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ILI Newsletter

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Editorial

The protection of global environment has become a matter of grave international concern particularly during armed conflicts especially after the 1st Gulf War which has taken place in the year 1991. Waging war causes pollution and has, perhaps, the potential to be the most polluting factor of all human activities. Armed conflicts have always been destructive of the environment and are antithetical to its rational management and use. There has always been a tendency on the part of warring parties to argue that in war, laws are silent; however, in reality it is difficult today to deny the existence of the rules of international law which impose restrictions on belligerents as to the way and manner in which armed conflicts are to be conducted, and the nature of weapons to be used in armed conflicts. Though protection of environment is not directly addressed in the customary law of war, but inference can be drawn to the extent that it falls within the general ambit of protecting the civilian population and property. The most prominent provisions explicitly dealing with environment protection in times of international armed conflicts are found in 1977 Protocol I additional to the 1949 Geneva Conventions. The specific provisions in Protocol I that seek to protect the environment are articles 35(3) and 55. The general strategies which have emerged since the 1991 Gulf war to improve the legal protection of the environment. Drafting of a new convention is seen as an opportunity both to clarify and develop existing law. A new convention could set lower threshold of harm in order to be more effective. In recent times, concern for the environment has emerged to the forefront of global concern, making it possible to assert that its protection has become a major humanitarian priority. However, the lack of an institutional framework for the implementation and enforcement of the law of war is a serious lacuna to its development. The outcome of this is a bundle of very general principles that at best act as guidelines and whose practical effect is to leave states with maximum freedom.

Manoj Kumar Sinha

Inside

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ACTIVITIES AT THE INSTITUTE

Summer Course

The Indian Law Institute and the Human Rights and Business Academy (HURBA) organised a summer course on "Business and Human Rights" from June 20 – July 1, 2016. Hon'ble Justice Dipak Misra, Judge, Supreme Court of India, delivered the inaugural address. Mr.Rakesh Munjal, Senior Advocate/Vice President, ILI, Ms. Justine Nolan from UNSW, Australia, Dr. Jernej Letnar Černič from European University Institute,Scotland and Prof. (Dr.) Manoj Kumar Sinha, Director, ILI also addressed the participants at the inaugural session. Hon'ble Mr. Justice Anil R. Dave, Judge, Supreme Court of India delivered the valedictory address along with Dr. Surya Devaand, Dr. Erika R. George.

The two week intensive course was attended by 60 participants from diverse backgrounds including students, corporate executives, government officials and policy makers. The course was structured in the form of interactive seminars, 20 seminars of two hours in total. The participants were exposed to international and comparative perspectives in the field of business and human rights by a team of leading scholars and practitioners from all over the world. On successful completion of the course, certificates were issued to the participants by the Indian Law Institute.

Hon'ble Justice Dipak Misra, Prof. Manoj Kumar Sinha, Mr. Rakesh Munjal, Ms. Justine Nolan, Dr. Jernej Letnar Černič and Mr. Shreenibasas Chandra Prusty at the inaugural session of the Summer Course on Business and Human Rights

International Conference

The Indian Law Institute also organised an International Conference on "*Human Rights Responsibilities of Business: Emerging Regulatory Trends"* at the Institute on June 25, 2016 to review critically the emerging regulatory landscape regarding the responsibilities of business enterprises in relation to human/labour/environmental rights. The inaugural address was delivered by the chief guest, Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India. The special address was delivered by Mr. Rakesh Munjal, Vice President, ILI and Mr. Suresh Chandra, Secretary, Department of Legal Affairs, Ministry of Law and Justice. The conference focused on drawing lessons from voluntary as well as mandatory regulatory trends at corporate, domestic, regional and international levels.

The conference intended to provide an opportunity to scholars, judges, practitioners, policy makers, civil society organisations and business executives to share their critical insights on diverse issues like implementation of the UN guiding principles on business and human rights by the states, corporate social responsibility and grievance redress mechanisms at corporate level. A total of 76 participants enrolled for the conference.

Workshop for Nodal Officers

The Ministry of Law and Justice, Department of Legal Affairs and Indian Law Institute conducted a two days' workshop for Nodal Officers on, "Legal Information Management and Briefing System (LIMBS) on June 28-29, 2016 at the Institute. LIMBS was an initiative of the Ministry of Law and Justice, in line with the digital India movement, to digitalise court case details and bring various stakeholders on a single platform. The workshop was an attempt to make available for the Nodal Officers a user friendly and innovative web based application for monitoring court cases in a transparent manner.

Sh. D.V.Sadananda Gowda, Hon'ble Union Minister of Law & Justice, Mr. Suresh Chandra, Sh.Ajay Gupta and Prof.Manoj Kumar Sinha at the workshop.

SPECIAL LECTURES

Prof. Virendra Kumar, Former Founding Director (Academics) of Chandigarh Judicial Academy and UGC Emeritus Fellow delivered a special lecture to LL.M. students on the topic "Social Sciences in Contemporary Era" on April 7, 2016.

Prof. Upendra Baxi, Professor of Law, University of Warwick, UK delivered a special lecture to LL.M. students on the topic "Institutional Sanctity versus Freedom of Speech and Expression: Some Critical Perspective" on April 6, 2016.

RESEARCH PROJECTS

Project from Ministry of Panchayati Raj, Government of India

The Ministry of Panchayati Raj (MoPR), has entrusted a project to the Indian Law Institute on "*A Study on Case Laws Relating to Panchayati Raj in Supreme Court and Different High Courts*". The study is under progress.

Project from the National Investigation Agency

The National Investigation Agency (NIA), Ministry of Home Affairs, Government of India has entrusted a project to the Indian Law Institute to prepare a Compendium of Terrorism Related cases and to draft a Model Investigation and Procedural Manual.

Project from Ministry of Law and Justice

The Ministry of Law and Justice, and the Indian law Institute have prepared a Report on the "Merger of Tribunal in India". The report has been submitted.

ACADEMIC ACTIVITIES

The Institute offers admission for LL.M. 1Yr, Ph.D. and four Post Graduate Diploma Courses of one year duration in Alternate Dispute Resolution (ADR), Corporate Law and Management (CLM), Cyber Law (CL), Intellectual Property Right (IPR). The admission process for LL.M. (1Year) and Post Graduate Diploma Programmes for academic year 2016-2017 started with the sale of prospectus *w.e.f.* May 1, 2016.

The merit lists are under preparation and shall be displayed as per the schedule notified in this regard.

For the Ph. D. Programme 56 application forms, complete in all respects with research plan, have been received for enrollment in Ph.D. programme 2016-2017. Shortlisted candidates based on the admission test shall be called for presentation of their research proposal and interview as per schedule. Candidates of exempted category shall be shortlisted on the basis of their research plans submitted along with the application form.

EXAMINATION

All India Common Admission Test for LL.M. Programmes

The All India Common Admission Test (CLAT) for the LL.M. (1Year) Programme was conducted on June 11, 2016 at ILI, New Delhi. A total of 436 candidates appeared for the LL.M programme. Merit list of candidates shortlisted for interview/ viva shall be notified on July 6, 2016 as per the approved schedule.

Examination for P.G Diploma

Annual Examination for Post Graduate Diploma Courses was successfully conducted from April 12-30, 2016. The result for the same was declared in June.

Examination for LL.M Programmes

Examinations for LL.M (1Yr/ 2Yr/ 3Yr) were successfully conducted in the month of May. Results for LL.M (2Yr /3Yr) were declared in the month of June.

RESEARCH PUBLICATIONS

Released Publications

- *Journal of the Indian Law Institute* (JILI) Vol. 58 (1) (January- March, 2016).

Forthcoming Publications

- *Journal of the Indian Law Institute* (JILI) Vol. 58 (2) (April- June, 2016).
- Index to Legal Periodicals 2015.

E-LEARING COURSES

Online Certificate Courses in "Intellectual Property Rights Law" and "Cyber Law"

Intellectual Property Rights Law

The admission process for the 35th batch of three months duration started on April 18, 2016. A total of 55 students were enrolled for this batch.

Cyber Law

The admission process for the 24th batch of three months duration started on April 18, 2016. A total of 94 students were enrolled for this batch.

FORTHCOMING ACTIVITIES

Common entrance test for admission to Ph.D. programme 2016-2017 shall be conducted on August 22, 2016.

Classes for the new batch of students enrolled in the LL.M.(1Year) programme shall commence from July 20, 2016.

LIBRARY

A new database namely *Taxmann.com* was procured to enrich the database/e-Resources collection of the Library. *Taxmann.com* provides comprehensive coverage on tax and corporate laws. It covers Direct Tax Laws, Corporate Laws, Indirect Tax Laws,

International Taxation and Accounts & Audit. The access of this database is IP based and link for the same is *https://www.taxmann.com/index.aspx*.

STAFF ACTIVITIES

- Mr. Ajay Kumar Verma, Assistant Registrar Indian Law Institute has been awarded the degree of Ph.D. In Commerce on the topic "The Role of COMPFED in Economic Development of Bihar", in May 2016 under the supervision of Dr. Ahmad Hussian, Associate Professor in Commerce VMV, Patna University.
- Mr. Khem Singh, Daftery, superannuated on June 30, 2016 after successfully serving the Indian Law Institute for nearly forty years.
- Ms. Sonam Singh, Library Assistant, attended the 5th International Library and Information Professional Summit (LIPS 2016) on "*From Ownership to Access: Leveraging the Digital Paradigm"*. It was jointly organized by Ambedkar University, Delhi and SLP from May 19-20, 2016 at New Delhi.
- Santosh Kumar Kori, Jr. Library Assistant published a paper on "Information Technology and Libraries: A Bibliometric Study" in *International Journal of Innovative Knowledge Concepts,* Volume 2, (2016).

VISITS TO THE INSTITUTE

Student's visit at ILI

Students of the Durgapur Institute of Legal Studies, Burdwan, West Bengal visited the Institute on June 26, 2016.

Associate Prof. Anurag Deep and Asst. Prof. Stanzin Chostak with the students.

- Students from the Bimal Chandra College of Law, Kandi, Murshidabad, West Bengal visted the Institute on June 26, 2016.

Asst. Prof. Stanzin Chostak with the students

LEGISLATIVE TRENDS

(A) Ordinances

Enemy Property (Amendment) Third Ordinance, 2016

(May 31, 2016)

The Central Government had designated some properties belonging to nationals of Pakistan and China as 'enemy properties' during the 1962, 1965 and 1971 conflicts. It vested these properties in the 'Custodian of Enemy Property', an office under the central government. The Ordinance amends the Enemy Property Act, 1968 which regulates these enemy properties and the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. Previously two similar Ordinances had been promulgated in January 2016 and April 2016.

Highlights of the Ordinance:

- Retrospective application: The Ordinance is deemed to come into effect from January 7, 2016, the date of promulgation of the first Ordinance. However, several of its provisions will be deemed to have come into effect from the date of commencement of the 1968 Act. Consequently, divestments (i.e., returning of property from the Custodian to the owner) and transfers of enemy property, which had taken place before January 7, 2016, and violate the Ordinance, will be considered void.
- Definition of enemy: The 1968 Act defined an 'enemy' as a country (and its citizens) that committed external aggression against India (i.e., Pakistan and China). The Ordinance expands this definition to include: (i) legal heirs of enemies even if they are citizens of India or of another country which is not an enemy, (ii) nationals of an enemy country who subsequently changed their nationality to that of another country, etc.

- Vesting of enemy property: The 1968 Act allowed for vesting of enemy properties with the Custodian, after the conflicts with Pakistan and China. The Ordinance amends the Act to clarify that properties will continue to vest with the Custodian even in some more incidents including these: (i) the enemy's death, (ii) if the legal heir is an Indian, (iii) enemy changes his nationality to that of another country, etc. It further provides that vesting of enemy property with the Custodian will mean that all rights, titles and interests in the property will vest with the Custodian. No laws and customs governing succession will be applicable to these properties.
- Divestment: The 1968 Act provided that the central government may order for an enemy property to be divested from the Custodian and returned to the owner or other person. The Ordinance replaces this provision, and allows enemy property to be returned to the owner only if an aggrieved person applies to the government, and the property is found not to be an enemy property.
- Power of sale: The 1968 Act permitted sale of enemy property by the Custodian only if it was in the interest of preserving the property, or to secure maintenance of the enemy or his family in India. The Ordinance expands this power, and allows the Custodian to sell or dispose of enemy property, within a time period specified and approval provided by the central government, irrespective of any court judgments to the contrary.
- Transfers by enemies: The 1968 Act prohibited transfer of enemy property by an enemy if: (i) it was against public interest, or (ii) to evade vesting of property in the Custodian. The Ordinance removes this provision, and prohibits all transfers by enemies. Further, it renders transfers that had taken place before or after the commencement of the 1968 Act as void.
- Jurisdiction of courts: The Ordinance bars civil courts and other authorities from entertaining cases against enemy properties. However, it allows a person aggrieved by an order of the central government to appeal to the High Court, regarding whether a property is enemy property. Such an appeal will have to be filed within 60 days (extendable up to 120 days).
- Powers of the Custodian: The 1968 Act authorised the Custodian to take measures to preserve enemy property, and maintain the enemy and his family if they are in India, from the income derived from the property. The Ordinance removes the duty to maintain the enemy and his family. Further, the Ordinance amends the Public Premises Act, 1971 to provide the Custodian the power to remove unauthorised occupants and construction from enemy properties.

The Dentists (Amendment) Ordinance, 2016

(May 24, 2016)

The Ordinance amends the Dentists Act, 1948. The Act provides for the constitution of the Dental Council of India (DCI) for regulating: (i) permission to start colleges, courses or increase the number of seats, (iv) registration of dentists, and (v) standards of professional conduct of dentists; etc.

Highlights of the Ordinance:

- The Ordinance introduces a uniform entrance examination for all dental colleges which will be conducted in Hindi, English and other languages. This would be applicable at the undergraduate and the post-graduate level.
- The Ordinance gives the DCI the power to frame regulations with regard to the (i) authority designated with the conduct of the exams, (ii) manner of conducting the exams, and (iii) specifying languages other than English and Hindi in which the examinations may be conducted.
- For the academic year 2016-17, if a state has not opted for such uniform entrance examination, then the examination will not be applicable at the undergraduate level. This provision will apply to state government seats in state government and private dental colleges.

The Indian Medical Council (Amendment) Ordinance, 2016

(May 24, 2016)

The Ordinance amends the Indian Medical Council Act, 1956. The Act provides for the constitution of the Medical Council of India (MCI) for regulating: (i) standards of medical education; (ii) permission to start colleges, courses or increase the number of seats; (iv) registration of doctors, (v) standards of professional conduct of medical practitioners; etc.

Highlights of the Ordinance:

- The Ordinance introduces a uniform entrance examination for all medical educational institutions at the undergraduate and the post-graduate level.
- It gives the MCI the power to frame regulations with regard to the (i) authority designated with the

conduct of the exams, (ii) manner of conducting the exams, and (iii) specifying languages other than English and Hindi in which the examinations may be conducted.

- For the academic year 2016-17, if a state has not opted for such uniform entrance examination, then the examination will not be applicable at the undergraduate level. This provision will apply to state government seats in state government and private dental colleges.

(B) Acts

The Insolvency and Bankruptcy Code, 2016
(May 28, 2016)

An Act to consolidate and amend the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

Highlights of the Act:

- The Code creates time-bound processes for insolvency resolution of companies and individuals. These processes will be completed within 180 days. If insolvency cannot be resolved, the assets of the borrowers may be sold to repay creditors.
- The resolution processes will be conducted by licensed insolvency professionals (IPs). These IP will be members of insolvency professional agencies (IPAs). IPAs will also furnish performance bonds equal to the assets of a company under insolvency resolution.
- Information utilities (IUs) will be established to collect, collate and disseminate financial information to facilitate insolvency resolution.
- The National Company Law Tribunal (NCLT) will adjudicate insolvency resolution for companies. The Debt Recovery Tribunal (DRT) will adjudicate insolvency resolution for individuals.
- The Insolvency and Bankruptcy Board of India will be set up to regulate functioning of IPs, IPAs and IUs.

The Sikh Gurdwaras (Amendment) Act, 2016

(5th May, 2016)

The Act makes amendment to the Sikh Gurdwaras Act, 1925 (hereinafter referred to as the principal Act) which regulates administration of Sikh Gurdwaras in Chandigarh, Haryana, Himachal Pradesh and Punjab. The principal Act established the Sikh Gurdwara Prabandhak Committee (SGPC) for overall administration and management, and set up committees for management of every Gurdwara and also lays down the powers of the SGPC and other committees, and regulates elections to them. It provided that every Sikh who is above 21 years of age and is registered as a voter will be entitled to vote in the elections to the SGPC and management committees.

This amendment was brought in the light of a government notification passed under section 72 of Punjab Reorganization Act dated October 8, 2003 which had sought to disentitle the Sehjdhari Sikhs from voting in the SGPC and management committee elections. However, the Punjab and Haryana High Court had struck down the notification as invalid in 2011.

Highlights of the Act:

- The amendment substitutes the proviso in section 49 of the principal act by the following proviso namely:—

  "Provided that no person shall be registered as an elector who—

  (a) trims or shaves his beard or keshas; (b) smokes; and (c) takes alcoholic drinks."

- Retrospective operation: The Act has been given retrospective operation from October 8, 2003.

The Mines and Minerals (Development and Regulation) Amendment Act, 2016

(May 6, 2016)

The Act amends the Mines and Minerals (Development and Regulation) Act, 1957 (the 'principal Act') which regulates the mining sector in India and specifies the requirement for obtaining and granting leases for mining operations.

- **"Leased area" definition added:** In section 3 of the principal Act, for clause (*a*), the following clauses shall be substituted, namely:—

  '(*a*) "leased area" means the area specified in the mining lease within which mining operations can be undertaken and includes the non-mineralised area required and approved for the activities

falling under the definition of mine as referred to in clause (*i*);

(*aa*) "minerals" includes all minerals except mineral oils;'.

- **Transfer of mining leases:** Section 12A of the principal Act allowed the transfer of mineral concessions only for such concessions which had been granted through auction. While the Act already provided for transfer of mining leases, the Amendment provides that captive mining leases where the entire quantity of mineral extracted is used in the manufacturing unit owned by the lessee and which were granted otherwise than through auction, would be transferable with prior State Government approval on such terms and conditions and payment of 'transfer charges' as may be prescribed by the Central Government. It is aimed at facilitating banks and financial institutions to liquidate stressed assets where a company or its captive mining lease is mortgaged as well as to spur mergers and acquisitions in the sector. A proviso and an explanation are inserted for this purpose in sub-section (*6*)

LEGAL JOTTINGS

Recognising Human Rights of Disabled person

Earlier the traditional approaches to disability have depicted it as health and welfare issue, to be addressed through care provided to persons with disabilities, from a charitable point of view. Disability tends to be couched within a medical and welfare framework, identifying people with disabilities as ill, different from their non-disabled peers, and in need of care. Because the emphasis is on the medical needs of people with disabilities, there is a corresponding neglect of their wider social needs, which has resulted in severe isolation for people with disabilities and their families… The subject of the rights of persons with disabilities should be approached from human rights perspective, which recognized that persons with disabilities were entitled to enjoy the full range of internationally guaranteed rights and freedoms without discrimination on the ground of disability. This creates an obligation on the part of the State to take positive measures to ensure that in reality persons with disabilities get enabled to exercise those rights. There should be insistence on the full measure of general human rights guarantees in the case of persons with disabilities, as well as developing specific instruments that refine and given detailed contextual content of those general guarantees. There should be a full recognition of the fact that persons with disability were integral part of the community, equal in dignity and entitled to enjoy the same human rights and freedoms as others.

***Jeeja Ghosh* v. *Union of India* (UOI)** Writ Petition (C) No. 98 of 2012.

FACULTY NEWS

Manoj Kumar Sinha delivered a talk on *Convention on the Rights of the Child* to the participants of a Teaching Programme for Interns organised by the National Human Rights Commission of India(NHRC), June 7, 2016.

Delivered a talk on *"International Human Rights Instruments"* to the participants of Summer Course organised by the Indian Society of International Law, June 6, 2016.

Invited to Chair a session on *Hindu Jurisprudence: Texts and its Evolving Concepts* organised by Indian Council Philosophical Research (ICPR), New Delhi, May16, 2016

Invited to deliver Keynote Address at the inaugural session of the Seminar on *"E-Governance, Cyber Crimes, Cyber Security and Cyber Laws: Contemporary Issues and Challenges"* organised by the Department of Law, North-Eastern Hill University, Shillong, April 29, 2016

Invited to deliver a lecture on the topic *General Protection in Armed Conflict Wounded, Sick and Shipwrecked, Civilians and Protected Objects* to the participants of a Training programme, organised by the International Committee of the Red Cross (ICRC) and Jaipur National University, Jaipur, April 27, 2016.

Invited to deliver valedictory address in the *1st Baljeet Shastri Memorial National Moot Court Competition* organised by the Amity University, Gurgaon, April 03, 2016.

Anurag deep submitted post graduate assignment of Meerut University, Ram Manohar Lohia National Law University, and Jamia Millia Islamia, New Delhi.

Delivered lecture on the topic "Human Rights in Indian Constitution" in Indian Society of International Law, and "Research in Law –Sharing Experiences" in Amity University, Haryana.

Jyoti Dogra Sood Contributed statement of purpose (SOP) for Children Court in Standard Operating Procedures for Stakeholders Implementing ProcessesRelating to Children in Conflict with Law, submitted by National Commission for Protection of Child Rights.

Has been nominated as a member of the committee for drafting a manual similar to Model Prison Manual in respect of Juveniles, constituted by the Ministry of Women and Child Development, Government of India.

FACULTY ACHIEVEMENTS

Prof. S. Siva Kumar has been conferred the Honorary Degree of Doctor of Laws (Honoris Causa LL.D- Legum Doctor) by the board of management of Vels University, Chennai in recognition of his immense contributions in the field of Law and Mass Communication on May 07, 2016.

Hon'ble Justice B.S.Chauhan, Dr.Ishari K.Ganesh, Hon'ble Justice Chelameshwar and Prof.(Dr.) S.Siva Kumar.

CASE COMMENTS

Marie- Emmanuelle Verhoeven* v. *Union of India

2016 (6) SCC 456

Decided on April 28, 2016

The Supreme Court of India held that section 2(d) of the Extradition Act, 1962 is binding between India and Chile. In this case the Government of Chile has requested the extradition of the petitioner who is believed to be a French national. The petitioner was accused of being a conspirator in the assassination of a Chilean Senator on 1st April 1991. The request for petitioner's extradition was made to German Government earlier but the proceedings terminated in her favour. Subsequently, request for extradition was made to Government of India but the Delhi High Court held that that the extradition proceedings initiated against her were not in accordance with law.

The request for extradition was based on the principles of international law derived from multilateral and bilateral treaties on extradition. The Chilean Government acknowledged the existence of Extradition Treaty between the Republic of Chile and United Kingdom of Great Britain and Ireland signed at Santiago on January 26, 1897. Though, the Government of Chile was not quite clear in the beginning whether the treaty was binding to Government of India. Ambiguity related with application of the treaty was clarified by the notification issued by the Government of India on 28th April 2015under section 3(1) (read with Section3 (3)) of the Act thereby making the Extradition treaty of January 26, 1897 applicable to the Republic of Chile. In this case the court looked into the applicability of the international agreements signed by the British Government before the independence and its obligation on India and Pakistan after Independence. The Governor-General issued the Indian Independence (International Agreements) Order, 1947 on 14th August 1947 which recorded on agreement between the Dominion of India and the Dominion of Pakistan. The above Order of 1947 clarified that all international agreements to which British India was a party would devolve upon the Dominion of India and the Dominion of Pakistan and if necessary the obligations and privileges should be apportioned between them. The Court also relied on its earlier decision in *Rosiline George* v. *Union of India* (1994) 2 SCC 80 (relying upon *Babu Ram Saksena* v. *State* 1950 SCR 573) in which the court observed that our Independence and subsequent status as a sovereign republic did not put an end to the treaties entered into prior to August 15, 1947by the British Government of behalf of India. The court held that there is a binding treaty exists between India and Chile and that the provisions of the Extradition Act, 1962 are applicable to the Republic of Chile in respect of the offences specified in the Extradition Treaty. This judgment has removed the vagueness related with the application of Extradition treaty by looking into the application of international agreements especially those agreements which were signed prior to the Independence by the British Government.

Manoj Kumar Sinha

Ajambi* v. *Roshanbi

2016 (6) SCALE 58

Decided on June 29, 2016

This is an appeal filed before the division bench of the Supreme Court pertaining to partition of property against the order of High Court of Karnataka at Bangalore. The brief facts were that the appellant was the original defendant in the suit. Respondents had filed a suit for partition and separate possession of the 7/8th share in the property. The property belonged to late Shaikaji, whose first wife had died and thereafter he had married Roshanbi. Out of the first marriage, late Shaikaji had two children and one of them had died whereas he had six children through his second marriage. The suit was filed by the second wife and her children against the child of first wife who was also heir of the deceased Shaikaji. The property was purchased by Shaikaji and was in occupation of all the family members.

The suit was decreed and had been challenged but it was dismissed. Thus, an appeal was filed in the high court which had remanded the matter to the first appellate court for its fresh disposal with a direction to permit the parties to lead documentary evidence in relation to a memorandum of partition. Accordingly the appellate court had permitted production of the afore stated document is in a nature of a memorandum of partition, whereby, during the lifetime of Shaikaji, the property in question had been divided among the children of the first wife and the second wife.

The appellate court considered the validity of the document and concluded that the property had been divided earlier, recorded under a document signed by late Shaikaji and also been attested by two witnesses. However, neither Shaikaji nor the attesting witnesses were alive at the time when the said document was exhibited.

Thus the court set aside the decree passed by the trial court holding that the property had been divided during the lifetime of late Shaikaji and thus , the plaintiffs were not entitled to 7/8th share in the property comprised of CTS No. 883/A and CTS No. 883/B. The property had been duly divided and was in occupation of the respective parties even during the lifetime of late Shaikaji.

This judgement was challenged before the high court as a second appeal which had been allowed by the high court. The high court did not agree with the view expressed by the lower appellate court. The high court was of the view that there is no concept of joint family in Muslim Law and therefore, there could not have been any partition or joint family property among the plaintiffs and the defendant, who belong to the family of Shaikaji. Being aggrieved from the order of high court the appeal came before the Supreme Court.

After hearing the councils of appellant and respondent and perusal of judgment and the evidence recorded by the courts below, the Supreme Court was of the view that the lower appellate court was correct in its conclusion that late Shaikaji had made arrangements with regard to his property during his lifetime and the said arrangements had been subsequently recorded in the concerned document which had been duly acted upon by the revenue authorities by dividing the suit property into two different parts namely, CTS No. 883/A and CTS No. 883/B. The Court further held that it is not in dispute that the property which had been divided by late Shaikaji was in occupation of the respective parties and the said fact has also been recorded in the revenue record.

Though the apex court agreed with the opinion of high court that there is no concept of joint family in Muslims Law but it was open to late Shaikaji to give his property to his children in a particular manner during his lifetime, which he rightly did, so as to avoid any dispute which could have arisen after his death. The arrangement so made was duly accepted by the family members and it was also acted upon. Only thereafter a formal record of the said fact was made by late Shaikaji

Accordingly the court set aside the judgment of the high court so as to give effect to the judgment and decree passed by the lower appellate court.

It is respectfully submitted that both the apex court and the High Court of Karnataka understood the concept that there is no joint family property under Islamic Law. However, the explanation given by the lower court about the partition of property in dispute and the approval of the Supreme Court shows that Islamic Law of property whether it is gift or inheritance both the courts seems confusing. According, to Islamic Law, during lifetime, the owner of the property is the only owner unless he dispossesses himself by transferring the property to any other person including his son and daughters. Through delivery of possession of the property by way of gift, the other person whether wife or children, can be owner of that property. If it is not done by the late Shakaji the property would have belonged to him till his last breath. After his demise, the property automatically devolved among the heirs and in this case the widow is entitled to 1/8 share of the property and the rest 7/8 will be divided among sons and daughters. Each son will get twice of the daughters share. The facts of this case are very jumbled therefore, the decision of the learned high court was little akin to the Islamic Law to certain extent.

According, to the Islamic Law of inheritance, the claim of 7/8th share by the child of first wife was also incorrect because after leaving 1/8th share of the widow Roshanbi, the remaining 7/8th will be divided amongst all the sons and daughters of late Shakhaji, irrespective of the fact who is born from which wife. Since they are all children of Late Shakhaji, therefore, they would all inherit the father's property according to the shares determined by the Islamic law of inheritance. It is further submitted that under Islamic Law, property of a father and the property of his children will always be separate and cannot be clubbed together.To this extent, high court's understanding must appreciated.

Furqan Ahmed

Subramanian Swamy* v. *Union of India

AIR 2016 SC 2728

Decided on May 13, 2016

In this case the constitutional validity of Section 499 Defamation, section 500 Punishment for defamation in Indian Penal Code 1860 and section199. Prosecution for defamation under Cr PC 1973 had been challenged before a division bench of Hon'ble Justice Deepak Mishra (who delivered the verdict) and Prafulla C. Pant. The issue before the court was whether the provisions (above) violates article 19(1) and are against the test of reasonable restrictions being vague, colonial, unreasonable, generating chilling effect etc. The court held the provisions are perfectly valid and constitutional.

For convenience the judgement can be divided into seven parts. First is reference of arguments of all parties. Second is discussion of the concept of defamation and reputation. This part can have two sub classifications. One the philosophical aspect where the judgement quotes Bhagawad Gita, Quran, Bible, opinion of thinkers and philosophers. Other is legal aspect where the judgement discusses international law, travels through constitutional position and judicial approach in the UK, USA, Canada, South Africa, European Court of Human Rights followed by various judicial precedents in India to reiterate and establish that right to reputation is one of the essential element that form the boutique of fundamental rights under article 21. *Third part* addresses whether "defamation" in 19(2) as reasonable restriction should be interpreted as an independent unit or should it be necessarily read with "incitement of offence". *Fourth part* is discussion on freedom of speech highlighting the similarities and differences regarding the idea of free speech in India and the USA and reiterates test for reasonable restrictions as laid down by various benches of the Supreme Court of India. *Fifth* part is application of this test. *Sixth* part is application of principle of constitutional fraternity and the fundamental duty to corroborate the finding of the court. *Seventh* part is analysis of section 499 to answer whether it is vague

or unreasonable? It also examines the section on the basis of doctrine of proportionality. As section 199 CrPC 1973 was also under challenge, the meaning of term "some person aggrieved" under section 199 of Cr PC 1973, discussion on article 14 *vis- a- vis* 199 (6) is thoroughly answered. Objections on the ground of Press and Registration of Books Act 1867, multiple jurisdiction argument, issue that neither can any FIR be filed nor can any direction be issued under Section 156(3) CrPC 1973 has also been addressed to repel the arguments of petitioners. The operative part of the judgement is that to protect freedom of speech under 19(1), right to reputation under article 21 cannot be ignored as none is inferior or superior. Therefore section 499, 500 of Indian Penal Code 1860 and section 299 of Cr PC 1973 provide measures to protect right to reputation are not unconstitutional.

The *ration decidendi* can be quoted as under:

"Penalization of defamation "is *not a restriction* that has an inevitable consequence which impairs circulation of thought and ideas. In fact, *it is control* regard being had to another person's right to go to Court and state that he has been wronged and abused. He can take recourse to a procedure recognized and accepted in law to retrieve and redeem his reputation. Therefore, the balance between the two rights needs to be struck. "Reputation" of one cannot be allowed to be crucified at the altar of the other's right of free speech." [Emphasis Added]

One of the issues (this comment refers it as fourth part of the judgement) involved was whether the term 'defamation' be given limited interpretation or not. In other words is the word 'defamation' independent in existence for a criminal proceedings or does it get oxygen from other terms like, 'incitement to an offence.' The connected questions are should the principle of *noscitur a sociis* (meaning of an ambiguous word should be considered by the words with which it is associated in the context) has to be made applicable while interpreting defamation or not? The arguments were that the word defamation cannot be literally interpreted because controlling word is the sister word ie incitement to an offence. Therefore a limited interpretation has to be given and any plain meaning will violate article 19 of the constitution of India. Arguments were also advanced that "the intention of clause (2) of Article 19 is to include a public law remedy in respect of a grievance that has a collective impact but not to take in its ambit an actionable claim under the common law by an individual." In other words as per petitioners greater evidence of *actus reus* (apart from defamation) has to be proved for a successful criminal proceedings and this additional element is 'incitement to an offence'.

The court answered the arguments as under: 1. 'Defamation' was present in 1950 when the constitution was originally framed while "incitement to an offence" was not a restriction under article 19(2) which came through first amendment in 1951. 2. In constituent assembly debates the intention was to place defamation as one of the restrictions independent of other words. This shows 'defamation' has existence independent of 'incitement of offence.'

On connected issue of whether *noscitur a sociis* be applicable while evaluating the meaning of defamation, the court with the help of primary authority of judicial precedents and secondary authority of experts like Maxwell held that *noscitur a sociis* rule of construction can be pressed into service when there is some doubts as the meaning of the word. It can also be used when intention of legislature regarding words are not clear. In case of 'defamation' the meaning has no doubts and the intention of legislature to use words are also not doubtful. Making a comparison of *noscitur a ssociis* and *ejusdem generis* the court observed that 'it is a rule wider than the rule of *ejusdem generis*; rather the latter rule is only an application of the former'. On why "defamation" as used in article 19(2) should not be narrowly construed the court advanced two reasons. One, it would defeat the very purpose that the founding fathers intended to convey and two, no justifiable reason to do this. Another line of arguments was whether "defamation" is meant to

serve private interest of an individual and not the larger public interest. The court discussing the concept of crime held that it is meant to serve public interest also.

The arguments indicate that Indian intellectuals are influenced by western liberal thoughts and therefore time and again they approach the Supreme Court to convince that modern western legal norms be imported in Indian soil. The tendency test was as accepted in constitution bench judgement of *Kedarnath Singh* (AIR 1962 SC 955) demands inquiry into the intensity of expression which ought have potential enough to create public order problem. Since then the tendency test is evergreen arguments of some human rights lawyers. In *Arup Bhuiyan[2011 (3) SCC 377]* also the test was successfully argued. After *Shreya Singhal* (2015) judgement where again the tendency test was successful, the liberal thought got momentum but the Supreme Court has rightly refused to oblige the petitioners(most of whom are in political life covering ruling party as well as opposition). If politicians feel so strongly they may delete or amend section 499 IPC and 199 CrPC 1973. The judgement is very lengthy (though it has avoided unnecessary reference to previous quotations from judgements on presumption of constitutionality etc and *obiter*) probably because of lengthy arguments(and sometime childish arguments like defamation is not even a civil wrong) and judgement has to address all arguments. It is high time the Supreme Court in consultation with the bar limit the length of petitions, written submissions and time of oral arguments.

Anurag Deep

A. Aniswar* v. *Union of India
W.P. No.15628 of 2016
(High Court of Judicature at Madras)
Decided on June 27, 2016

The facts of the case are that the petitioner is a minor represented by his mother who is an Indian citizen and was married as per Hindu Rights and Customs in Trichy to a person who was a Malaysian citizen. Subsequently, due to difference of opinion, the mother filed for divorce in First Additional Family Court, Chennai under section 13(1) (i-a) of the Hindu Marriage Act, 1955. She got the divorce *ex-parte* and since there was no step taken by the father to set aside the *ex-parte* decree, it became final. The petitioner, a minor child, was issued a Person of Indian Origin (PIO) card. As per the respondents, all PIOs will have to submit for registration an Overseas Citizen of India Card Holders (OCI Cardholders) on or before March 31, 2016. Hence the petitioner filed the application with all the relevant documents. However, the Bureau of Immigration, FRRO, Chennai returned the paper stating that the petitioner has to produce custody papers wherein custody is granted in favour of the mother. This writ petition was filed before the Madras High Court under article 226 of the constitution of India for quashing of the decision passed by the Bureau of Immigration, FRRO, Chennai being arbitrary, illegal and unconstitutional in nature. The counsel on behalf of the respondent drew the attention of the court towards clause 5 (iii) of the brochure issued with regard to OCI card holders. According to this clause, in the case of a minor child where both parents are citizens of India or one of the parents is a citizen of India and the parents are divorced, court order of dissolution of marriage which specifically mentions the legal custody of the child is with the parent who is applying for the OCI card. However the counsel mentioned that in the decree of divorce, nothing specific as to custody of child was provided. The High Court of Madras stated that the Supreme Court has in previous cases like *Githa Hariharan* v. *Reserve Bank of India* has concluded that section 6(a) of the Hindu Minority and Guardianship Act, 1956 recognises that both mother and father ought to be treated as natural guardians and the word 'after' (in the case of a boy or an unmarried girl-the father, and after him, the mother) shall be interpreted in terms of constitutional safeguard and guarantee so as to give a proper and effective meaning to the words used. The high court stated that given the circumstances of the case, the fact that mother owing to difference of

opinion came with the petitioner to Trichy and her husband still continued to stay in Malaysia; that there was no steps taken to set aside the ex parte divorce decree makes it clear that the custody of the child is with the mother. Hence the court allowed the writ petition setting aside the order of the Bureau of Immigration, FRRO, Chennai. The court gave liberty to the mother to represent the application for the OCI card and directed the bureau to expeditiously proceed with the application and pass orders within two weeks from the date of the said decision.

This case again brings to light the pitiable condition in India where mother has to go to the court to prove her claim over her own child. The High Court of Madras did a commendable job by stating that even though in the divorce decree there was no specific mention about the custody of the child, the factual circumstances left no doubt that the child was in the custody of the mother only. The decision of the high court is applaudable and is expected to pave the way for further development of maternal guardianship in the country.

Jupi Gogoi

Star Sports India Private Limited* v. *Prasar Bharti

2016(5) SCALE 661

Decided on May 27, 2016

This appeal arose out of the dictum passed by Delhi High Court on October 3, 2013 in which it asked Star Sports India Pvt. Ltd. (formerly ESPN Software Pvt. Ltd.) to share clean feed with Prasar Bharti, without any advertisement in it. In the present case, the Supreme Court dealt with the issue of scope of obligations of a Television Broadcasting Organisation under the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharti) Act, 2007. Under section 3 of the Act, a broadcaster is prohibited from carrying the live television broadcast of a sporting event of national importance, unless it simultaneously shares the broadcasting signals with Prasar Bharti, without its advertisements. The court in this case has thrown light on the said provision. The appellant was permitted to insert advertisements on its avenue during breaks between overs and at the fall of a wicket, but these advertisements are not be included while sharing the signals with Prasar Bharti.

The issue was that at times, the content shared by appellant with Prasar Bharti, included some advertisements also. One of the arguments advanced by Appellant was that the 'world feed' (the feed which is provided to all broadcasters throughout world) is provided by the event organisers and along with live play it includes certain features also like hawk-eye, ball delivery speed, umpire naming graphics, statistics, score cards etc. to help the spectators. Such sort of features have the logos of the sponsors of event and are called as 'on-screen credits'. The appellant's contention was that section 3(1) of the Act talks only about the sharing of the world feed and hence, it is not bound to remove the on-screen credits included by the event organisers.

On March 07, 2013, the Appellant informed the Respondent that it shall be sharing its live signals with Prasar Bharti. On March 14, 2013, appellant sent another letter informing that the said sharing shall include certain added features comprising of commercial features. Prasar Bharti replied to the above letters on April 06, 2013, stating that appellant's obligation is to share the signals without any commercials. The appellant took the plea that as per section 3 of the Act, its obligation was just to share the live broadcast signals as such, in the form in which it was received by it from the sport event organiser and it did not have any kind of control on the on-screen credits which are integral part of the feeds. Hence, it was not violation of section 3 of the Sports Act.

The apex court adopted the principle of purposive interpretation reasoning that an interpretation which would attain the object and purpose of the Act has to be given precedence over any other interpretation which may not further the cause of the Act. It expressed that while enacting this statute, larger public interest was sought to be achieved. The court

dismissed the plea of Star Sports India Private Limited, contending that Prasar Bharti is meant to telecast the sports events for the benefit of general masses throughout India, who otherwise may not be in a position to receive signals of private channels on account of not having financial capacity to pay for these channels. The court contended that as per the statute, the broadcasters were obligated to supply clean feed to the Prasar Bharti by removing all the sponsor logos and on-screen credits. It further provided that Act and the rules there under made it clear that signals to be shared with Prasar Bharti by the content right owner to be the clean feed and has to be free from all kind of advertisements. The court outlined the purposes of the provisions of the Act which are meant to achieve the goals like providing access to larger number of listeners and viewers on a free-to-air basis. The approach of the Supreme Court, to a greater extent has been to lay stress on the larger public interest of the society.

Vandana Mahalwar

Visvesvaraya Technological University* v. *Assistant Commissioner of Income Tax

2016(4) SCALE 246

Decided on April 22, 2016

With the purpose to encourage the promotion and development of education, certain educational institutions have been granted exemption, though conditional, from the levy of income tax. Universities and educational institutions, entitled to such exemption under the Income Tax Act, 1961 (the 'Act' herein after), existing solely for education purposes and not for purposes of profit have been categorized under three different heads, namely, universities receiving substantial grants from government covered under section 10(23C) (iiiab), universities with annual receipts less than one crore rupees under section 10(23C)(iiiad) and those run by charitable trusts under section 10(23C)(vi).

With such exemptions in place, it is also required that the income of only genuine and eligible institutions are exempted from levy of income tax and correct amount of tax is paid by all institutions not so exempt.

The assessee/appellant in the present case, Visvesvaraya Technological University (VTU), constituted under the Visveswaraiah Technological University Act, 1994 by the state of Karnataka, to exercise control over all government and private engineering colleges within the state was issued notices under section 148 by the income tax officer for the assessment years 2004-05 to 2009-10(hereinafter AY) . In response to the notices, the appellant declaring 'nil' income claimed exemption under section 10(23C) (iiiab) of the Act which was rejected by the Assessing Officer as well as the other adjudicating authorities under the Act and the High Court leading to the present appeal.

The exemption as provided under the said provision is not absolute but qualified requiring the educational institution or university to exist solely for the purpose of education, without any profit motive, and be *wholly or substantially financed by the government*.

In *Queen's Educational Society* v. *Commissioner of Income Tax*[1] and *American Hotel & Lodging Association Educational Institute* v. *CBDT*[2] , the apex court has clarified that making surplus through the educational activity, directly or incidentally, by the university and educational institutions, *per se,* will not lead to the conclusion that that it has ceased to exist *'solely for educational purposes'* and has become a profit earning entity. Relevant principles of law governing the issue have been laid down and established through a number of judicial decisions and are no longer *res integra*. The 'predominant object test'must be applied in all such cases and where the surplus is applied, wholly and exclusively, to the object for which it was established, it will be well within the exemption clause.

It was apparent from the records submitted for the relevant AY that huge surplus were accumulated by the university by realising fees under different heads

[1] (2015)8 SCC 47.
[2] (2008)10SCC 509.

(in consonance with the powers vested in it under Section 23 of the VTU Act). The appellant successfully established that a major share of it was spent on the infrastructural development during this period satisfying the court that the *surplus has been ploughed back for educational purposes*. Following the consistent principles laid down by this court in various pronouncements, referred to earlier, it was held that the first requirement of section 10(23C) (iiiab) is satisfied.

Moving towards the second criteria under section 10(23C) (iiiab) of the Act that the appellant university should be '*wholly or substantially financed by the government',* the court observed that the grants/direct financing by the government during the annual year (AY) in question had never exceeded 1% of the total receipts. Despite taking into account the value of the land allotted to the university (114 acres), repelling revenue's contention that the exemption for a particular AY must be judged only in the context of grants received in the relevant year previous to such AY, the court observed the total funding to be around 4% - 5% of its total receipt.

The appellant came up with a very innovative argument that fees, being a statutorily prescribed source, would tantamount to government funding as contemplated by the provisions of section 10 (23c) (iiiab) of the Act.

Rejecting the argument, the court observed that though the first requirement under section 10(23C) is consistent in all three categories; it is the second requirement which creates differentiation. If collection of fees is to be understood to be amounting to funding by the government merely because collection of such fees is empowered by the statute, all such receipts by way of fees may become eligible to claim exemption under section 10 (23c) (iiiab). Such an interpretation, according to the court, would render the provisions of the other two sub-sections nugatory which cannot be understood to have been intended by the legislature and must, therefore, be avoided.

Therefore, dismissing the appeal, the court held that the appellant university does not satisfy the second requirement spelt out by section 10 (23c) (iiiab) of the Act. It is neither directly nor even substantially financed by the government so as to be qualified for exemption from payment of tax under the Act.

There has been lack of certainty in this regard for a very long time as to the '*nature*' and '*quantum*' of grant and contributions. The absence of a definition of the phrase "*substantially financed by the government*" had led to large scale litigation and varying decisions of judicial authorities who had, for this purpose, relied upon various other provisions of the Act and other statutes in *peri materia*.

In 2014, for the purpose of infusing more clarity on the issue of '*quantum of grant*', rule 2BBB was notified in the income tax rules requiring government grants to such universities in excess of 50 percent of its total receipts during the said previous year to be sufficient to satisfy the criteria of substantially financed by the government. It will certainly help the assessing officer and judicial officers at different levels to arrive at a finding while assessing the taxability of a university and educational institution under sub-clauses (iiiab) of clause (23C) of section 10 and minimise the burden of judiciary in this behalf.

Deepa Kharb

Swaraj Abhiyan – (I)* v. *Union of India

2016 (5) SCALE 506

Decided on May 11, 2016

The song "Hariyala sawan dhol bajata aaya" in the memorable, soul-stirring and topical Hindi film *'Do Bigha Zamin'*, best expresses the joy of an Indian peasant on the arrival of rain. On the other hand, it is difficult to fathom the despair and sorrow when there is deficient rain and one's heart sinks to see farmers wail at the game that nature plays. The present case, arising out of public interest litigation deals with the situation of drought and how the various machineries

of the state together can solve the drought situation. The fact of the case is that the petitioner Swaraj Abhiyan sought remedy from the court seeking directions for those states which have not declared themselves as drought hit even after 11 states *i.e.,* 1/3 of the country has already done so. The states are Haryana, Gujarat and Bihar. The petitioners contended that non declaration as 'drought-hit' will result in distress to the vulnerable lot of the population and goes against the spirit of article 21 of the Constitution.\

In the context of drought, the case deals extensively with the provisions of relevant legislations such as the Disaster Management Act, 2005(hereinafter 'the DM Act.) and the statutory responsibility of the union government in matters pertaining to disasters. Basically under the federal polity that we have, the authority to declare a 'drought' vests with the state and this was one of the contentious issue in the present case because the union government submitted before the court that it is not within its power to do so, and hence it cannot direct the states to declare a 'drought'. The court therefore held that "It cannot totally wash its hands off on issues pertaining to article 21 of the Constitution. The Union of India has certainly to maintain a delicate and fine balance between federalism and its constitutional responsibility, and that it must do, otherwise it is ultimately the common person who will suffer and be in distress because of a situation not of his or her making."

In today's time when issue of climate change has taken a centre stage, it is very essential to appreciate and know the various institutional set up under which the adverse impacts of climate change gets addressed and the court has truly shown the way forward to tackle such challenges in a coherent way. Through this judgment some facts have been made very clear by the court. For instance even after 10 years of the coming into force of the DM Act; and as mandated by its various sections, no 'Disaster Response Force' (constituting of specialist cadre) has been established. Same is the case with the 'National disaster Mitigation Fund' and 'National Plan' (though a policy document existed). The court has directed the UOI to set up the above forums. In the climate change parlance 'adaptation and mitigation' are very important components. In this context the court directed the formulation of a national plan relating to risk assessment, risk management and crisis management in respect of disaster. In the nature of directions the court touched upon (a) timely declaration of drought (b) standardization in the methodology to be followed in declaring or not declaring a drought by each state (c) revision and updation of drought manual.

Enumerating on the role of the state as a protector of its citizens in times of natural disaster the court also discussed about the scope and relevance of PIL both in the historical and current context, directive principle of state policy, the preamble to the constitution read with articles 38, 39 and 39 (A), the doctrine of *parens patriae*. While referring to the Guidelines of September, 2010[19] published by the NDMA on drought management some provisions of which are (a) Abandon the use of famine codes and varied state management plans (b) Focus on mitigation measures (c) Adopt newer technologies (d) Adapt to the new legal framework (e) Include employment and area development programmes in drought mitigation (f) Prescribe standardised steps for management at the national/central level. The court observed that "Strangely, none of these prescriptions seem to have gained universal acceptance over the years." Further it held that, "Like other hazards, the impacts of drought span economic, environmental and social sectors and can be reduced through mitigation and preparedness. Because droughts are a normal part of climate variability for virtually all regions, characterized by extended periods of water shortage, it is important to develop contextual plans to deal with them in a timely, systematic manner as they evolve." On judicial restraint the court held that: "Notwithstanding the absence of judicially manageable standards, the judiciary cannot give a totally hands-off response merely because such

standards cannot be laid down for the declaration of a drought. However, the judiciary can and must, in view of article 21 of the Constitution, consider issuing appropriate directions should a state government or the Union of India fail to respond to a developing crisis or a crisis in the making. But there is a Lakshman rekha that must be drawn."

The court laid emphasis on the fact on the value of prevention, preparedness and mitigation which is gaining recognition the world over, thus pointing at the development taking place in international environmental law. While referring to India it stated that: " In India in particularly, after 2005, there has been a paradigm shift from the erstwhile relief-centric response to a proactive prevention, mitigation and preparedness-driven approach for conserving developmental gains and also to minimize loss of life, livelihood and property. The other concerns raised through this landmark judgment is on humanitarian factors such as migrations from affected areas ("internally displaced people") suicides, extreme distress, the plight of women and children, availability of adequate food grains and water that ought to be kept in mind by state governments and the UOI in matters pertaining to drought management in India.

By contextualising the environmental law aspect of this judgment, the judgment can be well summed up by referring to an article by J.B. Ruhl "Climate Change Adaptation and the Structural Transformation of Environmental Law." *Environmental Law* 363-431*(*2010) where in the *context and policy dynamics of climate change adaptation, he identifies ten trends that will have profound normative and structural impacts on how environmental law fits in: 1) shift in emphasis from preservationism to transitionalism in natural resources conservation policy, 2) rapid evolution of property rights and liability rules associated with natural capital adaptation resources, 3) accelerated merger of water law, land-use law, and environmental law, 4) incorporation of a human rights dimension in climate change adaptation policy, 5) catastrophe and crisis avoidance and response as an overarching adaptation policy priority, 6) frequent reconfigurations of transpolicy linkages and trade-offs at all scales and across scales, 7) shift from "front end" decision methods relying on robust predictive capacity to "back end" decision methods relying on active adaptive management, 8) greater variety and flexibility in regulatory instruments, 9) increased reliance on multiscalar governance networks, and 10) conciliation.*

Stanzin Chostak

State of Gujarat* v. *Lal Singh @ Manjit Singh

2016(6) SCALE 105

Decided on June 29, 2016

This case arises from successive petitions made to the judiciary by a life convict which read like desperate cries in search of liberty. Although remission is not a matter of right but by whom and on what basis can the prisoner's application for remission be rejected- these were the questions that formed a part of this long drawn struggle. Can a prisoner who committed a "heinous" offence be made to languish in jail for the rest of her life without anyone bothering to ask the difficult question of the meaning and form of reformation? Is reformation meant to exist only as a platitude or it is time that the criminal justice system directs its attention to who, how, when of reformation?

Manjit Singh was convicted and sentenced for various offences under the TADA Act, Explosive Substances Act and the Arms Act. He was undergoing the sentence of imprisonment for life in the Central Prison, Ahmedabad (Gujarat) from which he sought transfer to the Central Prison, Jalandhar (Punjab) as his family, which was in a precarious condition, was based in Punjab. On completion of 14 years of actual sentence in jail in 2004, he sought release under section 432 of the Cr PC. This application was rejected by the Government of Gujarat. Thereafter he

filed a writ petition in the High Court of Punjab and Haryana whereby the state of Gujarat was required to reconsider the case under section 433 of Cr PC and section 3 of the Transfer of Prisoner Act. The Government of Gujarat looked into the application and it was again rejected in the year 2009. The respondent again approached the high court praying for a writ of *habeas corpus* and seeking his release under sections 432, 433 and 433A of Cr.PC and paragraph 431 of the New Punjab Jail Manual. The high court directed the state government of Gujarat to pass a speaking order within a period of two months. The application for release was yet again rejected. Another writ petition was filed before the high court in 2011 wherein the court directed the state government "to reconsider the premature release taking note of the actual sentence of 14 year and three months and more than 21 years including remission" and release him on parole subject to conditions. The state government of Gujarat based on the Cr PC provisions, provisions of Bombay Jail Manual (applicable to Gujarat) and various other factors, rejected the proposal for release in 2011. The respondent contested this by invoking the high court jurisdiction under article 226 of the Constitution. He argued that Punjab Jail Manual is applicable to him and the Gujarat government's action in not accepting the recommendation of release under Punjab Jail Manual was arbitrary. He also argued that even under the Bombay Jail Manual he was entitled to release as he had undergone more than 14 years of sentence and also that the refusal to entertain his prayer for release was contrary to article 21.

Two questions taken up by the high court are noteworthy: whether non-release of a convict is worse sanction than the death sentence, resultant encroachment upon the life and personal liberty by the executive? And whether the order of the state government is subject to judicial review, and is arbitrary, whimsical and against the provisions of article 21 of the Constitution?

Addressing the first question, the high court observed that "indeterminate life imprisonment and non-release of a convict- prisoner is worse sanction than the death sentence, resultant encroachment upon the life and personal liberty by the executive. A barbaric crime does not have to be met with a barbaric penalty which may upset the mental balance of a person who may realize that he will never be out of prison…it is the primary obligation of the Legislature to carry out necessary amendments in the cases where imprisonment for life is provided to make aware the convict/ prisoner how much period he has to undergo in prison. Otherwise, the approach of reformative, rehabilitative and corrective system will be only a futile exercise" (para 11). On the other question that court opined that the reports of the transferee state (Punjab) should have a bearing while considering the application and the same cannot be rejected without any cogent reasons. In the light of these observations, high court directed reconsideration of the application and a further order of releasing him forthwith on parole. This order of the high court was challenged by the State of Gujarat before the Supreme Court.

In addressing this matter the apex court first reiterated that the sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate government chooses to remit or commute the sentence. It also clarified that imprisonment for life is equated with the definite period of 20 years only for working out remission- it does not confer any indefensible right to be unconditionally released on the expiry of a specific period of time. The court surveyed the case law on remission and affirmed the constitutional norm that the order of remission passed by the President or the Governor (under articles 72 and 161) or the appropriate government (under sections 432, 433, 433A of Cr.PC), if *malafide*, arbitrary or in disregard of constitutionalism, can be scrutinized in the exercise of the power of judicial review.

Another issue that the court settled pertained to the appropriate government in this case. Referring to

G.V. Ramanaiah's case and section 432(7) of Cr PC, the court held that appropriate government would be Central Government where the sentence is for an offence against, or the order is passed under, any law relating to a matter to which the executive power of the union extends. Thus, if the sentence is under TADA, the executive power of union will apply as this law pertained to the union government. This was an important clarification made by the court as the high court had all through opined that State of Gujarat was the appropriate government in the instant case. The Supreme Court thus rightly set aside the high court order and asked the respondent to submit an application before the Union of India which is the competent authority in this case.

Another point that deserves attention is the court's acceptance of the Gujarat Government's order of rejection of remission application. The order had stated that "the convict was involved in disruptive activities, criminal conspiracy, smuggling of arms, ammunitions and explosives…his conduct showed that he had wide spread network to cause harm and create disturbance to National Security" (para 32). It is important to note that all these reasons pertain to the convict's past and do not illustrate clearly that the conviction did not reform the convict after all these years. This case, it is submitted, was an opportunity for the Supreme Court to foreground reformation in the discussion of remission. The court could have insisted on the need to relate remission with the reformative and rehabilitative objective of punishment. While remission is not a prisoner's right, it is also not a whimsical discretionary power of the executive outside the paradigm of prisoners' rights jurisprudence. Starkly, while commenting on the high court's invocation of human rights, the court stated: "the High Court, has referred to, as has been indicated earlier, many aspects of human rights and individual liberty and, if we allow ourselves to say so, the whole discussion is in the realm of abstractions" (para 32). One can just say that if the realm of human rights is still one of abstractions, then there is not much hope for the constitutional promises made to the ordinary citizens, what to say of prisoners languishing in jails !

Latika Vashist.

Standard Chartered Bank* v. *State of Maharashtra

(2016) 6 SCC 62

Decided on April 6, 2016

The principle of vicarious liability of the directors or the persons in charge of and responsible for conduct of business of company in case of commission of offence has always been a matter of adjudication in the past years in spite of the settled position in law. This case is one among them, where apex court was made to recapitulate the question whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary? In this case it was relating to the dishonor of the cheque and liability of the company under section 138 of the Negotiable Instruments Act, 1881 and the imposition of constructive liability on persons responsible for conduct of business of company. This special leave is directed against the order passed by High Court of Judicature at Bombay where the summons issued by Metropolitan Magistrate against some of the accused were quashed on the ground that there are no allegations against the accused connecting them with affairs of the company.

The law with regard to the vicarious liability of the persons responsible for the day to day affairs of the company got developed through several decisions laid down by the apex court in *S.M.S. Pharmaceuticals Ltd* v. *Neeta Bhalla*[3], *Gunmala Sales Pvt Ltd.* v. *Anu Mehta*[4] *etc*., and in majority of the decisions of the apex court emphasised on the duty of the high court to scrutinise the assertion

[3](2005) 8 SCC 89.
[4](2015) 1 SCC 103.

made in the complaint before quashing summons issued against the accused especially with regard to persons who are responsible and in charge of day to day affairs of the company. The statutory provisions under Negotiable Instruments Act,1881 sections 138 and 141 are clear and it states that if the person who commits an offence under section 138 of the Act is a company, the company as well as other person in charge of or responsible to the company for the conduct of the business of the company at the time of commission of the offence is deemed to be guilty of the offence. Moreover the apex court in *Aneeta Hada* v. *Godfather Travels and Tours Private Limited* held that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition an proof thereof and also there cannot be any vicarious liability unless there is a prosecution against the company.

It is very disheartening that the commercial people take shelter under the process of law and tries to interpret and misguide the courts and delay the whole process of trial which adversely affects the economy of the nation. By relying on the procedural lapses and the allegation of failure to establish the essential requirements under the provision of law they escape their liability to repay loan advanced by financial institutions. In this the chairman and other directors with active connivance, mischievously and intentionally issued cheques to the appellant bank to repay the amount in three installments, which were dishonoured when presented for payment. The appellant bank issued requisite statutory notice for each cheque and on failure to get response from the parties concerned they filed three complaints under section 138, of Negotiable Instruments Act, 1881 before the Metropolitan Magistrate, who took cognizance and issued summons against all the accused persons. The high court quashed the summons against the whole-time and executive director stating the reason that no specific averments were made against them in the complaint filed. It is to be noted in this regard, that the mentioning of averments in the complaint is required only against those persons who are not constructively liable under provisions of statute and the law laid down by the court. However with regard to the vicarious liability principle in company cases, if the accused is the managing director or a joint managing director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of business of the company while filing the complaint before the appropriate authorities. Similar is the case with regard to the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific allegation about consent, connivance or negligence. The very fact that the dishonored cheque was signed by him on behalf of the company will give rise to his responsibility.

In this case apex court set aside the order passed by the High Court of Judicature at Bombay and directed the trial court to proceed with the complaint against the accused. However, it is high time for the lower courts and high courts to have consistency with the approach to decide the cases involving the vicarious liability principle since there is crystal clear law in this aspect and avoid undue delay to settle the cases of dishonor of cheques and provide parties an opportunity to make abuse of the procedural law.

[5](2012) 5 SCC 661.

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