of any estate which vested in him or her before the adoption. [5] In the instant case the plaintiff adopted the defendant after the death of her husband in 1979. The contention of the defendant, that by virtue of adoption by the plaintiff who is the widow of the late Hukumchand he has become the son of Hukumchand, did not find acceptance of the Court. It was held that when a widow adopted a son, no right of co-ownership or co-heirship is created in favour of the adoptee in respect of the property inherited from her husband.

(f) Inter-country adoption

In *Lakshmikant Pande v. Union of India,* [6] the Supreme Court laid down the procedure to be followed in adoption of children by foreigners. The subject matter again came up for consideration of the apex court in a series of applications filed by various petitioners seeking further directions. In disposing of those applications the Court held :[7]

(i) There is no necessity for the Indian citizenship of the child adopted from India to be continued until the adopted child attains the age of majority and is legally competant to opt for citizenship of his or her choice.

(ii) The licencing authority should ordinarily ensure that registered agencies have proper child care facilities.

(iii) When licences of ill-equipped child care agencies are revoked or cancelled, the principles of natural justice shall be followed.

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5 The Hindu Adoption and Maintenance Act, 1956, Sec.12(c).
6 (1984)2 SCC 244.
7 (1991)4 SCC 33.

Guardianship

Alienation of minor's property by the guardian – whether the right to impeach the transaction is available to his transferee?

An important legal issue that came up for the consideration of the apex court in *Amirtham Kudumbah v. Sarnam Kudumban,* [8] was whether the right of a minor to impeach any alienation of his property made by his guardian during his minority is available to a transferee who acquired the interest from the minor after the latter had attained the age of majority.

The Hindu Minority and Guardianship Act has curtailed the powers of the natural guardian under the Shastric Law. Now he requires the prior permission of the Court to sell or mortgage or to create any other interest in any immovable property of the minor. [9] Any disposal of property in violation of the above stipulation is voidable at the instance of the minor or any person claiming under him. [10]

In the instant case, the father of a minor girl 'K', sold the suit property which she inherited from her mother, without obtaining the permission of the court required under Sec.8(3) of the Act. After attaining the age of majority, 'K' sold the property to the plaintiff. Thereupon the plaintiff instituted a suit to set aside the sale made by the father of 'K', within three years of the vendor attaining the age of majority. He relied on Sec.8(3) of the Act.[11] The defendants contented that the right conferred by the provision is available to the minor or his legal representative and not to his assignee or transferee. The right of a minor to impeach alienation made by his guardian is a 'mere right to sue'. The transfer of such a right is prohibited by Sec.6(e) of the Transfer of Property Act.

Rejecting the above contention Dr.K. Thommen, J held :

The effect of this sub-section[12] is that any disposal of immovable property by a natural guardian otherwise than for the benefit of the minor or without obtaining the previous permission or the Court is voidable. A person entitled to avoid such a sale is either the minor or any person claiming under him. This means that either the minor of his legal representatives

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8 (1991)2 SCC 20.

9 The Hindu Minority and Guardianship Act, Sec.8(1). As regards lease, the provision is attracted only if it is for a period of 5 years or above or a period beyond one year after the cessation of minority.

10 *Id.* Sec. 8(3).

11 (1991)3 SCC 20 at p 23.

12 Sec.8(3) of HMGA which reads thus : "Any disposal of immovable property by a natual guardian in contravention of sub section (i) or sub-section (2) is voidable at the instance of the minor or any person claiming under him."

in the event of his death or his successor in interest claiming under him by reason of transfer *inter vivos,* must bring action with the period prescribed for such a suit.

His lordship referred to the decisions of various High Courts,[13] wherein it was held that the right of a minor to impeach alienation of his property made by his guardian was a personal right of the minor which cannot be transferred *inter vivos*. Disagreeing with the rationale of those decisions, and concurring with the view expressed by the Madras High Court in *P.Kamaraju v. Gunnayya* [14] and *P.Goundan v. N.Goudan* [15] that when an ex-minor transfers property unauthorisedly sold by his guardian during his minority, he transfers not a mere right to sue but his interest in the property, and therefore is assignable. Sec.8(3) of the Hindu Minority and Guardianship Act is intended specially for the protection of the interest of the minor, 'a construction which is unduly restrictive of the statutory provisions intended for the protection of the interest of the minor must be avoided'.[16]

The decision sets at rest an important question of law on which the various High Courts took conflicting views.

Custody

The immediate and perhaps the permanent victims of matrimonial disputes are the children. In the tug of war between the parents over the custody of children, the courts should give paramount consideration to the welfare of the child. In a few cases which came up before the various High Courts, the above principle was reiterated.

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13 AIR 1933 Bom 42; AIR 1939 Cal 460; AIR 1956 Mad 1062; AIR 1969 Bom 361; 1980 All LJ 130.
14 AIR 1924 Mad 322.
15 AIR 1951 Mad 817.
16 (1991)3 SCC 20 at 26.

VII. PRIVATE INTERNATIONAL LAW

Whenever cases involving some "foreign elements" come up before courts of law, the principles of Private International Law become applicable. Despite our extensive interactions with foreigners, very few legal disputes involving Private International Law have been referred to courts for settlement. The year 1991-92 is no exception to this general trend. However, there are at least two significant judgments, one in the area of Personal Law and the other in relation to Admirality Law, delivered by the Supreme Court during this period. Both the judgments represent bold and welcome departure from the "beaten track" and go a long way in reforming the unsatisfactory state of law in these areas.

PRIVATE INTERNATIONAL LAW

*A. Jayagovind**
*Joseph Pookkatt***

The judgments on Private International Law issues may be broadly grouped under three heads : domicile, recognition and enforcement of foreign judgements and arbitral awards, and admirality jurisdiction. While most of them affirmed earlier legal positions, the judgement dealing with admirality jurisdiction made a decisive and welcome departure from the past.

Louis de Raedt v. Union of India,[1] involving foreign missionaries in India, attracted nation-wide attention. Louis de Raedt, a Belgian missionary, came to India in 1937 and stayed here continuously thereafter. In 1987, the Government of India ordered him to quit the country and he challenged the order under Article 32 of the Constitution on the ground that his personal liberty under Article 21 was violated. Under Article 5(c) of the Constitution, every person who has his domicile in India and who has been ordinarily resident in India for not less than five years preceding the Constitution shall be a citizen of India, and in normal course, Louis should have got his citizenship under this Article. But it was argued that Louis was not domiciled in India despite his long residence in India, since he did not demonstrate clearly his intention to stay permanently in India. To acquire domicile of choice in contradistinction to domicile of origin, a person should demonstrate his state of mind *(animus manendi)* to stay in the choosen place permanently, along with the fact of residence; and the burden of providing this state of mind rests upon the person seeking the domicile. In 1950, many missionaries obtained permanent residence visa from the Government and the fact that Louis did not avail himself of this facility was cited to show that he did not intend to stay in India permanently. And also, in 1980 he applied for the extension of his visa by one year and this was also cited as an evidence of his state of mind. Louis in turn argued that in 1950 he did apply for permanent residence and the Government did not act on it, and on his part, he could not pursue the application since he was involved in missionary activities in remote places.

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* Faculty Member, NLSIU, Bangalore.
** Student V Year, NLSIU, Bangalore.
1 AIR 1991 SC 1886.

The Supreme Court held that the petitioner had not discharged the burden of proving his state of mind. The fact that his application was pending with the Government since 1950 failed to convince the Court. His continuous stay (except for two short breaks to visit Belgium) did not weigh with the Supreme Court and it went by the formality of renewal of visa for a period of one year. The Court did not pronounce anything on the pending application with the Government of India since 1950. Once there is no change in his status as a foreigner, Louis could not claim any right to stay in India, and therefore, the Government's order expelling him was upheld.

Y.Narasimha Rao v. Venkatalakshmi[2] was an important judgement of the Supreme Court on recognition and enforcement of foreign judgements concerning matrimonial matters. Narasimha Rao married Venkatalakshmi at Tirupathi in 1975 and they separated in 1978. In 1980, the husband got the marriage dissolved by a decree of the Circuit Court of St.Louis, Missouri, issued without hearing the wife. Thereafter, he came back to India and re-married. Venkatalakshmi filed a criminal complaint for the offence of bigamy against Narasimha Rao. The Magistrate dismissed the complaint on the ground that her marriage with Narasimha Rao was properly dissolved, but the High Court reversed this judgement and the matter finally reached the Supreme Court.

According to Section 13 of the Civil Procedure Code, 1908, a foreign judgement is not conclusive

a) if it has not been pronounced by a court of competent jurisdiction; or

b) if it has not been given on merits of the case;

c) if it is founded on an incorrect view of International Law or a refusal to recognise the law of India in cases wherein such laws are applicable;

d) if the proceedings are opposed to natural justice;

e) if it is obtained by fraud; or

f) if it sustains a claim founded on a breach of law in force in India.

According to the law of St.Louis Circuit Court, any person who has stayed within its territorial jurisdiction for a period of 90 days can invoke its matrimonial jurisdiction and the marriages could be dissolved on the

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2 (1991)2 SCALE 1.

ground of irretrievable breakdown. In the present case, the husband was actually resident in New Orleans and he stayed in St.Louis for 90 days just for the purpose of invoking the Circuit Court's jurisdiction. Though the wife stayed with him for sometime in New Orleans, she was never with him at St.Louis. When the court sent summons to her Indian address, she gave a reply under protest. Finally, the marriage was dissolved on the ground of irretrievable breakdown.

The Supreme Court pointed out that matrimonial jurisdiction is different from other jurisdictions under Private International Law, and under relevant conventions, such as the Hague Convention on the Recognition of Divorce and Legal Proceedings, courts may refuse to recognise foreign jurisdiction if such recognition is incompatible with public policy. Given the facts of the present case, there is a prima facie ground to refuse to recognise the foreign jurisdiction. As for the relevant principles of conflict of laws, the Supreme Court summarized them as follows:

The jurisdiction assumed by the foreign courts as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The only exceptions to jurisdiction could be where matrimonial action is filed in the place where the defendant is domiciled or when the defendant voluntarily submits to the jurisdiction though it is not in accordance with the matrimonial law. The grounds on which the relief is granted should also be in accordance with the matrimonial law of the parties.

In the present case, the Supreme Court held that the Hindu Marriage Act, 1955 was the matrimonial law of the parties. Under Section 13(a) of this Act, the court competent to adjudicate matrimonial disputes is the District Court within whose civil jurisdiction (a) the marriages are solemnized, or (b) the respondent at the time of the presentation of the petition resides, or (c) the parties to the marriage last resided, or (d) the petitioner is residing at the time of presentation of the petition in cases where respondent is residing outside India or has not been heard of for more than seven years. The jurisdiction of St.Louis Court cannot be sustained in any of these grounds; and also irretrievable break down is not recognised as a ground for the dissolution of marriages under the Indian law. The Supreme Court therefore refused to recognise the foreign decree and remanded the case to the Magistrate for a proper trial.

National Thermal Power Corporation (NTPC) v. The Singer Company and others[3] raised an interesting question about the jurisdiction of Indian

3 (1992)1 SCALE 1034.

courts over arbitral awards made outside India. The NTPC and Singer Company entered into an agreement in 1982 in India whereunder Singer Company would supply certain materials and commission certain works in India. The "General Terms and Conditions of Contact" (General Terms) were expressly incorporated into this agreement. The relevant provisions of General Terms which gave rise to the present contention are as follows:

"Cl.7.2 The laws applicable to this contract shall be the laws in force in India. The courts of Delhi shall have exclusive jurisdiction in all matters arising under this contract."

The General Terms further provided for the settlement of disputes by amicable means failing which arbitration may be resorted. There were different provisions with regard to the Indian and foreign contractors in regard to arbitral proceedings.

Cl.27.7 dealing with foreign contractors provided : "In the event of a foreign contractor, the arbitration shall be conducted by three arbitrators, one each to be nominated by the owner (NTPC) and the contractor and the third to be named by the President of International Chamber of Commerce, Paris. Same as above, all rules of conciliation and arbitration the of the International Chamber of Commerce shall apply to such arbitrations. The arbitration shall be conducted at such places as the arbitrators may decide."

Subsequently, when some disputes arose between the NTPC and Singer Company, the matter was referred to arbitration under Cl.27.7. The arbitration was held at London. When the arbitral tribunal gave an interim award, NTPC sought to appeal against it under sections 14,30 and 33 of the Arbitration Act, 1940 asking the Court to set aside the order. But the Delhi High Court held :

> Since the arbitration agreement was not governed by the Indian Law, the Arbitration Act won't be applicable. London, being the seat of arbitration, only English courts can set aside the award. The award, as it is, falls under the Foreign Awards (Recognition and Enforcement) Act.

The issue before the Supreme Court was whether the said award was a foreign award within the meaning of the Foreign Awards Act, 1961. It was argued by the Singer Company that the arbitration agreement was collateral to the main agreement and it was governed by the law of the seat of arbitration, notwithstanding that the main agreement was governed by the Indian law. But Thommen J., speaking for the Court, rejected this argument.

Copiouly citing from Dicey and Morris on Conflict of Laws, he held that when the arbitration agreement was incorporated into the main agreement through a clause in the latter, as it was in this case, the substantive law governing the validity, effect and interpretation of arbitration agreement would be the proper law iteself. The law governing the procedure of arbitration would be the law of the forum, in the absence of a specific choice by the parties in this regard. In the present case, the parties had chosen the Rules of International Chamber of Commerce as the law governing the arbitral proceedings. But the substantive law, applied by the arbitral tribunal, was the Indian law. Under Section 9 of the Foreign Awards Act, an award governed by the Indian law would be considered as an Indian award, notwithstanding that it was made outside India. On this ground, the Supreme Court held that Indian courts can assume jurisdiction over the award under the Arbitration Act.

M.S.Elisabeth and others v. Harvan Investment and Trading Private Ltd.,[4] brought into open some serious lacuna in the admirality jurisdiction of Indian courts, and the Supreme Court closed this lacuna through an imaginative interpretation. Harvan Investment and Trading Private Ltd. was a private company registered in Goa and Elisabeth was a vessel owned by a foreign company based in Greece. Elisabeth left Marmagoa port in 1984 with the goods of Harvan Company on board without issuing a bill of lading and subsequently delivered them to a wrong party in the U.A.E. in violation of the shipper's instructions. After sometime when the ship entered into Vishakapatnam port, the plaintiff moved the A.P. High Court invoking its admirality jurisdiction by means of an action *in rem*. The Court issued a decree arresting the ship. The defendant opposed the order on the ground that this jurisdiction cannot be invoked in respect of the carriage of goods from India to foreign ports.

The significance of a maritime action *in rem* is that by the arrest of a foreign ship, the court can assume jurisdiction in respect of any maritime claim involving that ship, irrespective of the nationality of ship or the place where the cause of action has arisen. The ship or the cargo therein may be used either as a security for the satisfaction of the claim or in execution of the decree itself. In case the owner of the ship refuses to appear before the court, the court can proceed *ex parte* and pass the decree which may be executed by confiscating the ship. This is a common feature associated with the superior courts of record (i.e., the courts exercising maritime jurisdiction) all over the world. But the defendant in this case argued that the Indian courts did not possess this jurisdiction in respect of

4 (1992)1 SCALE 490.

cargo moving out of Indian ports. In other words, admirality jurisdiction cannot be invoked in those cases wherein it is really required. Surprisingly, this was the law laid down by the Calcutta and Bombay High Courts in numerous cases and the defendant based his arguements upon these pronouncements.

The Colonial Courts of Admirality (India) Act, 1891, made English Admirality Act of 1861 applicable in India. Certain Indian High Courts, designated under the Colonial Courts Act were conferred with admirality jurisdiction on par with the admirality jurisdiction of the High Court of England. Since in 1891 the admirality jurisdiction of the High Court of England was governed by the Admirality Act of 1861, it was generally believed that the admirality jurisdiction of the Indian High Courts stood frozen as of 1861, notwithstanding the subsequent expansion of this particular jurisdiction of English High Court. Under Section 6 of English Admirality Act, the admirality jurisdiction in *respect of goods was* confined to goods moving into any port in England, (i.e. *mutatis mutandis*, any port in India). It may be noted that *the Privy Council in Yuri Maru v. The Wason* interpreted the Colonial Courts of Admirality Act in relation to Canada and arrived at the restrictive interpretation as given above. The Calcutta and Bombay High Courts in independent India faithfully followed this Privy Council precedent and thereby virtually crippled the admirality jurisdiction of Indian courts. The Supreme Court, speaking through Justices Thommen and Sahai, over-ruled the earlier judgements and thereby restored the full scope of admirality jurisdiction to Indian Courts. The reasoning of the Supreme Court may be briefly summed up as follows : Firstly, the Supreme Court held that the Privy Council and the Indian High Courts misconstrued the relevant provisions of the Council Courts of Admirality Act. Section 2(2) of the Act read : The Jurisdiction of a Colonial Court of Admirality shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the admirality jurisdiction of the High Court in England, whether existing by virtue of status or otherwise, and the Colonial Courts of Admirality may excercise such jurisdiction in like manner and to the full extent as the High Court in England and shall have the same regard as that court to International Law and comity of nations.

The Supreme Court held that the above provision equates the jurisdiction of Colonial Court with that of English High Court, and as a result, the expansion of the jurisdiction of the English High Court would automatically expand the like jurisdiction of Indian courts as well. It may be noted that the Administration of Justice Act of 1920 considerably expanded the admirality jurisdiction of English High Court and this should apply to

Indian High Courts as well.

Secondly, English statutes on admirality jurisdiction are the codification of maritime practice evolved over a period of time. When the Colonial Courts of Admirality Act described the jurisdiction on "whether existing by statute or therwise", it recognised that the admirality jurisdiction may go beyond what was provided in the statute. Therefore, even under the Admirality Act of 1861, there was no need to exclude totally this important procedural device to render justice.

Thirdly, International Law clearly recognizes that a merchantship is subject to the jurisdiction of the host country, when it enters into the territorial waters of the latter. The U.N. Convention on the Law of the Sea, 1982 and International Convention on the Arrest of Sea-going Ships of 1952 clearly recognise this position. It may be noted that Section 443 of the Merchant Shipping Act, 1958 provides that where any damages has been caused to property belonging to the Government or citizen in any part of the world, Indian courts can assume jurisdiction in respect thereof. The Supreme Court held that this provision may be extended, in the light of international conventions, to cover damage occured within Indian territorial waters as well.

In the view of all these reasons discussed above, the Supreme Court held that the admirality jurisdiction of A.P.High Court (as successor to Madras High Court) extends to cover the present case as well.

VIII. LABOUR LAWS

This Section dealing with labour laws comprises of two parts and covers almost all the case law development in the area for the period under review. In these two parts there are about 45 cases reviewed, which came up before the Supreme Court and the various High Courts.

The first part deals with Workmen's Compensation under which cases comming under Workmen's Compensation Act and Employees State Insurance Act have been reviewed.

The second part deals with Neglected Labour under which the decisions comming under the areas like Minimum Wages Act, Equal Pay for Equal Work, the Contract Labour (Regulation and Abolition) Act, 1970, Bonded Labour (Abolition) Act 1976, Regularisation of Casuals and Temporary Workers are reviewed.

NEGLECTED LABOUR

Chitra Narayan *

This part surveys developments in the law in the area of neglected labour. The period under review is April 1991 to March 1992. This section deals with the legislation pertaining to the informal sector, the developments in law regarding casual labour, temporary labour and labour of the non-predominant activity in the organised sector.

The main areas dealt with under this section are :

- Regulation of casual and temporary workers;
- Principal employer in case of informal labour done in an industry;
- Casual temporary worker; and
- Informal sector.

While the judiciary has taken up with concern and enthusiasm cases under the welfare legislations, the latter area where there is no enactment, the crucial considerations in that area have not been taken up.

The Minimum Wages Act, 1948

The decisions in this area have been on different considerations.

In *M/s Kalathia & Co. Bhavnagar v. State of Gujarat,*[1] a writ petition filed in the High Court challenged the order of the Labour Court, which computed the Minimum Wages of the workers, as being outside its jurisdiction, under Section 33C(2) of the Industrial Disputes Act, 1947. S.B. Majumdar and V.H. Bhairavia JJ., ruled that if a right arising in favour of the workmen is the matter in question, the same must be granted by the Court under Section 33 C (2) of the Industrial Disputes Act even though the Minimum Wages Act may have a separate enforcement machinery. In the absence of any express or even implied exclusion of the jurisdiction of the labour Court under Section 33-C(2) of the Industrial Disputes Act, the applications are maintainable. The Minimum Wages Act is not such a complete Code that it excludes the jurisdiction of the Labour Court under Section 33-C(2).

In this case the workmen were *adivasis* who worked in the construction of a dam, and were paid a minimum wage of Rs.2/- to 3/- only per day

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* Student IV Year, NLSIU, Bangalore.

1 1991 2 LLJ 377.

while the minimum wage fixed was Rs.6/-.

Even though the respondents (workmen) had a remedy under the Minimum Wages Act, the Court held that there was nothing to prohibit them from going to the Labour Court. Even though the workmen had claimed lesser amounts the Court directed that the interest which was computed in the claimed amount be paid. Reliance was placed on *Peoples Union for Democratic Rights v. Union of India,*[2] where the Court had included in the definition of "forced labour", conditions of hunger, poverty and destitution which forced labourers to work for less than minimum wages.

In the two cases which follow, the essential considerations for minimum wage computation was considered by the Bombay High Court and the Supreme Court respectively.

In *Mumbai Kamgar Sabha v. The State of Maharashtra,*[3] Justice D.M. Daud ruled that the minimum wages fixed on the recommendations of a committee established to do so, could not be accepted where the Committee proceeds on basic errors vis-a-vis the concept of minimum wages. The minimum requirements of food, clothing, medicine and housing of worker had not been taken into consideration as the requirements which go into making a minimum wage. It cannot be said that the commission has formulated what can be understood as "minimum wages" as contemplated by the Act. [4]

This was further expanded by the Supreme Court in *Workmen of Reptakos Brett and Co. Ltd v. Management,*[5] where the Court not only dealt with minimum wages but also imposed on the establishments a duty to maintain the wage structure.

The Court said that the concept of minimum wages is not the same as it was in 1936. Keeping in view the Socio-economic aspects of the wage structure one more additional component, namely, the children's education, medical requirement, minimum recreation and provision for old age, marriage etc., constituting 25% of the total minimum wages should be added. This wage structuring is nothing more than a minimum wage at subsistence level. The employees are entitled to a minimum wage at all times and under all circumstances. An employer who cannot pay the

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2 1982 2 LLJ 454.

3 1992 1 LLJ 169.

4 The report of the Committee which is unreasoned and which proceeds on basic error vis-a-vis concept of minimum wages cannot be sustained.

5 1992 1 LLJ 340.

minimum wage has no right to engage labour and no justification to run the industry.

The management can revise the wage structure to the prejudice of the workmen in a case of financial stringency. But in an industry where the wage structure is at the level of minimum wages no such revision is permissible - not even on the ground of financial stringency.

Therefore, where a management seeks to restructure the dearness allowance scheme to the disadvantage of the workmen, it has to prove that the wage structure in the industry concerned is well above the minimum level and the management is financially not in a position to bear the burden of the existing wage structure. (Ranganath Misra, C.J., Kuldip Singh, J).

In *Mathura Refinery Mazdoor Sangh v. Indian Oil Corporation Ltd, Mathura,*[6] co-operative societies were formed by some contract labourers while others worked under contract with the respondent. The casual labourers had been working in the refinery for 10-15 years but were denied wages and other benefits including service conditions granted to the regular employees.

The Supreme Court, speaking through K.N. Sarkia and M.M. Puchhi, JJ, upheld the orders given by the Tribunal that the Indian Oil Corporation should approach the Advisory Board (under the Act) to make a study with regard to the desirability of continuance of the contract labour system and the minimum of the pay scale as paid to the regular employees of the same scale. Further, those among the contract labourers who had worked for 5 years must be continued to be employed in the establishment even though there is a change in contractor and there shall be no termination of their services except as disciplinary action for misconduct etc, voluntary retirement or retirement on reaching the age of superannuation (which should be the same as those of regular employees) or on ground of continuous ill health. The Refinery should give preference to those workmen in its employment by waiving the requirement of age and other qualifications wherever possible. The tribunal also suggested the setting up of a benevolent fund for the contract labour on the lines of a Provident Fund. The Court stated that there could not be more reliefs given than that granted by the Tribunal.

In *Dhan Singh v. National Hydro-electric Corporation Ltd,*[7] a writ petition under Articles 14, 16 and 29 (d) was filed in the Jammu and Kashmir High Court, on the request of discrimination against casual labourers.

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6 (1991) 2 SCC 176.
7 1992 2 LLJ 382.

The gradation in service is permissible on the basis of length of service, qualifications or exceptional circumstances, yet persons similarly situated cannot be discriminated in the matter of grant of grades only on the ground that one set of employees is in regular employment and the other is in a work-charge basis, especially when the nature of duties and functions of both sets of employees are identical. On the basis of the petitioners being on a work-charge basis, deductions were made in their pay scale which the Court directed reimbursement for, and granted periodical reimbursements in their pay from a month from the date of the order which granted them promotion, but had also required a deduction in pay due to their being employed on a work-charge basis (R.P. Sethi, J.)

In *P. Mari Basavaradhya v. University of Mysore,* [8] the question was whether Research Assistants appointed by the University would have the same service conditions and retirement age as the teaching staff of the University as the two are academicians and the Research Assistants would not fall into the category of "other employees" who were adminstrative Staff.

The Court went into the resolution of the Syndicate (dated 21 January 1975) which stated that the teaching staff and the Research Assistants formed one class.

The Court held that taking into account the special attributes and mode of recruitment of Research Assistants, qualifications prescribed, promotional avenues provided for the post and duties performed by them, they cannot be equated with "other employees". Therefore, the reducion in the age of superannuation from 60 to 58 is not based on intelligible differentia and therefore is not valid.

In *Committee for Protection of Rights of ONGC Employees v. ONGC, Dehradun,* [9] temporary employees of the Government of India who worked in the ONGC when it worked as a Department of the Government, and subsequently absorbed into the ONGC claimed pension in addition to the Provident Fund Scheme as applied to employees of the Commission. The Supreme Court held that such employees were not entitled to pension under the condition of service.

The Court based its decision on the terms of employment of the petitioners which did not provide for pension and even though the ONGC Act - Conditions of Service provided for the same the petitioners would not come with in its purview since they were employed before the coming

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8 1991 2 LLJ 271.

9 1991 2 LLJ 271.

into force of that Act. (Sabyasachi Mukharji. C.J., B.C. Ray, M.H. Kania, K.N. Sarkia, S.C. Agarwal, JJ).

In *K. Vasudevan Nair v. Union of India,* [10] the supreme Court held that equal pay for equal work would not apply since the category of work done by the petitioners (section officers working in the Indian Audit & Accounts Department) cannot be equated to that of the section officers in the Central Secretariat. The Court based its holding on the ground that very often the petitioners worked under section officers of the Central Secretariat when sent on deputation. The method of recruitment, the supervisory powers etc, of the two sets of officers are different and so the doctrine would not apply. In this case, the petitioners were given an option to join the Audit Wing but they chose not to and so now they could not ask for the same pay scale. The fact that the qualifications of the petitioners were commensurate with that of the officers of the Audit Wing was not given much importance (Kuldip Singh, P.B. Sawant, JJ).

In *Karnataka State Private College Stop-Gap Lecturers Association v. State of Karnataka,*[11] S. Rathavel Pandian, Kuldip Singh and R.M. Sahai, JJ. held that as temporarily appointed teachers did the same work as the permanent teachers, adoption of a different method of payment would be arbitrary and violative of Article 14. A teacher appointed temporarily must be paid the same salary paid to a regularly appointed one. The provision in the Karnataka Government's Order, allowing a break of a day after every two or three months, was struck down.

> Fixation of such emoluments is arbitrary and violative of Article 14. The evil inherent in it is that apart from the teachers being at the beck and call of the management are in danger of being exploited as has been done by the management committees of the State of Karnataka who have utilised the services of these teachers for eight to ten years by paying a meagre salary when probably during this period if they would have been paid according to the salary payable to a regular teacher they would have been getting more.

The management was directed to fill up permanent vacancies in accordance with the rules.

In *Shri Jagannath v. Union of India,*[12] Ranganath Misra, C.J. and M.H. Kania and Kuldip Singh, JJ. held that experience is a merit and can be a valid basis of classification under Article 14, and equal pay for equal work

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10 1991 2 LLJ 420.
11 JT 1992 (1) SC 373.
12 JT (1991) 4 SC 238.

cannot be advanced here.

In *Surja v. Union of India,* [13] Ranganath Misra, C.J., and P.B. Sawant J. gave further extension to the concept. Under the Freedom Fighters' Pension Scheme of 1972, the appellants, who had participted in the Arya Samaj Movement, sought to claim the pension granted to the Freedom Fighters, maintaining that the Arya Samaj movement was also a freedom movement. The Court allowed this.

Though most of the cases cited above were not strictly under the Equal Remuneration Act, the questions decided were of similar nature. A very wide interpretation was given by the Supreme Court in the *Employees of Tannery and Footwear Corporation of India Case.* The guidelines laid down to determine whether equal pay for equal work would arise were experience, similarity of posts, qualifications, conditions of service agreed upon at time of employment, quality of work, nature of work, responsibility, etc.

The Contract Labour (Regulation & Abolition) Act, 1970

From the title of the Act it can be seen that the policy contemplated is not total abolition of this phenomenon. Under Sections 1(4), 7, 9 and 12 of this Act, the principal employer is required to obtain a certificate of registration issued by the appropriate Government and the contractor is to obtain a licence in order to employ contract labour.

In the *Food Corporation of India Workers Union v. FCI,* [14] the Gujarat High Court held that both these conditions must be fulfilled. Therefore, in a situation where only one of these two conditions is fulfilled, the position would be that a workman employed by an intermediary would be deemed to have been employed by the principal employer. In such a period where either the principal possess the certificate or the contractor did not possess the licence the workmen can claim that they are directly employed by the principal employer.

In this period the workmen can claim to be the direct employees of the principal employer. In the absence of adequate material and factual data, the workmen's union and/or the individual workman is given the liberty to make representations to the FCI to claim necessary benefits giving details as regards the employment of the workman, the place at which he worked and under whom he worked. The principal employer is directed to decide such representation, and where the decision is against the workman they

13 1991 (2) SCALE 532.
14 1992 1 LLJ 257.

will be at liberty to move the appropriate authority under the relevant labour laws for redressal of their grievances. Even if one of the two conditions are not fulfilled, the employers would not be allowed to avail the benefits of the Act.

This decision was reversed by the Supreme Court. In *Deva Nath v. National Fertilizers Ltd,*[15] K. Jagannatha Shetty and Yogeshwar Dayal, JJ held that it is not for the High Court to enquire into the question and decide whether the employment of contract labour in any process, operation or in any other work in any establishment should be abolished or not. It is a matter for the decision of the Government after considering the matter as required to be considered under Section 10 of the Act. The only consequence provided in the Act where either the principal employer or the labour contractor violates the provisons of Section 9 and 12 respectively, is the penal provision as envisaged under the Act for which reference may be made to Sections 23 and 25 of the Act. In a writ petition, the High Court could not assume any mandamus for deeming the contract labour as having become the employees of the principal employer.

The Bonded Labour (Abolition) Act, 1976

There were only two cases under this Act in the period under survey.

In *Bandhana Mukti Morcha v. Union of India,*[16] a Public Interest Litigation was brought under Articles 14 and 32. The Court gave an order and constituted a committee to identify the bonded labourers and to collect all material in respect of them so as to assist the Court to make further directions in terms of the requirements of a scheme to rehabilitate them. (Ranganath Misra CJ, M.M. Punchhi and S.C. Agarwal, JJ.).

A committee was appointed pursuant to the Court's order. The report submitted by the Committee indicated inhuman living and working conditions in quarries, deprivation of welfare amenetics and ecological problems. The Court held that as a Welfare State, the Government has to deal with the problems. The health care of workmen and their families, education of the children and the adults is the responsibility of the employer, as also to provide a definite source of water. To require a school to be built in an area where there may not be adequate number of children for the purpose of schooling at the expense of the exchequer would not be appropriate. A permanent base of residence, i.e., housing, supply of water, provision store, schooling, hospital facility, recreation and resolution of law and

15 1992 1 LLJ 289.
16 (1991) 4 SCC 174.

order problems.

> The petition is disposed by directing that the state of Haryana shall now ensure that the people who have been identified numbering 2000, are continued in work with improved conditions of service and facilities as referred to above and such of them who want to go back to their native areas be treated as released from bondage, and appropriate action must be taken in accordance with Government of India's Scheme forthwith.

The court directed the Government to send officials to regularly monitor the situation there.

Regularisation of casual and temporary workers

In *Dharwad District P.W.D. Literate Daily Wage Employees Association v. State of Karnataka,*[17] the Equal Remuneration Act and the Karnataka State Civil Services (Special Recruitment of the Candidate) Rules, 1986 were considered.

The Daily Wage Employees Association prayed the Court to direct the Karnataka Government to regularise and confirm the services of the daily rated and monthly rated employees as regular Government servants and for payment of salary at the rates prescribed for the appropriate categories of the Government servants and for other benefits.

The Court gave an interim order directing the Government to pay the same salary to the Gangmen and Others under casual labour as was being paid to the regularised Gangmen and Others and directed the State Government to frame a rational scheme for absorption of casual workers and monthly workers.

On the draft scheme filed by the State Government, the Court decided that the casual and daily rated workers be treated as monthly rated employees (those appointed on or before July 1, 1984) with an annual increment of Rs.15/- till they were regularised. On regularisation they would be placed within the minimum pay scale cadre within their group, but would be entitled to the regular Government servant's pay of the corresponding cadre. All casual and daily rated workers who have completed 10 years as on a December 12, 1989 would be immediately regularised on the basis of seniority-cum-suitability. The remaining monthly rated employees who had completed services as on December 31, 1989 should be regularised before Dec. 31, 1992 in a phased manner on the basis of seniority-cum-suitability.

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17 1991 2 LLJ 318 (SC).

The balance of casual or daily rated workers would be entitled to regularisation on the basis of completing 10 years of service and on the basis of seniority and suitability. For every unit of five years of service done in excess of 10 years, an additional increment in the time scale of pay shall be given.

The Court admitted that the scheme was not an ideal one, but unduly burdening the State for implementing the constitutional obligation would create problems which the State would not be able to withstand.

The Court stated:

> We can well reaslise the anxiety of the petitioners who have waited too long to share the equal benefits mandated by Part-IV of the Constitution in respect of their employment. At the same time, we cannot overlook the constraints arising out of or connected with availability of state of resources.

The Court emphasised that equal pay for equal work and security of service were the constitutional goals. (Ranganath Misra, M.M. Punchhi, Agarwal, JJ).

In *Harish Kumar v. Registrar, Delhi High Court,*[18] the petitioner was employed as a sweeper in the High Court for three months every time, for 15 years. The Delhi High Court held that the practice of appointing employee for three months at a time, without the support of any statutory rules, absence of any rational method of selection and termination of service and the absence of a seniority list maintained for Class IV employees for the purposes of promotion, the employees cannot be deprived of the benefit of long service. The Court stated that short term appointment resulting in denial of benefits is violative of Articles 14 and 16 of the Constitution. Such a sweeper would not be regarded as a temporary employee and the Registrar was issued directions to confirm sweepers and other Class IV employees who had completed seven years of service. The termination of his services could not, therefore, be done by mechanical invocation of the Central Civil Services (Temporary Services) Rules, 1965.

In *Rabinarayan Mohapatra v. State of Orissa,* [19] a teacher was appointed on 89 day basis with one day break which deprived him of his salary for the period of summer vacation and other service benefits. The Court held that this was arbitrary and suffered from the vice of discrimination. The

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18 1992 1 LLJ 148.
19 AIR 1991 SC 1286.

teacher had been working for four years and his services was to be regularised. The appellant, the Court held, was entitled to his salary including the salary of the summer vacations and other breaks from the date of his initial appointment. (Ranganath Mishra C.J., M.H. Kania and Kuldip Singh, JJ).

In *Municipal Corporation Raipur v. Ashok Kumar Misra,* [20] K. Ramaswamy and N.M. Kashiwal, JJ. held that where the rules empower the authority to extend probation beyond prescribed period, continuance in service even after the initial period of probation in absence of any express order of confirmation would amount to extension of probation period. In such a situation termination after initial period of probation would amount to termination of probationary service and is valid. Where the rules empower the authority to extend probation beyond the prescribed period, mere expiry of the initial period would not automatically result in deemed confirmation. Express order is necessary.

In *Dr. V.P. Chaturvedi v. Union of India,* [21] the Court ordered the regularisation of medical researchers continuing research work under different projects for more than 15 years. In order to have better efficiency a core cadre of researchers could be created. The Court opined that service guarantees should be provided only in the later part of their service (Ranganath Misra, C.J., M.H. Kania, and Kuldip Singh JJ.).

In *Delhi Development Horticulture Employees Union* v. *Delhi Administration,*[22] the petitioners were employed on daily wage basis under Jawahar Rozgar Yojana. The Court held :

> It is apparent that the schemes under which the petitioners were given employment have been evolved to provide income for those who are below the poverty line and particularly during the periods when they are without any income whatsoever. The schemes were further meant for the poor, for the object of tackling the problem of poverty from that end. The object was not to provide the right to work as such even to the poor - much less to the unemployed in general ... If the resources used for the Jawahar Rozgar Yojana were in their entirety to be used for providing full employment throughout the year, they would have given employment only to a small percentage of the population in need of income, the remaining vast majority being left with no income whatsoever. No fault could

20 (1991) 3 SCC 325.
21 (1991) 4 SCC 171.
22 JT 1992 (1) SC 394.

> therefore, be found with the limited object of the scheme given the limited resources at the disposal of the State. Those employed under the scheme, therefore, could not ask for more than what the scheme intended to give them. To get employment under such schemes and to claim on the basis of the said employment, a right to regularisation is to frustrate the scheme itself. No court can be a party to such exercise. It is wrong to approach the problems of those employed under such schemes with a view to providing them with full employment and guaranteeing equal pay for equal work.
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> Although there is the Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore it ... The Court can take judicial view of the fact that such employment is sought and given directly for various illegal considerations, including money.

Therefore, the Court held that under Articles 21, 32 and 41, right to livelihood - the country has so far not been able to attain the capacity to guarantee the same. Therefore under Article 41 while giving the direction to the State to ensure the right to work, the Constitution makers thought it prudent not to do so without qualifying the same. (P.B. Sawant, B.P. Jeevan Reddy, JJ.).

Principal employer in case of informal labour done in an industry

This section deals with the court rulings on labour and activity which is not the predominant activity of the industry. While the concern is for labour of the organised industry, the informal labour in the organised industry is neglected behind the improved conditions of labour in the industry.

In *All India Railway Institute Employees' Association v. Union of India,* [23] the employees of Railway institutes/clubs petitioned before the Supreme Court to be treated as Railway Employees. The Court held that it could not be held so since the institutes do not engage in uniform activities and further the provision for institutes/clubs is not mandatory. They are established as a welfafe measure, and there is no employer-employee relationship between the Railway administration and the employees of the Railway clubs/institutes. If the service conditions are unsatisfactory, they cannot file a writ petition under Article 32 and their remedy lies elsewhere.

In *A.P. Dairy Development Co-operative Federation Ltd., v. Shivadas*

23 1991 2 LLJ 265.

Pillay,[24] it was held that it is difficult to hold that the employees in a canteen established under Sec.46 of the Factories Act, 1948 would not be employees of the occupier, even though for purpose of management, a canteen committee whose functions are advisory, has to be constituted under the rules. Once a canteen is established under Sec. 46 of the Factories Act, the employees in the canteen would become employees of the occupier.

In *Sanjerao Unkar Jadhav v. Gurindar Singh*,[25] a contractor was employed by the Electricity Board and engaged as a workman. On the question of the liability of the principal employer under the Workman's Compensation Act, on the workman losing his earning capacity, the Bombay High Court held that since the workman was engaged in doing what was part of the trade or business of the Board, the Board would be responsible for paying compensation. In any event, the Court held, "the employer cannot certainly refuse to make the payment of compensation on the basis of some agreement of indemnity between him and the contractor."

In *Union of India v. Tejram Parashramji Bombhate*,[26] a primary school was established to impart education to children of employees of an ordnance factory. The employees later established a secondary school. The teachers of the secondary school, it was held, could not claim a pay scale admissible to Government School teachers nor claim regularisation of employment from the Central Government (K. Jagannatha Shetty and Yogeshwar Dayal, JJ.).

In the above cases, as can be seen, the courts have not been consistent in granting the status of employee and the service benefits which go alongwith it.

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24 1992 1 LLJ 153.
25 1991 1 LLJ 156.
26 AIR 1992 SC 570.

WORKMEN'S COMPENSATION

*V. Nagaraj**
*G.S. Srividya***

In this section the cases decided by the Supreme Court and the High Courts under the Workmen's Compensation Act, 1923 and the E.S.I.C. Act, 1948 are considered. It covers the period from May, 1991 to June, 1992.

In *Chaitram v. S.A.I.L.*,[1] goggles were supplied by the employer to be worn by the workmen while doing the work. The workmen did not wear it while working. A flying chip struck a workman's left eye and his eye was injured. The question before the High Court of Madhya Pradesh was whether the non-wearing of goggles amounted to wilful disobedience ?

The Court held that the provision, (b) (ii) of Sec. 3(1) of the Workmen's Compensation Act indicates that the employer shall not be liable to pay compensation for personal injury caused to a workman by accident arising out of and in the course of employment if the accident is directly attributable to wilful disobedience of the workman of an order expressly given or a rule expressly framed for the purpose of securing the safety of workmen. The burden of proving the wilful disobedience is on the employer if he wants to claim the benefit of the provisions.

In the instant case it was not established that the employee was not using the goggles intentionally and in wilful disobedience of the orders. Therefore, the employer was held liable to pay compensation.

In *Juthi Devi v. M.S. Pine Chemicals and Another*,[2] a chowkidhar employed through a contractor as security guard died due to heavy machines lying in the premises falling over him. When his legal heirs claimed compensation, the defence of the employer was that the deceased did not fall under the definition of workman under Sec. 2(1)(a) of the Workmen's Compensation Act, 1923. This contention was sustained by the Workmen's Compensation Commissioner. Hence the appeal.

The High Court of Jammu and Kashmir held that the authorities under the Act should interpret the provisions of the Act not in an orthodox or

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* Faculty Member, NLSIU, Bangalore.
** Student IV Year, NLSIU, Bangalore.
1 1991 2 LLJ 144.
2 1991 2 LLJ 386.

literal way but in a purposive way. The workman employed in a premises where manufacturing process is intended to be carried out is not necessarily required to be actually connected with the manufacturing process. Any person engaged in such premises who is contributing for the intended manufacturing process would be deemed to be workman for the purpose of the Act. This interpretation covers even workmen in a factory which is yet to commence production.

In *Sarjerao Unkar Jadhav v. Girider Singh and Others,*[3] the appellant workman was required to climb the ladder cart to do the painting work. He was injured to the extent that he could not walk without crutches. The loss of earning capacity was estimated by the Commissioner at 20%. On appeal, the High Court of Bombay raised it to 50%. In doing so the Court relied on an earlier decision of the Supreme Court,[4] wherein it was held that the compensation is required to be awarded not with reference to the physical incapacity but to the loss of earning capacity which is to be examined with reference to the nature of job the workman was doing.

In this case, the Court further held that the principal employer cannot refuse to make payment of compensation to the workman on the basis of some agreement of indemnity between him and the contractor. The Court held further that the principal employer is only liable to pay compensation and not liable to pay interest and penality.

Again in *Sadashiv Krishnan Adke v. M/s. Time Traders,*[5] the question before the High Court was as to the mode of determining loss of earning capacity. The Court held that the loss of earning capacity is to be determined with reference to the work or job the workman was doing at the time of the accident. Here again the Court relied on the decision of the Supreme Court.[6] In this case the applicant had suffered multiple fractures in the leg out of an accident arising out of and in the course of employment. The medical certificate estimated the permanent disability at 35%. The Workmen's Compensation Commissioner estimated the liability to be 60%. On appeal the High Court increased it to 100%.

In *Managing Director, Orissa State Housing Corporation v. Smt. Gitarani Seal and Another,*[7] the Court held that the business activity of the appellant was to store commodities. For such commodities, a storage place is absolutely necessary and the construction or repair of such storage place

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3 1992 1 LLJ 156.

4 *Pratap Naraim Singh Deo v. Shrinivas Sabeta* 1976 1 LLJ. 235.

5 1992 1 LLJ 235.

6 *Supra.* 4.

7 1992 1 LLJ 619.

cannot be said to be delinked so far as the business or trading activities of the appellant are concerned.

In the instant case the workman was engaged by a contractor employed by the appellant principal employer. The workman died during the course of employment. The Court held that in such case the liability passes on to the principal employer. But the principal employer is entitled to be indemnified by the contractor.

In *M/s. Kap Steel Ltd. v. Smt. R. Shashikala,*[8] the High Court of Karnataka held that in the absence of any provision in the Workmen's Compensation Act imposing a duty to communicate the order passed, the time for preferring the appeal should be counted from the date of pronouncement of the order and not from the date of communication of the order, if it is communicated.

The Court further held that the deposit of interest or penalty ordered is not a condition precedent for preferring an appeal.

In *Dilipkaur and Others v. Northern Railway and Others,*[9] the High Court of Punjab and Haryana held that even without any claim for penalty in the application, the Commissioner under the Workmen's Compensation Act is bound to impose penalty, if the conditions of Sec.4A(3) of the Act are satisfied. A court of law is not to go into the relief clause in the petition while granting appropriate relief.

In *Indirani Surulimani v. Commissioner for Workmen's Compensation,*[10] the question before the Madras High Court was whether the objection could be raised at the appeal stage regarding delay in claiming compensation, when the same was not objected to before the Workmen's Compensation Commissioner. The Court answered in the negative and further held that the participation of the appellant in the proceedings before the Commissioner amounted to acquiescence and the objection cannot be taken to be one which undermines the jurisdiction in toto.

In *E.S.I. Corporation v. Cheerans Auto Agencies,*[11] the High Court of Kerala held that an appeal will lie to the High Court from an order of the Insurance Court only when it involves substantial question of law. This is clear from Sec. 82 of the E.S.I. Act, 1948. The question whether two persons are employees or not is a question which has to be decided on an

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8 1992 1 LLJ 619.
9 1992 1 LLJ 762.
10 1992 1 LLJ 756.
11 1992 1 LLJ 704.

assessment of facts and it cannot be treated as a substantial question of law.

In *Regional Director, E.S.I.C., Bombay v. Century Spinning & Weaving Co. Ltd,*[12] contribution towards E.S.I. was made by the respondent employer for a period of six months. Because of subsequent settlement, workers started getting wages exceeding the limit for E.S.I. coverage. The employer claimed refund of the contribution already paid under Clause 40 of the E.S.I. (General) Regulation Act, 1950 on the ground that the said contribution was erroneously recovered. The E.S.I. Court allowed the claim and directed the Corporation to refund the contribution. On appeal, the High Court set aside the order stating that the Insurance Court Judgement suffers from patent illegality and refund cannot be ordered.

In *Sathyabhama* v. *E.S.I. Corporation,*[13] the appellant attended the factory, signed the lay-off register and while returning home was hit by a scooter on public road in front of the factory gate. Whether that injury can be called employment injury ? The High Court of Kerala held that decision in every case would depend on the facts and circumstances of the case. The theory of notional extension cannot be reduced to a mathematical formula for distance and time. In the instant case, considering both the point of time as well as the distance, the theory of notional extension of the employer's premises has to be applied. It was held to be an employment injury.

In *Frontier Motor Car Co. (P.) Ltd. v. Regional Director, E.S.I.C. Gauhati,*[14] the question before the High Court was whether the Managing Director was an employee of the Company for the purpose of seeing whether the company employs 20 or more persons. The Court held that a person can not be both a principal employer and also an employee. Whether he will be an employee or not would depend on the contract of employment. In the instant case there was nothing on record to show that there was any contract of employment between the Managing Director and the Company and as such he will not come under the definition of employee.

In *Management of Guest Keen Williams Ltd. v. Presiding Officer, L.C. and Others,*[15] the High Court of Karnataka held that Sec. 73 of the E.S.I. Act, 1948 places an embargo on the employer not to dismiss or punish an

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12 1992 1 LLJ 660.
13 1992 1 LLJ 831.
14 1992 1 LLJ 828.
15 1992 1 LLJ 846.

employee during the period of sickness. It is also necessary that during that period of sickness the employee must be in receipt of sickness benefits.

An order of discharge or dissmissal in contravention of Sec. 73 of the Act shall not be valid. Contravention of the said section also exposes the management to the peril of prosecution. Voluntary abandonment of service as contemplated in the standing orders will not attract Sec. 73 of the E.S.I. Act, 1948.

In *Vasudevan Nair v. Regional Director, E.S.I.C.*,[16] the question was whether the E.S.I. Act, 1948 empowers the E.S.I. Court to examine the correctness of the disability certificate given by the Medical Board. The High Court of Kerala held that though the Insurance Court may not have the expertise, the statute has empowered the Insurance Court to examine the correctness of the certificate issued by the Medical Board.

In *C.E.S.C. Ltd. v. Subash Chandra Bose and Others*,[17] the meaning of the word 'supervision' as used in Sec. 2(9) of the E.S.I. Act was explained by the Supreme Court. The Court held that the Act does not give its own definition of the word 'supervision'. Therefore it must be construed in the context of the ultimate purpose of the Act, the aims to be served and the object behind the Act. The literal interpretation would cause injustice in perpetuity denying to the employee the benefits contemplated under the Act.

The 'supervision' in the fact situation is not day-to-day supervision but legal control, i.e., right to accept or reject the work done or maintenance effected.

In *Employees State Insurance Corporation, Chandigarh v. Gurdial Singh and Others*,[18] the question before the Supreme Court was whether the Directors of a Private Company are personally liable under the E.S.I. Act. The Court held that Directors cannot be treated *ipso facto* as owners. The liability was of the Company and in the event of there being an occupier, he was liable to meet the demand. In the instant case the occupier being there, he is liable and not the Directors. So Sec.2(iii) has no application.

In *Regional Director, E.S.I.C. v. S. Saravanan*,[19] the High Court of Karnataka held that when an injury is not specified in the Schedule, the

16 1992 1 LLJ 359.
17 1992 1 LLJ 475.
18 1992 2 LLJ 425.
19 1992 2 LLJ 494.

Medical Board, Medical Appeal Tribunal or the E.S.I. Court deciding upon the 'disablement question' is not barred from estimating and fixing its own percentage of loss of earning capacity of an insured person resulting from an employment injury suffered by him for determining the extent of disablement benefit to which he is entitled under the Act.

The Court further held that determination of loss of earning capacity should have regard to the reduction in capacity for work and has no relation to the nature of injury suffered, pain and suffering undergone.

IX. CIVIL PROCEDURE CODE

*Dayan Krishnan**

Introduction

Procedure is regarded as the hand maiden of substantive law, the medium which by institutionalising rules of the disputants and adjudictors invest the process with predictability.[1] The hand maiden has however assumed a changed role in recent times. The classical theoritists believed subjects were autonomous and pre-constituted, and assumed that law established clear and determine spheres in which they could or could not exercise free or constrained choice. The rights had to be knowable as the spheres of these rights were determined by strict legal rules.[2] In this rigid system of legal thinking procedure was merely a means to ensure that the correct facts get the benefit of the correct rule. This understanding of procedural law draws its underlying philosophy from the thought or the idea that the social ethos, values and goals and aspirations of the litigant consumer of procedural law are of no relevance. This idea of procedure as an isolated medium was described by realist thinkers such as David Trubek and Maurice Rosenberg,[3] as "a transparent medium", unconcerned with and shy to interact and adopt with society's needs. With the advent of legal realism, a new era in legal thought was ushered in. This school rejected the classical school as objective and the transparency idea gave way to the recognition of the fact that adjudication involved law making and procedure and substance were inextricably linked. It also ushered in the realisation that there was a need to redefine rules in the background of the social process. Echoing these thoughts in his review of Mulla's Code of Civil Procedure, D.K. Sampath opines[4]: "A study of procedure creates a realisation of the pragmatic limits of the legal process enabling the

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* Student V Year, NLSIU, Bangalore.

1 D.K. Sampath: *Review of Mulla's Code on Civil Procedure*, (1991) 3 NLSU 181.

2 Kennedy : Towards an Understanding of Legal Conciousness. The case of classical legal thought in America from David Trubek "The Hand Maiden's revenge, on reading and using the newer sociology of civil procedure, *Journal of Law and Contemporary Problems, Duke Law Journal*, (1988) V. 51 p. 116.

3 Maurice Rosenberg: Impact of Procedure, Impact Studies in Admn. of Justice, *Journal of Law and Contemporary Problems* (1988) Vol. 51 No. 3 p. 15 and M. Trubeck " The Hand Maiden's Revenge, on reading and using a newer sociology of civil procedure, *Journal of Law and Contemporary* Problems, (1988) Vol 51 No.3 p. 116.

4 *See Supra* n. 1 at 181.

student to place the study of law in a wider perspective."

In this study we will focus on this role of procedural law, while highlighting the various decisions of the High Courts and the Supreme Court. The realist school of thought is now an integral part of our procedural law and this is evidenced by the fact that the 1976 amendment to the Code was brought about with the following basic principles in mind:

(a) litigant should get a fair trial in accordance with accepted principles of natural justice;

(b) every effort should be made to expedite disposal of civil suits so justice is not delayed; and

(c) procedure should not be complicated and the poor must get a fair deal.

With this framework we shall attempt to study the development in the law of procedure under the following heads, *viz.*,

a) **Jurisdiction:** This area will include Sec.9, Sec.15-20, and allied matters.

b) **Fair trial :** This area will include cases under Sec. 34, Sec. 86, Sec.13, O XXXIX, O XXVI, O XLI.

c) **Speedy Justice:** This area will include Sec.11, O XIII, O II, O XXIII, O XIV, O VIII, O XXXIV, O XLI.

d) **Simplicity and justice to the weaker section:** This area includes Secs. 22-24, Sec. 96, Sec. 148 O XIV *inter alia.*

e) **The Hand maiden's advances**

Procedure being the handmaiden of substantive law all important area not covered under the above heads will be covered under this head. This review will examine only important High Court and Supreme Court decisions in the area of Civil Procedure which in the year under review has seen several significant advances.

PART A : JURISDICTION

Ouster Clauses

The Civil Court has jurisdiction with regard to a workman's application for correction of date of birth

The Supreme Court has held in *Isharsingh v. Nath.Fertilizers,*[5] a case pertaining to a workman's application for correction of his date of birth which was shown originally as 07.10.1930 and changed later to 23.10.1933.

The question arose whether an injuction for superannuation could be entertained in a civil court and whether Section 2-A of the Industrial Disputes Act was applicable. The Court held that it is an accepted position that a suit correcting a date is maintainable in a civil court. Section 2-A of the Industrial Disputes Act does not act as an ouster clause.

Questions of jurisdiction do not constitute res judicata and jurisdiction cannot be conferred on civil court for an eviction suit on grounds of res judicata

In a case arising out of a plea for a decree for recovery of a suit premises and mesne profits, the Supreme Court held in *Issabella Johnson v. M.A.Susai*[6] That the civil court has no jurisdiction as jurisdiction lay with the rent controller. Jurisdiction cannot be conferred on a civil court on a plea of *res judicata.* Further no plea of estoppel arises as estoppel cannot be raised on pure question of law. This case overruled the decision of a division bench of the Supreme Court in *Avtar Singh v. Jagjit Singh*[7] which took the view that the civil courts decision regarding lack of jurisdiction will act *res judicata* in a subsequent suit. However it re-affirmed the decision of a three member bench of the Supreme Court in *Mathura Prasad Bajvo Jaiswal v. Dossibai N.B.Jeebeeboi*[8] which took the view that jurisdiction of a pure questioin of law unrelated to the rights of the parties to a previous suit is not *res judicata* in a subsequent suit.

Civil court has jurisdiction even when ousted, for ultra vires acts

The old dictum in *Secretary of State v. Mask and Co.*[9] was reaffirmed by the Supreme Court in *Gurbax Singh v. Financial Commissioner,*[10] a case relating to the Displaced Persons (Compensation and Rehabilitation) Act

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5 1991 T.N.L.J Civil SC 15, (Mishra. C.J. Kania and Kuldip Singh, J.
6 AIR 1991 SC 993 Kania, J. as he then was.
7 AIR 1979 SC 1911.
8 AIR 1971 SC 2355.
9 AIR 1940 PC 105.
10 AIR 1991 SC 435.

1954 wherein Sec. 15 provides for the ouster of civil courts. It was held that "jurisdiction of civil courts are generally barred but it is true that where a tribunal acts *ultra vires* the civil court has by virtue of Section 9 power to interfere and set things right."

Other jurisdiction questions

In passing off action, jurisdiction lies with court where plaintiff has substantial market

The Karnataka High Court in *M/s Cadilla Lab (P) Ltd.v. M/S.Kamath Atul*[11] *& Co.*, a case relating to a passing off action filed for judgment and decree against the defendents preventing them from infringing the trade mark of their, skin ointment 'Hurbionol' and preventing the passing off of the defendants recently introduced skin ointment Herbinol. On the question of jurisdiction the Court held: "In a suit for passing off, the jurisdiction lies with the court where plaintiff has substantial market, suit not required only where plaintiff resides."

Application for compromise on decree for divorce by mutual consent must be filed before civil court and cannot be filed before Supreme Court

The Supreme Court in *Dr. Leena Roy v. Dr.Subrato Roy,* [12] a petition for transfer under Art. 136 and 32 held that even though both parties present and filing for compromise before the Supreme Court, the Court not being sized of the matter, parties should file application before the civil court and custody of the child will be decided on terms of the compromise.

Location of Subordinate Office or Branch Office of Transport Corpn. is place of business

In a matter relating to Section 20 where the appellant carries on the business of a transporter and has its principal office in Bombay and branch offices at various places, the Supreme Court in *Patel Roadways v. Prasad Trading Co.*[13] held: "In case of a corporation for purposes of clause (a) of Section 20, the location of subordinate or branch office is place of business.

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11 AIR 1991 Kant 303, K. Ramachandraiah.
12 AIR 1991 SC 92.
13 JT 1991(3) SC337.

PART B: FAIR TRIAL

Article 227 can be invoked to set aside injuction granted without notice and not disposed of in 30 days due to extraneous considerations

In *Ratinam and Others v. Pavathal* [14] the Madras High Court set aside a temporary injuction given by the District Court of Nilgiris without notice and without recording reasons and not disposed of in 30 days and order of the High Court that relief can be granted ignored held: "Or 39 R 1 C.P.C. enumerates circumstances under which temporary injuction can be granted. Rule 3 directs the issue of notice and even in grave circumstances of urgency reasons have to be recorded. Inspite of this the District Judge has deliberately "refused to exercise jurisdiction and invoking Art 227 the ex-parte interim injuction is set aside".

Compromise decrees cannot be enforced against the wishes of one party through the mechanism of Lok Adalat

The Lok Adalat cannot be used to pressurise the litigant and compromise decrees cannot be passed when one party objects, this was the view of the Gujurat High Court in *Union Bank v. M/s. Narendra Plastics.*[15]

Here a money suit was filed in January, 1989 and even before the suit was ripe for hearing and even before all defendants had filed written statements, it was listed in the Lok Adalat in July, 1989 where the claim was admitted and inspite of objections from the bank, decree passed on grounds that "suit called out in Lok Adalat, compromise agreed to by parties and compromise decree passed." Held: "under Sec.19 of the Legal Services Act (39 of '87) .... cases not ripe for hearing and hustled through Lok Adalat, Lok Adalat not ment for pressurising people and bringing pressure on public officials and therefore passing of compromise decree despite plaintiff's protest is illegal."

Central Government must give hearing while refusing permission to sue foreign consul and must decide in accordance with law

The Supreme Court has directed the Central Government to follow the principles of natural justice when deciding a question as to grant of permission to sue a foreign Government. In *Shanti Prasad Agarwalla v. Union,* [16] the petitioners were owners of a premises in Calcutta under occupation of the U.S.S.R Consulate General. On expiry of lease petitioners

14 1991 II MLJ 323, Venkateswami,J.
15 AIR 1991 Guj 69, Ravani, J.
16 AIR 1991 SC 814.

gave notice for termination. On a Sec. 86 application the Central Government gave no reply and when writ filed directing such reply, the Government said no permission on "political ground", without spelling out what the grounds were. The Supreme Court held that the order was bad and required fresh consideration in accordance with law and after giving petitioners a hearing.

Court should reject Commissioner's report which contains serious discrepancies

In a suit for declaration of title a Commissioner appointed to survey lands to indicate to which plot did a disputed well etc.. belong, the report contained serious discrepancies. The Orissa High Court in *Gopal Behra v. Loknath Sahu* [17] held: The Commissioner's report is meant to assist the Court. If there are serious discrepancies in the Commissioner's report and his evidence recorded, the Court must reject such report.

Not examining impact of subsequent legislation and acceptance of petition without examining evidence is a fit case for remand

In *A.P.Wakf Board v. Baig* with *Shri. Radhakrishna Rice Mills and Ors.v Jamma Masjid,* [18] a case concerning a scheme for the administration of a Wakf, before the Wakf Act, which provided for a lifetime trustee. The party in this case claimed to succeed to the life trusteeship. The Judge here accepted the party's petition without examining the postion after the Wakf Act. The Supreme Court held that the acceptance of the petition without recording of evidence and without examining the provisions of the Wakf Act to see whether the said mosque came under the control of the Wakf Board after the Act and whether the scheme was now operative or not after the coming into force of this Act, is a fit case for remand and the matter is to be consdiered afresh by the subordinate court.

Application for additional evidence when of great importance and party can explain circumstances preventing it from producing evidence during trial is a good ground for remand

The Supreme Court in *Premier Auto Ltd. Bombay v. Kabirunnisa*[19] held that where the evidence appears to be of great importance and the parties can show the circumstances that prevented them from producing, such evidence is a fit ground for remand to the first appellate court.

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17 AIR 1991 SC Ori 6, D.P.Mohpatra, J.

18 AIR 1991 SC 87, Mishra C.J. and M.H. Kania as he then was.

19 AIR 1991 SC 91, L.M. Sharma and M.N. Venkatachalaiah, JJ

Foreign decree of divorce obtained by fraud not conclusive

In a landmark decision which is an attempt to protect the unsuspecting woman who marries the unscruplous non resident Indian, the Supreme Court held in *Narasimha Rao v. Venkatalaxmi* [20] where the appellant and the respondent married at Tirupathi in 1975 and separated in 1978. The respondent filed for dissolution of marriage in the Circuit Court of St. Louis, Missouri, U.S.A. The respondent sent a reply under protest. Circuit Court passed a decree of dissoulution in 1980 on the following grounds:

(a) No reasonable likelihood that marriage can be preserved;

(b) The appealant was a resident in Missouri for 90 days.

The appellant then married another woman. The Supreme Court held that the grounds are not recognised by Hindu Law and further the appellant had given wrong jurisdictional facts to the foreign court and therefore the decree of divorce obtained by fraud was not enforceable.

Arrest and detention of judgement debtor without enquiry into means or ability to pay is vitiated

In the Bombay High Court decision in *Jandlik v. Maharashtra State Farming Corporation*,[21] where in a suit for recovery of misappropriated money the suit was decreed and in execution proceedings decree was not satisfied. Then a detention order was passed on grounds of having means to pay. It was held that there was no evidence as to ability to pay except the provident fund of the debtor. The proviso to Sec.51 C.P.C. requires the Court to enquire into means of the debtor. The order was held bad as the means test was not looked into and the duration of the order not stipulated.

Not allowing cross examination by pigeon hole method amounts to non-exercise of mind and can be interfered in revision

The Rajasthan High Court in *Ratanlal v. Kamal Devi* [22] held that not allowing cross examination by pigeon hole method (showing only disputed signature on some other document without disclosing contents) was a fit case for revision as it amounts to non exercise of jurisdiction.

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20 JT 1991 (3) SC 33, Mishra and Sawant, JJ.

21 AIR 1992 Bom 48.

22 AIR 1992 Raj 1.

after six years. This was unsuccessful on counts of delay *res judicata* and estoppel.

In suit for redemption even if amount became due under the earlier limitation Act the provisions of the New limitation Act will apply

The Kerala High Court in *K. Kunjamma v. Bageerathi Amma,*[31] a case concerning a redemption of a mortgage, under O XXXIV the preliminary decree directed deposit within a fixed time. The Court held that the deposit amount fixed in the preliminary decree has to be made within the date fixed in the decree or the period in Art. 61 i.e., 30 years from the date on which the mortgage money became due.

Compromise recorded after hearing parties cannot be later objected to by parties

The Supreme Court in *Venkat Seshaiah v. Ramasubbamma*[32] held that when parties had been heard and only then recording compromise had been taken up by the court. If one party later objected to the compromise, if the compromise was genuine and lawful, the same must be accepted and the suit must be disposed of in terms thereof.

PART D

SIMPLICITY AND JUSTICE TO THE WEAKER SECTIONS

Husband cannot get transfer on grounds that he has to undertake journey

In *Ms. Shakuntala Modi v. Prakash Baruka,*[33] the Supreme Court on a question under Sec.22-24, C.P.C. in a litigation concerning custody of children of divorced spouses when application pending in one Court and the husband instituted claim in another court. The Court transferred the suit filed by the husband holding that "there is no suggestion by husband of financial difficulties and prejudice cannot be assumed from the fact that he would have to undertake a journey."

High Court has jurisdiction to transfer cases from one Family Court to another

The Allahabad High Court in *Munnalal v. U.P.*[34] held that the Family Court, while exercising jurisdiction under Sec.7 of the Family Courts Act, acts as a civil court and the High Court can transfer cases from one Family

31 JT 1991 (1) SC 642.
32 AIR 1991 SC 1104 (L.M. Sharma as he then was and J.S. Verma J.)
33 AIR 1991 SC 1104.
34 AIR 1991 All 189.

Court to another under Sec.22-24 of C.P.C.

Arrest of women not possible under any circumstances Under O XXXVIII, Civil Procedure Code

In a suit for recovery of money the plaintiffs apprehended that the defendant woman was likely to leave the country and prayed for a warrant of arrest, the Delhi High Court in *M/S. Chelsea Mills Ltd v. Chorus Girl Inc*[35] held that a woman cannot be arrested or detained in civil prison under O XXXVIII R 1. If under Sec.56 of C.P.C. the Court shall not order arrest of women in execution of decree for payment of money, similarly her arrest cannot be ordered in a suit for recovery of money, when decree is yet to be passed. The provisions of O XXXVIII R 4 cannot be used.

Time for payment of costs can be extended even not paid within stipulated time.

In *Nainar Mohamed v. Kwaja Moideen*[36] the Madras High Court held that even in a situation where an interim stay is made absolute on the conditions of a party depositing costs within a fixed time of four months, a further application to extend time can be entertained under Sec.148 and the case not disposed of finally by the earlier order.

However on facts the application was not entertained on grounds of vagueness and inordiante delay.

Opportunity to make good defeciency of court fee must be given

The Supreme Court in *Shri. Mohammed M. Hibullah* [37] *v. Seth Chamanlal* held that when there is a defeciency of court fee the dismissal of appeal without giving opportunity to the parties is not appropriate.

PART E : THE HAND MAIDEN'S ADVANCE

Temporary injunction does not revive on restoration of suit after rejection of plaint

Temporary injunction granted by the trial court does not revive as only interlocutary orders which are meant to aid the ultimate result would be ancillary to such order and would stand revived on the restoration of the suit. Orders granting temporary injunction do not aid the ultimate result of the litigation and therefore are not ancillary and do not stand revived. This view was enunciated by the Rajasthan High Court in *Kanchan* v. *Ketsides.*[38]

35 AIR 1991 Del 129.
36 AIR 1991 Mad 29.
37 JT 1991 (4) SC 1.
38 AIR 1991 Raj 94 Milpa Chandra, J.

When injunction order is violated, the court has power to compel implementation on passing interim mandatory injunction postponing action under O XXXIX, Rule 2A

In this highly published decision regarding the internal problems of the Indian Olympic Association, the Madras High Court in a Full Bench decision held in *V.C. Shukla v. T.N. Olympic Assn.*[39] that the Court has power to compel implementation of the order by passing an interim mandatory injunction for restoring action under R.2A of O XXXIX. This is an ancillary power to the Court's power to grant finally on the conclusion of the proceedings. The consideration that will induce the Court to resort to such jurisdiction will depend on the nature of the injury, its seriousness and the threat it created to the enforcement of the order of the Court.

Foreign decree where no defence filed or plaintiff's evidence considered is not conclusive

If an application under O XXI, R 41 of C.P.C. for examination of judgment debtor the Calcutta High Court in *Middle East Bank v. Rajendrakumar Sethia*[40] held that as the decree in question was an ex parte foreign decree by the Supreme Court of England (Q.B.D) and no defence filed or proper consideration of plaintiff's evidence. It is not a conclusive judgement as per Sec. 13 C.P.C. and is therefore not executable.

Court must take judicial notice of illegal or immoral contract

In a case where a property is sold by an agreement whereby the appellant's father got the appellant, Kamalabai, a married woman, married to one Jhita, for a sum of Rs.5,000/- and land transferred in lieu of that amount.

The Madhya Pradesh High Court in *Kamalabai v. Arjun Singh*[41] held that where a contract is illegal or for immoral purposes there need to be no pleadings of parties raising the issue of illegality. The Court is bound to take judicial notice.

Serious election malpractice will invite heavy costs

The Supreme Court in *Ambika Prasad Dube v. Dist. Magistrate, Allahabad,*[42] a case wherein the election of the Pradhan of a Gaon Sabha extra bullot papers were mixed during a counting break. The poll was

39 AIR 1991 Mad 323 (F.B.)
40 AIR 1991 Cal 335.
41 AIR 1991 MP 276 (F.B).
42 AIR 1991 SC 1106, Jaganath Shetty, J.

cancelled and re-pool ordered as the respondent had won by the 41 illegal votes. The court held that repoll was unnecessary as the 41 votes had no value and ordered the respondent to pay heavy costs of Rs.10,000/- owing to the seriousness of the malpractice.

Receiver under Civil Procedure is the agent of court unlike in insolvency

In a matter that arose out of a suit to declare properties as joint family property and subsequent application pending a suit for the appointment of receiver for the various properties mentioned in the schedule, the Supreme Court in *Krishnakumar Khemka v. Grindlays Bank*[43] brought out distinction between a receiver appointed under O XL of C.P.C. and the insolvency Acts and held: "Act done by receiver is subject to directions and orders of appointing court as a receiver appointed under O XL unlike a receiver under the insolvency Acts does not own the property or hold an interest of the property during the time the court exercises jurisdiction over the litigation in respect of the property."

Right of preemption is a personal right and cannot be transferred to third persons

In a suit for pre-exemption a person was to deposit 4/5 th of sale price. The respondent claimed that by an assignment deed he had acquired the rights of such person. Here the Supreme Court in *Bhops* alleged son of *Sheo v. Matadin Bhardwaj*[44] going into the nature of pre-emption right held that the sole object of conferring this right is to exclude strangers from acquiring an interest in an immovable property. This right is personal and cannot be transferred to third persons. The wording or O XX R. 14 make it clear that on payment of purchase money on or before specific date the title would vest in the pre-emptor without further documentation, also the conjoint reading of Sec.146 with O XX R 14 makes it clear that on payment of purchase money on or before specified date the title would vest in the pre-emptor without further documentation, also the conjoint reading of S. 146 with Or 20 R 14 makes it clear that the assignee was not entitled in law to execute the decree transferred to him and obtain possession from the judgement debtor.

Notice not an essential ingredient while granting leave to sue a public charity under Sec. 92

The Supreme Court in *R.M. Narayana Chettair v. N. Lakshmanan Chettyiar*[45] was of the opinion that though as a rule of caution notice must

43 AIR 1991 SC 899.

44 AIR 1991 SC 373, Shetty J and Ahamedi, J.

45 AIR 1991 SC 221, Kania, J.

be given by the court to the defendant before granting leave under Section 92 of the C.P.C. to the public charities but the court is not bound to do so. If a suit is instituted on the basis of such leave granted without notice it will not be rendered bad in law or not maintainable. This case impliedly over-ruled the decision of the Madras High Court in *T.M. Shanmugam v. Periyar Self respect Propoganda Institution*[46] and the Delhi High Court in *Gurudwara Prabandak Committee v. Amarjit Sen*[47] which held leave granted under Section 92 without notice at the stage of granting leave is bad in law.

Application to insert date in written statement after closure of evidence for greater clarity allowed

The Orissa High Court in *Mahendra Mehta v. A. Sarkar*[48] in a case where the execution of a contract was admitted but specific plea of recision was raised, an application for amendment of written statement was made to insert the date of recission. The Court held that the amendment is allowed as the insertion of date of recission is to make existing averments more explicit as it does not introduce a new case or cause of action.

Court can refuse to execute decree on consideration of subsequent events

The Orissa High Court in *Radha Devi v. Lalit Behari Mohanty* [49] held that in consideration of subsequent events the Court can refuse to execute the decree. If the decree is a nullity or the holder loses the right to execute on account of subsequent change in law or subsequent development, then executing Court can refuse to execute on that basis. In this case the right of the decree holder was an intermediary interest which was abolished by the Orissa Estates Abolition Act.

Court may take a cautious cognizance of subsequent events

The Supreme Court deciding on a question of a claim for eviction and whether subsequent events could be pleaded, the Court held in *Ramesh Kumar v. Keshoram*[50] that the normal rule is that in any litigation the rights and obligations of a party are decided at the commencement of the *lis*. But this is subject to one exception *viz.*, wherever subsequent event of fact and law having a material bearing on the entitlement of the parties or

46 AIR 1991 Mad 93.
47 AIR 1984 Del 39.
48 AIR 1991 Orissa 1.
49 AIR 1991 Orissa 36.
50 AIR 1992 SC 701.

on aspects which bear on moulding of the relief. The Court is not precluded from taking cautious cognisance of the subsequent clauses in law and fact.

Claim for profits in a partition suit not claim for mesne profits :

The Kerala High Court has held in *Heneefa Rowther v. Saraumma,*[51] that in a suit for partition the co-sharer in possession of disputed premises is accountable for profits during disputed period but claim for such profits is not a claim for *mesne profits* within the meaning of Section 2(12) and O XX R 12.

Stranger has no audience in execution proceeding

In a case where a decree was obtained for arrears of rent and ejectment and the petitioner obstructed the execution, the question arose whether the petitioner could make an application for adjudication under OXXI R 97. The Rajasthan High Court in *Jai Prakash v. Khimraj* [52] held that third party obstructors cannot make an application under Order XXI R 97. For adjudication of his rights it is available only to a decree holder or auction purchaser. The stranger has no audience in execution proceedings.

When two executable decrees are passed on different dates the provisions of O XXI R 19 are not attracted

O XXI R 19 envisages a situation in a case of cross claim under the same decree hat each party can execute his decree at the same time. In *Jaganath v. Jaggi,* [53] the Orissa High Court held that the provisions of O XII R 19 C.P.C. are attracted only when each party can execute his decree at the same time and therefore when two executable decrees are passed at different times O XXI R. 19 is not attracted.

When person holds property in the capacity of lessee and mortgagee he does not lose the capacity as leassee on redemption of mortgage

Nemichand v. Onkarla,[54] a case where the respondent had let a property to the appellant on lease. During the period of the lease the appellant lent a sum of Rs.5,000/- to the respondent and the leased property was mortgaged. On expiry of the period the respondent gave notice of redemption and asked for possession on grounds that it was a an usufructory mortgage. The appellant refused on grounds that he was the lessee and the

51 AIR 1991 Ker 94.
52 AIR 1991 Raj 136.
53 AIR 1991 Orissa 74.
54 1991(2) Scale 108.

lease usufructory. The Supreme Court held that the relationship as leassee and leassor subsisted and no merger could take place in law.

The arbitrator has got the power to grant interest pendente lite

A Constitution Bench in *Secretary, Irrigation Department v. G.C.Roy*[55] overruled its decision in *Galimala v. A. Bhaduttajena.*[56] In the *Jena case* items held that the Arbitrator to whom the reference was made without intervention of Court does not have jurisdiction to grant interest *pendente lite.* Overruling this view a Constitution Bench held: "Where an agreement between parties does not prohibit grant of interest and where a party claiming interest and that claim for interest is claimed independently is referred to an arbitrator he shall have the power to award interest *pendente lite.* The Supreme Court has directed a prospective working of this rule.

Court has discretion to reduce contract rate of interest in mortgage suit

The Kerala High Court in *Bank of India v. Dr. Mrs. Mary George*[57] held that the Court had under O XXXIV the discretion to determine reasonable rate of interest irrespective of the contract rate. In the instant case the contract rate was 16% which was reduced to 12% by the Court.

Mere serving of full term in civil prison does not enable a person to be discharged of his debt

The Orissa High Court in *Santosh Kumar Mande v. A.B. Satpaty* [58] held that the mere fact that a judgement debtor is released from prison after serving a full term does not be discharge him of his debt. The decree holder is still entitled to attach and sell the judgement debtor's movable properties.

Sale Deed prior to the attachment will prevail over the attachment

The *Supreme Court in Hamda Ammal v. Anniappa Puthar*[59] held that where a Sale Deed has been executed by the defendant in favour of a third person, a transaction of sale already taken place before suit cannot be said to be with an object of delaying proceedings. The Sale Deed prior to attachment will prevail over the attachment before judgement. This is so even when it is executed pending registration as Section 47 of the Registration Act says registration will be relate back to date of registration.

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55 AIR 1992 SC 732.
56 AIR 1988 SC 1520.
57 1992 Ker 125.
58 AIR 1992 Orissa 29.
59 1991 1 SCC 715

LAW OF EVIDENCE

*S.V. Jaga Rao**
*K. Arun Kumar***

The period under review takes within its fold the judical pronouncements pertaining to definitional aspects, circumstantial evidence, identification parade, admissions, discoveries, dying declaratioin, relevancy of books of accounts, public records, relevancy of judgements and orders, expert opinion, judically noticeable facts, proof of execution, certfied public documents, oral and documentary evidence, burden of proof, dowry deaths, presumptions, estoppel, incrimination etc. As there are no legislative changes in this area the survey is confined only to decisional law.

Evidence

Evidence is the means in the light of which the existence or non existence of disputed facts would be proved. It may be adduced by the depositions or by documents. In the case of oral or testimonial evidence impartiality of the witness is very crucial, as appreciation of evidence squarely depends on such criterion. The witness is normally considered as being independent unless he springs from sources which are likely to be tainted, being interested in the final outcome of the proceedings.

In a criminal proceeding, where the main prosecution witness is wholly corroborated by other witness and also by medical evidence, submissions as to partisanship is of no avail according to the Supreme Court in *Guvala China Venkatesu v. State of Andhra Pradesh.*[1]

According to the High Court of Kerala, in a civil proceeding, a witness' testimony is not liable to be rejected merely on the ground that he is an interested witness.[2]

As regards natural and independent witnesses the Supreme Court in *Alma v. State of Madhya Prades,*[3] has held that a conviction can be based on their statement, even though the witness a had been declared as being hostile as against all other accused persons except the appellant.

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* Faculty Member, NLSIU, Bangalore.
** Student IV Year, NLSIU, Bangalore.

1 AIR 1991 SC 1926, K.N. Saikia, M.M. Punchhi, JJ.

2 AIR 1992 Ker 49, P.K. Shamsuddin, J.

3 AIR 1991 SC 1519, *A.M. Ahmadi V. Ramaswami, K. Ramaswamy,* JJ.

In some exceptional situations a witness may wilfully refuse to testify truthfully on behalf of the person who presents him as a witness in court. The evidence of such a hostile witness according to the Supreme Court in *Khujji v. State of Madhya Pradesh*[4] cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny.

As regards the credibility of evidence given by a witness, the Supreme Court in *Balbir Singh v. State of Punjab*[56] has held that the acquittal of one of the accused on the benefit of doubt, is no reason to discard the evidence of the witness as regards the other accused, when the witness has held a consistent view free of any infirmities and when it leads to the conclusion that the accused have intentionally caused death.

The Supreme Court in *Vindo Samuel v. Delhi Administration*[7] held that in a conviction for theft, the guilt is not proved beyond reasonable doubt when the witnesses could not definitely identify the features of the accused, though they had apprehended him after a long chase and more so when the chain alleged to have been stolen was not found in his possession. Similarly in *State of Rajasthan v. Madho,*[8] the Supreme Court held that where the prosecution shy away from disclosing the reality, doubts are cast on the genesis of the prosecution case and thus entitling the accused to the benefit of doubt. This was a case wherein the prosecution witnesses deposed that the accused having assaulted some people followed them as they were taken for treatment and delivered the fatal blows with a *farsi* on the head of the deceased. This story nevertheless failed to explain the injuries on the accused which were proved to have been caused in the course of the same incident.

In a civil case involving wakf property, the Punjab and Haryana High Court has held that in the absence of evidence as to whether members of the muslim community have been buried in the impugned land without objection from the owner, and evidence as to the nature, character and extent of such burials and in the absence of revenue or historical papers which describe the said land to be a public graveyard, which would be conclusive proof to prove the public character of the graveyard, the said property cannot be treated as a wakf property. This was the ruling in *Dwarka Dass v. The Punjab Wakf Board,*[9] wherein the sale of property was

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4 AIR 1991 SC 1853 A.M. Ahmadi, V. Ramaswamy, K. Ramaswamy, JJ.

5 AIR 1992 SC 214, A.M. Ahmadi, J

7 AIR 1992 SC 465, A.M. Ahmadi, M.M. Punchhi, JJ.

8 AIR 1991 SC 1065 (F.B), A.M. Ahmadi, V. Ramaswami, M. Fathima Beevi, JJ.

9 AIR 1991 P&H 88, R.S Mongia, J.

contested on the ground that there was no title to do so, and the defence had no direct evidence to show the dedication to public, by which alone a wakf can be created.

Circumstantial Evidence

Section 5 permits evidence to be given of relevant facts. This is recognition of the fact that in some cases the evidence to prove the guilt of the accused may have to be necessarily drawn from the circumstances impending the scene of crime. In such cases the circumstance must point towards the guilt of the accused and no other hypothesis but to that of guilt if a conviction is to be based on them.

The Supreme Court therefore held in *Jawarhrlal Das v. State of Orissa*[10] that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of innocence of the accused. The Court thus directed the courts to be watchful and to ensure that conjectures and suspicion do not take the place of legal proof, acquitted the accused, who was charged with the gruesome rape and murder of a five year old girl.

The apex court in *Sakharam v. State of Madhya Pradesh*[12], wherein the appellant, a child under the Childrens Act, was charged with the murder of the death of his uncle's wife by a gunshot, was convicted as he was the only person who accompanied the deceased lady in the house in which they lived and as he had failed to prove alibi or suicide.

Identity of persons whose identity is relevant

The identity of a person as being involved in the commission of a crime is relevant. This may be established by an identification parade arranged at the earliest point of time. The endeavour herein is to ensure that the witness is not guided in any way in establishing the identity of the person, which must be based on the mental impression made by the witness at the time of occurence.

The Supreme Court in *B. Pedda Narsi Reddy v. State of Andhra Pradesh*[13] held that, in the absence of cogent evidence as to the visibility of light and proximity of the witness, facilitating a clear vision of the action of each one of the accused persons so that their features could be imprinted on the mind of the witness, thus enabling future identification of

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10 AIR 1991 SC 1386, S. Ratnavel Pandian, K. Jayachandra Reddy, JJ.

12 AIR 1992 SC 758, Kuldip Singh, J.

13 AIR 1991 SC 1468, Fathima Beevi, J.

the accused and recollection of the scene, even after a long lapse of time, it would be hazardous to draw inferences from the evidence of such witnesses.

The Supreme Court in *Chaman v. State of Uttar Pradesh*[14] observed that excessive paper makeup on the face and body of the accused was held to render the identification parade wholly unreliable and unfit to base a conviction. This was a case of dacoity wherein the other persons from among whom he was identified also had similar patches, the patches having been made to cover some marks on the body of the appellant.

Unexplained delay in conducting the identification parade renders that evidence as to the identity of the accussed not absolutely reliable, according to the Supreme Court in *State of Andhra Pradesh v. M.V. Ramana Reddy,*[15] a case of murder of an advocate by the members of a trade union as he slept on the terrace of his house along with his daughter, the identifying witness.

Admissions

Admissions under Section 17 (Evidence Act) is a voluntary acknowledgement of facts in issue or relevant facts made by a party or a person identifiable with him in legal interest. Thus statements made by the brother before the Income tax department alleging that he was the tenant of the tenant, cannot be held as an admission against the tenant who was not a party to it, according to the Supreme Court in *Sri. Chand Gupta v. Gulzar Singh.*[16] Such acknowledgements may be made in the proceedings of the case, in which case they are binding on the person making them. On the other hand such acknowledgements made in other circumstances will also bind the parties making it when they partake the nature of an estoppel. The Patna High Court has therefore held that the recitals in a sale deed cannot be said to be immaterial or irrelevant due to the serious consequences that accrue,and that such extra judicial admission is admissible against the person making it *proprio vigore,* in a case of partition wherein the defendant was found to have identified the donor of the alleged gift deed as the owner of the impugned property in a sale deed. This was the case of *Maimuna Bibi v. Rasool Mian*[17] wherein the Court held that to make evidence admissible, it is not necessary to bring such fact to the notice of the person making such an admission. Similarly in *Chiranjilal v. Bhagwan*

14 AIR 1992 SC 601, Kuldip Singh, Yogeshwar Dayal, JJ.

15 AIR 1991 SC 1938, A.M. Ahmadi, M.M. Punchhi, JJ

16 AIR 1992 SC 123, K. Ramaswamy, Yogeshwar Dayal, JJ.

17 AIR 1991 Pat 203, S.B. Sinha, J. The Supreme Court ruling in *Biswanath Prasad v. Dwarka Prasad* AIR 1974 SC 17 was followed here.

Das[18] wherein income tax and wealth tax assessment orders which are not admissible under Section 40 to 42 of the Evidence Act were made admissible under Section 43 as they contained admissions relevant under Section 17 of the Evidence Act, in a suit for partition, with regard to the shares owned in the impugned property.

Discovery

Section 27 permits information received from the person accused in the custody of the police, which leads to a discovery of fact, to be proved, as the genuinness of such information is evident on the face of it. On this principle the Supreme Court held in *Khujji v. State of Madhya Pradesh*[19] that such evidence received will not be rejected on the ground that the witness to the panchnama, of the discoveries, being the neighbour of the deceased.

Dying declaration

Under Section 32 (1) statements made by a person as to the cause of his own death or as to the circumstances which resulted in the transaction which caused his death, irrespective of whether such person is under the expectation of death, are relevant when the cause of that person's death comes into question. They nevertheless have to be tested by the court as to their reliability. In this regard the Supreme Court in *Suraj Mal v. State of Punjab*[20] ruled that merely because the witness to the dying declaration was not satisfied with the recording of the dying declaration the veracity of the dying declaration is not affected in the absence of a suggestion that it was the converse.

Books of accounts - relevancy

Section 34 makes books of accounts relevant when they refer to a matter into which the court has to inquire, provided they are regularly kept in the course of business. The rationale behind this exception to the rule that a man cannot make evidence for himself, contained in Section 21 of the Evidence Act 1872, was explained by the Gauhati High Court in *Rukmanand Ajit Saria v. M/s Usha Sales Private Ltd.*[21] According to the Court, books of accounts kept in the regular course of business are supposed to be accurate and there is the strongest improbability of untruth

18 AIR 1992 Del 325.
19 AIR 1991 SC 1853, A.M. Ahmadi, V. Ramaswami, K. Ramaswamy, JJ.
20 AIR 1992 SC 559, S. Ratnavel Pandian, K. Ramaswamy, JJ.
21 AIR 1991 NOC 108 (Gau), S.K. Phukan, J.

of entries made in such books of accounts and is therefore made admissible under section 34.

On the probative value of this evidence the Gauhati High Court has held that a person cannot be entitled to a decree merely on the basis of entries in books of accounts kept in the regular course of business unless further evidence is adduced. This is the ruling in *Ajit Chand Bagchi v. Harishpur Tea Co. Pvt. Ltd.*,[22] wherein a credit sale was sought to be proved by books of accounts maintained by the plaintiff, on which the Court held that the benefit of Section 34 can be derived only when it is proved that the books of accounts were regularly kept in the course of business and when the books are proved properly. The books of accounts are properly proved when affirmed by the writer of the books unless it is impossible to bring him.

As to the ambit of this section the Punjab and Haryana High Court has, in *Suresh Kumar v. Mewa Ram*[23] held that Section 34 applies only to such entries in the accounts which are made in regular course and which create a liability. In this suit for eviction on grounds of non payment of rent, wherein payment was sought to be proved by receipts entered in *bahis*. The Court thus went on to hold that the entries in dispute creates no liability on the parties, the entries being merely in the form of receipts, thus Section 34 is not at all applicable to the case in hand.

Public records as proof

Entries in public records by public servants is a relevant fact under Section 35 of the Evidence Act, 1872 provided he has done so in the discharge of his official duty. The rationale is that this is recorded by a person authorised and accredited to do so and in whom law reposes confidence. The Punjab and Haryana High Court has held that in the absence of an entry in a public document, which was a mandatory requirement by the statute, there is an adverse presumption. This was the ratio in the *State of Punjab v. M/s. Subash Chander*[24] wherein, under the Punjab Land Act 1887, excess land over which no third party interest is claimed must be shown in the record of rights (also implied in the case). In the absence of such an entry the court held that there is an irrebutable presumption that it belongs to the landlord.

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22 AIR 1991 Gau. 92, Dr.B.P. Safari, J.

23 AIR 1991 P&H 254, A.L. Bahri, J.

24 AIR 1991 P&H 134, J.V. Gupta C.J., R.S. Mongia, J.

Relevancy of judgement and orders

Judgment, orders or decrees are made relevant when they relate to *res judicata* under Section 40; probate, matrimonial, admirality or insolvency proceedings under Section 41, or if they relate to matters of a public nature under Section 42 of the Evidence Act. Otherwise they are irrelevant unless their existence is relevant under any other provision of the Act, under Section 43. Thus in *Chiranjilal v. Bhagwan Das*[25] the Delhi High Court has held that Income tax and wealth tax assessment orders which are not relevant under Section 40 to 42 of the Evidence Act are admissible under Section 43, as statements therein amounted to admissions as to the shares held in the impugned property, in a suit for partition. While in *Raja Ram Garg v. Chhanga Singh,*[26] the Allahabad High Court held that the judgment of the criminal court would not be relevant in a claim petition under the Motor Vehicles Act even when they are in respect of the same transaction involving adjudication on the same issues. This ruling came in the claim petition under the Motor Vehicles Act, which was sought to be stayed on the ground that he is being prosecuted in a criminal court involving the same issues.

Expert opinion

When it comes to inferences, the opinion of experts is relevant under Section 45. This is based on the presumed expertise as to the subject matter on which such opinions are rendered. The expert is also fallible like all other witnesses. Thus in *Suresh Kumar v. Mews Ram*[27] the Punjab and Haryana High Court has held that the fact that the expert will favour the party who produces them can be no reason for discarding experts opinion, if the Court after examining the disputed signatures also comes to the same conclusion. The Court also held that in reinforcing the reasoning the court is not acting as an expert.

In *Rukmanand Ajit Saria v. M/s Usha Sales Pvt. Ltd,*[28] the Gauhati High Court ruled that every document must be proved for signature or handwriting by the writer of the document or by a person acquainted with the hand writing or on the basis of expert opinion. While the Madras High Court in *Venkata Lakshmiah v. Venkatappa*[29] has held that it is not essential that a handwriting expert be called to prove or disprove a writing, for the Court

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25 AIR 1991 Del 325, P.K. Bahri, J.
26 AIR 1992 All 28, B.P. Jeevan Reddy, C.J.
27 AIR 1991 P&H 254, A.L. Bahri, J.
28 AIR 1991 NOC 108, (Gau), S.N. Phukan, J.
29 AIR 1991 Mad 399, Abdul Hadi, J.

can do so on its own accord, however if the defendant chooses to have the benefit of the handwriting expert, he cannot be denied it unless such an attempt is very much belated or with an ulterior motive. This was a case wherein the defendant denied the signature on the sale deed.

In *A. Chandrabathi v. Lakshmi Dei,*[30] the Orissa High Court has ruled that the expert need not know the language in which the signature is made.

Judicially noticeable facts

Under Section 3, a fact is said to be proved when after considering the matters before it the Court believes it to exist, but in some circumstances the Court may believe in the existence of a matter before it, of its own knowledge and such facts need not be proved under Section 56. This was utilised by the Supreme Court in *Shashi Nayar v. Union of India,*[31] wherein the Court took judicial notice of the fact that law and order situation in the country has not only not improved since 1967 but has deteriorated over the years and is fast worsening today, while reemphasising the relevance of death penalty and the Law Commission's opinion on the matter in 1967 and in asserting the constitutional validity of death sentence.

Proof of execution

Section 68 requires that any document which is required to be attested by law cannot be used as an evidence unless atleast one of the attesting witnesses has been called upon to prove its execution whereever possible.

In *Chandrabati v. Laxmi Dei,*[32] the Orissa High Court held that it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary requirements of law in the case of a will as it is one of the solemn documents by which a dead man entrusts to the living the carrying out of his wishes and in view of the very fact that he cannot be called upon to either deny his signature or to explain the circumstances under which the will was executed.

In *Sumangala T.Pai v. S. Sundaresha Pai,*[33] the High Court of Kerala has held that though the evidence required by law is that of the attestors other kinds is not shut out by law in proving a will.

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30 AIR 1991 Ori. 289, A. Pasayat, J.

31 AIR 1992 SC. 395, K.N. Singh, P.B. Sawant, N.M. Kasliwal, B.P. Jeevan Reddy, G.N. Ray, JJ.

32 AIR 1991 Ori. 289, A. Pasayat, J.

33 AIR 1991 Ker. 259, U.L.Bhat, T.U. Ramakrishnan, JJ. It overruled its own decision in AIR 1989 Ker 228.

Certified copies of public documents

Section 76 requires that a public officer who has the custody of a public document shall give certified copies of the document to any person on the payment of the requisite legal fees, when the document is of that nature as may be inspected by any person. Section 77 provides that such certified copies may be produced as proof of contents of public documents.

The object of the High Court rules prescribing that every certified copy shall indicate the date of application, the date of posting the notice and the date of delivery in words as well as in figures is to exclude all possibilities of tampering with those dates which play a crucial role in computing the period of limitation, according to the Allahabad High Court.

This remarks was made in *U.P. State Road Transport Corporation v. Kedar Singh,*[34] wherein some interpolation as to the date of delivery of the judgement copy was detected.

Exclusion of oral by documentary evidence

Section 91 provides that when law requires that the terms of a contract, a grant or disposition of property be reduced to the form of a document no evidence shall be given except the document itself or secondary evidence of its contents. Section 92 provides that in the case of such documents or any other matter required by law to be reduced to the form of a document no evidence of any oral agreement or statement shall be admitted to contradict, vary, add or subtract from its terms, except in cases of illegality, on the presence of agreements prior to or subsequent to the contract, to show the presence of oral agreements consistent with the document on which it is silent, evidence as to customs and also evidence as to show the links between facts and language.

In *Leelamma Ambika Kumari v. Narayanan Ramakrishnan,*[35] it was held that Sections 91 and 92 create a complete bar on a plea that a consideration for a sale is more than what is mentioned in the conveyance or in the contract. This decision of Kerala High Court appeared in a case wherein the plaintiff contended that the actual consideration for the sale of land with an unfinished building was Rs.16,000/- as against Rs.10,000/- as mentioned in the sale deed. The Court also observed that a plea of non-payment of consideration or a failure of consideration or that the consideration was of a different kind would be barred by these sections.

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34 AIR 1991 All 317, N.N. Mithal & G.D. Dube, JJ.

35 AIR 1992 Ker 115, P. Krishnamoorthy J : It followed AIR Mad 147, AIR 1970 Mys 270.

While in *Raghunath Tiwary v. Ramakant Tiwary*[36] the Patna High Court opined that, no oral evidence was admissible unless a specific pleading of fraud was made in the complaint to prove that the recitals of the sale deed are not correct, in a suit partition wherein the validity of a sale deed was questioned.

In *Gouranga Sahu v. Maguni Dei*[37] the Orissa High Court has held that, under Sections 91 and 92 oral evidence can be adduced to prove that the document was a sham and that it was not acted upon, wherein the document was a gift deed.

In *Anjali Das v. Bidyut Sarkar*[38] the Calcutta High Court has observed that Section 92 of the Evidence Act does not apply to agreements which are partly oral and partly in writing, to prove the exact terms of the agreement. This was a suit for specific performance wherein the contract to sell was shown to exist prior to the letter which was said to evidence the contract and the Court accordingly let in evidence of an oral form, which was contrary to the express terms of the written agreement.

In *Javarasetty v. Ningamma,*[39] the Karnataka High Court has ruled that there is no prohibition imposed on the Court to prefer or act upon oral testimony over the available documentary evidence for good and sufficient reasons. This was a case as to property rights wherin the material question was whether the birth of a person was before of after the death of the Karta, so as to ascertain the rights of a woman member in the said property. Oral evidence here was given precedence over school certificates evidencing the date of birth of the student.

Burden of proof

The general rule as to the burden of proof or to the onus of proving a requisite fact is on that person who asserts it, whose motion would fail if no evidence was given on either side or on the person who wishes the Court to believe in its existence.

In *Chaitan Charan Parida v. Maheshwar Parida,*[40] the Orissa High Court held that, the burden of proof is on the person who attacks a document, but in the case of a 'pardhanashin' woman, the burden is on the person who is the beneficiary under the document to prove that the document was executed after understanding the impact of the document,

36 AIR 1991 Pat 145, S.B. Sinha, J.
37 AIR 1991 Ori 151, G.B. Patnaik, J.
38 AIR 1992 Cal 47, Manoranjan Mallick, J.
39 AIR 1992 Kan 160, M.P. Chandrakantaraj Urs, J.
40 AIR 1991 Ori 325, A.K. Padhi, J.

with independent advice and after it was read out and explained to her. The court also held that this rule will not be followed if the lady is shown to have business capacity and strength of will or if the deed is shown to have been in the circumstances of the case a natural disposition of her property. This ruling of the court was in a case wherein the pardhanashin woman was alleged to have executed a gift deed in favour of her husband and another.

In *United India Insurance Co.Ltd v. O.Jameela Beevi,*[41] the Kerala High Court went on record by saying that the burden of proving the fact which excludes the liability of the insurer to pay compensation lies on the insurer alone and no one else. This ruling came in a case of accdient claim wherein the insurer claimed that the subject matter, namely the vehicle had been sold to the driver.

In *Raghunathi v. Raju Ramappa Shetty,*[42] the Supreme Court held that it is settled law that once the parties have been permitted to produce evidence in support of their respective cases and it is not their grievance that any evidence has been shut out, the question of burden of proof loses significance and remains only academic.

Dowry death

A sucide by a married woman within seven years of marriage, having been subjected to cruelty at some point of time leads to the presumption that the suicide was abetted by the husband or near relative accused of it, under Section 113-A. In other cases of unnatural death, of the woman who has been subjected to cruelty with relation to a demand for dowry, the accused is presumed to have caused a dowry death, under Section 113-B. In *Shanti v. State of Haryana*[43] the Supreme Court went on record by holding the question whether the unnatural death was homicidal or suicidal is irrelevant under Section 304-B of the Penal Code read with Sections 113-A and 113-B. In this case, cruelty having been established and death being within seven years of marriage, in unnatural circumstances, the accused was sentenced to undergo imprisonment for life.

Presumption of facts

Section 114 enables the court to infer the existence of one fact from the existence of some other facts based upon previous experiences on the

41 AIR 1991 Ker 380, U.L. Bhat, G.H. Ghuttal, J.
42 AIR 1991 SC 1040, N.D.Ojha, K.N. Saikia, JJ.
43 AIR 1991 SC 1226, S. Ratnavel Pandian, K. Jayachandra Reddy, JJ.

common course of natural event, human conduct and public and private business. The courts have presumed the service of notice under this provision. As in *D.Ennis v. Calcutta Vyapar Pratisthan,*[44] wherein the Calcutta High Court has held that, the notice is deemed to have been served where the notice is returned with the endorsement 'left' and the landlord has taken all possible measures to serve that notice on the tenant, who had made herself scarce for a long time without having authorised anyone to accept letters. This was a suit for eviction wherein the defendant took the plea that no notice was served on her.

Similarly in *Akileshwar Upadhyaya v. Magadh Stock Exchange*[45] the Patna High Court observed that, the question of serving a notice does not arise when the consequences of failure to discharge his duties as a stock broker was intimated to him and the same also being clear from the Articles of Association of the Stock Exchange, where a stock broker was declared a defaulter on non payment of money due to the exchange.

In the case of public notification, the Kerala High Court has ruled that, the public notice declared to have been made on a specified date by the Village Officer, is entitled to the protection of the presumption under section 114, in the absence of any evidence rebutting the presumption.

This ruling came in *Balakrishna Pillai v. State of Kerala,*[46] a case under the Kerala Land Acquisition Act wherein the petitioners had contended that the notification could not have been made on the same day on which the notified declaration was made by the Board of Revenue, in which case the acquisition proceedings would lapse by the passage of time, within which time the proceeding was to be complete.

This power of presumption have also been used to presume regularity in many cases. In *Manickan v. Kanakam,*[47] purchase certificate issued under the Kerala Land Reforms Act, 1964 was presumed to be regular under sectioin 114 of the Evidence Act.

In *Rachna v. Himachal Road Transport Corporation*[48] the presumption of regularity in the performance of official acts, in the issue of driving license and the issue of a medical certificate to the driver is not sufficient to absolve the liability, when the burden of proving due care by the prudent employer was heavy, in a case involving accident claim.

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44 AIR 1991 Cal 152, S.S. Ganguly, S.P.Rajkhowa, JJ.
45 AIR 1992 Pat 61, R.N. Prasad, N.P.Singh, JJ.
46 AIR 1992 Ker 136, K. Shreedharan, J.
47 AIR 1991 Ker 316, L. Manoranjan, J.
48 AIR 1991 HP 73, V.K. Mehrotra, J.

Certain presumptions have also been invoked in the domain of family law. In *Chito Mahto v. Lila Mahto*[49] the Patna High Court has held that, there is a presumption of jointness and in the absence of any document of settlement the court has no other option but to draw a presumption that the properties in question were not ancestoral properties.

In *S.P.S Balasubramanyam v. Suruttayan*[50] the Supreme Court has held that a man and a woman cohabiting and living together under the same roof for a long number of years raises a presumption that they lived as husband and wife. This presumption cannot be said to be destroyed when the evidence does not deny that they were so living or does not question the legitimacy of the children so born.

In *Govind Laxman Solapurkar v. D.D.Kelkar*[51] it was held that the nonproduction of best evidence on which the parties could rely would be a ground for drawing an adverse inference by the court only if the court had given a direction in respect of production of such evidence or if it was demanded by the other party to the suit. This ruling of the Allahabad High Court came in a suit for eviction wherein the landlord made a casual statement that he had made entries in respect of rent in a diary which was not produced in evidence, on which ground the trial court applied the penal consequences of Sectioin 114.

Estoppel

Where a person is made or permitted to believe and to act on such belief, Sectioin 115 prevents him or his representative in interest from denying the truth of that thing, between them. This is the principle of estoppel under the Indian Evidence Act.

The Madras High Court has pointed out that the principle of estoppel is a product of enquity devised to prevent injustice. The fundamental basis of a document according to the court is that, where any party has by his words or conduct made, to the other party an unequivocal promise or representation, which is intended to create legal relationship or which effects legal relationship to arise in future, knowing and intending that the representation, promise or assurance would be acted upon by the other party to whom it has been made and the other party has acted based on this representation then the promise would be binding on the person making it as it would be inequitable to allow him to go back on that promise. This

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49 AIR 1991 Pat 186, S.B. Sinha, J.
50 AIR 1992 SC 758, K. Jagannatha Shetty, R.M. Sahai J.
51 AIR 1991 All 226, M.L. Bhat, J.

principle according to the Court, cannot be attracted against the legislature in the exercise of its legislative functions, or against the Government or Public Authority in performing a statutory duty or to compel to perform an act contrary to law or beyond the scope of their powers. The promise, it was stressed, must be clear, unambigious and not tentative or uncertain. This was in the case of *S.Ramabadran v. State of Tamilnadu.*[52]

In *D.D.A v. Lala Amar Nath Educational and Human Society*[53] the Delhi High Court held that the allotment letters issued, within the authority given under law, based on which the society had altered their position after making payments and taking possession of land would be binding as the principle of promissory estoppel would be invoked. This ruling of the Delhi High Court came in a case wherein the prices of land allotted by the Delhi Development Authority to a Society on a no profit, no loss basis was suddenly enhanced by 350 percent. The contract being in the pre-executory stage and the cancellation being a matter of uniform policy and due to the peculiar circumstance of the case, the Madhya Pradesh High Court held in *Nandkishore v. Nagarpalika, Shahajapur*[54] that promissory estoppel could not be invoked. This was a case wherein the right to collect terminal taxes having been auctioned to the petitioner was cancelled by a change in the governmental policy.

Mere recommendation by the State Government for the grant of mining licence does not attract promissory estoppel as it was subject to the approval of the Central Government, according to Supreme Court in *India Metals and Ferro Alloys Limited v. Union of India*[55]. In *Bhilai Steel Plant v. Special Area Development Authority*[56], Bhilai, the Madhya Pradesh High Court held that the petitioners having acted on the agreement with the local authority, the local authority is stopped from going back from the agreement, in a case in which the Bhilai Steel Plant had contracted with the local authorities that no property tax will be levied on the township which the steel plant planned to develop within it's own premises. In lieu of such an undertaking the Company was to pay a sum of Rs.5 lakhs per annum besides the Company also undertook to provide civic amenities within the said township. They also agreed to pay a sum of Rs.3 lakhs as grant in aid towards development. In this case the Bhilai Steel Plant had already performed a part of its undertaking under the said contract. In

52 AIR 1991 Mad 371, Adarsh S. Anand C.J., Raghu, J. *See* also AIR 1991 AP 331.
53 AIR 1991 Del 96, R.N. Pyne C.J., B.P. Wadwa, J.
54 AIR 1991 MP 99, A.G. Qureshi & Y.B. Suryavanshi, JJ.
55 AIR 1991 SC 818, S. Ranganathan & M. Fathima Beevi, JJ.
56 AIR 1991 MP 332, B.C. Verma & B.K. Sethi, JJ.

Modi Alkalies and Chemicals Ltd v. The State of Rajastan,[57] the Rajastan High Court estopped the Government from withdrawing concessions, initially granted to induce to setting up of new industries in the State by exempting the payment of electricity duty for 5 years, by a subsequent notification. In response to the governmental plea of financial distress the Court also observed that had the financial distress and drought conditions be proved by the Government, it would be sufficient to tilt the scales of equity, against the operation of the principles of estoppel.

In *Steel Crackers* v. *M.S.R.C.*[58] the Calcutta High Court held that the Government having made a representation to an ordinary individual of particular set of facts or circumstances by reason wherefore, the individual concerned was wilfully induced to act upon that representation the government agency is estopped as against the individual from contending otherwise. In this case M.S.T.C., the selling agent of S.A.I.L., refused to perform reciprocal sale when the Steel Crackers had already made a purchase based on that agreement.

The Calcutta High Court bound the New Indian Assurance Co. by the rule of estoppel as the Insurance Company had invited the plaintiff to place the insured car for repair at their appointed garage and also having assured the plaintiff that they would repair the car and deliver the same. This was the case of *Rajendra Kumar Arva v. New India Assurance Co.*[59] wherein the Insurance Company disclaimed liability in the Court on the ground that the plaintiff had failed to comply with the arbitration clause in the policy.

In *Kanishka Aggarwal v. University of Delhi*[60] it was held that the allotment of a role number, identity card, a section and all communications of University which presented the plaintiff as having been admitted was sufficient enough to show that there was a representation by the University. The Court went on to hold that the other avenues opened to the plaintiff now being closed, constitutes a sufficient detriment. Thus the Delhi University was estopped from denying the plaintiff a valid admission.

No estoppel can be pleaded against the statue to prejudice the minor or a lunatic who enjoys the protection of law. According to the Madhya Pradesh High Court in *Johari v. Mahila Draupati.*[61]. This was the case of a transfer of property by the wife of a lunatic on his behalf.

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57 AIR 1992 Raj 51, Inder Sen Israni, J.
58 AIR 1992 Cal. 86, Umesh Chandra Banerjee, J.
59 AIR 1992 Cal 110, Mahitosh Majumdar, Abhani Mohan Sinha, JJ.
60 AIR 1992 Del 105, Malik Sherief-Ud-din, Jaspal Singh, JJ.
61 AIR 1991 MP 340, S.K. Dubey, J.

Where the promissor retains the power or discretions of not being bound by the promise, the whole basis for invoking the doctrine of promissory estoppel goes. According to the Delhi High Court in *R.K. Deka v. Union of India.*[62] This was a case of aborting a scheme for allotment of residential plots to non-residents living abroad, on an experimental basis, due to poor response and escalation of cost.

In *Chandrakant Bhailal Patel v. T.V. Krishnamurthy*[63] the High Court of Gujarat estopped the plaintiff from denying that the Gram Panchayat lacked the authority to grant lease of a well when his previous contract of lease of a well was with the Gram Panchayat.

On a lease of property the change of use of property having changed about 7 years prior to the suit for eviction the Supreme Court held that the landlord must be said to have accepted the use of the property on lease for commercial purpose also and thus landlord was estopped from contenting that the property had been put to uses other than what was contemplated in the agreement for lease. This observation was made in *D.C. Oswal v. U.K. Subbaiah*[64].

With reference to estoppal on the right of presumption the Supreme Court has held in *Indira Bai v. Nand Kishore*[65] that the application of the rule of estoppel as a defence in cases where a preemtory right holder being aware of the impugned sale surruptitiously permits it and also assists the vendee in making improvements on the land, depends on whether the statute conferring the right seeks to protect a public or a private interest. The Court held that, where the interest sought to be protected is public in character, it may be difficult to apply estoppel as a defence. But where it is a right of the party alone, then it is capable of being abrogated either in writing or by conduct.

The right of prior purchase being a statutory right, notice must be as provided for in the statute and in its absence estoppel cannot come to nullify the requirement of a notice to extinguish the right of prior purchase. It was so held in *Abdul Aziz Pattoo v. Khatji.*[66]

Estoppel by pleading : In execution proceeding arising out of an eviction suit in *Radheshyam Modi v. Jadunath Mohapatra*[67] it was held by the orissa High Court, in the main suit on the death of the father the other

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62 AIR 1992 Del 53, Arun Kumar, J.
63 AIR 1991 Guj 63, R.K. Abhichandani, J.
64 AIR 1992 SC 184, Ranganath Misra & T.K. Thommen, J.
65 AIR 1991 SC 1055, K. Jaganatha Shetty, J.
66 AIR 1991 J&K 34, G.A. Kuchhai, J.
67 AIR 1991 Ori 88, P.C. Misra, J.

party who is also the son of the deceased filed the memo that he be allowed to continue the revision without impleading the other heirs of the deceased, and in the absence of subsequent demands for the inclusion of the other heirs by him or by the other heirs, he cannot be allowed to turn back and contend in the same execution proceeding that the proceeding is liable to be dismissed in the absence of other legal heirs.

An objection to the jurisdiction of a school committee consisting of outsiders cannot be raised as it was barred by estoppel according to Supreme Court in the *National High School v. Educational Tribunal*[68], the respondent himself having demanded an enquiry by educationists other than the school committee and also having participated in the enquiry without raising any objection as to the jurisdiction of the committee.

Where in an earlier suit the plaintiff had not raised the contention that the agreement for sale was contingent in nature and therefore unenforciable, by virtue of which he had obtained a judgement, it would not be open for the defendent to content now that it is a contigent contract and therefore unenforciable, according to the Kerala High Court in *S.R. Varada Raja Reddiar v. Francis Xavier Joseph.*[69]

The plea of illegality is a good answer to the objection of consent and defence of estoppel, according to the Supreme Court in *Union Carbide Corporation v. Union of India*[70] wherein the Union of India having been a party to the compromise with the Union Carbide turned around to content that the compromise was illegal and thus the agreement is void.

Estoppel by procedure : Where there is material to infer that the appellant had accepted and was satisfied with the award of the Additional District Judge though no notice was served in those proceedings, it will not be open to the appellant to assail the enhancement made by the court of reference on the ground of non-service of notice as was held in *Krishi Upaj Mandi Samiti v. Ashok Singhal*[71] by the Supreme Court, wherein even after the quit notice the tenant rendered rent for the post-notice period and continued in possession there is an implied waver of the first notice, according to the Calcutta High Court. It was so held in *Malina Mondal v. Pushpa Rani Dasi*[72], a suit for eviction, which was challenged as being bad

68 AIR 1992 SC 717, Jaganatha Shetty, & Yogeswar Dayal, JJ.
69 AIR 1991 Ker 288, P.K. Shamsuddin, J.
70 .AIR 1992 SC 248, M.N. Venkatachaliah, J.
71 AIR 1991 SC 1320, M.N. Venkatachalaiah, J.
72 AIR 1991 Ker 288, P.K. Shamsuddin, J.
70 AIR 1992 SC 248, M.N. Venkatachaliah, J.
71 AIR 1991 SC 1320, M.N. Venkatachaliah, J.
72 AIR 1991 Cal 291, J.N. Hore, J.

in law, for it was based on second notice.

The Madhya Pradesh High Court had held that an arbitration proceeding cannot be brought to play thereby preventing the suit from proceeding, by appointing an arbitrator when the stay granted on that ground had been withdrawn by him. This was in the case of *Kishanadas v. Bhagchand*[73] where in a stay of suit was withdrawn and was participated in by the party.

A tenant having abandoned his statutory right to the fixation of standard rent mid-way through the proceeding, a fresh exercise of the right can be availed of only if a fresh cause of action arises as was held in *Y.A. Mistri v. L.H. Kadri.*[74 & 75]

In *Nilofar Insaf v. State of Madhya Pradesh*[76] the Supreme court has ruled that the meritless challenge being the reproduction of an earlier list which was not challenged, the challange at a second stage must be debarred on equitable considerations.

Estoppel in error : The failure of the authorities to enquire into the community background of the plaintiffs to whom alone some job oriented training and stipend was reserved, which resulted in the plaintiffs' completing the training and thus entitling themselves to stipend, they cannot be denied this at this stage as it would result in the miscarriage of justice, according to the Kerala High Court in *Kamalu Itty v. Asst. District Industries Officer.*[77]

In *Plasmac Machine Manufacturing Co. Pvt. Ltd v. Collector of Central Excise,*[78] the Supreme Court held that the Tax Department's earlier classification and approval under the same entry will not estop them from revising the classification. This was a case under the Central Excise and Salt Act 1944 wherein a company manufacturing injection moulding machine, also manufactured 'tie-bar nuts' used in the machine were being taxed under the same entry providing for the taxation of the machine. The objection arose when they were sought to be taxed under different entries. On the same principle the Supreme Court in *Commissioner of Income Tax v. British Paints India Ltd.*[79] held that the officer is not estopped from accepting the system of accounting regularly employed by the assessees. The correctness of which was not questioned in the past.

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73 AIR 1991 M.P 309, B.C. Varma, J.
74 AIR 1991 Guj 180, Y.B. Ghatt, J.
75 AIR 1991 Bom 296, M.F. Saldhana, J.
76 AIR 1991 SC 1872, S. Ranganathan, M. Fathima Beevi & N.D. Ojha, JJ.
77 AIR 1991 Ker 405, Radhakrishna Menon, JJ.
78 AIR 1991 SC 999, K.N. Saikia, R.M. Sahai, JJ.

A statement in misapprehension of legal rights cannot be estopped according to the Calcutta High Court in *Sukumar Chakraborthy* v. *Asst. Assessor Collector.*[80]

Estoppel in maintenance : The doctrine of estoppel cannot be invoked against a person so as to defeat a claim for higher maintenance as it would be contrary to Section 25 (2) of the Hindu Marriage Act and thus an invalid contract, besides it would also frustrate the purpose of maintenance according to the Allahabad High Court in *Ram Shankar Rastogi* v. *Vinay Rastogi.*[81]

Estoppel on tenants : The tanents cannot be denied of the tenancy rights existent prior to the execution of the sale deed in favour of the present owners, according to Punjab and Haryana High Court in *Kuldip Singh v. Balwant Kaul*[82] wherein the tenants under a bonafide belief that they were the owners, denied that they were the tenants of the actual owners by virtue of a sale deed prior to the sale deed held by the tenants. The trust being represented by a trustee, the trustee is the land-lord and as the tenant obtained their possession of their property as a tenant it is not open to him to deny the relationship of the landlord and the tenant. He is thus liable to be evicted on grounds of wilful denial of title according to Madras High Court in *Kamuthi Madalaichamy v. Thangarathina Nadar.*[83]

While the Bombay High Court has held that where the tenant repudiates or disputes the title of the landlord section 116 of the Evidence Act does not require that there should be a decree forthwith for eviction. The rule of estoppal only means that the defence of such nature outght to be shut out and the defendants for this reason cannot be deemed to have lost the protection under the Bombay Rents, Hotels, and Lodging House Rates Control Act, 1947 in a suit for eviction thereunder. This was in the case of *Leena Pereira v. Mary Boracho.*[84]

Incrimination - no excuse

Section 132 compels a witness to answer any question in any civil or criminal proceeding despite an excuse on the ground that the answer will incriminate, in the interest of justice. The excuse under the proviso to the section will operate if the answer would subject him to arrest or prosecution

79 AIR 1991 SC 1338, T. Kochu Thommen, J.
80 AIR 1991 Cal 181, K.M. Yusuf, J.
81 AIR 1991 All 255, S.K. Deon, B.L. Yadav, J.
82 AIR 1991 P & H 291, Ashok Bhan, J.
83 AIR 1991 Mad 229, Sunni Durai, J.
84 AIR 1992 Bom 93, B.N. Sri Krishna, J.

or if it would be proved against him in a criminal proceedings except when it is used in a prosecution for giving false evidence on such answer.

The proceedings before the Lok Ayukta being taken to be a civil proceeding by virtue of it being deemed to be a Civil Court there is reason as to why the protection of the provisio to Section 132 should not apply to a witness who has been compelled to answer any question during investigation. It is so held in *Rajendra Manubhai Patel v. State*[85] wherein the constitutionality of Gujarat Lok Ayukta Act, 1986 was challenged before the High Court of Gujarat.

Section 134 - number of witnesses

It is not the quantity but the quality of witness which go to prove a fact. This was reiterated by the Supreme Court in *Jayaram Shiva Tagore v. State of Maharashtra*[86] wherein it emphasized that when the prosecution rests on the sole testimony of the eye witness it should be wholly reliable. It also held that each and every type of infirmity or minor discrepancy such as the time during which the deceased was said to be working on the field when the sole witness, the wife of the deceased, carry food personally would not render the evidence of such witness unreliable.

85 AIR 1992 Guj 10, R.K. Abhichandani, J.

86 AIR 1991 SC 1735, S. Ratnawal Pandian, K. Jayachandra Reddy, J.

X. TAX LAWS

The New Economic Policy of the Government of India is reflected in the Annual Budget presented by the Finance Minister on 28th February, 1992. In the Budget proposals, the Finance Minister has implemented major recommendations of the interim report of Chelliah Committee. The Committee has submitted its final report recently.

As regards corporate taxation, only marginal changes have been made, since Chelliah Committee which is considering in detail the proposals for corporate tax reform had not yet submitted its recommendations at the time of Budget presentation. Further, a Direct Taxes Code, integrating all direct taxes, is under an active consideration by the Government. In part A, I have given details of major changes made in the Annual Budget in Income Tax and Wealth Tax. In part B, Ramanand Shankar, IV Year student has reviewed the Supreme Court's decisions during the year 1991-92.

DIRECT TAX

*K.C.Gopalkrishna**
*Ram Anand Shankar***

Part A

Budget proposals 1992:

The most important event during the year is the Annual Budget presentation by the Finance Minister on 28th February, 1992. The Budget reflects the new economic policy of the Government and also the interim recommendations of the Chelliah Committee.

The salient features of the Union Budget 1992 are the following.

(i) raising the exemption limit from Rs.22,000/- to Rs.28,000/-;

(ii) abolition of the distinction between registered and unregistered firms and cumbersome procedure in the assessment of partnership firms. The firms will have to pay 40% on the total income earned by them. If the income exceeds Rs.1 lakh, a surcharge at 12% on income tax will be levied. Partner's share income will not be taxed in the hands of the partners. Salary, commission, and bonus due to the partners will be allowed as a deduction subject to certain restrictions in computing the income of the firm. Interest paid to the partners will be allowed subject to the maximum rate of 18% p.a. These changes will be applicable for the assessment year 1993-94 and onwards;

(iii) minor's income and wealth will be clubbed with the income and wealth of the parent. However, professional and wage income of minors are excluded from clubbing;

(iv) major change has been made in the computation of long term capital gains. Under the new scheme, taxable capital gains will be computed by allowing the cost of the asset to be adjusted for general inflation before deducting from sale proceeds. The adjustment factor for each year will be notified by the Central Government. The long term capital gains thus computed will be taxed at 20 percent in the case of individuals and Hindu undivided families; 40 per cent in the case of companies, firms, association of persons and bodies of individuals

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* Faculty Member, NLSIU, Bangalore.
** Student IV year, NLSIU, Bangalore.

and 30 per cent in case of others. The cut off date for valuation is shifted from 1.4.74 to 1.4.81. Standard deduction in computing the taxable capital gains invested in specified assets and Sec. 53 in respect of capital gains arising from sale of residential house are withdrawn;

(v) introduction of presumptive tax system in respect of shop keepers and other retail traders with an annual turnover below Rs. 5 lakhs. Under the simplified scheme, the tax payer under this category need not maintain detailed account books or file a complicated tax return but file a simple statement and pay Rs.1400/- as tax for each year. The scheme is introduced on a purely optional basis and is intended only for those who may have taxable income and wish to avail of this simplified procedure;

(vi) section 44 AC imposing tax on presumptive basis on liquor, timber business, etc., has been withdrawn;

(vii) income tax exemption in regard to payments received by private sector employees seeking voluntary retirement has been allowed;

(viii) tax exemption to the (a) compensation received by victims of Bhopal Gas Leak Disaster; (b) co-operative societies promoting interests of the members of Scheduled Castes and Scheduled Tribes; (c) co-operative societies engaged in the business of banking from interest tax;

(ix) limit for imposition of surcharge has been increased from Rs.75,000/- to Rs.1 lakh;

(x) on the basis of Chelliah Committee's recommendations, important changes have been made in the Wealth Tax Act. Wealth tax on productive assests of the tax payer has been exempted. Wealth tax will be levied on individuals, Hindu undivided families and all companies only in respect of non-productive assets such as residential houses including farm houses and urban land, jewellery, bullion, motor cars, planes, boats and yachts which are not used for commercial purposes. Basic exemption limit is increased to Rs.15 lakhs and the rate of tax is one percent of the taxable wealth;

(xi) no change in corporate taxation;

(xii) advance rulings: A scheme for giving Advance Rulings in respect of transactions involving non-residents will be worked out and put into operation soon. The scope of this can be extended subsequently on the basis of the experience gained;

(xiii) National Court of Direct Taxes: The Government is planning to set up a National Court of Direct Taxes in order to ensure that litigation in direct tax matters is settled expeditiously;

(xiv) Direct Taxes Code: The Government will prepare a Bill on Direct Taxes Code, integrating therein all the three direct taxes so as to make the law easily understandable and tax administration simple;

(xv) Section 132 has been amended to the effect that any person whose premises is raided by the Department, he shall personally attend during search unless he is permitted to go by the authorised officer subject to the conditions imposed by him. This amendment nullifies the Delhi High Court's decision in *L.R. Gupta v. Union of India* (1991) 59 Taxman 305) to the effect that once the statement of a person whose premises, etc. is being searched has been recorded, the Department has no power to restrain him from going out from the place of search.

The above are the major policy changes with regard to Direct Taxes. Many marginal changes are proposed in the Budget mostly on equity grounds.

Part B

Supreme Court Decisions

Sharanpur Electric Supply Co. v. C.I.T. (1992) 60 Taxman 412

Point involved: The written down value of assets acquired previous to the assessment year 1962-63 was ignored and instead Section 43(6)(h) was applied, and the actual cost of the installed service connection was computed by excluding the part of the cost met by the customers.

Decision: The revenue's claim was upheld on the ground that under Sec.43, the officer had to determine the actual cost of all assets, new and old. Sec.43(6) envisages the computation of the actual cost of each asset, for every assessment year not only in respect of assets acquired during the previous year but also in respect of assets acquired before the previous year.

C.I.T. v. Nawab Mir Alam (1991) 57 Taxman 97

Points involved: Whether Section 60 and 61, I.T. Act were attracted as the assessee had used his absolute discretion to defray expenses from a trust set up by him for the purpose of Haj travel.

Decision: (a) The decision was in favour of the assessee. (b) Sec.61 was not attracted, as the assessee as the trustee had a very wide discretion on him to decide in what matter the income from the trust could be paid. (c) Reliance was placed on *C.I.T.* v. *Raghbir Singh (1965) 57 I.T.R. 408.*

Mahadeo Prasad v. I.T.O. (1992) 60 Taxman 388

Points involved: Whether the assessment already completed for the years 1953-54 to 1961-62, could be responded in 1977, by applying Sec.148 with respect to the 1922 Act ?

Decision: It was in favour of the Income Tax Officer.

(a) Sec. 150 (1) removed the bar of time with respect to the present 1961 Act.

(b) Sec.297(2)(d)(ii) saved administrative steps taken under the 1922 Act, by deeming them to be steps taken under the 1961 Act; hence the orders passed by the I.T.O., the Tribunal etc., were deemed to mean orders passed under the 1961 Act.

Important principle: The decision relates to the interpretation of transitional provisions contained in Sec.297 to facilitate the change from the 1922 Act to the 1961 Act; the Court opined that Sec.297 provided for the continuity from the 1922 Act to the 1961 Act and should be construed to effect such continuity and not to create a lacuna.

H.H. Sri Rama Varma v. C.I.T. (1991)57 Taxman 149

Points involved: The issue was whether donations of shares to certain funds, charitable institutions etc., qualify for deduction under Sec.80(g) (2) (a) ?

Decision: It was in favour of the Department.

Section 80(g)(2) (a) uses the words any sums paid, which means only payment of money. 'Shares' are not contemplated by Sec.80 G to be deducted.

Somasundaram Chettiar v. C.I.T. (1992) 60 Taxman 406

Points involved: Whether the assessee could claim proceeds from contracts by purchasing and the sale of the same goods as speculative transaction, under Sec.24 ?

Decision: The Court rejected the assessee's contentions.

Sec.24(a) first part refers to contracts of merchandise, being speculative transactions. The second part refers to contracts for the actual delivery of goods sold by him. There has to be a corelation between the first and second parts; unless such corelation exists, the first part is not attracted. The words 'for actual delivery of goods' include contracts of purchase and hence the assessee's contracts do not fall within Clause(a).

Vijaya Bank v. C.I.T. (1991) 57 Taxman 152

Point involved: Whether interest accrued on securities purchased by the assessee bank from another bank/open market can be deducted under Sec.19 and 20 ?

Decision: It was in favour of the I.T. Department.

(a) The price paid to purchase the securities was the consideration in the nature of a capital outlay; no part of it could be set off as expenditure against income accruing on those securities. When such securities yielded interests, such income was taxable under Sec.18.

(b) The amounts claimed by the assessee was not shown to be expended for the purpose of realising the interest and therefore could not be deducted under Sec.19 and 20.

C.M.Shah v. C.I.T. (1992) 60 Taxman 106

Points involved: Whether there could be a contract *inter se* between the undivided members of HUF, and was there a valid partnership between the Karta and his son who joined the HUF, on the basis of a contractual nature between the Karta and his son?

Decision: There can be a contract inter se between the undivided members of the family, as the Court had decided so in earlier decisions. The nature of contribution of an undivided member to the firm depended on the nature of the contract; this contract could include 'labour and skill', calculated to achieve profit for the firm. The labour and skill are the assets of each individual; such contribution, hence, could be made for a valid partnership. The assessee firm was, therefore, entitled to registration.

Badal Narain v. C.I.T. (1991) 57 Taxman 235

Point involved: Whether interest on borrowed capital could be deducted?

Decision: If the goodwill was purchased out of the borrowed capital, the interest paid on the borrowed capital was an allowable deduction.

The decision of the tribunal in correlating the debit balance to the purchase of goodwill, since the firm had taken over the running of the business was justified.

Indian Tube Co. C.I.T. (1992) 60 Taxman 399

Points involved: Whether the resolution of the general body meeting on 31-5-1963 had retrospective effect and thus dividend paid out was not reserve includable in computation of capital for assessment year 1964-65, corresponding to the previous year ending 31-3-1963 ?

Decision: An amount satisfied out of profits, not to meet the liability is a reserve. Creating a reserve out of a profit was a stage distint in point of fact and anterior in point of time to the stage of making recommendation for payment of dividend by the general body. The resolution of 31-5-1963 had retrospective effect as it referred to the profits of the previous year ending 31-12-1962. Therefore, the dividend reserve amount was a provision and could be included in the capital, and the difference between the profits and the dividend reserve was to be treated as a reserve.

Radhasoami v. C.I.T. (1992) 60 Taxman 248

Points involved: Whether the income derived by the religious institution could be exempted under Sec.11 of the I.T. Act ?

Decision: The donations and contributions had been received voluntarily and was limited to religious use. The Satguru had never claimed any title over or beneficial interest in the properties and they were always utilised for the purpose of the religious community. Exemption under Sec.11 was granted.

Importance: The new principle involved was that for the first time, exception to a religious trust was granted under Sec.11. The Court however, observed that the facts of this case were very special and could not be generalised.

Commissioner of Gift Tax v. Abdul Karim (1991) 57 238

Points involved: Whether exemption for gift tax could be claimed under Sec.5 of the Gift Tax Act by the assessee for gift of moveable property gifted to the assessee by the deceased ?

Decision: The Court upheld the contention of the assessee.

(a) The gift was recognised by the Muslim personal law and the personal law superceded Sec.191 of the Indian Succession Act.

(b) The gift was made during a marz-ul-maut (death bed illness) and it satisfied all the three tests which qualified the death bed illness. The three tests are : proximate danger of death; some degree of subjective apprehension of death in the mind of the sick person some external indicia like the inability to attend ordinary avocation.

The gift made satisfied all three conditions; the gift was not absolute and irrevocable and hence legitimate to conclude that the gift was in contemplation of death.

Contintental Construction Co. v. C.I.T. (1992) 60 Taxman 429

Point involved: Whether the introduction of Sec.80 HHB prevents the assessee from claiming exemption under Sec.80 ?

Decision: It was in favour of the I.T. Department.

The Court examined in detail the contents of Sec.80-O and concluded that in the present facts, the contract was for a single indivisible consideration for the execution of a foreign project and did not spell out the imparting of information or technical services and was difficult to segregate two parts if such a contract under Sec.80 and 80-O HHB. There was complete indentity of matters governed by Ss.80 HHB and 80-O in the given facts, and so the assessee would be entitled to only one and not to both reliefs. But the introduction of Sec.80 HHB prevailed over Sec.80-O.

SALES TAX LAW

Sanjay Bhatia *

During the period of survey i.e. June 1991 to May 1992, legislative activity was limited to minor changes in some states and in others there a total absence of amendments. Similarly, the Central Sales Tax Act remains as it is due to a total lack of amendments worth mentioning. This seems to be a strange phenomenon because of the unexpected changes and shifts taking place in the economy due to privatisation.

The judicial activity, as always, in this area is hectic with a plethora of decisions. The higher judiciary's tendency towards orthodox patterns of interpretation is slowly giving way to new modes of approaches in order to accommodate the living realities of the present milieu of our economic life.

Legislative competence

The Constitution (46th Amendment) Act, 1982 enlarged the scope of Entry 54, List 2 of the VII Schedule to the Constitution and conferred legislative competence to the State Legislature which was found absent by the Supreme Court. The net result was that the State Legislature was authorised to make law imposing such levy and collection of tax. Hence, for future levies, the making or amending of laws was necessary. Section 6 of the Act only intended to validate past levies and collection, if any. Such amendment in the State law for the past was not necessary where the State law already permitted such imposition and collection.[1] Thus, the Fourty-Sixth Amendment did not bring in any new law but merely empowered the State legislature to do so. In the absence of an appropriate provision in the State law, no new levy is possible.[2]

With respect to the legislative competence in enacting laws imposing a tax burden with retrospective effect, the Kerala High Court struck down a provision which imposed tax with retrospective effect. The Court reasoned that such a law may be struck down if it imposes an unreasonable burden or is confiscatory in nature. In the instant case, an item which was taxed at 5% was, through an amendment, charged at 10% with retrospective effect for over five years. The Court held the provision to be invalid as far

* Student V Year, NLSIU, Bangalore.

1 *Yogi Restaurant v. Commissioner of Sales Tax*, (1991) 83 STC 122.

2 *Calcutta Swimming Club v. C.T.O*, (1991) 83 STC 197.

as the retrospectivity is concerned.[3]

With respect to refund of tax, merely because there is a provision for refund of tax, where tax is not found leviable, the State Legislature cannot be allowed to make a provision, which will be in violation of a law. If the collection of tax is itself without jurisdiction, the provision for refund will not validate it.[4]

Registration and recognition

Upon receiving an application for a certificate of registration, the Sales Tax Officer has to make an enquiry for being satisfied that the application is in accordance with the provisons of the relevant Act and Rules made thereunder, and the dealer carries on business in the classes of goods, which he has mentioned in the application form. If he is so satisfied, he is bound to issue a certificate.[5] Goods integrally connected with the ultimate production of goods are also to be included in the certificate of registration.[6] The S.T.O. has no jurisdiction to grant a certificate mentioning only some of the goods and omitting the others or not mentioning any goods at all. This would, in the eye of law, amount to a refusal of the certificate of registration to that extent and the S.T.O. is bound to record reasons for such refusal, which he can do only after giving an opportunity of hearing to the applicant.[7] It is not mandatory for the dealer to make a personal appearance before the S.T.O. for grant of a certificate of registration. However, the S.T.O. may call for the appearnce of the dealer.[8] Once the certificate of registration is issued, it takes effect from the date of application or from the date on which liability to pay sales tax is incurred, whichever is later, and not from the date of issue.[9]

Dealer

Generally, a dealer is entitled to a concessional rate of tax if he is a registered dealer under the Act and the sale is in favour of another registered dealer under the Act and the sale is against the prescribed declaration. In such situations, it is not necessary to go into the question of the actual use of the goods by the purchaser.[10] However, the registered

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3 *Mega Traders v. State of Kerala,* (1991) 83 STC 59.
4 *Builders Association of India v. State,* (1992) 85 STC 363.
5 *Fact India Ltd v. State of Orissa,* (1991) 82 STC 62.
6 *C.T.O. v. Mac Charles Brothers (Pvt) Ltd,* (1991) 82 STC 162.
7 *See.* 5, *Supra.*
8 *Rajkumar Chawla v. State of M.P.,* (1991) 82 STC 101.
9 *Rajasthan Waste Cotton Agency v. Commissioner of Sales Tax,* (1991) 83 STC 531.
10 *Commissioner of Sales Tax v. G.E.C. India Ltd,* (1992) 84 STC 78.

dealer will not get any benefit if such sale is to a non-registered dealer even though the purchaser passed as a registered dealer and furnished false declaration forms.[11]

In order to assess the sale proceeds of goods, which are not serviceable for the business of the dealer, it should be established that the dealer had an intention to carry on business in those commodities. Merely because the dealer sells goods, which are unserviceable or unsuitable for his business, it cannot be said that he is a dealer in those goods. Whether a person has intention to carry on business in these articles can be decided from the frequency, volume, continuity and regularity of transactions carried on by him and whether they are carried out with a profit motive.[12]

Hospitality Organisation, Punjab, a department of the State Government, which run canteens without a profit motive, was held not to be a dealer and therefore not liable to pay Sales Tax under the Punjab Sales Tax Act, 1948.[13] In *Cottanad Plantations v. Kerala,*[14] a plantation owner, who sold tea leaves grown in his plantation was held to be a dealer.

Manufacture

In the context of fiscal statutes and more particularly Sales Tax laws, the activity of manufacture would include such activity which would bring out a change in the article as a result of some process, treatment, labour or manipulation. The process of treatment must further result in transformation and a new, different article must emerge having a distinct name, character and use.[15] In *State of Tamil Nadu v. S. Natarajan and Sons,*[16] the Madras High Court held that the mixing of various powders to make curry powder cannot be said to bring into existence new commodities for the purpose of levy of sales tax where the ingredients have already suffered tax, the sale of curry powder cannot be taxed again.

Inter-State sale

The settled position of law for determining when a sale becomes an inter-state sale as enunicated by the Supreme Court is :

a) An inter-state sale takes place when there is a movement of goods

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11 *Chudqai Raichhodlal Jethlal v. State,* (1992) 84 STC 30.

12 *Dy. Commissioner of S.T. v. Hindustan Cashew Products,* (1992) 84 STC 149.

13 *State of Punjab v. Assessing Authority,* AIR 1991 AC 1059.

14 (1992) 85 STC 40.

15 *Bahri Steel Wires v. A.C.T.O.,* (Kar) (1992) 84 STC 418; *State of Gujarat v. Lina Traders,* (1991), 82 STC 313; *Edible Products (Pvt.) Ltd. v. C.T.O.,* (1991) 83 STC 313.

16 (1992) 84 STC 581.

from one state to another;

b) That such inter-state movement must be a result of a covenant, express or implied, in the contract of sale or as an incident of that contract;

c) That such a covenant need not be specified in the contract itself and it would be enough if the movement was in pursuance of or incidental to the contract of sale; and

d) That there should be a conceivable link between a contract of sale and the movement of goods from one state to another.[17]

Therefore, where the dealer in Kerala despatched his goods to his "depot" in Calcutta under an agreement, and where the depot keeper was responsible for loss or damage of goods at the depot and liable to keep the goods insured and pay the staff, correspondence and rent himself, the transaction was held to be a sale and not an agency transaction even though the seller fixed the price at which the dealer was supposed to sell.[18]

Promissory estoppel

Promissory estoppel cannot be invoked against the legislative functions of the State. Promissory estoppel can be invoked against the withdrawal of a concession by an executive order or a notification. But, the position is different where the withdrawal of the concession is by an Act passed by the Legislature.[19]

Declarations

Where the registered dealer is entitled to 'C' Forms, the concerned authority is duty-bound to issue the same. The suspicion that the dealer may in future misuse the 'C' forms is not a ground for refusing the forms.[20] As the 'C' forms are issued in three identical parts, the assessee may submit the 'duplicate' part instead of the 'original' to the Assessing Authority.

It is well established law that merely obtaining the declration forms is not sufficient. The assessee has to furnish the same in the prescribed form (which is given by the purchasing dealer) to the assessing authority in order to get the benefit of a deduction.[21]

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17 *Kerala Small Scale Development Corpn. v. CTO*, (1991) 83 STC 356.

18 *Alagappa Textiles v. State of Kerala*, (1992) 85 STC 527

19 *Calcutta Oil Industries v. State*, (1991) 82 STC 27. *See*, also *Sashi Kant Vohra v. State of Haryana*, (1991) 82 STC 148.

20 *Unitech Ltd v. CTO*, (1991) 83 STC 207.

21 *Shyam Gudakun Factory v. State of Orissa*, (1992) 84 STC 150.

Where it is proved that the declaration can be furnished at any time before the final assessment of the accounts for that year, the words "at any time before the final assessment of the accounts for that year" mean at any time before the final assessment for that year either by the assessing authority or by the appellate authority.[22] However, the appellate authority, before accepting the form, must record a finding whether or not the dealer was prevented by sufficient cause from producing the forms before the assessing authority.[23]

Notice

The condition precedent for assessment by the Authority under the Act on the evasion or escapement of turnover, is the service of a valid notice within a specified time, without which the Assessment and demand without notice is invalid.[24] The mere mention of a wrong provision of a status in a show-cause notice, would not, by itself, vitiate the order passed in proceedings pursuant thereto.[25] Where a notice of demand directs the dealer to pay the amount mentioned therein "within 31 days of receipt of the order," it is not invalid on account of not giving the exact date of making payment.[26]

Best judgement assessment

Where the assessee had failed to maintain proper accounts and registers, and no explanations were forwarded for large remittance to the bank, best judgement assessment was held to be justified.[27] However, the Assessing Authority has to give the assessee an opportunity to be heard before making such assessment. Where such an opportunity is in fact given and several adjournments had been granted, the best judgement assessment was upheld as valid.[28]

The matter of the estimate of the gross and taxable turnover in a best judgement assessment is essentially one to be examined by the Tribunal and not by the Court.[29]

Mistake

A mistake that can be rectified must be a mistake apparent of the face

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22 *State of Tamil Nadu v. English Elec. Co.*, (1992) 84 STC 1.
23 *K. Murlidhara v. State of Tamil Nadu*, (1992) 84 STC 121.
24 *Projects and Services Centre v. State*, (1991) 82 STC 89.
25 *Shree Vallabh Glass Works Ltd v. State*, (1992) 84 STC 187.
26 *Bansi Dhan v. Commissioner of S.T.*, (1992) 84 STC 406,
27 *Rajlakshmi Industries v. State*, (1992) 84 STC 505.
28 *Pawamn Steel Corpn v. Commissioner of C.T.*, (1991) 83 STC 148.
29 *P.P. Varkey v. Dy. Commissioner of Sales Tax*, (1992) 84 STC 383.

of the record. It should be clear without the need for elaborate arguments.[30] Where the assessment was done on the basis of the original return after a revised return was filed, it was held to be an error apparent on the face of the record which could be rectified.[31]

Powers of authorities

If there more than one S.T.O. in respect of the place of business of the dealer, then each of them will have the jurisdiction to assess but it is not for the dealer to decide which of them will exercise the jurisdiction.[32] However, where the officer appointed under the local law was also empowered to administer the Central Sales Tax Act, it would not empower such officer to have recourse to the provisions of the local law for the purpose of passing an order relating to the Central Sales Tax Act. Therefore, 'F' Forms issued under the CST Act cannot be refused on the ground that the local tax is outstanding.[33]

Where the S.T.O. sent a garnishee notice to the bank directing it to withhold all the payments to a defaulting dealer, a garnishee notice was held to be illegal and without jurisdiction, as it was not in the prescribed form and did not specify the amount due from the defaulting dealer. [34]

Where the Joint Commissioner does not have jurisdiction to bring to tax for the first time, turnover which has already escaped assessment, the Joint Commissioner cannot exercise the power, which the Assessing Authority should have exercised, but did not. [35]

Penalty

Any provisions which provide for the levy of penalty are penal provisions, they can be applied only when a guilty mind is established by the department. [36]

However, the Madras High Court in *Vijay Electricals v. State of Tamil Nadu,*[37] held that Section 10-A of the CST Act does not require the element of *mens rea* to be proved for levy of penalty under Section 10(b),

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30 *Jaison Hosiery Industries v. Assessing Authority,* (1991) 83 STC 26; *Mohd. Ismail v. Commissioner of S.T.* (1991) 82 STC 50.

31 *Subash Chandra v. State of Tripura,* (1991) 82 STC 13.

32 *Commissioner of Sales Tax v. Tarachand Sahni,* (1992) 85 STC 200.

33 *RH Enterprises v. Commr. of Sales Tax,* (1992) 85 STC 251.

34 *Narmada Marble v. Intelligence Officer,* (1991) 83 STC 17.

35 *Reliance Motor Co. c. State of Tamil Nadu,* (1992) 84 STC 201.

36 *State of Karnataka v. Subramanyam,* (1992) 84 STC 230; *V.K. Chemicals v. Commr. of Sales Tax* (1991) 82 STC 351.

37 (1991) 82 STC 268.

if on facts, it is found that the assessee made a false representation. It was further held that, under the criminal law, *mens rea* is considered as 'guilty intention' but when it is relatable to tax delinquency, which is a civil obligation, it implies 'a blameworthy conduct'. The recording of a finding that the assessee had made a false representation by itself shows the establishment of *mens rea* to the limited extent applicable to civil obligations.

Penalty also cannot be imposed when the assessee fails to produce relevant documents on demand.[38] An opportunity to be heard must be given before the levy on penalty.[39] Moreover, the imposition of the penalty must be with the object of the provision and maximum penalty should not be imposed as a matter of course. The quantum of penalty must depend upon the gravity of the offence.[40]

In *CTO v. Hari Krishna & Co.*,[41] the Rajasthan High Court held that no penalty can be levied upon the issue of notice after the levy was held void on account of want of notice.

Refund and adjustment

Rule 15(3) of the Bombay Motor Spirit Taxation Rules, 1958 provided for refund to the selling dealer, of Sales Tax on the quantity of motor spirit lost on account of leakage or evaporation of the motor spirit which has been stored in the storage installation belonging to the selling dealer, and if refund in respect of such quantity is allowed by the selling dealer to the purchasing dealer. This rule was held not to be discriminatory and violative of Article 14 of the Constitution of India by the Supreme Court even though refund was allowed to the selling dealer alone and not to the purchasing dealer. [42]

In *Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner of Commercial Taxes,* [43] the Karnataka Govt. issued a notification in 1975, which stated that new industries entitled to refund were permitted to adjust refund against the Sales Tax payable by them after obtaining permission from the D.C.C.T. for such adjustments. The permission was to be renewed every year. The appellants who were entitled to a refund applied for the same but the application seeking permission for adjustment of

38 *Deputy Commr. of Sales Tax v. Jyothi Liquors*, (1992) 84 STC 509.
39 *Prakash Roadlines v. Commr. of C.T.*, (1991) 83 STC 49.
40 *P.D. Sodi v. Intelligence Officer*, (1992) 85 STC 337.
41 (1991) 83 STC 453.
42 *Karfule Pvt. Ltd. v. State of Maharahtra*, (1992) 84 STC 81.
43 AIR 1992 SC 152.

refund was not disposed of by the D.C.C.T. in spite of the appellant being eligible for adjustment, which was not disputed. The appellant, meanwhile, in anticipation of the permission, adjusted the refund against the tax payable and filed its monthly returns setting out the adjustments so effected, which was challenged. The Supreme Court held that as the industry was entitled to the exemption and the application for seeking adjustment of refund was withheld for no valid and substantial reason, and as the grant of permission was a mere technicality, in that the 1975 notification did not leave any discretion to refuse permission, the industry would be entitled to adjust refund of tax against tax due for the year even though the year had expired. [44]

Interpretation of statutes

While interpreting items in statutes like the Sales Tax Act, resort should not be had to the technical details of terms, but to the popular meaning attached to them, that is to say, to their commercial sense. [45]

Where there is a particular or specific entry in a fiscal statute, the general entry has to give way to the specific entry. [46] In case of a discrepancy between a State Act and the Central Act, to the extent of discrepancy, the provision in the State Act will have to be read down as having '*protanto* stood modified'. [47]

In case of confusion while interpreting a fiscal statute, the interpretation should be in favour of the assessee. [48] However, if there is no confusion as such, the provision should be strictly construed to prevent evasion of tax.[49]

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44 The Supreme Court, in effect held that permission was not necessary for adjustment of refund even though the notification expressly provided for the permission of the D.C.C.T. before the new industry could adjust its refund. By doing so, the Supreme Court has gone against the express provision of the 1975 notification which makes it mandatory for the new industry, seeking adjustment. By reasoning that the provision is a mere technicality, the Supreme Court has held that any new industry can adjust its refunds after completing the formalities, like applying for permission, etc., if it is in fact entitled to adjustment. In the instant case, as the permission was refused for no valid reason, the new industry ought to have sought a writ of mandamus from the appropriate High Court praying the High Court to direct the D.C.C.T. to grant permission to the new industry to adjust its refunds.

45 *Brooke Bond India Ltd. v. State of Gujarat,* (1992) 84 STC 277.

46 *Kanwar Brothers v. State of Punjab,* (1992) 84 STC 307. *Brooke Bond India Ltd. v. State of Kerala,* (1992) 84 STC 334. *Harnarian Singh v. State of U.P.,* (1992) 84 STC 323. *Bavishi and Sons v. State of Gujarat,* (1992) 84 STC 161. *State of Gujarat v. Pfizer Ltd.,* (1991) 82 STC 374. *Dy. Commissioner of Sales Tax v. Food Specialities Ltd.,* (1991) 82 STC 298.

47 *Builders Association of India v. State,* (1992) STC 363

48 *Navbharat Industries v. Additional Commissioner,* (1992) 82 STC 48.

49 *N.V. Bhage v. Commissioner of Commercial Taxes,* (1991) 83 STC 449.

Declared goods

The object of specifying certain goods as 'declared goods' under Section 14 of the Central Sales Tax Act, 1956 is to ensure that taxation on these goods shall not exceed 4% and that they shall not be subject to tax again and again. Wheat, one of the declared goods, is a staple food article and is capable of being consumed only in the form of broken wheat or flour or *rava*. These items cannot, therefore, be treated different from wheat. Therefore *atta, maida,* and *soji,* which are products of wheat, in substance and are declared goods, cannot be subjected to the tax under the State law, if the wheat out of which they are prepared had already suffered tax as declared goods. [50] However, in *Deccan Engineers v. State of A.P.,* [51] the A.P. High Court held that cast iron, which is a declared good, will not include C.I. pipes or manhole covers etc., made out of cast iron.

Entries in schedule

A substantial portion of sales tax litigation revolves around the interpretation of the entries in the Schedule to the various General Sales Tax Acts of the States or the interpretation of the entries listed under Section 14 of the Central Sales Tax Act, 1956. Consequently, it has been held that the word 'food' ordinarily connotes that which can be readily eaten. Thus 'Stermicelli',[52] 'Bournvita',[53] and 'Baby Cereal',[54] are not 'foodstuffs' or 'food provisions'. Neither is 'instant coffee' a 'beverage'[55] nor a coconut a 'fresh fruit', [56] packing shooks made by cutting timber logs to size [57] and splint wood veneer [58] were held to be within the meaning of 'timber', but furniture made out of iron and steel does not include 'slotted angles' and 'panels' sold separately. [59] Guns and rifles were held to be outside the meaning of the word 'arms'.[60]

The word 'chemical' was held to include raw/refined bentonite powder[61]

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50 *New Swastic Flour Mills v. State,* (1992) 84 STC 49.
51 (1992) 84 STC 92.
52 *Jaya Industries v. C.T.O.,* (1991) STC 319.
53 *State v. Gokuldas Trading Co.,* (1991) 82 STC 249.
54 *State v. Chunilal M Mehta,* (1992) 84 STC 62.
55 *Brooke Bond v. State of U.P.,* (1992) 84 STC 334.
56 *Harnarian v. State of U.P.,* (1992) 84 STC 323.
57 *S.V. Industries v. D.C.C.T.,* (1992) 84 STC 351.
58 *State v. Tamil Nadu Stick Industries,* (1991) 83 STC 338.
59 *Godrej & Boyce Mfg. Co. (P) Ltd v. State of Kerala,* (1991) 83 STC 475.
60 *Commissioner of Sales Tax v. P.V. Rao,* (1992) 84 STC 355.
61 *Vijay Foundry & Machinery Works v. State,* (1992) STC 152.

and yeast.[62] Agricultural implements do not include sugar cane crushers,[63] and 'scientific instruments' does not include a steam boiler. [64]

Appeal

It is a firmly established judicial view that the right to appeal is not an inherent right, nor is it a fundamental right. The right to appeal is a mere creature of the statute and it is open to the legislature, which creates such a right, to take away the same, if necessary or prescribe conditions for the exercise of the right. [65] However, the right to appeal is not merely a matter of procedure, it is a substantial right. The right to appeal from a decision of an inferior Tribunal to a Superior Tribunal becomes vested in a party when proceedings are first initiated, and before a decision is taken by the inferior Tribunal. The right of appeal also carries with it the right to seek condonation of delay, if any, in filing the appeal. The pre-existing right of appeal is not destroyed by an amendment unless the amendment is shown to operate retrospectively by express words or necessary intendment. [66]

Where it is provided that a deposit of 20% of assessed tax is to be made before the filing of an appeal and the same is not waived or relaxed, such a deposit is a *sine qua non* for maintaining an appeal even in a situation where neither any return has been admitted by the assessee at any stage of the proceedings. [67]

However, where the appellate authority has the discretion to waive or relax this requirement of deposit, the discretion must be exercised on relevant material, honestly and objectively. In every case, where an application is made in that behalf, the appellate authority is expected to apply its mind objectively and to decide on judicial considerations whether a case for waiver or relaxation has been made out or not. The provison is for the benefit of the tax payer and if a case is made out, the relief cannot be denied solely on the ground that the power conferred is discretionary. The authority, therefore, is expected to take a decision in view of the relevant considerations, which may include, *inter alia,* the quantum of the disputed tax and the capacity of the assessee to pay the amount. [68]

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62 *State of Gujarat v. Bhagvathi Genl. Agencies,* (1991) 83 STC 347.

63 *D.H. Bros. v. Commr of ST,* AIR (1991) SC 1992. However, from 1985 onwards, the UP State Govt. has specifically exempted sugarcane crushers from the levy of sales tax.

64 *Jaya & Co. v. State of TN,* (1991) 83 STC 513.

65 *CTO v. Swathi Traders,* (1992) 84 STC 113.

66 *State of TN v. Aristo Paints,* (1992) 85 STC 54 (*See* also *State of AP v. K. Venkateshwarlu,* (1992) 85 STC 334.

67 *South Eastern Roadways v. UP Sales Tax tribunal,* AIR 1991 All 124.

68 *Premchand Sureshchand v. Sales Tax Tribunal,* (1992) 84 STC 215.

Almost all general Sales Tax laws proivde for a time limit for the aggrieved party to file an appeal. The discretionary power is also conferred upon the appellate authority to condone the delay of the same, if not filed within time, if sufficient cause existed for the delay. What is a sufficient cause is a matter of fact. Where the first appellate authority dismissed, as time barred, the first appeal filed by the petitioner, but the records contained a medical certificate, which was the basis of seeking a condonation, it was held that the appeal had been disposed off without proper application of mind to the cause shown by the petitioner in regard to the delay in filing the appeal. The order dismissing the appeal *in limine* was liable to be set aside. However, where sufficient cause for condonation of delay was not proved and the appellant took inconsistent pleas, the dismissal of the appeal was held to be justified.[70]

Where the appellant seeks a stay of recovery pending appeal and the order rejecting stay or granting only partial stay is made, the authority passing such an order is bound to record reasons for the same and a mere statement that no *prima facie* case was made out for grant of stay is not proper.[71]

Where, during the pendency of an appeal filed by the respondent dealer against an order of re-assessment passed by the Sales Tax Officer, the STO issued notice and thereafter passed a second order of re-assessment, it was held that the STO must make a report to the forum, before which the appeal was pending without which it cannot pass a second re-assessment order. [72]

Revision

The power of revision cannot be restricted to a case, where a subordinate authority has positively exercised power and has committed some error or illegality in the exercise thereof. Even in cases where the authority has failed or omitted to exercise power to levy tax, the revisional authority can exercise its power.

Therefore, if the original authority has expressly or impliedly not at all exercised its penal jurisdiction, the revisional authority cannot proceed to levy a penalty for the first time, but where the assessing authority has omitted to impose a penalty despite initiation of penalty proceedings, the order failing to impose penalty can be revised. [73]

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70 *K. Abdul Majid v. State of Kerala,* (1992) 84 STC 126.

71 *Rajasthan Spinning and Weaving Mills Ltd v. Additional Commissioner for Commercial Taxes,* (1991) 83 STC 181.

72 *State of Gujarat v. Minakshi Metals,* (1991) 83 STC 399.

73 *Bhabnagar Chemical Works v. Commissioner of Sales Tax,* (1991) 83 STC 409.

Where the time limit for exercising revisional jurisdiction is fixed under the statute as 4 years, the act of the revisional authority calling for the records relating to an order for the purpose of exercising its revisional jurisdiction marks the commencement of the exercise of the power. If the act itself is after 4 years from the date of the concerned order, every further step is beyond time and, therefore, without jurisdiction. If on the other hand, the act of calling for the records is within four years from the date of the concerned order, every further step would be within time and within jurisdiction. [74]

Review

The powers of the Tribunal to review can be exercised only where new and important facts are discovered and such facts were not available at the time of disposal of the appeal by Tribunal. A subsequent decision of the High Court cannot be treated as a new and important fact so as to enable the exercise of power of review. The power of review can be exercised only within the parameters fixed by the Statute itself and not on general principles.[75]

74 *G. Vittoba v. State of Karnataka,* (1992) 84 STC 467.

75 *State of TN v. Sri. Gounder & Co.,* (1991) 83 STC 521.

XI. ACCIDENT COMPENSATION LAW

*S.V.Joga Rao**
*G.Leela***

Introduction

The present survey of various decisions pertaining to accident compensation is limited to the period April 1990 April 1991.

For the purpose of clarity and convenience the review has been broadly classified under three heads, with further details, which run as -

1. Accident Compensation Objectives
   - A. State's duty vis-a-vis accident compensation.
   - B. What is just compensation?
   - C. How to assess just compensation?
2. Quantum of Compensation.
   - A. How to determine compensation?
   - B. Multiplier: How to arrive at it?
   - C. Rate of Interest: Objectives behind paying interest.
   - D. Same disability under two heads.
   - E. Earning capacity.
   - F. Deduction.
   - G. Enhancement.
3. Status of the Claimant.
   - A. Eligibility to be considered as legal representatives.
   - B. Principles of assessement in case of a young boy.

Accident compensation objectives

A. State's duty vis-a-vis accident compensation.

While emphasising the objectives of accdient compensation, the Jammu and Kashmir. High Court, speaking through Justice R.P.Sethi, went on record-saying:

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* Faculty Member, NLSIU, Bangalore.
** Student IV Year, NLSIU, Bangalore.

> The Constitutional set up in India envisages that all communities have a right to life and a right to carry on any profession or trade within the limits of law and the state is under an obligation to protect their life and liberty ensuring them all the benefits of Fundamental Rights enshrined under Part III of the Constitution. As and when this life and property is taken away by an individual or an organization a duty is cast upon the state representing the will of people to compensate the victim by granting adequate compensation.[1]

Thus it is to be realised that granting compensation is a duty, not a charity.

B. What is just compensation?

While addressing the above question the Madhya Pradesh High Court held, Though an attempt is always made to plead and prove the factors affecting determination of quantum of compensation, ordinarily court (sic) has to arrive to a just figure of general damages and much is left to the judicial experience of judges.[2]

While expressing a similar opinion the Court, in *New India Assurance Co.Ltd v. RambhaBai,*[3] held that, for the death resulting from a motor accident, a computation of compensation which falls below minimum compensation cannot be accepted as ' just compensation'.

In *Jaybharat Saw Mill v. Babulal Ambalal Sodh* [4] a workman working on a machine in a saw-mill was injured during his work. His employer offered to continue the employment instead of paying him workman's compensation under Sec.3 of the Act. Going by the spirit of the law, and not by its letter, Justice J.N.Bhatt held that such an offer cannot be said to be an offer as such it cannot disqualify the workman's claim.

However, in *Himachal Road Transport Corporation v. Arvind Singh Mann,*[5] the Court opined that 'just compensation' differs from case to case depending on the facts. The Court in this case went one step further saying that the provisions of the Motor Vehicles Act are not designed to compensate the dependants for the actual loss. They are intended to put the dependants in the position they would have been in, had the deceased been alive. The court thus pointed out the objective behind compensating the victim's family.

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1 *Indu Puri General Store v. Union of India,* 1991 ACT 1081 (J&K).
2 *Bhagwandas v. National Insurance Co., Gwalior* , AIR 1971MP 235.
3 1991 ACJ 306 (MP).
4 1991 ACJ 793 (Guj).
5 1991 ACJ 825 (HP).

C. How to assess just compensation?

In *Oriental Insurance Co.Ltd v. Evan Lodricks,*[6] the Court held that the calculation of compensation is not a rule which could be laid down with exactitude. It relied on Lord Viscount Simon's assessment of compensation in *Nance v. British Columbia Rlys* [7] where it was laid down that a claim for damages in cases of death falls under two heads, namely -

1. sums the deceased would have probably applied out of the income to the maintenance of his wife and family, if the deceased had not been killed and would have lived his life span; and
2. what the additional savings, which the deceased would have left but for his premature death, would have been.

Trying to reason out the principle behind just compensation and the procedure to assess it, Justice Varghese Kalliath and Justice G.H.Guttal speaking, through Kerala High Court, in *Nazeema v. George Kuriakose*[8] observed:

> No Compensation which fails to balance loss and gains can be said to be just. A complete and just balancing must be taken into account, the lost gains of future savings and capital must be included in the compensation and while computing such just compensation the receipt pf property of the deceased by the dependants through succession, which is not by reason of death of the deceased, must be kept out of consideration.[8]

Quantum of compensation

A. Mode of assessing compensation

The three generally accepted modes of compensation are:

1. lump-sum payment after determining the compensation, taking into account the annual loss of dependancy multiplied by estimated life span, after working necessary deductions therefrom;
2. the multiplier system, where calculation is made on the basis of annual loss of dependancy multiplied by a suitable multiplier taking into account various factors; and
3. interest system, awarding a lump-sum to the dependants, with receipt of an amount, by way of interest, for the annual loss out, of the

6 1991 ACJ 1085 (Raj).
7 1951 AC 601.
8 AIR 1992 Ker 67.

compensation determined by the Court.[9]

Looking at the concept of accident compensation from the Human Rights perspective, Justice D.P.Mohapatra, speaking through Orissa High Court, opined that the determination of compensation must be liberal, not niggardly, since the law values life and limb in generous scales.[10]

In this case, a 48 year old man died in a road accident and the Tribunal assessed the total compensation at Rs.6000/- and the loss due to death at Rs.24,000/-. This was challenged as inadequate compensation.

When the case came up to the Orissa High Court, the compensation was enhanced to Rs.40,000/- for the injuries sustained by him and Rs.30,000/- on account of loss of income due to father's death. This enhancement has been assessed with the help of *Basavaraj v. Shekhar,*[11] wherein it was held that to assess compensation in such cases the victim had to be compensated for

a) pain and suffering;

b) loss of earnings or loss of earning capacity or in some cases for both, and

c) medical treatment and other special damages.

In *State of U.P v. Surt. Dhan Kunwar* [12] Honeshwar Singh, aged 35 years, was badly injured and died after about 2 hours of the accident when he was hit by a jeep. The compensation was fixed at Rs.80,000/- after considering certain factors like robust health, no bad habits and that the mother of the deceased, aged 72 years, was still alive. The court, from these factors, arrived at a conclusion that if he could have remained alive upto 65 years age, he would have got pension, almost equal to salary. Hence, Rs.80,000/- for a period of 30 years is reasonable.

Similarly, when a young man was severely hurt, the Tribunal awarded him Rs. 3,30,000/-, a very huge amount, considering his prime youth, lost future prospects, etc., in *United India Assurance Co.v. Shaik Saibaqtualla.*[13] However in this case, the Court was not inclined to countenance the claim of the appellant on purely technical grounds. In *State of Orissa v. Rabati Bewa* [14] the deceased, a mason working under a contractor, was aged 30

9 *See The B. M., Oriental Fire & Gen-Insurance Co. v. Laxmi Patra,* AIR 1991 Ori. 310 (311). *See* also *Transport Co. Ltd. v. R.K. Das* (1989) II OLR 196.

10 *South Sekhar Singh Samantha v. M.D. Orissa Road Transport,* AIR 1991 Ori 225.

11 AIR 1988 Kant 105.

12 AIR 1991 All 186.

13 AIR 1992 AP 124.

14 AIR 1992 NOC 23 (Ori).

years at the time of death. The Court had taken Rs.450 as his monthly income, applied a multiplier of 20 and assessed the compensation. In this regard one should examine *New India Assurance Co.Ltd v. Koyammu* [15] where the Court not only allowed the court fee, expenses incurred for summoning witnesses and causing to produce documents, but also held that since the amount is paid as compensation for the loss sustained, the payment should be an immediate one and not a postponed one.

The Court's eagerness to compensate the victim's family is very well reflected in *Oriental Fire & General Insurance Co.Ltd v. Manju Goel.*[16] In this case, one Mr.Ramesh died when his two-wheeler was hit by a truck which was driven rashly and negligently. The Tribunal, while awarding compensation, awarded an amount under the head, 'agony suffered by the dependants'. When this was challenged as improper, since the amount awarded under one head can be shifted to another, Rs.10,000/- awarded under this head was shifted under the head 'loss of consortium' and a total amount of Rs.1,09,500/- was awarded.

B. Multiplier-how to arrive at it

With reference to multiplier the Punjab and Haryana. High Court, in *Joginder Kaur v. Haryana,*[17] held that there can be no hard and fast rule. However, in case of a professional man or young person, the adoption of 20 as multiplier is always safe.

A more detailed explanation as to the multiplier has been given in *The General Manager, Karnataka State Road Transport v. Smt.Khateyabee.*[18] In this case, the deceased died as a consequence of rash and negligent driving of a bus owned by the Corporation. His mother and brother claimed a total of Rs.4,75,000/-. The Court in order to arrive at a multiplier relied upon the Supreme Court judgement in *Jyotsna Dev v. Assam*[19] wherein the Supreme Court has suggested the three principles, namely, multiplier should be arrived at by deducting the age of the victim on the date of his death from the life span expectancy of a normal healthy Indian. This was fixed at 70. The present case followed this principle and it held that if the method to arrive at the multiplier and the multiplier adopted by the Supreme Court results in higher and more beneficial compensation, then the High Court should lean in favour of that method. Thus, the Court acted as per the spirit of the law considering the object of

15 1991 ACJ 429 (Ker).
16 1991 ACJ 882 (All)
17 1991 ACJ 374 (P & H).
18 AIR 1991 Kant. 189.
19 1987 (1) ACJ 172.

the Act as conferring benefit on the dependents left behind by the deceased victim of the accident.

When the Compensation has been fixed on the basis of a multiplier method, can an additional sum, under the head ' loss of expectation of life', be paid? This issue came up for consideration in *K.S.R.T.C. v. Jayalaxmi,*[20] where the Court, relying on *Bhandary v. Muniyamma,*[21] responded positively. They arrived at a compensation amount through the multiplier method and also awarded an additional sum of Rs.500/- under the head, 'loss of expectation of life'.

Though a majority of the courts are of the opinion that there is no rule as to the multiplier, Justice V.K.Malhotra in *Bimla Dubey v. Himachal Road Transport Corporation*[22] followed the ratio of *M.P.S.R.T.C v. Sudhakar,*[23] decided by the Supreme Court, Justice Malhotra opined:

> Suitable multiplier shall be determined by taking into consideration the number of years of dependency of various dependents ,the number of years by which the life of the deceased was cut short and the various imponderable factors, such as early natural death of the deceased, his becoming incapable of supporting the dependants due to illness or any other natural handicap or calamity, the prospects of remarriage of the widow, the coming of age of the dependants and their developing independent sources of income as well as the pecuniary benefits which however shall not include the amount of the insurance policy of the deceased to which the dependants may become entitled on account of its maturity as a result of the death.

Rate of interest

The objective behind paying interest was pronounced in the *Oriental Insurance Co.Ltd Bangalore v. S.Jagadish.*[24] It was held that the interest in accident claim cases is not awarded as damages but is awarded for keeping the plaintiff out of the money which ought to have been paid to him, taking care of the period between the date of the claim and the date of realisation.

In *U.P.S.R.T.C. Jhansi v. Jagjit Singh.*[25] the victim was paid compensation,

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20 1991 ACJ 988, (Kant.).
21 ICR 1985 Kant 337.
22 1992 ACJ 166, (H.P).
23 1977 ACJ 290.
24 AIR 1991 Kant 258.
25 AIR 1991 All 84.

with 6% interest, when he got injured in a bus accident and suffered physical and mental agony. When this rate of interest fell for consideration, Justice K.P. Singh and R.R.K. Trivedi together held that in a case like this even an 8% rate of interest would not suffice because these days even a 12% rate of interest is being awarded. Finally, a compensation of Rs.88,000/-, with 6% interest was awarded.

D. Same disability under two different heads

As was examined in some previous cases, if compensation is paid under two similar heads, if possible one can be shifted to a different head. If the same disability falls under two different heads, it amounts to duplication of compensation under the former head. This was decided in *The Oriental Insurance Co. Ltd., Bangalore v. S, Jadagish.*[26] In this case, a 4% disability of total self was taken into consideration, by the Tribunal in awarding Rs.25,000/- as compensation under the head severe pain and suffering. The same disability of 4% of total self of Jagadish had formed the basis for an award of a sum of Rs. 9.600/- under the head, "for the injury affecting his day, life and future."

E. Earning capacity earnings

In *State of Gujarat v. Khodabhai,*[27] a workman safe-guarding a forest was assaulted by some people. He suffered 40% disability as a result and claimed Rs.75,000/- from the employer, failing which he applied for compensation. The question that came up for consideration was on what basis would he be eligible for compensation, when the disability did not affect his earning? It was held that under the provisions of the Workmen's Compensation Act 1923, once it is proved that the victim is a workman and that he has suffered an injury by accident, in the course of his employment, irrespective of increase or decrease in earnings, he is entitled to secure compensation for loss of earning capacity which is different from earnings.

The earning capacity of a deceased lady who was not gainfully employed but used to help husband in day-to-day affairs was assessed at Rs.500/- per month and dependency at Rs.300/- per month in *Akhey Singh v. William Jerry and Others.*[28]

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26 *Supra* n. 24.
27 1991 ACJ 638 (Guj).
28 1991 ACJ 876 (P&H).

F. Deduction

Whatever may be the mode of assessment, deduction, due to various factors, plays a crucial role in the area of accident compensation law. One may examine this in the light of various cases. For convenience, deduction scan be classified as 'permissible' and 'non permissible'

Permissible deductions: Uncertainites of Life - Deduction under this head permissble, provided the Tribunal takes into consideration the possible increase in earnings of the deceased with his advancement of age and the inflationary trend which is bound to reduce the value of money.[29] The same principle was followed in *The General Manager, K.S.R.T.C. v. Smt Khateyabee,*[30] wherein 20% of the amount awarded from the lump-sum was deducted.

Lump-sum Payment: Usually deduction under this head is possible. The issue that came up in *Nihal Devi v. Raghuvir Singh* [31] was whether it is justified to have 30% deduction on account of lump-sum payment. In this case the deceased was likely to live for another 28 years and the entire earnings for that period were being paid in a lump-sum. Considering this, the Court held that when the period is long a higher rate of deduction is justified and it is only in the vicinity of 10 years or so, that a lesser deduction of 20 to 25% is usually made.

Under what conditions can a deduction for lump-sum payment be allowed was the issue in *Chako P.M. v. Rosemma Antony.*[32]

While responding to this the Court held that if the Tribunal has not considered the likelihood of increase in earning and the inflationary trend prevailing, the deduction for advantages of lump-sum payment and unforeseen contingencies, including possibility of pre-mature death, is not required.

Interim award

In *Kannan Transport Another v. Maria Arokiam*[33] while the person was going on his cycle he was hit by a bus driver rashly and negligently as a result of which he died. Here the Court not only awarded interim relief under Sec.91-A of Motor Vehicles Act, of Rs.15,000/- but also deducted that from the final total compensation as a permissible deduction.

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29 *See, Badri Prasad v. National Insurance Co. Ltd,* 1992 ACJ 98.
30 *Supra* 18.
31 1991 ACJ 1128 (All).
32 1991 ACJ 597 (Ker).
33 1991 ACJ 923 (Mad).

Non-permissible deduction

1. Family pension : Deduction on account of family pension is not permissible if it is not proved as a benefit accruing to the claimants in the form of advantage resulting from the death. This was in *Union of India v. Smt. Vijay Sundari.*[34]

2. Gratuity, provident fund: As per the *B.M. Oriental Fire & General Insurance Co v. Laxmi Patra*[35] deduction on account of family pension is not permissible if it is not proved as a benefit accruing to the claimants in the form of advantage resulting from the death.

3. Receipt of property: An interesting but strange issue that came up for consideration in *Nazeema v. George Kuriakose*[36] was whether the receipt of property of the deceased be considered for deduction. It was held that the value of such property should be kept out of consideration in arriving at a figure of just compensation. If the property was obtained through succession and not by reason of death of the deceased.

4. Ex gratia: Any payment made as ex gratia is not liable to be deducted from the amount of compensation payable to the claimants under the provisions of the Motor Vehicles Act. This is the firm principle that has been laid down in *Bimla Dubey v. Himachal Road Transport Corporation.*[37] In para 23 of this judgement, Justice V.K. Malhotra quoted *Cunningham v. Harrison*[38] where it was stated: "It is an established principle that the damages awarded to an injured person are not to be reduced by reason of any insurance monies received by the injured person nor by reason of gifts made to reduce his distress. Similarly the damages are not to be reduced by reason of exagratia payments made by his employer."

This decision was reiterated in *New India Assurance Co.Ltd v. K. Chandra*[39] which in turn relied on *Bhagat Singh Sohan Singh v. Om Sharma.*[40]

5. Lump-sum: A stable principle which is still being followed by many Courts with regard to deduction was laid down in *National Insurance Co. v. Saraswatibai* [41]. Here the Tribunal awarded Rs. 38,400/- as

34 AIR 1991 MP 328.
35 *Supra* n. 10.
36 *Supra* n. 8.
37 *Supra* n. 22.
38 1974 ACJ 218.
39 1991 ACJ 386 (Mad).
40 1983 ACJ 203 (P&H).
41 1991 ACJ 797 (MP).

compensation by following the multiplier method but made a deduction for lump-sum payment of Rs.6,400/-. The Court held that this deduction was incorrect and observed that when the multiplier is fixed and the compensation is arrived at, it takes care of all the heads. Hence deduction for lump-sum payment is not required.

Statutory levy under the Passengers and Goods Taxation Act provides that the purchase of a ticket on the part of a passenger entitles his dependants to receive the benefit of any insurance amount under a contract which comes into existence on payment of the price of ticket. This law had been framed with a view to ameliorate the lot of passengers and to minimise their loss on account of accidents. Hence, in *Himachal Road Transport v. Arvind Singh Mann*[42] it was held that it would be against public policy to allow the tort-feasor to claim a deduction of the amount paid by the State Government from a fund under the provisions of the scheme.

G. Enhancement

In the case of *D.M.C.* v. *Kainlesh Kumar*[43], after the death of the husband, the wife got his job on compassionate grounds. A lump-sum was paid as compensation. The issue before the Court was whether, due to the expected enhancement of salary, the claim in dependency might be increased. While replying to this Justice Mahesh Chandra opined that an "expected increase in pay cannot enhance the compensation because of the element of uncertainity of life. The lump-sum payment would not have come if the husband were alive." Hence, upward revision was declared not possible.

In *T.S. Ganga v. Jabbarkhan*[44] a girl, who was the victim of the accident, had been awarded, under the general head 'pain and suffering', a sum of Rs. 28,000/-. When enhancement was asked for it was not done because the Court found that the girl was attending dance classes normally.

Status of claimant

A. Principles of assessment in case of a young boy

Assessing compensation in the case of a deceased who was young is a difficult task. Nevertheless, courts never let the tort-feasor go without paying proper and just compensation.

When a five year old boy was hit by a motor-cycle due to rash and negligent driving, the boy died out of injuries the next day and the

42 *Supra* n. 6.
43 1991 ACJ 970 (Del).
44 1991 ACJ 901 (Kar).

Tribunal awarded Rs.10,000/- as compensation. But this was raised, to Rs.48,000/- with 12% interest, by the Court. This is the case that came before the Kerala High Court in *R. Ayyavu v. Gopinathan Nair.*[45] The mere fact that the child was not earning money would not disentitle his/her parents from claiming the benefits. The anguish, agony and mental suffering of the parents on the death of the child necessiated provision for payment of compensation under no fault liability.

A landmark judgement worth mentioning in this regard is *Oman Singh Gurung v. Seva Ram Dutta.*[46] The Court in this case made it plain and clear that not only shock and pain but also future prospects, family background, academic activities, achievements of the child, reasonable expectancy which the parents might have had from the childhood were to be considered. In this case, the parents claimed a compensation of Rs.1,00,000/- for the death of their seven year old only son. The Court awarded Rs.60,000/- considering all the above factors. It relied on various other cases for justifying the rule that even if the child is not earning, the parents deserve compensation. Some similar cases are:

K.L. Pasriya v. Oriental Fire & General Insurance Co. Ltd[47]-Allowed Rs. 20,000 as compensation ;

Mangaldas Mohanlal Patel v. Union of India[48] - Death of a 13 year old boy - Allowed Rs. 54,000/- as compensation;

Allah Bakhas v. Dhirendranath Panda[49] - Death of an 8 months old female child - Rs. 8000/- allowed.

B. Eligible and ineligible legal representatives

The Tribunal cannot conclude that a person is ineligible to claim compensation as legal representative merely on the alleged discrepancy in the age of the victim in the absence of any positive evidence or any material on record. This was decided in *Bilas Naik v. Radhashyam Mohanty*[50].

While speaking about legal respresentatives, Justice M. Srinivasan, going strictly by Sec. 2(1) (d) (iii) (b) of the Workmens' Compensation

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45 1991 ACJ 718 (Ker).
46 1991 ACJ 1030 (P&H).
47 1986 ACJ 252 (P&H)
48 1982 ACJ 426 (All).
49 1983 ACJ 650 (Ori).
50 AIR 1992 Ori 32.

Act, went on record saying that an "uncle cannot claim to be a parent of the deceased worker since he is not covered by the Act but a widowed mother, though not depending on the earnings of the deceased worker, is entitled to compensation."[51]

In *Venkalakshmamma v. R.Vijaya Raghavan*[52] the Court held that brother and sister who were not legal representatives in the strict sense but nevertheless were dependent on the deceased were entitled to recover compensation on the ground of loss of dependency. In case of a widow the compensation for mental agony and suffering would devolve on the estate of the deceased [53] The Courts seem to be very particular about the eligible legal representative to get compensation whether they require it or not. In *Mala Aggarwal v. Jagdish Kumar*[54] even if the parents were well to do and not dependent on the deceased, Justice K.P. Bhandari could not rule out the possibility that when the father becomes old and infirm, the son would have to maintain him and the mother. Hence the Court allowed Rs. 50,000/ - to the father. The mother was given Rs. 80,000/- with 15% interest, as compensation.

However, per *Jenabi v. Gujurat State Road Transport Corp.*[55], legal representatives of the deceased claimant who died an unconnected death with injuries would only be entitled to 'loss of the estate' which comprises medical expenses and miscellaneous expenses.

Thus, this year has witnessed profuse judicial contribution in this emerging field which was traditionally in the realm of classical tort law.

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51 *P.L.Vellaichamy v. Union of India* 1991 ACJ 874 (Mad).
52 1991 ACJ 1119 (Kar).
53 *Kerala State Electricity Board, Trivandrum v. Kali,* 1991 ACJ 64 (Ker).
54 1992 ACJ 123.
55 1991 ACJ 585 (Guj).

CINEMA LAW

K. Abdul Latheef *

Cultural production, especially cinema, received less attention from law makers due to the general over-emphasis on its entertainment aspect at the cost of neglecting its educative value and its mediating role in shaping of the values within the social milieu. The overt neglect is creating problems in the society because the existing legal regime of cinema and other cultural industry is unable to control its attempt to thwart constitutional ideals by feeding people with patriarchal and capitalist values camouflaged with popular acceptance.

During the period under survey,[1] legislative and judicial activity in this area is scanty but a major step was taken by the Central Government through a notification[2] which provides detailed directions concerning certification of films for public exhibition. Judicial activity during the period is marked by interpretation conducive to the changing needs of the socio-political life.

Legislative activity

Some minor changes are introduced in the Cinematograph (Certification) Rules, 1983[3] by Cinematograph (Certification) Amendment Rules, 1991[4].

In the first Schedule to the Cinematograph (Certification Rules, 1983 -

(a) against serial number 3, for the entry in column 3, the following entry shall be substituted, namely :-

"States of Arunachal Pradesh, Assam, Bihar, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and West Bengal and the Union Territory of Andaman and Nicobar Island";

(b) after serial number 3 and the entries thereto, the following serial number entries thereto, shall be inserted, namely :- "4. Cuttack — State of Orissa ."

(c) serial numbers 4 to 7 shall be renumbered as serial numbers 5 to 8 respectively.

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* Research Scholar, NLSIU, Bangalore.

1 June 1991 to May 1992.

2 *See.* n. 5

3 Cinematograph Act, 1952 S.8.

4 *Gazette of India, Extra.*, Part II Section 3(i) 26 Nov. 1991 pp. 2-3.

In another attempt to widen the regulation concerning public exhibition of films, the Ministry of Information and Broadcasting issued a detailed notification[5] in supersession of past notification[6] under the Cinematograph Act, 1952.[7]

The new notification directs that in sanctioning films for public exhibition, the Board of Film Certification shall be guided by the following principles :

1. The objectives of film certification will be to ensure that -
   (a) -the medium of film remains responsible and sensitive to the values and standards of society;
   (b) artistic expression and creative freedom are not unduly curbed;
   (c) certification is responsive to social change;
   (d) the medium of film provides clean and healthy entertainments; and
   (e) as far as possible, the film is of aesthetic value and cinematically of a good standard.
2. In pursuance of the above objectives, the Board of Film Certification shall ensure that -
   (i) anti-social activities such as violence are not glorified or justified;
   (ii) the modus operandi of criminals, other visuals or words likely to incite the commission of any offence are not depicted;
   (iii) scenes :
   (a) showing involvement of children in violence as victims or as perpetrators or as forced witnesses to violence, or showing children as being subjected to any form of child abuse;
   (b) showing abuse or ridicule of physically and mentally handicapped persons; and
   (c) showing cruelty to or abuse of animals are not presented needlessly.
   (iv) pointless or avoidable scenes of violence, cruelty and horror, scenes of violence primarily intended to provide entertainment

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5 No. S.O. 836(E) 6 Dec. 1991, *Gazette of India, Extra.*, Part II, Section 3(ii) 6 Dec. 1991 pp 3-4.
6 No. S.O. 9(E) 7. Jan 1978.
7 S. 5-B(2).

and such scenes as may have the effect of desensitizing or dehumanising people are not shown;

(v) scenes which have the effect of justifying or glorifying drinking are not shown;

(vi) scenes tending to encourage, justify or glamorise drug addiction are not shown;

(vii) human sensibilities are not offended by vulgarity, obscenity or depravity;

(viii) such dual meaning words which obviously cater to baser instincts are not allowed;

(ix) scenes degrading or denigrating to women in any manner are not presented;

(x) scenes involving sexual violence against women like attempt to rape, rape or any form of molestation, or scenes of a similar nature are avoided, and if any such incident is germane to the theme, they shall be reduced to the minimum and no details are shown;

(xi) scenes showing sexual perversions shall be avoided and if such matters are germane to the theme, they shall be reduced to the minimum and no details are shown;

(xii) visuals or words contemptuous of racial, religious or other groups are not presented;

(xiii) visuals or words which promote communal, obscurantist, anti-scientific and anti-national attitudes are not presented;

(xiv) the sovereignty and integrity of India is not called in question;

(xv) the security of the State is not jeopardised or endangered;

(xvi) friendly relations with foreign States are not strained;

(xvii) public order is not endangered;

(xviii) visuls or words involving defamation of a individual or a body of individuals, or contempt of court are not presented; Explanation: Scenes that tend to create scorn, disgrace or disregard of rules or undermine the dignity of court will come under the term "Contempt of Court "; and

(xiv) national symbols and emblems are not shown except in accordance with the provisions of the Emblems and Names(Prevention of

Improper Use)Act, 1950 (12 of 1950).

3. The Board of Film Certification shall also ensure that the film -

   (i) is judged in its entirety from the point of view of its overall impacts; and

   (ii) is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the morality of the audience.

4. Films that meet the above-mentioned criteria but are considered unsuitable for exhibition to non-adults shall be certified for exhibition to adult audiences only.

5. (1) While certifying films for unrestricted public exhibition, the Board shall ensure that the film is suitable for family viewing, that is to say, the film should be such that all the members of the family including children can view it together.

   (2) If the Board, having regard to the nature, content and theme of the film, is of the opinion that it is necessary to caution the parents/ guardian to consider as to whether any child below the age of twelve years may be allowed to see such a film, the film shall be certified for unrestricted public exhibition with an endorsement to that effect.

   (3) If the Board, having regard to the nature, content and theme of the film, is of the opinion that the exhibition of the film should be restricted to members of any profession or any class of persons, the film shall be certified for public exhibition restricted to the specialised audiences to be specified by the Board in this behalf.

6. The Board shall scrutinise the titles of the films carefully and ensure that they are not provocative, vulgar, offensive or violative of any of the above-mentioned guidelines.

Judicial activity

In *Lakshmi Talkies v. State of A.P. and others,*[1] a vital question was raised before the High Court[2] on whether the licensing authority

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1 AIR 1991 AP 170.

2 Ramanujulu Naidu and N. D. Patnaik, JJ.

3 A.P. Cinema Regulation Act, 1955, S.11 & A.P. Cinema Regulation Rules, 1970 R.12-B.

under the Cinema Regulation Act[3] can inquire into possession of building site in order to renew or refuse to renew a cinema licence ?

The Court answered the question in the affirmative where the owner of the theatre had raised an objection at the time of renewal of cinema licence that the licensee was not in lawful possession of the building(theatre) and equipment, the licensing authority had the jurisdiction to make an inquiry regarding such possession.

A crucial question weaving together certain restrictions on semi-permanent cinema[4] and fundamental rights[5] was raised before the Karnataka High Court[6] in *State of Karnataka v. Javeed Hyder.*[7]

Regarding the location of semi-permanent cinema the State regulation imposes a prohibition that such cinema should not be established in towns or cities with a population of more than 50,000.

The Court held that it cannot be assumed that an applicant for a semi-permanent cinema licence has a fundamental right to have it in a place of his choice and when a rule made in the interest of public policy interferes with that choice it is violative of his fundamental rights. It is well settled law that no court could ever question the wisdom of the policy. [8] The Supreme Court[9] considered a question relating to classifying seats and fixing rates of admission to cinema theatres[10] on the basis of a plea that such an action infringes fundamental right,[11] in *Deepak theatre, Dhuri v. State of Punjab and others*[12] the Court took the view that the fixation of the prices of Cinema tickets is integral to and a necessary corollary of the larger power to regulate the cinema business. Such power is a reasonable restriction in the interest of the general public. The relevant section and rules thereunder is a regulatory measure and it is well within the licensing authority.

They do not infringe the fundamental right of the licensee to trade, business or avocation. It is a reasonable restriction imposed in the public interest. The power to regulate a particular business or calling

4 Karnataka Cinema (Regulation)Act, 1964 S.19(2)d & Karnataka Cinema (Regulation)Rules, 1971 R. 111-G.
5 Constitution of India, Art. 14 and 19(1)(g).
6 S. Mohan. C.J and N.Y. Hanumanthappa, J.
7 AIR 1991 Kant. 235.
8 The author is of the opinion that "alternate judges" are needed today to correct the "idiotic" policies which are forced on the people with the label of "wisdom".
9 K. Ramaswamy, M.Fathima Beevi and Yogeshwar Dayal, JJ.
10 Punjab Cinema (Regulation)Act, 1952, S.5, 8 ,9 & R.4.
11 Constitution of India, Art.19(1)(g).
12 AIR 1992 SC 1519.

implies the power to prescribe and enforce all such power and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. Though the right to fix rates of admission is a business incident, the theatre owner having created an interest in the general public therein, it has become necessary for the State to step in and regulate the activity of fixation of maximum rates of admission to different classes as a welfare weal[13]

An interesting issue was raised before the Gujurat High Court[14] in *Ramanlal B. Jariwala v. District Magistrate,* Surat and Another.[15] The issue raised was whether the government of Gujurat and its authorities functioning under the Gujurat Entertainment Tax Act, 1977 are entitled to collect entertainment tax on charges levied at the petitioner's cinema theatre from the passengers who use the lift faciltity available at the theatre[16]. The Court restrained the government of Gujurat and its authorities from levying and collecting entertainment tax on the lift charge, the petitioner is collecting from people who voluntarily wish to use the lift faciltity[17].

In *Gobardhan Chakroborthy v. Abani Mohan,*[18] the Calcutta High Court[19] considered a question relating to the bar of transfer of Cinema Licence[20].

Licence was granted in the name of a proprietary concern and later the licensee entered into partnership for running the cinema. The Court held that the licence cannot subsequently bring a suit for settlement of accounts on the basis of such a partnership agreement because such a partnership is illegal and forbidden due to the operation of the express rule[21] [22]. The above view of the Calcutta High Court was contradictory to the view taken by Andhra Pradesh High Court in Kommineni Krishna Rao v. Kommineni Babjee Rao[23], wherein it was held on similar facts[24] that a licensee after

13 The author considers this view as running counter to the ideals of socialist society because class difference is perpetuated by maintaining the status-quo in providing access to educative-entertainment or cultural production. The expected socialist situation in cinema hall is defeated by the class segregation.

14 S.B. Majmudar and Y.B. Bhatt, JJ.

15 AIR 1992 Guj. 38.

16 Gujurat Entertainment Tax 1977. S 3(1), 2(g)(v).

17 The author feels that it is time to introduce luxury tax/energy tax on equipments such as elevators, lifts, air conditioners etc., to control pollution and to promote energy conservation.

18 AIR 1991 Cal. 195.

19 Mahitosh Majumdar, J.

20 W.B. Cinema Regulation Act, 1954 S.5 & W.B. Cinema (Regulation of Public Exhibitions) Rules, 1956 R.8,9,19.

21 *Ibid* R. 19(2) See also Partnership Act, 1922 Ss. 16, 48, & Contract Act, 1872. S. 23.

22 Mrs. Amareswari and P.L. Narasimha Sarma, JJ.

23 AIR 1991 232.

24 *See* n. 18.

obtaining licence for cinema in his name can run the business by forming a partnership and such partnership will not be illegal or opposed to public policy,[25] nor violative of S.23 of the Contract Act, 1872. A suit by a partner for dissolution of firm and for accounts is maintainable. The Court took a bold view that licence-holder himself formed the partnership is illegal at a later stage when problems crop up amongst the partners.

The distinction of these two decisions is based on a very narrow difference in the two respective state regulations. As the business of running cinema involves considerable risk to the life of the public, the view taken by Andra Pradesh High Court[26] though based on a lack of an express bar[27] seems to be a far-fetched interpretation of Section 23 of the Contract Act, 1872 and the relevnt State regulation.[28]

Issues germinating from the information and entertainment explosion are engaging more and more judicial time. A basic question relating to video recorders came up before Punjab and Haryana High Court[29] in *Jyoti Video Theatre v. State of Haryana and other.*[30] The Court held that a Video Cassette Recorder is a cinematograph.[31] Hence, video parlours must obtain licence prescribed under the Act. The provisions of Punjab Entertainment Duty Act, 1955[32] cannot be invoked to exempt video parlours from obtaining licence.

Another question raised before the Court was that entertainment duty on more than one basis is unconstitutional. But the Court emphatically brushed aside this argument by declaring that duty on video parlours imposed on more than one basis[33] is not invalid or discriminatory as it is well within the scope of Art.14 of the Constitution.

The Court's view is a laudable one as it is trying to respond according to the needs of the day without sticking to the archaic philosophies with the help of out-dated interpretative jargons.

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25 A.P. Cinemas (Regulation) Rules, 1970 R. 12(2).
26 *See.* n. 23.
27 *See.* n. 21.
28 *Ibid.*
29 R.S. Mongia, J.
30 AIR 1992 P & H 48.
31 Punjab Cinemas (Regulations) At, 1952, S.2(a).
32 S. 3-A and Rule 8-A.
33 Punjab Entertainment Duty Act, 1955 S.3-A.

CONSUMER PROTECTION LAW

S. V. Joga Rao *
Rahul Matthan **

For the purposes of this review, a study of the consumer cases of the relevant period [1] at the State and National Level has been made and the important, path breaking decisions have been highlighted. For easier classification the cases have been grouped into broad sub-headings within which further trends have been culled out. Thus the jurisdictional aspects, definitional trends in the concept of consumer, compensation, negligence, deficiency, service, etc have been discussed. Finally a profile of the important industries, organisations and institutions commonly proceeded against in consumer fora, has been made, which includes electricity boards, housing boards, telephone and telegraph authorities, railways etc. Through this exercise we hope to provide an adequately accurate birds-eye view of consumer protection law over the past year.

Jurisdiction

It was held that jurisdiction is an intricate question of fact and law, [2] and where a preliminary objection regarding jurisdiction has been made, the district forum cannot proceed without first deciding on the objection. If it does its order would not be sustainable.[3]

The commission has adopted on its own, a rule of prudence, that when a case is already subjudice it will forbear to entertain a complaint under the Consumer Protection Act in the same case. Such a course of action is essential to avoid conflicting findings by different judicial and semi-judicial forums. It also oblivates multiplicity of trial on the same cause of action.[4] However, this is not true where the case is subjudice in another forum inasmuch as the reliefs obtainable and the parties which can obtain reliefs are entirely different.[5] It has also been held that, where the provisions of the Consumer Protection Act and any other law which

* Faculty Member NLSIU, Bangalore.
** Student, IV Year, NLSIU, Bangalore.

1 The period is between May '91 to June '92.

2 *S. Bhagat Singh v. Oriental Insurance Company* Vol II CPJ 700; *LIC v. Sheela Devi*, Vol II CPJ 722.

3 *Jaipur Stock Exchange v. C.P. Mehta* Vol II CPJ 51.

4 *Lt. Anand v. The Manager, Indian Bank* I (1919) CPJ 137; *Santhosh Sharma v. SBI*, II (1991) CPJ 262; *Patel Ukabhai v. Adarsh Welding Works*, II (1991) CPJ 276; *Agarwal Dyeing Industries v. Rajasthan Financial Co-op*, II (1991) CPJ 341; *Modern Mechanical v. Raj Financial Corpn.*, II (1991) CPJ 13; *Mohd. Basheer v. State Bank of Hyderabad*, II (1991) CPJ 665. *Byford v. Ramesh Tareja*, I (1991) CPJ 586.

5 *P.N.B. v. K.B. Shetty*, II (1991) CPJ 639.

provides for the establishment of quasi-judicial machinery, are not in derogation of each other and do not conflict with or supercede each other, then the jurisdiction of the respective fora would coexist and cannot be said to be mutually exclusive.[6]

The jurisdiction of the state commission can be founded on the basis of the claim laid by the party and not on the basis of relief granted.[7] It is also based on the territorial factor[8] and or the quantum of compensation claimed.[9]

In *L.I.C. v. Shri Bhavaram Srinivas Reddy,* [10] it was held that jurisdiction cannot be denied merely because the matter cannot be decided without taking and considering documentary and oral evidence. But where the case depends solely on the consideration of voluminous, complicated and elaborate oral as well as documentary evidence, and necessary local inspections, the commissions have preferred that the matter be adjudicated before a civil court.[11]

An interesting point of jurisdiction was discussed in *M/s Ansal Properties v. Chander Kohli.* [12] The complainant filed a complaint regarding immovable property. The first question was whether the forum could decide on a matter related to immovable property. The National Commission held that it could. The opposite party, however, filed a petition in the Delhi High Court challenging the decision of the Commission. The High Court held that where the Act provides the complete machinery for the redressal of a complaint, including appeal to the Supreme Court, it would be improper for the High Court to decide on whether a certain complaint can be entertained by the State Commission - that is a matter to be decided by the State Commission on the merits of the case.

The year 1991 has shown fairly uniform trends on the matter of jurisdiction. The basic grounds for exclusion of jurisdiction are pecuniary, territorial and *sub judice* (but not where relief offered by the other fora is substantially different), though individual facts have offered scope for slight modifications of the concept of jurisdiction.

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6 *Consumer Protection Council, Kerala v. Hindustan CIBA-GEIGY Ltd,* II (1991) CPJ 662.

7 *A.B.G.P v. Chairman, LIC,* I (1991) CPJ 171.

8 *Dynavox Electronics v. BJS Rampura College,* I (1991) CPJ 440; C.E.R.S. v. Canara Bank. II (1991) CPJ 148; *U.O.I. v. K.K. Bhat,* II (1991) CPJ 474; *Indian Airlines v. C.E.R.S.,* II (1991) CPJ 686.

9 *General Co-op Housing Society v. J&K Cement Works,* I (1991) CPJ 550; *Upbhokta Samiti v. P.H. Eng Dpt,* II (1991) CPJ 321.

10 II (1991) CPJ 189.

11 *Lt. Anand v. The Manager, Indian Bank,* I (1991) CPJ 157; *Sushila Gautam v. National Insurance Co.,* II (1991) CPJ 651.

12 I (1991) CPJ 679.

Who is a consumer ?

Section 2(d) of the Consumer Protection Act defines the term 'consumer' for the pusposes of the Act. As this definition is essential to the actual applications of the law in this field, it will be helpful to study judicial trends in this regard.

Thus, for the purposes of this Act the following persons have been held to be Consumers : an allottee of a house from a Housing Development Board,[13] passengers travelling by train on payment, [14] a subscriber provided a telephone connection, [15] a nominee of an insured person, [16] a tailor, [17] a person who installs a water cooler for the use of the public free of cost.[18] Furthermore, in *D.S. Sindhu v. Secy. Central Government, P & T Department,*[19] it was held that a person other than the original consumer, who hires any service, can maintain a complaint for alleged deficiency under this Act. Similarly, a person who availed of services with the approval of the person who hired the service, has been held to be a consumer.[20] Finally, attention must be drawn to a case decided by the Kerala State Consumer Forum where a complainant whose husband had died while undergoing treatment in a hospital was considered a consumer.[21]

As far as those persons excluded from the ambit of this section, this is mainly due to the exception of "commercial purpose". Thus the following are not consumers : a taxi driver,[22] the purchaser of a truck for commercial purposes,[23] the purchaser of an offset printing machine for commercial purposes,[24] a soap manufacturer against supplies of raw materials.[25] Also excluded are persons bitten by a stray dog,[26] a person who got his services free of charge with respect to insurance policies,[27] the highest bidder at an auction,[28] *dobhis* vis-a-vis the electricity supplied to the *Dobhighat* at the

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13 *U.P. Avas Evam Vikas Parishad v. Garima Shukla,* I (1991) CPJ 1; *Sneha Chadda v. DDA,* I. (1991) CPJ 13.
14 *South Eastern Railways, G.M. v. A.P. Sinha,* I (1991)CPJ 10.
15 *Union of India v. Nilesh Aggarwal,* I (1991) CPJ 203.
16 *Divisional Manager, LIC v. Uma Devi,* II (1991) CPJ 516.
17 *A.C. Mogadi v. Cross Well Tailors,* II (1991) CPJ 586.
18 *Vasundara v. B.K. Goyal,* I (1991) CPJ 69.
19 II (1991) CPJ 90.
20 *D.V. Lakshminarayana v. Divisional Electrical Engineer,* II (1991) CPJ 303.
21 *Vasantha P. Nair v. Cosmopolitan Hospital,* II (1991) CPJ 444.
22 *Western India State Motors v. S.M. Meena,* I (1991) CPJ 44.
23 *Jaheed Hussain v. Shah & Lohia Machines Ltd,* I (1991) CPJ 56.
24 *M/s Oswal Fine Arts v. M/s HMT, Madras,* I (1991) CPJ 330.
25 *Ram Gopal v. H.P. State Small Industries,* I (1991) CPJ 415.
26 *A. Srinivas Murthy v. BDA,* I (1991) CPJ 657.
27 *Alex J Rebello v. LIC,* I (1991) CPJ 418.
28 *N.S. Nayak v. BDA,* II (1991) CPJ 537.

cost of the BDA,[29] a person who alleges that her bufallo died due to the non-provision of safety measures by the Electricity board,[30] complainants standing in line to take petrol who were subsequently burnt by a fire resulting out of spillage,[31] complainants aggrieved of the existence of high tension wires in the locality supplying energy to Air Force auothorities.[32] Also, where a patient enters into a personal contact of services with a doctor in a hospital, the hospital is not a consumer.[33] Also noteworthy are two cases on the point of hospitals as consumers, viz., *Consumer Unity Trust Jaipur v. State of Rajasthan,*[34] decided by the National Commission and *Ram Kali v. Delhi Administration,*[35] wherein it was decided that persons availaing themselves of the facilities of Government hospitals where service was subsidised out of Government funds could not be treated as consumers under this Act. Finally, on the question of a supplier of goods, it was held that as the supplier does not receive any service from the purchaser he is not a consumer and cannot claim on account of non payment of the value of the goods sold. [36]

Negligence

On the question of what constitutes negligence, it has been held during this year that the following fact situations would involve negligence : confirming a reservation for a date when there was no scheduled departure of a train,[37] the failure to provide water for the irrigation of crops as per prior contract,[38] non-shifting of an external extension of a telephone resulting in the loss of business in attributable to the negligence of the telecom department,[39] an insurance company taking over 2 years to get the impugned loss assessed by a licenced surveyor,[40] loss of ornaments kept by the complainant in a locker was deemed to be due to negligence,[41] loss, injury or damage arising or resulting out of late delivery of a telegram is also negligence on the part of the government.[42] Also decided was the question of the liability of the principal for the negligence of the agent. In

29 *AKMMM Sangha v. Commr., Bangalore City Corporation,* II (1991) CPJ 543.
30 *Rajasthan State Electricity Board v. Pani,* II (1991) CPJ 127.
31 *Kumari Pinki v. M/s Motor Aids Petrol Pump,* II (1991) CPJ 264.
32 *Inderjit Kumar v. Haryana State Electricity Board,* I (1991) CPJ 115.
33 *Y Meenakshi v. Dr. H. Nandeesh,* II (1991) CPJ 533.
34 II (1991) CPJ 56.
35 I (1991) CPJ 309.
36 *Glass Studio v. Collector of Central Excise and Cusroms,* II (1991) CPJ 585.
37 *S.Pushpavanam v. Southern Railway,* II (1991) CPJ 64.
38 *Orissa Lift Irrigation Corpn. v. B.Rout,* II (1991) CPJ 213.
39 *Mahaveer Electricals v. District Engineer, Telecom,* II (1991) CPJ 296.
40 *J. Sarveswara Rao v. National Insurance Co.,* II (1991) CPJ 523.
41 *K.B. Shetty v. Punjab National Bank,* II (1991) CPJ 692.
42 *Telegram Master (o) Belgaum v. E.F. D'Silva,* I (1991) CPJ 394.

M.L. Sharma v. Chief Administrator, HUDA,[43] where the allotment of a residential plot was denied due to the non-receipt of documents from their agent, the Canara Bank, was held to be equivalent to the negligence of the principal.

In the following cases it was decided that the facts do not warrant a finding of negligence when the handing over of the property was delayed by a year because the relevant file was with the CBI it was not held to be negligence,[44] a 'work to a rule' agitation of employee causing hardship to the consumer did not imply negligence of employers.[45] The factum of negligence must be proved conclusively and cannot be implied per se. Thus an allegation that the wife of the complainant died due to the delay in departure of a flight from Lucknow to Delhi is baseless unless actual negligence is proved,[46] and a train stopped for over 6 hours due to a derailment cannot be 'per se' due to the negligence of the Railway authorities.[47] There must be a direct nexus between the ailment suffered and the water supplied by the P.H.E.D to prove negligence.[48] In another interesting case it was held that merely because UTI certificates are capable of being tampered with easily, there is no negligence on the part of UTI if a third party used tampered forms to commit a fraud.[49]

Finally, with regard to the negligence of Postal Authorities in a case decided in Kerala, reliance was placed on S.6 of the Post Office Act and it was held that there could be no negligence on the part of the Postal Authorities unless the alleged loss, misdelivery, delay or damage was caused fraudulently or by wilful act of default.[50] This is an obvious departure from the Karnataka High Court decision cited earlier.[51]

Limitation

The concept of limitation on the time of filing a suit is integral to the efficient and just functioning of the Consumer Protection machinery, as without it the consumer dispute redressal fora will be bogged down by numerous outdated disputes. The real question that had to be resolved was whether the provisions of the Limitation Act would be applicable to the resolution of disputes before the Consumer Forum.

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43 II (1991) CPJ 552.
44 *K.D. Narang v. C.P. Singh,* II (1991) CPJ 22.
45 *Society for Civic Rights v. Union of India,* I (1991) CPJ 199.
46 *Indian Airlines v. Rajesh Kr. Upadhyaya,* I (1991) CPJ 206.
47 *Saraswati Rembhavi v. D.R.M. Hubli Division,* I (1991) CPJ 539.
48 *State of M.P. v. Ram Mitra Pidiha,* II (1991) CPJ 367.
49 *Sarla Jain v. UTI,* I (1991) CPJ 320.
50 *K. Neelambaran v. Post Master, Urukunnum,* I (1991) CPJ 666.
51 *Supra* n. 42.

In this regard two separate schools of thought emerged. The Delhi Consumer Forum was of the opinion that the Limitation Act was applicable and stated so in two decisions.[52] The Kerala State Consumer Forum took the opposite view in *C.P.Philip v. Pulimootil Enterprises*.[53] In this case a complaint was filed before the National Commission and was kept in that forum for two years. It was held that as there was no provision for the exclusion of this time from the period of limitation, it was barred. The Limitation Act which could provide for such exclusion was held to be inapplicable.

The National Commission, however, laid the matter at rest by relying on the provisions of the Limitation Act in a series of cases, thus tacitly approving of its application. [54]

On specific points of law it was held that the period of limitation commences from the date of knowledge of the order and not from the date of the order.[55] Furthermore, a suit for compensation for libel was held to be not maintainable after one year.[56]

With specific reference to the Consumer Protection Act, the period of limitation for the filing of an appeal from any one of three fora is statutorily fixed at 30 days, unless reason for any delay is found to be sufficient. Thus, delay due to late communication of the free copy is not time barred.[57] Similarly, when the order passed by the District Forum in absence of the appellant was delivered by post 23 days after the receipt of the order, the delay was held to be satisfactorily explained.[58] Whereas, when the appeal was filed 4 months and 23 days late due to the tedious bureaucratic set up of the appellant department, this was held to be not "sufficient cause". [59]

Deficiency

Deficiency in service being so closely akin to negligence there is no need to go into detail on this subject apart from a brief synopsis of judicial trends in this field. The following acts were held to be a deficiency in

52 *Prabhat Bag Factory v. United India Insurance*, II (1991) CPJ 327, *S.Kumar v. M.D., Air India*, II (1991) CPJ 72.

53 II (1991) CPJ 275.

54 *M.Sahli v. United India Insurance Company*, II (1991) CPJ 660, *Mohd. Basheer v. State Bank of Hyderabad*, II (1991) CPJ 665, *M Sathi v. United India Insurance Company*, II (1991) CPJ 697.

55 *Marxikkar (Motors) Ltd v. Mrs. Mary Paulose*, II (1991) CPJ 283.

56 *Devanand Gehlot v. Rajasthan Patrika*, I (1991) CPJ 487.

57 *State of M.P. c. Ram Mitra Pidiha*, II (1991) CPJ 367.

58 *Dynavox Electronics v. B.J.S. Rampura Jain College*, I (1991) CPJ 440.

59 *Public Health and Engineering Department v. District Forum, Consumer Protection, Bikaner* I (1991) CPJ 432.

service : the reservation of a ticket on a train that did not depart on the date mentioned,[60] so also, when 2 berths were booked in the AC 2nd Class Sleeper but the names were not on the reservation charts on the date of departure.[61] When after an application was made for certified copies of orders by 5/1/90 and the same were not ready by 24/11/90 this is a deficiency.[62] When the water billing was raised sudenly on the basis that water was used for non-domestic purposes, and the same was done not in accordance with law,[63] when the goods were delivered by the transport company in a damaged condition and a short delivery was made at the destination, [64] it was held to be a deficiency in service with regard to a transport service. A deficiency in this service was said to include irregular plying of roadway buses, non-display of plates showing the route of the bus etc. [65] When a bus was purchased under hire-purchase agreement, a default in the payment of 4 monthly payments does not warrant the seizure of the bus by the financier and any such seizure is a deficiency in service[66]. Finally, a complainant who succeeds in establishing a deficiency in hired services is entitled to a refund of charges. [67]

Perhaps it would be more relevant to study those cases where there was held to be no deficiency in service. Thus where an allotment of shares was not made this was not considered a deficiency. [68] Similarly a change in the timing of the Post Office was not held to be a deficiency. [69]

Service

Another matter whose definition is essential to the proper functioning of the Consumer Protection machinery is "service". The following have been held to be service : telephone services, [70] activities relating to insurance [71] and life insurance, [72] services rendered by Housing Boards, [73] and facilities provided by Railway Administration. [74]

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60 *Pushpavanam v. G.M. Southern Railway*, II (1991) CPJ 64.
61 *Anil Gupta v. G.M. Northern Railway*, II (1991) CPJ 308.
62 *Chintamani Mishra v. Tahasildar Khandapara*, II (1991) CPJ 337.
63 *A. Sampath v. Commr. Hubli-Dharwar Municipal Corporation*, II (1991) CPJ 483.
64 *Vinod Seth v. Rattan Roadlines*, II (1991) CPJ 485.
65 *Kashinath Badwa v. Maharashtra, SRTC*, II (1991) CPJ 609.
66 *Kriya Yoga Foundation v. Team Finance Co.*, II (1991) CPJ 590.
67 *B.R. Sidhu v. Secy., Central Government, P&T Department*, II (1991) CPJ 90.
68 *L.C. Chandgotiya v. Northern Leasing & Industries*, II (1991) CPJ 19.
69 *Suptd. of Post Offices v. Grahak Parishad*, II (1991) CPJ 490.
70 *Mahaveer Electricals v. Dist. Engineer, Telecom.*, II (1991) CPJ 28
71 *Divisional Manager, LIC v. Uma Devi*, II (1991) CPJ 516.
72 *LIC v. Sheela Devi*, II (1991) CPJ 722.
73 *U.P. Acas Vikas Parishad v. Garima Shukla*, II (1991) CPJ 1.
74 *South Eastern Railway, G.M. v. A.P. Sinha*, I (1991) CPJ 1.

With regard to those services excluded from the ambit of the Act, most such services relate to those entered into under a contract of personal service. Thus a patient entering into a contract for personal services with a doctor is excluded,[75] and the services of a tailor are personal.[76] Similarly, the services of an advocate are personal.[77]

Note may be had of a decision of the National Commission where it was held that the Hindusthan Commercial Bank was under no legal obligation to provide Banking and Financial advice to their customers.[78]

Insurance

Being one of the institutions most involved in the activities of consumer protection, it was thought that a profile of the attitude of the consumer forum to insurance would be helpful. In the main the stress has been on protecting the insured.

Thus, where the policy holder was denied the right to know about surrender value, special surrender and bonus with respect to his policies, it was held to be a deficiency of service.[80] Also, merely because the insurer had totally repudiated his liability in respect of the claim, it was held that it did not mean that no proceedings could be brought under the Consumer Protection Act.[81] Where in a case of theft, the Insurance Company alleged that as there was no "forcible entry" the offence did not fall under the category of burglary, this objection was not sustained.[82] Where a taxi was missing with driver and passengers and its whereabouts could not be traced, the insurers claimed that it did not fall under the category of theft and so was not covered. This objection was disallowed.[83] The rejection of an "insured party" claim by the Insurance Company is not a per se jurisdiction bar to seek redress before the fori.[84] It was also held that it was not a pre-requisite for settling the claim that the original policy should be sent.[85] The insurer is not empowered to pay or settle a lesser amount than actually sustained by the insured.[86]

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75 *Y. Meenakshi v. Dr. H. Nandeesh,* II (1991) CPJ 533.
76 *A.C. Mogadi v. Cross Well Tailor,* II (1991) CPJ 586.
77 *K. Rangaswamy v. Jayavittal,* I (1991) CPJ 685.
78 *Special Machines, Karnal v. Punjab National Bank,* I (1991) CPJ 78.
80 *Akhil Bharatiya Grahak Panchayat v. Chairman, LIC,* I (1991) CPJ 171.
81 *New India Assurance Co. v. Wipro Electronics Pvt. Ltd,* I (1991) CPJ 335.
82 *Bhasin Industrial Corporation v. United India Insurance,* II (1991) CPJ 629.
83 *S. Bhagat Singh v. Oriental Insurance Co.,* II (1991) CPJ 700.
84 *R.S. Oil & General Mills v. National Insurance Co.,* II (1991) CPJ 402.
85 *June July Fashions v. National Insurance Co.,* II (1991) CPJ 677.
86 *Umedi Lal Aggarwal v. K.K. Nagpal,* I (1991) CPJ 169.

A complainant was held to be not entitled to invoke the jurisdiction of the Consumer Redressal Commission when his claim has already been investigated and rejected.[87] On a general point of law, it was held that an Insurance Contract is complete from the date that the premium is paid.[88]

Telecommunications

Under the general rubric of telecommunications, we shall study consumer complaints relating to telephones, telegrams, telexes and other related complaints.

In *Nazar Irani v. G.M. Maharashtra Telephone Nigam Ltd, Bombay,*[89] it was held that the telephone of the complainant could not be disconnected for default of payment of arrears of his wife's independent phone. Where the telephone department disconnected the phone without adequate notice, it was ordered to be restored.[90] On the question of telephone tariffs, it was held that the commission could not go into the reasonability of fixation of tariff rates.[91] Subscribers held to be entitled to a rebate when a large number of phones went out of order during a strike by telephone employees.[92] It was also held that the forum was empowered to entertain disputes under the Indian Telegraph Act.[93] The consumer forum was held not to have the power to fix the maximum number of calls which it considers reasonable and fail to be billed for a billing period.[94]

It is interesting to note that the Telephone District Manager of Patiala was held guilty of 'contempt, in disobeying an ad interim order of the District Forum and sentenced to one month's simple imprisonment.[95]

Housing

The commissions have frequently been faced with cases where the housing scheme is not completed on time and/or where the price charged finally for the plot/house has been in excess of the original amount mentioned in the scheme. In all such cases, the commissions have consistently held that the complainant would be entitled to interest, refund and other

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87 *M/s Janta Machine Tools v. Oriental Insurance Co.*, I (1991) CPJ 508.
88 *Mohan Lal & Sons v. United India Insurance Co.*, (1991) CPJ 556.
89 II (1991) CPJ 186.
90 *Dr. Devinder Gupta v. G.M., Srinagar*, I (1991) CPJ 271.
91 *Madras Provincial Consumer Association v. Department of Telecom*, I (1991) CPJ 497.
92 *Consumer Action Group v. Madras Metropolitan Telecom Board*, II (1991) CPJ 48.
93 *Telecom. Dist. Manager v. M/s Kalyanpur Cement Ltd*, II (1991) CPJ 286.
94 *Divisional Manager, Telephones v. Madhu Enterprises*, II (1991) CPJ 579.
95 *C.R. Kataria v. Consumer Disputes Redressal Dist. Forum*, II (1991) CPJ 682.

incidental expenses.[96] But where the cost is fixed provisionally and subsequently increased, it can't be held to be arbitary and unreasonable.[97] Likewise where the cost mentioned in the initial scheme is merely an 'estimated' cost by the time the scheme is completed is higher (in this case 9 years later), the complainant is entitled to no relief in terms of the calculation of the cost,[98] nor in cases where such an escalation is provided for in the terms and conditions of sale.[99] The complainant would not be entitled any claim in cases where there is no proof of the housing authority's negligence [100] or of the general allegations made.[101]

In *Rishi Pal Gupta* v. *DDA*,[102] the complainant got himself registered for allotment of a plot in a certain area , under certain scheme, but was instead allotted a plot in another area. It was held that the DDA would be estopped from taking up the plea that all the assured plots could not be taken up because of non availability of total area for the above scheme; and where the "builders" were neither the owners nor the landlords of the building that they had sold, and they had illegally retained the amount, it was held that the complainant would be entitled to a refund of the entire amount.[103] Complainants would also be entitled to compensation in cases where they were allotted a site that was found to be under litigation, and therefore were allotted alternate sites during proceedings.[104]

It has also been held that the complainant can satisfy himself about the actual area handed over by the Development Authority.[105]

It is rather needless to state that the commission has held the Housing

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96 *Manohar Lal Narang v. M/s Amita Corporation*, I (1991) CPJ 542; *Kanhaiyalal v. Rajasthan Housing Board*, I (1991) CPJ 603; *Raj Rahul Contractors v. Mr. Lalit Kumar*, I (1991) CPJ 576; *The Commissioner, Karnataka Housing Board v. B.N. Shetty*, I (1991) CPJ 191; *S.C. Jain v. U.P. Avas Evam Vikas Parishad*, I (1991) CPJ 258; *B.L. Patney & Krishna Patney v. DDA*, I (1991) CPJ 345; *S.K. Ahluwalia v. H.P. Housing Board*, I (1991) CPJ 481; *Gurvinder Bedi v. DDA*, I (1991) CPJ 606; *Sushila Devi v. Raj Sudha Towers*, II (1991) CPJ 197; *A.B.G.F. v. Gujarat Gram Gruh*, II (1991) CPJ 218; *Sita v. B.D.A*,. II (1991) CPJ 390; *N.Unni v. Kerala State Housing Board*, II (1991) CPJ 462.

97 *Sri. A.V. Narayan v. The Commissioner*, I (1991) CPJ 147.

98 *Sneh Chadha v. DDA*, I (1991) CPJ 409.

99 *B.L. Patney v. DDA*, I (1991) CPJ 345.

100 *K.D. Narang v. C.P. Singh*, II (1991) CPJ 22. *Also see M.L. Sharma v. Chief Administration HUDA*, II (1991) CPJ 552.

101 *Lal Chand v. DDA*, II (1991) CPJ 509; *S.N. Kashyap v. Raja Reddy*, II (1991) CPJ 363; *K.T. Shivaiah v. The Chairman BDA*, II (1991) CPJ 82.

102 I (1991) CPJ 368.

103 *Sushila Devi v. Raj Sudha Towers (P) Ltd.*, I (1991) CPJ 620.

104 *C.L. Jagannath v. Chairman B.D.A.*, II (1991) CPJ 88; *Gururajh Naik v. Commissioner, B.D.A.*, I (1991) CPJ 509.

105 *Sneh Chadhav v. C. DDA*, I (1991) CPJ 409.

Boards of various states to be within their jurisdiction,[106] since the majority of the judgements on this matter have been handed out against state housing authorities rather than private builders. That is a welcome trend becasue the atrocities committed by the housing boards have become a matter of grave concern. But that is not to say that private housing schemes are more virtuous or that their malfunctioning goes unchecked.

Railways

In keeping with the somewhat established principle of law as developed by the commissions, compensation is not awarded to passenger - complainants for hunger, thirst, mental agony, fear or dacoity, etc. when there is no proof of negligence.[107] But where there is proof of negligence of railway booking and reservation staff, then the Railway would have to bear vicarious responsibility for the same.[108]

The commissions do not entertain cases wherein their jurisdiction is clearly ousted by the Railway Claims Tribunals Act.[109]

The commissions have upheld the concept of rule of law and the principle of equality in the Constitution by holding that the allotment of seats to VIP's in preferance to the complainant (who was a non-VIP) was not in order and was arbitrary. It was also held that the complainant's claim to Compensation was sustainable.[110]

It may be observed here that while the commissions adhere to established principles of law, they also develop their own principles.

Electricity

The supply of electrical energy, is, under the Consumer Protection Act, a hiring of service.[112]

In the case of electricity, as in most other cases, claims made without sufficient evidence would not give rise to a cause of action.[113] Extending

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106 *Raj Kumar Bajaj v. Chandigarh Housing Board,* II (1991) CPJ 649; *Narayana Unni v. Kerala State Housing Board,* II (1991) CPJ 462.

107 *Saraswati N. Kembhavi v. R.M. Hubli,* I (1991) CPJ 539.

108 *G.M. Southern Railways v. J.F.A. Fernando,* II (1991) CPJ 407; *Anil Gupta v. Northern Railways,* II (1991) CPJ 308.

109 *Ashok Kumar v. Western Railway,* I (1991) CPJ 618; *Bharwarlal v. Station Supdt. Rahuri,* II (1991) CPJ 248.

110 *M.Meenakshisundaram v. G.M. Southern Railway* II (1991) CPJ 137.

112 *M.S.E.B. v. Dinesh Kumar,* II (1991) CPJ 38.

113 *K.E.B. v. Karnataka Citizens Forum,* I (1991) CPJ 97; *Kerala State Electricity Board v. Bhargavi,* II (1991) CPJ 733; *Billa Mali v. The R.S.E.B. Jaipur,* II (1991) CPJ 495.

this logic, if the electricity board claims an additional amount from the consumer (of the service) for alleged misuse and excessive load of electric energy, but if the allegation is vague and incredible, the claim would bear no merit.[114]

Where the matter has been found to be defective the commission has ordered the amount that the complainant has been exclusively billed for to be refunded. [115] Where the deposit has been made but no electrical connection given, the forum has ordered interest on the deposit, with directions to provide a service connection within one month. In fact, in one case, where the complaint was against DESU for excessive billing, DESU undertook that the consumer will be allowed to pay the amount of the bill in 6 equal instalments, and the electrical supply would not be disconnected and it also agreed to nominate its Public Relations Officer in the Central Office to deal with the complaints of the consumers.[116] Where the complainant was made to pay a surcharge not due to any fault of his, but due to a failure on the part of the Electricity Board to issue a fresh slab card in time, he was held to be entitled to a refund.[117]

Thus, the commissions have adopted the view (and rightfully so) that it is of paramount importance that the employees of the Electricity Board discharge their duties fairly and properly in accordance with law. In case of dereliction of duty on their part, the Board is not justified in collecting excessively from the consumers.

The commissions have recognised the principles of natural justice. Thus, in *Biharilal Sharma v. Rajasthan,*[118] the complainant, whose electrical connection had been disconnected was heard daily by the President of the forum, but the member who did not hear the arguments in the complaint had become party to the order, because he had signed it. This was held to be offensive to natural justice.

While the forum has been sympathetic to the consumers of electricity, it has nevertheless held that the hirers of the service for consideration would be entitled to the remedies offered by the Consumer Protection Act.[119]

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114 *D.E.S.U. v. Rishal Singh,* II (1991) CPJ 393.
115 *M/s. Vani TAlkies v. Secy. K.E.B.,* I (1991) CPJ 226.
116 *Common Cause v. DESU I,* (1991) cpj 113.
117 *D.V. Lakshmi Narayana v. Divisional Electrical Engineer,* II (1991) CPJ 303.
118 II (1991) CPJ 350.
119 *A.K.M.M.S. v. Commissioner, Bangalore City Corporation,* II (1991) CPJ 543.

Compensation

There were numerous decisions regarding the question of compensation in both the state level and the national commissions, since this is one concept that is vital to the scheme of the Act. One of the questions that came up for repeated consideration was whether compensation can be awarded if there was no material evidence on record when there was mere mental agony. The various commissions that have had to pronounce on this repeatedly have always held in the negative [120]. But where there is mental agony, substantiated by material evidence of negligence, compensation has been granted.[121] Further compensation can't be awarded when the precise loss is not quantified,[122] but compensation can be awarded for any professional breakdown caused due to deficient telephone service [123]. However, where a bank failed to render service due to strike by its employees, no compensation was awarded.[124]

In *Mumbai Grahak Panchayat v. Lohia Machines,*[125] it was held that compensation can be awarded when there is a failure of obligation to refund deposits on cancellation of bookings, but not when there is a mere delay of such refund.

In *Giriraj Sharma v. Regional Commissioner, Coal Mines Provident Fund,*[126] the complainant was covered the Provident Fund Scheme, but on his death, the wife was not paid the amount. The amount, however was paid during the course of proceedings before the commission. It was held that the complainant was entitled to compensation in lieu of interest.

In *Haryana Credits and Saving Ltd v. Prem K Taneja,*[127] the former

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120 *Bharat Bank Tractors v. Sri Ram Chandra Pandey,* I (1991) CPJ 14; *Western India State Motors v. S.M. Meena,* I (1991) CPJ; *Supdt. Telegraph Traffic v. Dist. Forum Bikaneer,* I (1991) CPJ 75; *Bharat Tractors Muzzafarpur v. Sri Ramachandra Pandey,* I (1991) CPJ 152; *Mangilal v. Dist Rural Development Agency,* I (1991) CPJ 474; *Shri Devanand Gehlot v. Rajasthan Patrika,* I (1991) CPJ 487; *Executuve Engineer v. Dr. Chander Bhan,* I (1991) CPJ 653; *B.V. Khatewale v. Sub Divisional Officer, Telegraphs, Karnataka,* I (1991) CPJ 675; *C.E.R.C. v. Indian Airlines,* Vol II CPJ 621; *T.B.O. Travels v. S. Narayana,* II (1991) CPJ 396.

121 *Commercial Officer Telecom v. Bihar State Warehousing Corp.* I (1991) CPJ 14; *Akhil Bharatiya Krishik Panchayat v. Chairman, LIC,* I (1991) CPJ 171; *B.L. Chakku v. Dist. Telecom Eng & Others,* I (1991) CPJ 263; *Patel Ramubhai v. Indian Airlines Corporation,* I (1991) CPJ 511; *U.O.I. v. K.K. Bhat,* II (1991) CPJ 474; *G.M.B.E.S.T. Bombay v. Milnad G. Dixit,* II (1991) CPJ 581; *MTN v. Dr. Karkare,* II (1991) CPJ 655; *Dpt. Controller K.S.R.T.C. v. Azeed Ahmed,* II (1991) CPJ 734; *Hardasan v. Kuthoos,* I (1991) CPJ 688.

122 *P.N.B. v. Pushkar Woolers,* I (1991) CPJ 627.

123 *U.O.I. v. Dr. S.B. Thakur,* I (1991) CPJ 31.

124 *Federal Bank v. Bijoi Mishra,* I (1991) CPJ 16.

125 I (1991) CPJ 26.

126 I (1991) CPJ 530.

127 II (1991) CPJ 124.

advertised in the local press for arranging the booking of Maruti cars against the deposit of a certain amount, and undertaking to loan the requisite balance to the prospective customers. The complainant deposited the specified amount, but was informed that the car could not be booked because of certain problems. It was held that it was a valid case for compensation. However, in *Margan Ram v. National Motors,*[129] the complainant applied for a bank loan to purchase a Ferguson Tractor. The loan was sanctioned. The margin money was deposited by the complainant and the balance was supplied by the bank. The tractor was not delivered. The complainant filed a complaint, in which he impleaded, unlike in the previous case, three parties - the Bank, the Manufacturer and the Insurance Company. The forum held that it was a civil case since all the three parties were impleaded and therefore dismissed the case without going into the merits. The Commission has however held [130] that where the complainant makes a declaration in a criminal court for compensation and the court grants a decree in his favour, but the respondent company does not make a payment, the complainant can approach the commission to direct the company to pay the claim.

Where there is no contractual and fidudiciary relationship between the parties, no compensation can be claimed,[131] nor when there has been no irregularity in supply nor any deficiency, in service, or in the goods.[132] However, where the relevant legislation (in the instant case, the Railway Act) provides for compensation to be paid, as per the circumstances, then the claim for compensation would be held to be sustainable by the commission.[133]

The commission has, rather consistently, taken a wide and liberal view of the concept of compensation. In *C.L. Jagannath v. Chairman, B.D.A.*,[134] the complainant got a lease-cum-sale agreement registered, and obtained the possession certificate, but he could not take up construction, as the site was involved in litigation. The B.D.A. allotted to him another site at the old rates. But the commission said that he was still entitled to re-imbursement of registration expenditure. In *Telecom Dist Engineer* v. *Dist Forum,*[135] the complainant was the subscriber of a telephone. His allotted number was changed. He was given a bill which he challenged as being

129 I (1991) CPJ 260.
130 *Oriental Insurance Co v. Lekh Raj Darg,* I (1991) CPJ 307.
131 *Sarla Jain v. Unit Trust of India,* II (1991) CPJ 34.
132 *M/s Shashi Gas Agency v. Chachan,* II (1991) CPJ 25; *S. Kumar v. M.D. Air India,* II (1991) CPJ 72; *Devanand Gehlot v. Rajasthan Patrika,* I (1991) CPJ 487.
133 *M. Meenakshisundaram v. G.M. Southern Railway,* II (1991) CPJ 137.
134 II (1991) CPJ 88.
135 II (1991) CPJ 107.

excessive. His telephone was disconnected. He claimed compensation and restoration. The commission upheld the claim on both counts. In *Mohanlal and Sons v. United India Insurance Co,*[136] the complainants insured their cloth shop against two Insurance policies. It was held that they were entitled to receive compensation from both the insurance companies.

The commissions have always dwelt on the very sensitive and relevant question of defective blood from blood banks - which is a very inhuman and unfortunately, a very prevelant practice these days. It has been held that compensation could be claimed from blood banks for supplying defective blood.[137]

Thus, the general trend has been to construe the term 'compensation' as signifying that which is given in recompense, as equivalent rendered damage, on the other hand, constitutes the sum of money claimed or adjusted to be paid in compensation for loss or injury sustained, the value estimated in money of something lost or withheld.[138]

Complaints

A complaint under the Consumer Protection Act (S.2(i)(c)) can be lodged with regard to

(a) Unfair trade practice;

(b) Defect in goods;

(c) Deficiency in service; or

(d) Price variation.

The commission has held that a complaint would be entertained by it only if it qualified under S.2(i)(c) of the Consumer Protection Act. In *U.P. Housing and Development Board v. Smt. Madhushila Singh,*[139] the respondent applied for allotment of a house, the agreement was executed, the amount was paid, the possession was handed over and the contract was concluded. Subsequently, the Housing Board reduced the prices to attract purchasers. On this ground, the complainant sought to re-open the concluded contract and lodged a complaint. It was held that the respondent is not entitled to re-open the terms of a concluded contract entered into by her voluntarily;

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136 I (1991) CPJ 556.

137 *Dr. Haresh Kumar v. Sunil Blood Bank,* I (1991) CPJ 645; *Mr N. Ravindran Navi v. SBI, Kerala,* I (1991) CPJ 648.

138 *Umedilal Agarwal v. K.K. Nagpal,* II (1991) CPJ 169; *Ashok Construction Co v. National Insurance Co.,* I (1991) CPJ 694.

139 II (1991) CPJ 338.

the reduction cannot be held to have retrospective effect and the complaint would not fall under Sec.2(i)(c). However, where the goods sold suffer from deficiency and the service rendered suffers from the deficiency, then the petition would fall within the definition of a complaint.[140] So, where the complaint was regarding defective supply of cement and supply of balance, or regarding a failure to deliver goods and shortage in quantity, it was held to be equivalent to 'defect in goods' and therefore a complaint within S.2(i)(c).[141]

The commissions do not generally take up a rigid stand on complaints with regard to technicalities. In *Dr. B.S. Sidhu v. Secy Central Government P & T,*[142] it was held that the approval of the original consumer need not be given expressly in writing while filling the complaint under the Act. But this does not mean that the commission will entertain frivolous or general complaints. In *C.E.R.C. v. Indian Airlines.*[143] the complainant, a society, made a complaint on the basis of a certain newspaper report, that the delay in the departure of a flight, of 90 minutes, due to waiting for the Chief Minister, caused inconvenience and hardships to passengers. The commission refused to entertain the complaint as it was not true, to the knowledge of the complainant, and was based on a newspaper report which might or might not be correct. Further, no passenger who has boarded the flight in question, had come forward to make the complaint, nor had any such passenger authorised the complaint.

Damages

Damages, unlike compensation, can be made payable even where there is no material evidence to substantiate the claim. In *Jaidev P. Singh v. Auto Tractor,*[144] the complainant was held be be entitled to damages even though he had not produced any material evidence to show the exact extent of the loss suffered by him. While lack of evidence to back the claim may not adversly affect the claim, a claim for mere mental agony would. Where the relation between the banker and the customer is that of debtor and creditor and the debtor fails to pay the debt at the time as promised, the creditor cannot be entitled to damages on account of alleged loss of prestige, status or mental agony. Damages cannot also be awarded on account of mere misbehaviour of the employees of a company towards the

140 *S.S. Bhatnagar v. Competant Automobiles Co. (P) Ltd,* I CPJ 316; *H.R. Gill v. Suryavarshi Kshatriya Dryati Samaj,* II (1991) CPJ 705.

141 *General Co-operative Group Housing v. J.K. Cement,* I (1991) CPJ 550.

142 II (1991) CPJ 90.

143 Vol II (1991) CPJ 621.

144 I (1991) CPJ 34.

customer.[145]

In *Indian Airlines v. Raajesh Kumar Upadhyay,*[146] it was held, as per the Non-International Carriage (Passenger and Baggage) Regulations, 1980, that an *ipso facto* delay in the carriage by air of passengers and baggage would not render the corporation liable for damage. When Indian Airlines offered tickets on the Bombay-Calcutta route in place of the scheduled Bombay-Nagpur-Bhuvaneshwar route, the alteration cannot be said to be a reschedule. Hence the complainant was entitled to damages.

In *New India Assurance Co. v. M/s Green Transport,*[147] there were damages suffered by the insured for loss caused to his goods by the transporters. There were affidavits attesting to leakage. The defence was that it was due to bad roads, but there was no evidence that the consignment was handled with due care. But the insurance Company was still directed to pay the claim with 12% interest p.a from the date of payment till the transport company made the actual payment with costs.

In *Chetan Kumari v. Vice Chairman, DDA,*[148] the DDA cancelled a valid allotment made to the complainant arbitrarily. The commission directed the DDA to hand over possession and pay damages. It was also directed to initiate an enquiry against delinquent officials and to release the amount of damages and cost.

Thus, the commissions have been rather lenient with the concept of damages - more so with damages, than with compensation, where material evidence has been a *sine qua non* for the claim succeed.

Conclusion

The review of the year's cases decided by the National as well as the various State Commissions leaves one feeling fairly satisfied about the performance of the quasi-judicial machinery set-up under the Consumer Protection Act, 1986 - which, although late in coming into being, has nevertheless justified its being.

Status quo over the past judgements was more or less maintained in all relevant areas such as with regard to the interpretation of "consumer", "service", "compensation" etc. However, the commissions have taken up definite stands on certain matters, thus setting trends.

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145 *S.S. Bhatnagar v. Competant Automobiles Co.* I (1991) CPJ 316.
146 *Indian Airlines v. Rajesh Kumar,* I (1991) CPJ 206.
147 I (1991) CPJ 209.
148 I (1991) CPJ 213.

ENERGY LAW

*S. V. Joga Rao**
*Vikram Singh***

The present survey of decisions pertaining to energy law[1] takes within its fold commercial energy legislations restricted to four broad areas of study:

a) Atomic Energy Law;

b) Electrical Energy Law;

c) Petroleum, Natural Gas and Fuel Law; and

d) Minerals Law.

The survey attempts an analysis of legislative activity, both at the Central and State levels, focussing apparently on that delicate balance to be maintained between fast depleting energy sources, development depending on a constant supply of energy and other social costs such as environmental pollution and degradation.

Judicial pronouncements in the aforementioned areas of study have been discussed with a view to trace judicial trends either in support of or in conflict with governmental policy in the said fields.

Atomic Energy Law

The legislature, after having paved the way for the Atomic Energy (Control of Irradiation of Food) Rules, 1990[2] (which was surveyed in the preceeding period[3]), seems to have decided to call it a day as far as atomic energy is concerned in the present period under survey. Judicial activity in this area of study is negligible.

Electrical Energy Law

During the period surveyed legislative and executive activity has been directed towards encouraging private participation in the generation, supply and distribution of electricity keeping in line with the present government's policy of liberalisation and increased privatisation.

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* Faculty Member, NLSIU, Bangalore.
** Student IV year, NLSIU, Bangalore.

1 Period covered is June, 1991 to May, 1992.

2 1991 CCL XVII p.212.

3 (1991) 2 MOL 263, January, 1990 to May, 1991.

Notable legislative and executive activity

The Central Government[4] issued a gazette notification[5] outlining the various details of the policy to encourage greater participation by the private sector in electricity supply, distribution and generation. Another notification[6] issued by the Central Government sketches the details of the scheme framed to encourage private enterprises participation in power generation, supply and distribution. The aforementioned resolutions were supported by Parliamentary action in the introduction of the Electricity Law (Amendment) Act, 1991,[7] seeking to amend the relevant enactments,[8] enforced by a subsequent notification.[9]

The scheme outlined under the former notification[10] proposes to constitute a high-powered Board for the faster clearance of electricity generation, supply and distribution projects in the private sector. The resolution discusses in detail the objectives of the said Board, its functions and the constitution of the same. It is interesting to note that the high powered Board is also required to Promote investment in private units and its ambit is widened to include idegenous, non-resident Indian and foreign enterpreneurs.

The Annexure to the resolution lists the major clearances required from the State and/or Central Governments and the particular agencies concerned with the same. provisions for clearances, required from the Ministry of Environment and Forests and the Satc/Central Pollution Control Boards, are laudatory, vis-a-vis the alarming state of environmental degradation.

The latter resolution [11] widens the scope of private sector participation, insofar as it envisages the setting up of thermal projects, coal/lignite or gas based, hydel projects and wind or solar-energy projects of any size by private-sector enterpreneurs as either licencees [12] or generating companies.

Judicial activity

In addition to significant legislative activity in the arena of electrical energy law, the Supreme Court and High Courts, adverting to the provisions of the Constitution of India, the Electricity Act, 1910 and the Electricity (Supply) Act, 1948, made certain notable propositions during the period.

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4 Ministry of Power and Non-Conventional Energy Sources (Dept. of Power).
5 *Gazette of India, Extra,* Part I, Section 1, 22 October 1991, pp.14-16; See 1992 CCL III 10.
6 *Gazette of India, Extra.,* Par I, Section 1, 22 October 1991, pp. 12-14.
7 *Gazette of India, Ext.,* 27/9/92, Part II , S.I, P.I (No.64).
8 Electricity (Supply) Act, 1948 & Indian Electricity Act, 1910.
9 *Gazette of India, Ext.,* Part II, S.3(ii), p.1(No.605).
10 Resolution No. 7/70/90-I. P. Cell.
11 Resolution No. 7/8/88-Thermal.
12 Sec.3 of the Indian Electricity Act, 1910. References hereinafter to the 'Act 1910' are to this Act.

In *Hindustan Zinc Ltd v. Andhra Pradesh State Electricity Board,*[13] where the Consultative Council under Sec. 16(5) of the Electricity (Supply) Act, 1948 had not been consulted prior to revision of tariff rates, the Supreme Court held that the revised rates of tariff were not invalidated insofar:

(i) Force of advice of the Council was only persuasive;

(ii) The consequence of non-compliance with Sec.16(5) was not provided ; and

(iii) There was a provision for tabling financial statements including revised tariffs in the State Legislature - an adequate safety valve.

Reacting to the issue on whether the factum of generation of a surplus due to the revision of tariffs, after amendment to Sec.59 of the Act, [14] (where the quantum of the same had not been specified by the Government) could be challenged, the Court observed that a mere generation of surplus by the Board could not invite criticism. If the profit was made not merely for the sake of profit, but for the purpose of a better discharge of its obligations by the Board, it could not be said that the public authority had acted beyond its authority.

In keeping with the trends traced during the preceeding period surveyed,[15] the Supreme Court held that the classification of consumers and the application of increased fuel cost adjustment charges only to H. T. consumers [16] was not unreasonable and discriminatory and thereby not violative of Article 14 of the Constitution. The aforesaid classification was not violative because :

(i) H. T. consumers were actual power-guzzlers;

(ii) H. T. consumers had been enjoying benefits under concessional tariffs; and

(iii) They had a better capacity to pay.

The Court further held that the revision of tariffs on the basis of a fuel cost adjustment formula could not be subjected to judicial review.

The question of classification of consumers being 'ultra vires' Article 14 was further discussed, by G. N. Ray, J., in *Indian Aluminium Company Ltd v. The Karnataka Electricity Board* [17] where the classification of an aluminium smelter plant as a high-power intensive industry was held not

13 AIR 1991 SC 1473.

14 Electricity (Supply) Act, 1948. References hereinafter to the 'Act, 1948' are to this Act.

15 *See,* (1991) 2 MOL 226; *GulabRai v. Municipal Corporation of Delhi* AIR 1990 Del 249.

16 *See,* Sections 49 and 59 of the 'Act, 1948'.

17 1992(1) Scale 1157.

to be arbitrary and unreasonable because it actually was a power intensive consumer and it had been so classified in a tri-partite agreement, to which both parties were privy, in 1975.

The issue of disconnection of supply to consumers by the electricity authorities has repeatedly come before the Courts[18] and it has been held in the preceeding period that "the power of disconnection should be very cautiously exercised by the Board though it is authorised by law."[19]

In *Andhra Cement Co. Ltd. v. Andhra Pradesh State Electricity Board,*[20] the High Court held that Sec.22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, which provided for the suspension of legal proceedings aganst sick units, did not include disconnection of power supply to a sick company within its purview. As such, disconnection by the Board was not hit by Sec.22(1).

Jagannadha Rao .J. further observed that an injuction, as prayed for by the company, against disconnection of supply[21] due to heavy arrears of electricity-dues and subsequent defaults in payment of instalments granted by the Court, could not be granted because of the difficulty of the Board in supplying electricity to such a continuous defaulter could not be ignored.

In *Andhra Pradesh State Electricity Board, Hyderabad v. Andhra Cement Ltd,*[22] the Court held that the power of the Electricity Board under Sec. 24 of the 'Act, 1910' to effect disconnection due to default in payment of arrears as well as current bills, had no relation whatsoever to the financial condition of the defaulter.

The Court also observed that the pendency of a representation, made to the Chief Minister, praying for an instalment payment facility, could not be a ground for a civil court remedy restraining the power of the Board. Even the alleged endoresement by the Chief Minister on the representation did not create any rights and obligations because it did not amount to a direction by the State Government[23] to the Board.

An interesting point was raised in *Modi Industries Ltd. (Steel) v. Executive Engineer, E. D. Division, Modinagar,*[24] where the party contended that the interim order preventing disconnection of supply amounted to a

18 *See,* (1992)2 MOL 265, 269.
19 *M/s Ram Bihari Movie Ltd v. Orissa S.E.B.,* AIR 1991 Ori 12.
20 AIR 1991 AP 269.
21 Under Sec. 24(2) Provisio of the 'Act, 1910'.
22 AIR 1991 AP 350.
23 Sec. 78-A of the 'Act, 1948'.
24 AIR 1991 All 351.

contract between the parties deferring demands of additional charges. Khanna, J., disagreeing with the contention, observed that the interim-order passed, allowing the furnishing of a bank guarantee and deposition of part of the amount of additional-charges levied to prevent disconnection, did not lead to a contract between the Board and the consumer deferring the said demands or payment of additional charges on the date the Bank Guarantees were furnished because the said order had in no way stayed the notification imposing the additional charges.

Successive State Governments have always used the lure of concessional rates for the supply of electricity, in order to entice large industrial houses to set up units in under-developed areas. Withdrawing of the same has always resulted in a hue and cry and a series of litigations on the ground of promissory estoppel being a bar to the said withdrawals.

In *M/S Modi Alkalies & Chemicals Ltd v. State of Rajasthan*[25] a similar question was raised as to whether the grant of a remission of electricity duty and subsequent withdrawal of the same could be barred by the principle of promissory estoppel. In the said case, the State Government, under Section 49 of the 'Act 1948', issued a notification granting remission of electricity duty with a view to induce new industries to be set up in the State. The petitioners, induced by the notification, set up industries by making huge investments. Noting these facts, the Court thereby held that the withdrawal of the concession by a subsequent notification was barred by promissory estoppel. It also observed that financial distress and drought conditions could not be a ground to avoid the liability of promissory estoppel.

The Court further negated the argument of the State that as it had issued the notification granting remission of duty in exercise of its delegated legislative power, and not its executive power, the doctrine of promissory estoppel would not be applicable. The Court felt that the plea that the doctrine was applicable only to the exercise of executive power by the State was not tenable.

In another case, *Indian Aluminium Company Ltd v. K.E.B.*,[26] the Court held that as the tripartite agreement in 1975, fixing the conditionalities for setting up of aluminium industries, was the result of tripartite negotitions between the Centre, the State and the Company, the latter could not later use the argument of promisory estoppel and bar the Government from imposing an increased uniform tariff structure.[27] It was neither an unilateral promise by the Government nor was it the result of its aluminium policy.

25 AIR 1992 Raj 51.
26 1992(1) Scale 1157.
27 Sec. 49(3) of the 'Act, 1948'.

In this context the Court observed that "the Central Government felt the necessity to strike a balance so that the Boards do not suffer and the plants for aluminium get a proper supply of electricity at proper rates."

In *Andhra Steel Corporation Ltd. v. Andhra Pradesh State Electricity Board*,[28] the Apex Court of the land held that the granting of concessional - tariff on the directions of the Government to the Board does not grant immunity to consumers from the payment of minimum charges stipulated under agreements. The only purpose in granting such tariffs was to reduce the charges of actual energy consumed by the consumers and not to force the Board to maintain the supply by countracting losses. Ojha, J. observed that the grant of concessions and the subsequent withdrawal of the same was not violative of the principles of natural justice and could only be questioned on grounds of promissory estoppel. Nonetheless, this latter challenge could not be sustained as the appellants had not argued that they had acted to their detriment on the grant of the tariffs.

In *Southern Steelmet & Alloys Ltd., v. Karnataka Electricity Board*,[29] the Karnataka High Court held that a writ, under Article 226 of the Constitution would be allowed because both the decision-making authority as well as the fact-finding authority had not followed the principles of natural justice nor had a reasonable opportunity of hearing been afforded to the customer in an enquiry[30] regarding the dishonest abstraction of energy. In *Krishnarajendra Mills Ltd* v. *Chairman, K.E.B.*,[31] the same High Court, observing that a reliable inspection of the meter required the joint inspection by an official of the Board and a representative of the consumer, held that when the presence of the latter was not secured the version of the former could not be lent legitimacy. On the question of back-billing the Court decided that where the meter in question had been recorded reflecting the actual consumption, back-billing by adopting the average consumption method was not permissible. It went on to say that back-billing on the ground of non-recording could only be done for upto six months.

The Court also enunciated the proper procedure governing a dispute relating to non-recording of the meter. It entailed the Engineer of the Board having the dispute, the cause thereof and the loss of revenue investigated by the Electricity Inspector.

In *Punjab State Electricity Board v. Arihant Textiles Industries*,[32] the

28 AIR 1991 1 SC 1456.

29 AIR 1991 Kant 267.

30 Under Regn. 41(e) (i) of the Electricity Supply Regulations.

31 AIR 1991 Kant 345.

32 AIR 1991 P&H 271.

Court held that a dispute regarding interest payable on the amount of additional security for the additional load of electricity by the Board to the consumer under the APRC Scheme of 1985, promoted by the Board for the development of industries, could not be referred to either the Electricity Inspector or the Arbitrator.[33] This was because the said dispute did not relate to the supply of electricity as necessitated by the aforestated conditions.[34]

In *M/S Modi Industries Ltd. (Steel) v. Executive Engineer, E.D. Division, Modinagar*[35], the Allahabad High Court was required to determine the scope and extent of the power of the Board under Sec.49 of the 'Act, 1948'. The scope of the aforementioned provision has already been discussed in some detail in the preceding period surveyed.[36] Khanna, J. observed that as the Board was authorised by Sec.49 to supply electricity on such terms and conditions as the Board thought fit, provisions for imposition of additional charges for delayed payment, would be squarely covered by the Sec.49 of the 'Act,1948'. The Court further held that the additional charge prescribed by the Board, at the rate of 25.5%, on the unpaid amount of the bill could not be termed as a penalty but was merely a device to ensure timely payment. In the opinion of the Court, the imposition was neither arbitrary nor unconscionable as it was also applicable to consumers who were big industries and whose bills ran into several crores.

In *Kanoria Chemical and Industries Ltd v. State of U.P.*[37] where the establishment of the industry in a backward area was due to special concessions on long term contracts, the Court was asked to decide whether the tariff rates to be fixed in the present case had to be, on proper considerations, less than, equal to or higher than the general 'HV-2 rates'. There had been a subsequent enhancement of 'HV-2 rates' followed by a further increase. The Court held that even after considering the subsequent high demand for supply, there was no justification in charging more than 'HV-2 rates' from the appellant. In another case regarding a dispute with respect to fixing of tariff rates, the Supreme Court in *Paras Enterprises v. Karnataka Electricity Board,*[38] had to decide whether the tariff on the supply to a cold storage would fall under Tariff Schedule LT-3 [39] or LT-5(B)[40]. The Court held that the K.E.B. was justified in imposing the tariff

33 Under Condition No.30 of the Abridged Conditions of Supply framed by the Punjab S.E.B.
34 *Ibid.*
35 *Supra* n.24.
36 *See,* (1991)2 MOL 226, 267.
37 1992(1) SCALE 107.
38 JT 1992(3) SC 149.
39 For commercial non-industrial lights, fans, heating and motive powers.
40 For industrial heating and motive power including lighting.

under the former schedule[41] as the cold storage was used for storing potato seeds for distribution to marginal farmers on a minimal profit-undoubtedly a commercial and non-industrial activity.

The last case analysed in this area of study is *Bombay Environmental Action Group v. State of Maharashtra,* [42] wherein the Bombay High Court was called upon to deliberate on the issue whether the granting of permission for establishing a Super-Thermal Power Station was environmentally hazardous and whether the decision to do so was arbitrarily taken. The Court observed that on the facts of the case, the conditions imposed by the Government showed that all possible environmental safeguards had been taken by the Government in the light of all the pros and cons. It went on the rule that, "though the needs of the environment require to be balanced with the need of a developing country, if environmental safeguards have been taken, then control by way of judicial review comes to an end."

Petroleum, natural gas and fuel law

During the period surveyed[43] there was no significant legislative activity to be taken note of. Judicial activity in this area of study has also been negligible.

Judicial activity

In *Karfule Pvt. Ltd v. State of Maharashtra,*[44] the Supreme Court was called upon to decide whether a dealer in motor spirit could claim a refund with respect to the spirit lost due to evaporation. Kasliwal,J. observed that the said claim for refund of tax, under Rule 15 of the Bombay Sales of Motor Spirit Taxation Rules, 1958, for the Government in respect of Motor spirit lost on account of evaporation or leakage, could only be made by the trader and not the dealer. The Court further ruled that the aforementioned Rule did not suffer from an illegality or discrimination as the dealers paid sales tax only on the quantity of motor spirit actually purchased and delivered to them by the selling trader.

Minerals law

Apart from two notifications[45] issued by the Central Government under

41 Tariff Schedule LT-3.
42 AIR 1991 Bom 301.
43 June 1991 to May 1992.
44 AIR 1991 SC 1728.
45 Notif. no. G.S.R. 618, 14/9/90; *Gazette of India, Part II,* Section 3(i), 29/9/90, p.2525. Notif. no.G.S.R. 619, 114/9/90; *Gazette of India, Part II,* Section 3(i), 29/9/90, p.2526.

the respective relevant enactments,[46] which introduce only a few minor technical amendments to the Rules,[47] there has been no other noticeable activity in this area of Energy Law. However, the Supreme Court and High Courts have been quite busy and a number of significant propositions are to be noted.

Judicial approach

In the preceding period surveyed[48] the Courts have deliberated on the issue of whether a State Government could impose a cess on royalty in respect of land held for carrying on mining operations.

The Supreme Court, reaffirming the stand taken earlier in *India Cements,*[49] observed in *Orissa Cement Ltd. v. State of Orissa*[50] that the State Government could not impose a cess on royalty for the following reasons:

(i) Royalty for carrying on mining operations or tax thereon could not be equated to land revenue. Thus the imposition of the cess under the Orissa Cess Act,1962 could not be brought under Entry 45, List II of the Seventh Schedule;

(ii) Tax on royalties could not be a tax on minerals. The imposition of cess could not, therefore, be justified by having resource to Entry 50, List II of the said Schedule;

(iii) The mode and collection of the cess, the change in the scheme of taxation, etc. showed that the legislation was with respect to royalty rather than land and therefore could not be treated as 'tax on land' within the meaning of Entry 49, List II;

(iv) Even if the cess, as contemplated by the Orissa Act, could be taken as a tax under Entry 50, List II, it would still be barred by Sec.9(3) of the Mines & Minerals (Regulation and Development) Act, 1957;

(v) The cess under Sec.10 of the Orissa Act could not be treated as a fee falling within the purview of Entry 66 of List III because there was no quid pro quo; and

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46 Sec.14(1), Iron Ore Mines, Managese Ore Mines & Ursome Ore Mines Labour Welfare Cess Act, 1976 and Sec.16(i), Limestone & Dolomite Mines Labour Welfare Fund Act, 1972.

47 Iron Ore Mines, Manganese Ore Mines & Chrome Ore Mines Labour Welfare Cess (Amend) Rules, 1990. Limestone & Dolomite Mines Labour Welfare Fund (Amendement) Rules, 1990.

48 *See,* (1991)2 MOL 271; *India Cements Ltd v. State of Tamil Nadu*: AIR 1990 SC 85.

49 AIR 1990 SC 85.

50 AIR 1991 SC 1676.

(vi) Sec.2 of the Central Act barred the imposition of a levy by the State under Entry 23, List II. Following *India Cement*[51] and *Orissa Cement*[52], the Supreme Court in *The Federation of Mining Associations of Rajastan* v. State of *Rajasthan*[53] invalidated Section 3 of the Rajasthan Land Tax Act, 1985 which levied tax on every land holder on the annual value of mineral bearing land held or used by him because the State Legislature did not have the competence to legislate for the levy of a tax on mineral-bearing lands based on the royalty derived from the land.

Refusal and rejection of applications for mining leases have led to a number of judicial pronouncements in the said area. In *Dag Minerals* v. *Director of Mining & Geology,*[54] the High Court observed that the language of Rule 29(1) of the Orissa Minor Minerals Concession Rules, 1983 specially allowed an aggrieved person to file an appeal against refusal of an application for a quarry lease within thirty days of communication of the said order of refusal. The right of appeal, being a beneficial provision for the person aggrieved, had to be liberally construed and thus the person could not be denied the same by non-communication of the said order of refusal. The Court held further that the limitation on appeal ran from the date of the communication of the said order of refusal.

In another case, *Damle Brothers v. Union of India,*[55] the Karnataka High Court ruled that the rejection of an application for renewal of a quarry lease made under Rule 28 of the Mineral Concession Rules, 1960 ignoring the report of the Geologist of the Department of Mines and Geology, an investigating officer, was unjustified. The Court correctly observed that the decision-making process involves a consideration of the facts which have been discovered by the inspection carried out by a competent authority of the Department specially deputed for the same. In the present case, the geologist was that person concerned and what was material was his report. Any decision taken in total disregard of his report would not only be unscientific but also irrational.

An interesting issue was raised in *Orissa Mining Corporation Ltd v. Union of India*[56] where the Orissa High Court was asked to decide whether Central interference in the rejection of a premature application for grant of a mining lease was justified. G.B.Patnaik,J. ruled that when a reservation

51 *Supra* n. 49.
52 *Supra* n. 50.
53 JT 1992(1) SC 118.
54 AIR 1991 Ori 330.
55 AIR 1992 Kant 140.
56 AIR 1992 Ori 61.

notification was issued by the State Government for exploitation by a public-sector undertaking, which was undoubtedly in the public interest, the aforementioned notification could not be annulled by the Central Government either on the ground of a greater public interest or on the ground of any sympathetic consideration for another application, where such application was untenable under Sec.11(2) of the Mines and Minerals (Regulation & Development) Act, 1957. The fact that the Central Government had not differed with the conclusion of the State Government that the reservation was in the public interest added weight to the argument that the interference was unjustified.

In *State of Bihar v. Bera Colliery Co. (P) Ltd.*[57] the Patna High Court held that the notice under Sec.20 of the Coal Mines (Nationalisation) Act, 1973 could not be invalidated on the gound that it had not been sent to the Secretary to the Government because it had been sent to the District Mining Officer who was an authorised agent of the State. The Court further observed that in a suit by a private colliery for recovery of excess royalty paid to another private colliery, the management of which had been taken over by a government-owned company, the latter's management was obligated to produce certain relevant and pertinent documents.

In *Saligram Khirwal v. State of Orissa* [58] the Court ruled that on a fair and harmonious reading of Rules 24(4) and (5) of the Mineral Concession Rules, 1960 and Rules 20(vi) and 32(1) of the Orissa Minerals Concession Rules, 1983 the existing lessee had a preferential and mandatory right to take the lease for working a new mineral discovered on the land already leased to him. Only on his rejection of the same could another applicant be considered.

In *Hindustan Aluminium Corporation Ltd. v. State of Bihar,*[59] the Apex Court of the land pronounced that under Sec. 11 of the Mines and Minerals Regulation & Development Act, 1957, the State Government was justified in granting a mining leases to one company, whose application was prior in time, even though the area so desired overlapped with that of another.

In *Amarjeet Singh v. State of Rajasthan* [60] the Rajasthan High Court held that the revision of dead rent, levied under Rule 18(3), second provisio of the Rajasthan Minor Minerals Concession Rules, 1986, in respect of a mining lease could not be made retrospectively applicable as

57 AIR 1991 Par 178.
58 AIR 1991 Ori 211.
59 AIR 1991 SC 1521.
60 AIR 1991 Raj 146.

the Rules were in the nature of subordinate legislation. In addition, Section 15 of the Rajasthan Mines & Minerals (Regulation & Development) Act, 1957 did not in any way confer the said power to the subordinate authorities.

In a case of alleged arbitrariness in the granting of a mining lease, the Punjab and Haryana High Court observed in *Gram Panchayat Peer Mushiala* v. *State of Punjab* [61] that when the State Government had decided[62] earlier to grant the lease of a minor mineral right by a public auction and a notification to that respect had already been issued, the subsequent grant of the lease to a private person for a paltry sum, without holding the auction, was arbitrary and in "utter disregard to the principles of natural justice, equity and fair play."

In another case decided by the same Court, J.L.Gupta, J. ruled in *State of Haryana v. Shishpal Singh* [63] that the State Government, with prior approval of the Central Government, could notify the reservation of an area for undertaking mining operations under Sec.17A of the Mines & Minerals (Regulation & Development) Act, 1957. He observed further that a letter granting approval, issued by the Central Government, even prior to the promulgation of the provision did not constitute its approval as required under Section 17A.

In a laudable intervention by the Supreme Court in *Tarun Bharat Singh v. Union of India,*[64] the Court pronounced that a notification under Sec.29(3) of the Rajasthan Forest Act, 1953 declaring an area as protected, pending enquiry, did not bar the issuance of interlocutory orders prohibiting mining operations as the enquiry did not pertain to the rights of miners. The Court further observed:

> It is indeed, odd that the State Government while professing to protect the environment by means of these notifications and declarations should, at the same time, permit degradation of the environment by authorising mining operations in the protected area.

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61 AIR 1991 P&H 289.

62 Under Rule 10 of the Punjab Minor Minerals Concession Rules, 1964.

63 AIR 1992 P&H 35.

64 AIR 1992 SC 514.

RAILWAY LAW

*K. Adbual Latheef**

During the period of survey[1] minor changes are introduced in the existing law by amending rules under various enactments related to Railways. A welcome development is the new rules concerning inquiry of misbehaviour and incapacity of members of the Railway Claims Tribunal. Judicial actions are also limited in number.

Legislative Activity

An amendment was introduced in Railway Servants (Discipline and Appeal) Rules 1968[2] whereby sub-rule (11) of rule 9 was substituted by the following : "(11) The Railway servant shall appear in person before the inquiring authority on such day and at such time within ten working days from the date of receipt by the inquiring authority of the order appointing him as such, as the inquiring authority may, by a notice in writing, specify in this behalf, or within such further time not exceeding ten days, as the inquiring authority may allow."

Certain amendments are introduced to Railway Claims Tribunal Procedure Rules, 1991, under Section 30 of the Railway Claims Tribunal Act, 1987[3]. This amendment introduced minor changes in Rr. 2,5,10,11,16,18,19,37, and in Form I, Part III, Form II Part III, Schedule II either by substituting, or by deleting and inserting certain words or phrases.

Minor changes are introduced in the Railway Claims Tribunal (Salaries, Allowances and Conditions of Services of Chairman, Vice-Chairman and Members) Rules, 1989[4] under Section 30 of the Railway Claims Tribunal Act, 1987. In a remarkable attempt to introduce efficiency in the working of the Railway Claims Tribunal, the Central government introduced a new set of rules[5] under Sections 30 of the Railway Claims Tribunal Act, 1987.

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* Research Scholar, NLSIU, Bangalore.

1 June, 1991 to May, 1992.

2 Railway Servants (Discipline & Appeal) Amendment Rules, 1991, *vide Gazette of India*, Part II, Section 3 (1).

3 Railway Claims Tribunal Procedure Amendment Rules, 1991, *vide Gazette of India, Extra.*, Part II, Section 3 (i), 26 Nov. 1991. pp 2-3.

4 Railway Claims Tribunal (Salaries, Allowances and Conditions of Services of Chairman, Vice-Chairman and Members) Amendment Rules, 1991, *vide Gazette of India. Extra* Part II, Section 3 (i) 6 Dec. 1991 pp. 2-3.

5 Railway Claims Tribunal (Procedure for Investigation of Misbehaviour or Incapacity of Chairman, Vice-Chairman and Members) Rules, 1991, *vide Gazette of India, Extra.*, Part II, Section 3 (i), 26. Nov. 1991 pp. 3-4.

The new rules presceibe that imputation of misbehaviour or incapacity of members of R.C.T. should be inquired into by a judge of the Supreme Court. He shall be appointed by the central government after consultation with the Chief Justice. In such inquiries the provisions of Civil Procedure Code and principles of natural justice should be observed by the appointed judge and he is empowered to regulate his own procedure whenever necessary. The inquiring judge will enjoy the same powers vested in a Civil Court under the Code of Civil Procedure 1908, while trying a suit.[6]

Judicial activity

In *Suraj Mal Tewari v. Union of India and Others*[7] the High Court at Gauhati was called upon to decide on the question of limitation in relation to a suit for compensation for short delivery of goods by the Railways. R.K. Manisana J., took the view that claim under Sec. 78B[8] is not a part of the cause of action. It is a condition precedent and/or a mode of procedure for getting the relief, and the result of the non-compliance with the provisions of Sec.78B[9] is that no valid suit was there i.e. the suit was not maintainable. Section 78B[10] expressly provides that the period of six months is to be calculated from the dte of delivery of goods for carriage by the railway. Whgen the claim from compensation of short delivery of goods was preferred beyond six months of delivery of goods for carriage by Railway, the suit would not be maintainable because short delivery is non delivery of some of the goods and the express provision under Sec.78B applies.

In *M/s. Oriental Fire and General Insurance Company Ltd. v. Union of India and Others*[11], the Karnataka High Court[12] considered certain important questions relating to claim made against goods damaged during transit.

The issues raised before the court falls under Sec.72 of the Railways Act, 1890, Ss.148, 151 and 152 of the Contract Act, 1872 and Ss.20 and 23 (2) of the Sale of Goods Act, 1930.

The goods in question, transformer, was delivered by the seller to the Railway for carriage. The booking was on F.O.R. basis. During carriage

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6 R. 4(1) & (2). *Ibid.*
7 AIR 1991 Gau 35, R.K. Manisana, J.
8 Railways Act, 1890.
9 *Ibid.*
10 *Ibid.*
11 AIR 1991 Kant 385.
12 D.P. Hiremath and N.D.V. Bhat., JJ.

the transformer was damaged. The consignor called back the R.R. and rebooked the transformer for carrying out repairs. There was insurance coverage of the transformer. Suit for damages was filed by the insurance company as assignee of consignor against the Railways. The vital question raised before the Court was whether the right, title and interest in the transformer had passed to the consignee-purchaser or remained with the consignor, and whether the insurance company as assignee of consignor could file the suit.

The Court held that as the booking was on F.O.R. basis and the transformer was in a deliverable state, the property in the transformer passed on to the consignee. The consignor or the insurance company as his assignee could not file suit for damages.[13]

Regarding the claim made towards cost of repairs and damage, the Court held that mere presentation of bill is not sufficient. These costs and expenses have to be proved by legal evidence in order to sustain in a suit for damages against the carrier.[14]

In *Khadigramodyog Bhavan v. Union of India and others*[15], the Kerala High Court dealt with an issue concerning pilferage of consignment in transit. The Court[16] held that the failure of Railway administration to disclose how the consignment was dealt with when it was in its possession points to a probable inference that pilferage occured as a result of negligence or misconduct of railway personnnel. In this event consignee is entitled to recover damages from the Railways[17].

The Allahabad High Court was called upon to decide a vital question concerning levy of demurrage[18]. In *U.P. State Electricity Board. v. Union of India and Others*[19], the Court held that the rules under which demurrage is levied on rake basis and not on wagon basis are not beyond the powers of the Railway Board or the provision of the Act.

V.K. Khanna and R.A. Sharma, JJ also held that rules concerning levy of demurrage are not arbitrary or discriminatory, therefore it is not violative of Articles 14 and 245 of the Constitution.

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13 Sale of Goods Act, 1930. Ss. 20 & 23 (2).
14 Contract Act, 1872. Ss. 148, 151 & 152.
15 AIR 1991 Ker 41.
16 P.K. Shamsuddin, J.
17 Railways Act, 1890 S.76-F (b).
18 Railways (Warehousing and Wharfage) Rules, 1958 R. 6. & Railways Act, 1980. Ss. 42 (d), 47(1) (f) & 46 (c) & (d).
19 AIR 1992 All 135.

In *Union of India v. Railway Rates Tribunal and Anothe*[20], the Orissa High Court[21] was called upon to decide certain questions concerning rate of siding charge. The case came up as an original jurisdiction case. It raised the question whether the High Court can sit as Court of Appeal against the order of the Tribunal. Ehen there ies no fixation of siding rate by the Central Government under section 29(2)[22] and the Railway, charged a rate arbitrarily which aggrieved certain person, that person is competent to file complaint to the Railway Rates Tribunal for redressing his grievances[23].

Another question raised before the Court concerns the levy of siding charges for service rendered by Railways, in relation to the usage, "any other charge."[24] The court held that normal charges are leviable in case of ordinary services. Special charges are leviable only when there is rendering of some special service.

The Court pointed out that it cannot sit as Court of Appeal against the order of the Tribunal nor it can interfere with finding of fact by the Rates Tribunal unless the order is *ex facie* perverse.[25]

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20 AIR 1992 Ori 15.
21 L. Rath and K.C. Jagadeb Roy, JJ.
22 Railways Act, 1890.
23 *Ibid.* S. 41 (C).
24 *Ibid* Ss. 3(4), 29(2) & 41 (1) (C).
25 Constitution of India, Art. 226 and Railways Act, 1890, S. 41(1)(C).

LAW OF TORTS

Mrs. Rose Varghese *
Saumya Gopalan **

Introduction

Tort law being primarily a development through cases, a perusal of the decisions during the period under review would highlight the contribution of the judiciary in this regard.

Some of the significant judicial decisions relate to general principles of liability in tort, on the question of absolute liability in tort and vicarious liability in tort. As for specific torts, the cases which were brought before the courts were in the area of negligence (including professional negligence), mass tort action, and malicious prosecution. The plea of inevitable accident, a general defence in tort, was raised in one of the cases before the court apart from a case on damages in tort.

The judicial decisions on the topic of torts in the year 1991-1992 fall under the following heads :

1 Discharge of effluent.

2 Vicarious liability.

3 Negligence (Composite and contributory).

4 Professional negligence.

5 *Res Ipsa Loquitor.*

6 Mass tort action.

7 Malicious prosecution.

8 Inevitable accident.

9 Damages.

In the majority of the cases, the principles evolved in the past years were merely reiterated, and no drastic or significant evolution of new principles of law can be traced though in some of the cases, certain principles of tort have been elucidated.

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* Faculty Member, NLSIU, Bangalore.
** Student IV Year, NLSIU, Bangalore.

Differences between the test of reasonableness and the test of reasonable man

Mahajan & Others v. Jalgaon Municipal Council & Others[1] is a case which has distinguished clearly between the test of reasonableness applied in administrative law and the test of reasonable man applied in the law of torts.

In this case, the Municipal Council entered into a contract with a private developer for construction of a commercial complex. The project contemplated its execution by the developer on self-financing basis subject to handing over the administrative building of the complex to the municipality free of cost, and allotting some shops to certain specified persons while having the right to dispose of the remaining accomodation at its own discretion and to retain the premia received by way of reimbursement of its financial outlays and profits. The validity of this was challenged on the basis that it was unreasonable. It is in this context that the Court sought to examine in great detail the difference between the two tests applied in administrative law and torts.

In this case, the administrative law test of reasonableness was applied to test the validity of the impugned resolution. The Court stated that the standard of reasonable man was the courts's creation and was a "mere transferred epithet". The test of reasonableness is the standard indicating what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper use of power. The Court held that in applying the standard of reasonable man, the judge merely enforces what he thinks is reasonable, whereas in condemning an administrative action he asks himself whether the decision is one which a reasonable body could have reached. In other words, he allows some latitute for the range of differing opinions which may fall within the bounds of reasonableness.[2]

Discharge of effluent

M/s Ajay Constructions v. Kakateeya Nagar Co-operative Housing Society Ltd. [3] is a case where the issue of discharge of effluent has been dealt with in great detail. In this case, the construction of a group of multi-storied flats had been permitted by the Hyderabad Urban Development Authority subject to the condition that no effluent should be allowed to be discharged outside the septic tanks and the soakage pits to be put up for

1 (1991) 3 SCC 91.
2 *Ibid.* at pp. 109-110.
3 AIR 1991 AP 294.

this purpose. However, subsequently the Municipality granted permission without adequate notice to any one, to connect the sewarage water flowing and cattle wash of the locality. This resulted in the sewarage water flowing from the multi-storied building to the Osmania University pipe line which resulted in tremendous air pollution near the University Students' Hostel. The inmates of the Hostel resisted with protest to the University authorties against the foul smell and the insanitary conditions prevailing in the area. The University blocked the outlet of the drainage pipe line into the University drain by constructing a wall. The result of this blockage was that the sewarage from the multi-storied building was getting accumulated at a point just outside the University wall and was formed into a big cess pool within the area of the University. Due to the deposits of the night-soil and other sediments, there was tremendous air and water pollution which made life difficult for those who were living in the said area. The Court held that there was an absolute liability on the part of those who are engaged in construction work, particularly of multi-storied structures, not to commit nuissance by letting out effluent from their drainage system. It was held that the permission granted by the Municipality for connecting the sewarage pipe line of the builder to the underground Municipal line was illegal as none can be permitted to pollute the atmosphere of an area by letting out offensive material from his premises. However, the High Court in the circumstances directed the Municipality not to disconnect the sewage pipe lines from the underground pipe line of the Municipality for a period of one month. In the meantime, the builder was to ensure that the septic tanks and the soakage pits became operational and discharge was to be let out from his premises into the outside area. After the expiry of the one month period, the sewage pipe line would be severed by the Municipality and if any violation is committed after that, by the inmates of the flats by letting out the sewarage outside their premises, they would be liable for such action, civil or criminal, as the case may be, which may be taken up against them.

The Court pointed out the fact that the decided case law on the subject clearly points to the fact that none can be permitted to pollute the atmosphere of an area by letting out offensive material from his premises. Based on this, the Court opined that no person has any right to create pollution in any area which constitutes a health hazard, and it would therefore have to be put down with an effective hand and the law will not tolerate the pollution of the atmosphere by a wrongful act of any person as such.[4]

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4 *Ibid.* at p.305.

Vicarious liability

In *Sitabai Mangesh Koli v. Jonvel Abraham Soloman & Others,*[5] the driver allowed another person to drive an autorickshaw and the latter caused an accident resulting in the death of a passenger in the autorickshaw. The owner disputed his liability on the ground that the driver in utter disregard of his instructions allowed the vehicle to be driven by some other person. The issue was whether or not the owner was vicariously liable to pay the damages.

The owner contended that the person who was driving the vehicle at the time of the accident was not in his employment. The owner admitted that he was maintaining a log book showing the persons employed by the owner, but the same was not produced. Hence an adverse inference was drawn and it was held that the owner failed to prove that the person was not his employee and hence the owner was held vicariously liable.

Similarly, in *Radhe Shyam v. Nasir Hussain,*[6] where a vehicle driven by a person was involved in an accident and on the issue of vicarious liability of the owner, a question that came up for consideration before the Court was whether or not the claimants have to prove the identity of the driver in order to succeed in their claims. The Court held that the claimants are not required to prove who the driver was and that the only requirement for holding the owner vicariously laible is that the driver is in the employment of the owner. As that fact was admitted by the owner in this case, he was held to be vicarious liable.

These cases show that a vital ingredient of vicarious liability is that at the time of the accident, the driver was in the employment of the owner. Cases concerning vicarious liability inevitably pivot around this issue. There are other cases in 1991-1992 where vicarious liability was imputed on the owner of the vehicle, but where neither any new principle was evolved nor accepted principles elucidated.[7]

In *State of Orissa v. Rabati Bewa & Others,*[8] both vicarious liability and sovereign immunity were discussed and a distinction was made between the two principles. The facts of the case are that the driver was driving a government vehicle in the course of his employment and the vehicle met with an accident resulting in the death of the claimant's

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5 1991 ACJ 933.

6 1991 ACJ 755 (M.P.).

7 *Nerati Pichamma v. Pasumala Arogiya and Others,* 1991 ACJ 251; *Motor & General Finance (India) Ltd v. Mary Mary and Others,* 1991 ACJ 101.

8 AIR 1992 NOC 23 (Ori).

husband. It was held that the state is liable for damages occasioned by the negligence of its servants by applying the principle of vicarious liability. The government, however, was not held liable for the tortious act which was committed by its servants based on the accepted principle of "exercise of its sovereign powers".

The reasoning of the Court was that the plea of sovereign immunity can be available where the powers can be exercised only by a sovereign or a person by virtue of delegation of such powers to him. So, when the immunity is claimed by the state against a claim, it has to be looked into if the act committed by the servants was in exercise of its sovereign powers. To determine this, the nature of the act, the transaction in the course of which it is committed and the nature of employment of the person committing it have to be taken into consideration.

Negligence

In *Oriental Fire & General Insurance Co., Indore v. Gangabai* [9] the Court elucidated on one of the essential ingredients in a claim for compensation due to negligent driving and a consequential accident. For the claim to succeed in such cases, the injury has to be held to be caused by the use of the vehicle. The Court explained that use does not necessarily mean injury resulting from the movement of the vehicle or from the operation of some part of its mechanism, but that the injury must be in some way a consequence of the use of the vehicle as a motor vehicle.

Union of India v. Mahalaxmi Oil & Dal Mill [10] is a case concerning the negligence of the railway administration. Wagon load consignment booked at railway risk rate was delayed for more than three months in transit, as a result of which the goods melted and leaked out of the bags and there was deterioration of goods due to weather conditions. It was held that the loss of goods in transit took place due to the negligence of the railways or its employees. Consequently, it is liable to make good such loss due to the bailor. If the railways had not applied reasonable care and foresight, it cannot escape the liability for compensation for the damages caused to the consignment and hence the burden is on the railways to prove that reasonable care and forsight had been applied in transit. The same had not been done in the instant case and so the railways was held liable for having been negligent. This case illustrates the fact that the defence of reasonable care and foresight can be pleaded by the defandant in cases where the petitioner contends negligence and that the onus of proof is on the defendant.

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9 AIR 1991 MP 323.
10 1991 ACJ 578.

In *Purushottam Das Goyal v. Sant Lal,*[11] the Court made very pertinent observations about the difference between the test of negligence as applied to an act of an adult and that of a child. In this case, a bus came on the wrong side of the road and hit a child crossing the road. The bus was being driven at a high speed during daytime in a busy locality and no horn was blown. There was no evidence as to why brakes could not be applied and the bus stopped. The defence was that the child was not careful in crossing the road. The Court made a distinction between the degree of care expected out of an adult and a child. The Court opined as follows :

> The rule is that a child is only required to exercise that degree of care which the children of the same age ordinarily exercise in the same circumstances taking into account the experience, capacity and understanding of the child.[12]

The Court further stated that while driving a bus on the highway it is the duty of a driver to be careful as children can appear on the road who may not have the same understanding as a standard person. Thus the defence was rejected by the Court and the driver was held to have driven in a negligent manner.

In *Inja Venkatarao v. Sundara Barik,*[13] the applicability of the principle of contributory negligence came into question. Here, the driver allowed the deceased to travel on the roof top of the bus. The head of the deceased dashed against the branch of a tree as a result of which the deceased received fatal injuries and subsequently died. The issue was whether or not the deceased was guilty of contributory negligence. The Court observed as follows :

> It is true that passengers are not to travel on the roof of the bus. When the driver found passengers on the roof of the bus, he ought not to have driven the vehicle until the passengers got down. In such circumstances, the driver was negligent in driving the bus which resulted in the fatal injuries to the deceased. [14]

In *New India Assurance Co. Ltd v. Ramswaroop Katara,* [15] a tempo knocked down and injured a person sitting on the carrier of a cycle with his legs on the right side, and the issue was whether or not the injured was

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11 1991 ACJ 1096.
12 *Ibid.* at p. 1097.
13 AIR 1991 Ori. 104.
14 *Ibid.* at p. 105.
15 1991 ACJ 591.

guilty of contributory negligence on the ground that he was sitting with his legs on the right side. It was held that he was not guilty of contributory negligence and that the driver of a vehicle is supposed to know this habit of cycle riders and has to take suitable precautions. These cases illustrate the circumstances under which the Court holds that there is or is not any contributory negligence.

In *Karnataka Road Transport Corporation v. Reny Mammen,*[16] the Court drew a distinction between joint and several tort feasors. The Court explained that where it is coincidence of tortious acts or negligence of more than one person resulting in a single damage to a third party, there would be several tort feasors, for, there was no concurrence or community of design among them. In the Court's words, the damage caused was as a result of "collision and not coalition"[17]. In such cases, the liability of the drivers has to be to the extent of negligence of each one of them. Thus in the case of joint tort-feasors, a collusion between persons is necessary.

In some other cases [18] on negligence the courts have merely reiterated and applied the old principle and decided the issue accordingly.[19]

Professional negligence

There were two cases in the year of survey which dealt with professional misconduct or negligence. In *Dr. K.P. Shenoy* v. *Karnataka Medical Council, Bangalore & Another* [20], the petitioner was a registered medical practitioner, a consulting ENT surgeon and anaesthesologist. He made an error in judgement in fulfilling his duty as an anaesthesologist. An enquiry was held by the Karnataka Medical Council which composed of qualified medical doctors hearing both the parties (the complainant - the aggrieved husband of the deceased patient as well as the anaesthesologist) and the statements were recorded in writing. The unanimous opinion was that the petitioner should be adminstered a warning and this was duly communicated. The petitioner's contention was that the misconduct had not been established and there was no finding of any misconduct and hence the warning to the petitioner was impermissible. He also contended that the impugned order was not preceded by an enquiry as contemplated by law and was violative of principles of natural justice. However the Court overruled the contentions of the petitioner by holding that the order of a competent Medical Council

16 1991 ACJ 403 (Kant).
17 *Ibid.* at p. 413.
18 *Sitabai Koli v. Solomon,* AIR 1991 Bom 287.
19 *U.P.S.R.T.C. Bareilly v. Nandi Devi & Others,* AIR 1991 NOC 93 (All).
20 AIR 1991 Kant 271.

cannot be lightly brushed aside. The Court opined as follows :

> In a country where for the life of a patient there appears to be scant regard and where the patients do not seem to be conscious of their rights and also where malpractice litigation against negligent doctors is hardly in evidence, the action taken by the Medical Council commends emulation if the life and dignity of man are to be respected in our present day society.[21]

While it is commendable that the Court has taken cognisanace of the fact that professional negligence suits are not common in India, perhaps due to the low level of legal literacy and awareness, the Court seemed to have been swayed by this consideration in upholding the finding of the Medical Council which needs to be taken note of and questioned.

In *Council of the Institute of C.As of India v. B.K. Nagaraj, C.A.,* [22] the respondent had issued a certificate of purchase turn over to a fictitious firm and had failed to verify the books of accounts and the supporting papers, required to be done, before the issue of a certificate of such nature; he had also failed to maintain any working paper notes concerning the audit he had done before issuing the certificate. Hence the Council concluded that the respondent was guilty of professional negligence. However, since this was a solitary incident where the respondent had issued such a certificate and since he was persuaded mainly by the introduction given to him by his friend, and since in his answers to the Disciplinary Committee, the respondent was candid about his understanding of the situation and expressed regret for the manner in which he issued the certificate, the Court felt that the punishment of removal of his name from the register of members for 15 days, recommended by the disciplinary committee was excessive and it was altered to the penalty of reprimand "in the interest of justice which in no way would affect his continuation in the profession." [23]

Res ipsa loquitor

The rationale behind the application of the principle of res *ipsa locquitor* was explained in *Bhagwant Singh & Another v. Ram Pyari Bai & Others*.[24] In this case, the Court opined as follows :

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21 *Ibid.* at 273.
22 AIR 1991 Kant 380.
23 *Ibid.* at 384-385.
24 1991 ACJ 1115.

> Normally it is for the plaintiff to prove negligence, but as in some cases, considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but solely within the knowledge of the defandant who caused it. The plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitor.*

The facts of the case are that the deceased was found dead with his cycle lying near his body and the truck was lying in a damaged condition after having dashed against a roadside tree. The contention of the defendants was that there was no evidence about the negligence of the driver. The doctrine was applied and as the defendants failed to prove that the accident did not take place due to the negligence of the driver, it was assumed that the driver had been negligent in causing the accident.

The principle was applied again in *Gindiya Bai v. M.P. Electricity Board & Others*[25] where a boy grazing cattle 10 feet away from a stray wire supporting transformer poles, was electrocuted. The Electricity Board contended that for non-payment it had disconnected the supply but a consumer had unauthorisedly fixed uninsulated copper wire and had taken electric supply, and that this uninsulated wire touched the stray wire and current spread on the wet land. The doctrine of *res ipsa loquitor* was applied and it was held that the Board failed to discharge its burden to prove that the transformer and the electric line were being looked after peoperly and that all necessary precautions were observed. Hence the Board was held to be negligent. The principle was similarly applied in *Phillippose Cherian & Another v. Edward Lobo & Another.* [26]

Mass Tort Action

The only case decided under this head was *Union Carbide Corporation v. Union of India.* [27] The case concerned the legal consequence of the Bhopal gas tragedy in 1984. The principles of tort that were dealt with in the case were :

Admissibility of scientific and statistical evidence for quantification of damages

The counsel arguing for the U.C.C contended that the admissibility of

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25 1991 ACJ 1100.

26 1991 ACJ 634. *See also Padma Behari Lal v. Orissa State Electricity Board* AIR 1992 Ori 68, where the principle of *res ipsa loquitur*, was explained and applied.

27 AIR 1992 SC 248, Ranganath Misra C.J., K.N. Singh, M.N. Venkatachalaiah, A.M. Ahmadi and N.D. Ojha, JJ.

scientific and statistical evidence is confined to fairness hearings alone and not in adjudication where personal injury by each individual plaintiff must be proved. On the other hand, the Attorney General urged that such evidence and estimates of damages are permissible in toxic-tort actions and stated that the fundamental principle is and should be that countless injured persons must not suffer because of the difficulty of proving damages with certainity or because of the delay involved in pursuing each individual claim. He also stated that the risk of uncertainity in each cases should be thrown upon the wrong doer instead of upon the injured party. Although it was not expressly stated in the case, the Court seemed inclined towards accepting the contention of the Attorney General.

Application of the principle that the size of the award should be proportional to the economic superiority of the offender

The Supreme Court had earlier[28] observed that in toxic tort actions, the award of damages should be proportional to the economic superiority of the offender. A question arose as to the applicability of this principle to the case at hand. The Court stated that this principle cannot be applied to a settlement reached in the Bhopal Gas Disaster case as that was a principle which had arisen in a strict jurisdiction. In the matter of determination of compensation under the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 and the scheme framed there-under, the principle stated above could not have no application against the Union of India as the Supreme Court did not impute to it the position of a tort-feasor but only that of a welfare state.

Medical Surveillance costs and the operational expenses of the hospital

The Supreme Court was of the view that at least for a period of eight years from now, the victims of the Bhopal Gas Tragedy should have provision for medical surveillance by periodic medical check-ups for gas-related afflictions. For this purpose, long-term medical facilities in the form of a permanent specialised medical and research establishment was proposed, and directions were given for the drawing up of an appropriate action plan. The plan was to include the establishment of a full-fledged hospital at least 500 bed strength with the best of equipment for the treatment of MIC related afflictions. The state of Madhya Pradesh was directed to provide suitable land, free of cost, within two months. The hospital was to be constructed, equipped and made functional within a period of 18 months. Capital outlays on the hospital and its operation

28 In *M.C. Mehta v. Union of India,* AIR 1987 SC 1086

expenses for providing free treatment and services to the victims were to be borne by the UCC & UCIL.

Compensation to persons and children born to exposed mothers who may become symptomatic in future

The Supreme Court directed that such contingencies are to be taken care of by obtaining an appropriate medical group insurance cover from the General Insurance Corporation of India or the Life Insurance Corporation of India. There is to be no individual upper monetary limit for the insurance liability; the period of insurance cover is to be for eight years in the future the possible claimants would fall under two categories; those who were in existence at the time of exposure and those who were yet unborn and whose congenital defects are traceable to MIC toxicity inherited or derived congenitality. The premia for the insurance is to be paid by the Union of India out of the settlement fund.

Malicious prosecution

Sova Rani Dutta v. Debabrata Dutta [29] is a case where the appellant filed a false FIR against the respondent and his sister alleging theft of her ear-rings from her person whereby she had sustained bleeding injury to her ear and thus in order to set the police machinery and law into motion, included the offence of theft with the offence of assault, knowing very well that the respondent had not snatched away her ear-ring. The Court held that the FIR was clearly lodged out of malice. Further, the appellant had complained of a cognizable offence in the FIR knowing fully that the respondent would be handcuffed by the police and tied with a rope, and was therefore responsible for the humiliation suffered. Thus, it was established that the defendant (appellant) had maliciously prosecuted the plaintiff without just and reasonable cause.

Based on case law, the following principles were assimilated, highlighted and elucidated in this case :

(a) In an action for malicious prosecution, the plaintiff, in order to succeed, must prove the following :

1 the proceedings were instituted/continued by the defendant;

2 the proceedings terminated in the plaintiff's favour;

3 the defendant had acted without reasonable or probable cause; and

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29 AIR 1991 Cal 186

4 the defendant had acted maliciously.

(b) The burden to prove absence of reasonable and probable cause in an action is on the plaintiff though the onus may at different stages of the proceedings shift from one party to the other.

(c) Reasonable and probable cause may be defined as an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary, prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed.

(d) It is immaterial that the defendant made no formal charge before the Magistrate or that the proceedings did not reach the stage at which the Magistrate could take formal cognizance.

(e) Distinction between plaintiff suffering the imprisonment on account of ministerial and judicial act. Judicial act is one where steps are taken resulting immediately from the exercise of discretion of a Judge/ Magistrate and not from the act of the party. Ministerial act is one where the party employs the machinery of the law at his own risk and is directly responsible for the consequences[30].

(f) To succeed in an action for damages for malicious prosecution, the test is not whether the proceedins have reached a stage at which they may correctly be described as a prosecution but whether such proceedings had reached a stage at which damage to the plaintiff results.[31]

(g) What is meant by 'malice' is the presence of some improper and wrongful motive, that is, an intent to use the legal process in question for some other than its legally appointed or appropriate purpose.

This case is significant in that it has summarised and clarified the principle evolved in many of the earlier cases on the point.

Dr. Mohammad Gulam Nabi v. Dr. Mohfooz Ali [32] is a unique of its kind. In this case, complaints to district authorities led to the search of the place of business of the plaintiff. The complaints were found to be false. The plaintiff sued the complainant for damage for mental unrest, adverse effect to his business and lowering of his prestige. The Court stated as follows :

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30 *Ibid.* at 190.

31 *Ibid.* at p. 191.

32 1991 ACJ 548 (MP).

> A tortious act, i.e., injuries means any unauthorised interference with some absolute right is actionable *per se* even if no actual damage is proved where the Court is Cound to award at least nominal damages to the plaintiff. But an action would not lie when there is neither damage nor injury ....

This loss or detriment thus is not a ground for action unless it is one of the species of wrongs of which the law takes cognizance. [33]

This is a typical case where the action failed because the plaintiff was not able to prove the existence of a legal right in the first place, and an infringement of that right by the defendant. This case illustrates clearly that malice by itself may not be a cause of action if there is no violation of a valid right. It was incumbent on the plaintiff to have pleaded and proved the existence of such a legal right and its infringement by the defendant, before the plaintiff could be entitled to succeed.

Inevitable accident

Union of India v. V. Vijay Sundari [34] is a case where the defence of inevitable accident was unsuccessfully pleaded by the defendant in an action for damages for negligent driving. In this case, a jeep hit a pedestrian from behind , causing his death. The defendant contended that the deceased was not hit by the front portion of the vehicle but that he dashed against the rear portion when he was running across the road to board a bus. According to the defendant, he was not guilty of rash and negligent driving and that the interpositon of human agency resulted in the inevitable accident. The Court observed that in such a case, the onus would lie on the driver to establish his defence. He was found to be rash and negligent in causing the accident. This case reiterates the principle that once the defence of inevitable accident is pleaded by the defendant, the onus of proof shifts on to him.

Damages

In *Mathew v. Gopalakrishnan Nair,*[35] a property owner in exercise of his right to property constructed a compound wall to the very extremity of his land, and it collapsed after a drain was constructed by PWD, immediately adjacent to and running the entire length of the compound wall. The issue was whether or not the wall collapsed due to the negligent acts of PWD

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33 *Ibid.* at p. 549.
34 1991 ACJ 770.
35 AIR 1991 Ker 248.

and whether or not damages should be awarded in these circumstances. The Commissioner's report stated the following :

a) The compound wall was constructed to the very next extremity of the property.

b) Instead of using cement it was constructed with granite, stones and mud mortar.

c) No weep holes were left on it to drain away the rain water collected in the compound though the land at the opposite side of the wall was at a higher level.

Based on this, the Court held that it cannot be said that the wall collapsed due to the negligent act of PWD and hence no damages were awarded to the plaintiff.

Supreme Court Legal Aid Committee v. State of Bihar & Others [36] is a significant case as damages were awarded to the family of the deceased who died due to the negligence of the police in not providing timely medical aid to an injured person in police sustody. It was held that it is the obligation of the police particularly after taking a person in custody to ensure appropriate protection including medical care. A sum of Rs. 20,000/- was awarded as compensation to the legal representatives of the deceased. This case has imputed a higher degree of care to the police in holding that negligence in providing timely medical aid to a person in custody is an actionable wrong, for which the victim or his legal representatives are entitled to claim damages.

Conclusion

In the year 1991-1992, there have been a few significant cases on torts decided by the various courts of the country. The case of *U.C.C. v. Union of India* [37] has laid down new principles with regard to the computation of damages in mass tort actions. *Sova Rani's case* [38] enumerated comprehensively the ingredients of malicious prosecution and explained the principles in detail. In *Mohfooz Ali's case,* [39] the essential nature of the existence of a legal right before succeeding in an action in torts was highlighted. In *Bhagwant Singh's case* [39], the rationale behind the principle of *res ipsa loquitur* was elucidated upon. *Purushottam Goyal's case* [40] distinguished

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36 1991 ACJ 1034.
37 *Supra* n.1.
38 *Supra* n.9.
39 *Supra* n.12 at p.10.
40 *Supra* n.24.

between the test of negligence as applied to an adult and a child. *Supreme Court Legal Committee's* case imputed a higher degree of duty of care on the police which is in cosonance with the expanding scope of the right to life and liberty envisaged under Art. 21 of the Constitution. Thus although not many new principles may have been evolved during the year, the cases decided show a clear consistency with the principles already evolved by the courts in various earlier cases. The attempt of the courts to elucidate the already existing principles of torts is commendable as they are valuable both to a law student as well as to persons interested in knowing the law.

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I, Dr. N. R. Madhava Menon on behalf of the National Law School of India University, Bangalore hereby declare that the particulars given above are true to the best of my knowledge and belief.

For National Law School of India University

December 20, 1992.

Sd/-
Dr. N. R. Madhava Menon

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