THE INDIAN LAW INSTITUTE
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WHAT THE SUPREME COURT HAS SAID

Hem Raj & Ors. v. State of Haryana

Non-examination of independent witness by itself may not give rise to adverse inference against prosecution, when testimony of related witness is doubtful not.

The Supreme Court reiterated that non-examination of independent witness by itself may not give rise to adverse inference against the prosecution. However, when the evidence of the alleged eye-witnesses raise serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine independent witness would assume significance.

In the instant case the court doubted the presence of the witness who was not examined by the prosecution and giving the benefit of doubt the accused was acquitted

Amarendra Komalam & Anr. v. Usha Sinha & Anr.

Res judicata **Applicable to all subsequent proceedings between same parties on the same subject matter**

The Supreme Court ruled that once an issue of fact has been judicially determined finally between the parties by a Competent Court and the same issue comes directly in question in subsequent proceedings between same parties, then the persons cannot be allowed to raise the same question.

In the instant case an issue, which was determined already in one suit, was subsequently raised in another suit, the subject matter of which was materially the same. The S.C. rightly upheld the plea of the appellants that the doctrine of *res judicata* applies in this case.

Holiram Bordoloi v. State of Assam

Death sentence confirmed

On April 08, 2005 the Supreme Court in Holiram Bordoloi v. State of Assam, Cr. Appeal No. 1063 of 2004 confirmed the death sentence imposed on the accused. The Court listed out the aggravating circumstance against the accused: (a) this is a case of cold-blooded murder; (b) the accused was leading the gang; (c) the victims did not provoke or contribute to the incident; (d) two victims were burnt to death by locking the house from outside; (e) one of the victims was a young boy, aged about 6 years, who, somehow, managed to come out of the burning house, but he was mercilessly thrown back to the fire by the appellant; (f) the dragging of Nagarmol Bordoloi by the appellant Holiram to his house and then cutting him into pieces in broad daylight in the presence of bystanders; (g) the entire incident took place in the broad daylight and the crime was committed in the most barbaric manner to deter others from challenging the supremacy of the appellant in the village; (h) the entire incident was pre-planned by the accused appellant Holiram.

There was no mitigating circumstance in favour of the accused.

Dominant intention of parties is the determining factor

In *Spun Casting & Engg. Co. Pvt. Ltd. v Dwijendra Lal Sinha* (Civil Appeal No. 4392 of 1983) decided on 8th April, 2005, it was held that West Bengal Premises Tenancy Act 1956 is applicable only to the premises given on lease. The question in this case was whether the settlement was of premises/building or business. It was reiterated that test of dominant intention is applied in order to determine the nature of lease. Dominant intention of the parties is gathered by construing the terms of the lease deed. High Court held that it was a settlement in respect of business of iron casting factory and structure and sheds formed part of the settlement only because the foundry was set up therein. The parties never intended to settle or grant lease of the structure and the sheds as such. The Supreme Court accepted and upheld the findings of the High Court in this regard.

Clauses relating to arbitration and exclusion of jurisdiction

In, *Shree Subhlaxmi Fabrics Pvt. Ltd. v Chand Mal Baradia and others* (Civil Appeal No. 7653 of 2004) decided on March 29, 2005, the Supreme Court mulled two issues. First, it reiterated that all the objections including objection regarding non-existence of an arbitration clause can be raised before the arbitral tribunal. Moving the court for this purpose is against the spirit of the Arbitration Act 1996 which purports to minimize the supervisory roles of the courts in arbitration process. Decision *Konkan*

Railway [(2000) 7 SCC 201], *Gokulnanda Jena* [(2003) 6 SCC 465] and *Food Corporation* [(2003) 6 SCC 564] were relied upon.
Secondly, contract cannot confer jurisdiction on a court, which it does not possess under the code. Only when there are two courts having jurisdictions, can one court be conferred jurisdiction to the exclusion of other. Clause relating to ouster of jurisdiction must be clearly and unambiguously stated. High Court is not correct in granting injunction on the ground that there is arguable case made out by the applicant, with respect to jurisdiction of the court.

Exemption under Industrial Policy

In *M/s Tata Iron & Steel Co. Ltd. v State of Jharkhand & Ors*. (Civil Appeal No. 1912 of 2004) decided on March 30, 2005, the Supreme Court interpreted and applied the notifications pursuant to the Jharkhand Industrial Policy, 2001. Notifications provided for set off/ adjustment of tax to new as well as existing industrial units, which are not availing any tax benefit under any other notification. The question was whether the Cold Rolling Mill established by the Appellant is a new unit or the existing one having received benefits under earlier notifications. The Supreme Court reiterated that notifications have to be given liberal interpretation to advance the objective of notification to encourage investments and production in the state. Court conceded that if a provision of fiscal statute is obscure the construction favouring the assessee may be adopted, but it would have no application to construction of an exemption notification, as in such a case, it is for the assessee to show that he comes within the purview of exemption. Upon analysis of the facts and circumstances, the Court held that the CRM is an existing unit.

Power of court *vis-a-vis* arbitration award

In *Bhagwati Oxygen Ltd. v Hindustan Copper Ltd* (Civil Appeal Nos. 2412-2413 of 2005) decided on April 5, 2005 the Supreme Court observed and reiterated that court while exercising the powers under section 30 of the Arbitration Act cannot re-appreciate the evidence or examine the correctness of the conclusions arrived at by the arbitrator because the jurisdiction is not appellate in nature. The court cannot interfere with the award on the ground that it is erroneous or that other view is equally possible. Arbitration tribunal is the substitute of the court. The award can be set aside if the arbitrator has acted arbitrarily, irrationally, capriciously or beyond the terms of the agreement or there is error lf law appearing on the face of it.
The Court also held that the arbitrator has the power to award interest for pre-reference, *pendente lite* and post-award period.

Power to recall/ review its order by Industrial tribunal

In *Kapra Mazdoor Ekta Union v Management of M/s Birla Cotton Spinning and Weaving Mills Ltd. and another* (Civil Appeal No. 3475 of 2003) decided on March 16, 2005, the Supreme Court made two observations. One, that until the award made by the industrial tribunal becomes enforceable (i.e. after 30 days of it publication in the official gazette) the tribunal does not become *functus officio* and retains jurisdiction over the dispute as well as power to entertain any application in connection with such dispute. Two, industrial tribunal does not have power to recall (review) its order on merit unless until the power is expressly vested in it. Any court or tribunal, however, has inherent power of procedural review of its order if it can be established that the procedure followed by the Court or the tribunal suffered from such illegality that it vitiate the proceeding and invalidated the order made therein.

Principles of Natural Justice

In *M/s Noble Synthetics Ltd.* v. *Collector of Central excise, Bombay (Civil Appeal No. 7103 of 1999) decided on 17th March 2005*, the order of the Custom, Excise & Gold (Control) Appellate Tribunal, New Delhi was challenged on the ground that there was violation of principles of natural justice. The appellant submitted the opinion of the experts regarding its product. The Collector of Central Excise sent the technical opinions for certain clarifications to the Deputy Chemist and also got certain test conducted on the product of the appellant with the knowledge of the appellant. The appellant challenged the order of the Collector and the Appellate Tribunal on the ground that the opinions and test results were taken on its back and were not communicated to it and thereby denied the statutory right of being informed of the test results. Non-disclosure of all evidence on record to the assessee is also against the principles of natural justice.

The Court observed that it is always legally permissible for the adjudicating authorities to make such enquiries as are necessary for adjudicating the case. Moreover, since the adjudicating authorities did not rely on the reports and so there is no violation of principles of natural justice.

Non-appreciation of evidence at the stage of second appeal

In *Mangu Khan & Ors.* v. *State of Rajasthan (Criminal Appeal No. 30 of 2004) decided on Feb. 24, 2005,* the Supreme Court declined to go into the meticulous analysis of the evidence concurrently accepted by the two courts to sustain the charge.

Pre-mature civil suit may be Filed and Decreed

The Supreme Court in a landmark judgement in case of*Vithalbhai Pvt. Ltd.* V. *Union Bank of India* (Civil Appeal No. 2390 pf 2002) dated March 11, 2005, held directly for the first time, that a suit of civil nature disclosing a cause of action even if filed before the date, on which the plaintiff became actually entitled

to sue and claim the relief founded on such cause of action, is not to be necessarily dismissed for such reason. The question of suit being premature does not go to the root of jurisdiction of the court. It is in the discretion of the court to grant decree or not. The court, however, recognized certain exceptions where the court shall not exercise its discretion in favour of decreeing a premature suit where it :

1. **is specifically barred by a statute;**
2. **would have the effect of defeating a public policy or public purpose;**
3. **renders the presentation itself patently void and invalidity is incurable such as when it goes to the root of the Courts jurisdiction;**
4. **the lis is not confined to the parties alone and involve and affect other persons as well;**
5. **where the leave of the Court or some authority is mandatory.**

In this case, the lessor filed a suit before the expiry of lease for vacant and peaceful possession of his land on the expiry of the lease. The lessor served a notice on the lessee before the expiry of the lease and the lessee refuted his entitlement to demand possession. The lessor filed a suit against this reply of the lessee.

Exemption from excise duty *in connection with* manufacture and packaging of articles

Under a notification, exemption could be granted to 100% Export Oriented Units (EOU) for the capital goods, components and raw materials, consumables, spares and packaging materials (goods) brought *in connection with the manufacture and packaging of articles* into an undertaking. The respondent in *Commissioner of Central Excise, Allahabad* v. *M/s Ginni Filament Ltd. (Civil Appeal No. 5830 of 1999) (Feb 17, 2005)*, which is 100% EOU manufacturing filament yarn and cotton yarn, claimed exemption from payment of excise duty in respect of table, chairs, air-conditioners, flush doors, store wells, typewriters etc under a notification used in connection with the filament yarn and cotton yarn.

The Supreme Court did not grant the exemption on the ground that the goods with respect to which the exemption is granted cannot be said to be goods used in the manufacture of cotton or filament yarn. The Court observed that every capital asset is not capital good. For example, a telephone instrument may constitute capital goods where the assessee is in the business of telecommunication. However, if the assessee is in the business of manufacture of hydrogen peroxide, the same instrument cannot be construed as capital goods. The peculiarities of the business or the undertaking are also required to be kept in mind while interpreting the said notification.

Narmada Bachao Andolan v. Union of India (2005) 3 SCALE 111

The Sardar Sarovar Project involves the construction of a dam across the river Narmada. In 1969, the Government of India made a reference under the Interstate Water Disputes Act 1956 for resolving the issues arising out of the project which spans the states of Gujarat, Maharashtra and Madhya Pradesh, with the benefits largely accruing to Gujarat. A large number of residents of the three states are affected by the construction of the dam.

Before the Tribunal, the state of Gujarat admittedly made an offer that those ousted by the project can be resettled and rehabilitated in the state of Gujarat if they opted to be rehabilitated there; if they chose to stay in their home states of Madhya Pradesh or Maharashtra, Gujarat would bear the entire expenses of rehabilitation. An award was made to this effect.

In October 2000, in *Narmada Bachao Andolan* v. *Union of India*, (2000) 10 SCC 664, a three judge bench of the Supreme Court noticed that the states had liberalised the package of rehabilitation beyond that provided in the award of the Tribunal, and made a series of directions. The court also directed that the raising of the height of the dam should only be *pari passu* with the implementation of relief and rehabilitation measures.

As the directions remained unimplemented, the villagers of Jalsindhi and Picchodi in Madhya Pradesh approached the Supreme Court asking that there should be no further construction by raising the height of the dam till all people affected by the dam at the height of 110m. are rehabilitated in all respects. In the first instance, the court sent them to the Grievance Redressal Authority (GRA) to agitate their grievances. Those proceedings not having resulted in a resolution of the disputes, the Supreme Court again considered the facts, the Narmada Water Disputes Award and the directions of the Supreme Court in 2000, to hold that

- since major sons constitute a separate family, the scheme of giving land for land to Project Affected Families (PAFs) would entitle major sons to receive land in rehabilitation;
- in the matter of choice of land, the oustees can reject land offered to them only if it is shown that the lands are not irrigable or cultivable or is otherwise unsuitable;
- there is no distinction between permanently affected and temporarily affected oustees; and they should both be rehabilitated *pari passu*, before the height of the dam can be raised; and
- the GRA in Madhya Pradesh would be entitled to decide factual disputes regarding rehabilitation, and the court would intervene only when extraordinary

situation emerges.

Mahindra and Mahindra Ltd. v. N.B.Narawade, Civil Appeal No. 1508 of 2003, delivered on 22 February, 2005

A workman was dismissed for having used abusive and filthy language against his supervisor. The labour court, a Single Judge and a Division Bench of the High Court found the workman guilty of the alleged misconduct, but reduced the penalty of dismissal to reinstatement with continuity of service while reducing the extent of back wages to be paid to him.

The Supreme Court construed Section 11-A of the Industrial Disputes Act 1947 as vesting a certain amount of discretion in the labour court/industrial tribunal in interfering with the quantum of punishment awarded by the management. Such discretion was, however, available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the labour court to reduce the punishment.

In the case on hand, the Supreme Court held, the language used by the workman was such that it could not be tolerated in any civilised society. Use of such abusive language against a superior officer, not once but twice, in the presence of his subordinates cannot be termed to be an indiscipline calling for a lesser punishment in the absence of any extenuating factor referred to earlier in the judgment, the court decided.

His sole defence having been that he did not remember abusing the engineer concerned, no explanation of provocation could be entertained by the Supreme Court. The workman had been charge-sheeted more than once earlier, and more lenient penalties visited on him then. So the concurrent findings of the three courts below that the punishment of dismissal would be disproportionate to the misconduct was set aside.

Secy. Deptt. Of Home Secy., AP v. B.Chinnam Naidu, Civil Appeal 1014 of 2005 decided on 9 February, 2005

Applicants for recruitment as Stipendiary Cadet Trainee Police Constables (Civil) in Vishakapatnam, Andhra Pradesh, were required to disclose whether they had "ever been convicted by a court of law or detained under any state/central preventive detention laws for any offence." An applicant who had cleared the test, and the further medical test, was not sent for training on the ground that he had earlier been arrested in relation to commission of crimes under the Indian Penal Code, 1860 and the Andhra Pradesh Examination Prevention of Malpractice and Unfair Means Act, 1997.

The Supreme Court, however, held that he was not required to indicate whether he had been arrested in any case or whether any case was pending. Conviction by a court or detention under any state/central preventive detention law, the court held, is different from arrest in any case or pendency of a case.

The decision in *Kendriya Vidyalaya Sangathan* v. *Ram Ratan Yadav*, (2003) 3 SCC 437, stood distinguished on facts.

Search of bag carried by the accused does not constitute search of body under section 50 of NDPS Act (Decided on 8.4.2005*)*

Section 50 of NDPS Act requires that the person searched should be told of his right to be searched in the presence of a magistrate/Gazetted Officer and that he should be searched in the presence of such officer.

The difference of opinion that arose in the context of interpretation of person in State of H.P. v. Pawan Kumar, Cr. App. No. 222 of 1997 between the judges has now been resolved by a three judge bench which ruled that the bag carried by the accused does not form part of the person for the purpose of S. 50 of NDPS Act.

50 of NDPS Act is not attracted

When a person who was allegedly sitting on bags containing poppy husk was arrested, under the provisions of NDPS Act and the bags were searched, could it be termed to be a search of the person of the accused requiring the police to give him an option to be searched in the presence of a gazetted officer under S.50 of the Act? The Supreme Court answered it in the negative in State v. Balwant Rai, Cr. Appl No. 1240 of 1999 (decided on 24.2.2005).

The Court distinguished this case from (2004) 7 SCC 735 which has been referred to a larger bench earlier. (That case, State of H. P. v. Pawan Kumar has since been decided on 8.4.2005. It has been decided by the three judge bench that bag carried by the accused does not form part of the person for the purpose of S. 50, NDPS Act.

Mohd. Shamim & Ors. v. Smt. Nahid Begum & Anr. Appeal No. 23 of 2005 Cr. decided on 7.1.2005

The Supreme Court invoked its jurisdiction under Article 142 to set aside a judgement, which permitted the complainant lady to pursue the case against her husband under article 406/498A despite her agreement to settle the case on payment of Rs. 2,75,000/- in the court. The First Information Report has also been quashed. The Court has, however, hastened to add that this judgement is not to be treated as a precedent.

Anticipatory Bail only on arrest

The Supreme Court ruled that an application under Section 438 of the Code can be moved only by a person who has not already been arrested. Once he is arrested his remedy is to move the court concerned either under Section 437 or Section 439 of the Code. In the very nature of the direction, which the Court issue under Section 438 of the Code, it is clear that the direction is to be issued only at the pre-arrest stage. The direction becomes operative only after arrest. The condition precedent for the operation of the direction issued is arrest of accused. This being so the irresistible inference is that while dealing with an application under Section 438 of the Code the Court cannot restrain arrest. (Adri Dharan Das v. State of West Bengal, Cr. Appl. Nos 326 of 2005 decided on 21.02. 2005).

Maintenance under Section 125 Cr. P.C.

Maintenance under Section 125 Cr. P.C. is available only to a legally wedded wife. The Supreme Court recently reiterated the law it laid down in Smt. Yamunabi Anantrao Adhav v. Anantrao Shivram Adhav, AIR 1988 S.C. 644. The Courts reasoning goes as follows:

However, desirable it may be, as intended by learned counsel for the appellant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include woman not legally married in the expression wife

(Savitaben Somabhai Bhatiya v. State of Gujarat Cr. App. No. 399 of 2005 decided on 10.03.2005)

Section 151 Cr. P.C. is Constitutional

Listing out the inbuilt guidelines provided for under Section 151 for effecting the arrest of a person when the police officer comes to know of the design of the person to commit cognisable offence, the Supreme Court upheld the constitutionality of Section 151 Cr. P.C. The Court also pointed out that the police officer could arrest a person under this provision only if it appears to him that commission of the offence cannot otherwise be prevented.

The Court reiterated that these guidelines read with the requirements laid down by it in Joginder Kumar v. State of U.P., (1994) 4 SCC 260 and D.K. Basu v. State of W.B., (1997), SCC 416 provide an assurance that the power shall not be abused and in case of abuse the authority shall be adequately punished.

The Court also refused to interfere with the criminal proceedings initiated against the petitioner in Ahmed Noormohmed Bhatti v. State of Gujarat, Cr. App. No. 109 of 2001 decided on 16.03.2005

Congnizance of offence under Section 195(1)(b)(ii) Cr. P.C.

The question whether a complainant independently proceed against a person who has filed criminal case on the basis of forged document or whether he is barred by Section 195(1)(b)(ii) came to be answered by the Supreme Court in Iqbal Singh Marwah v. Meenakshi Marwah Cr. App. No.402 of 2005 (decided on 11.03.2005). Reiterating its decision in Sachida Nand Singh v. State of Bihar, 1998(2) SCC 493 the Court categorically ruled that Section 195(1)(b)(ii) would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any Court i.e. during the time when the document was in *Custodia Legis*

Separation of powers and constitution of Competition Commission of India

Brahm Dutt v. Union of India WP(C) No. 490 of 2003 decided on 20.1.2005

Disposing of a writ petition challenging the validity of certain provisions of the Competition Act, 2002 and Rule 3 of the Competition Commission of India (Selection of Chairperson and other members of the Commission) Rules 2003 the Supreme Court in the context of the Union of India and averments to make amendments to the constitution of the Competition Commission, represented the view that it might be appropriate for the Government of India to consider the creation of two bodies, one with expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment can go a long way in meeting the challenge based on the doctrine of separation of powers.

Requirement of injuries for grievous hurt

In Mathaiv. State of Kerala, Criminal Appeal No. 89 of 2005 decided on January 12, 2005, the Supreme Court held that before conviction for the offence of grievous hurt can be passed, one of the injuries defined in section 320, IPC must be strictly proved, and section 320 eighthly is no exception to the general rule of law that a penal statute must be construed strictly.

The essential ingredients to attract section 326 are : (i) voluntarily causing hurt; (ii) hurt caused must be a grievous hurt; and (iii) the grievous hurt must have been caused by dangerous weapons or means. What would constitute a 'dangerous weapon' would depend upon the facts of each case and no generalisation can be made. It is not that in every case a stone would constitute a dangerous weapon. The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on whether the weapon was a dangerous or deadly weapon and whether the punishment should be for the offence of hurt or grievous hurt.

Transfer of a trial from a female judge to a male judge

Fatima Riswana v. State rep. by A.C.P., Chennai, Criminal Appeal Nos. 61-62, decided on January 11, 2005, concerned the transfer of a trial from a Mahila Court to a court presided over by a male judge. The accused, in a case involving pornography, asked for the transfer, and the High court directed the transfer to be effected, on the basis that the entire proceedings in the trial would be about exploitation of women and their use in sexual escapades by the accused; and the evidence which was in the form of CDs which would need to be viewed in the course of the trial would cause embarrassment to the woman Presiding Officer of the Mahila Court.

On appeal by a prosecution witness, this order of transfer was set aside by the Supreme Court. In so doing, the court observed that embarrassment is a state of mind which is related more to the individual than to the sex of a person. The High Court was not justified in presuming embarrassment of the judicial officer solely on the ground that she was a lady officer, even when the officer herself had not expressed any reservation. If a situation requires, the Presiding Officer may make arrangements to avoid viewing the CDs in the presence of male persons. This, the court said, was a matter of procedure to be adopted by the Presiding Officer.

That the lawyers may be embarrassed to appear before a lady officer is not a ground for transfer of a case in a situation such as this. If there was a question of embarrassment, the court should have considered the embarrassment to the witnesses, who are actually in the nature of victims, while giving evidence of their acts before a male judge.

Excise duty cannot be charged in respect of notification having retrospective operation

In M/s W.P.I.L. Ltd., Gazhiabad v. Commissioner of Central Excise, Meerut, U.P. (Civil Appeal Nos. 4228-29 of 1999) the appellant is the manufacturer of power driven pumps and parts thereof designed for handling water, that is exempted from levy of excise duty since 1978. With a view to reducing special exemption notifications and consolidating various exemption notification in 1994, the Government rescinded 389 notifications with effect from March 1, 1994 and re-issued a consolidated notification incorporating earlier notifications. In the said notification, power driven pumps were shown as an exempted item. Due to inadvertence, however, parts of power driven pumps used in manufacturer of pumps within the factory which were all along exempted from 1978 were omitted. It was brought into the notice of the government. Another notification was issued by the government on April 25, 1994 correcting the mistake. According to appellant this notification was retrospective in operation. The Assistant Collector, Central Excise, however, directed the appellant to pay exercise duty for the intervening period. The appellate authority also confirmed the order. The Supreme Court allowing the appeal held that it was not a new notification granting exemption in respect of parts of power driven pump but it clarified the position and made the position explicit which was implicit.

Supreme Court can order transfer of prisoner from one prison to another

(Kalyan Chandra Sarkar v. Rajesh Ranjan & Pappu Yadav & Anr.
(Cr. Misc. Petition 10422 of 2004 decided on 14.2.2005)

Responding to the argument in Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav & Anr. that the transfer of the prisoner from the Beur jail in Bihar would violate his fundamental rights, the Supreme Court declared that the arms of law are long enough to remedy the situation even by transferring a prisoner from one prison to another.

Analysing its inherent powers under Art. 142 in the light of the various decisions the Court also said:

> . The plenary powers of this Court under Art. 142 of the Constitution are inherent in the Court and are complimentary to those powers, which are specifically conferred on the court by various statutes though are not limited by those statues. These powers also exist independent of the statutes with a view to do complete justice between the parties and are in the nature of supplementary powers (and) may be put on a different and perhaps even under footing than ordinary inherent powers of a court to prevent injustice.

Denial of promotion-an unfair Labour practice

J.H.Jadhav v. M/s. Farbes Gokak Ltd.
Civil appeal no. 1089 of 2005 dated 11.2.2005

Whether the appellant was justified in his prayer for promotion with effect from the date his juniors were promoted was the question to be decided by the industrial tribunal. The tribunal overruled the objection raised by the management that it was an individual dispute and not an industrial dispute since it found that the same was espoused by a union.

The management produced no records in the tribunal to show that it had taken into account the appellants production records, efficiency, attendance or behaviour while denying him promotion. Terming the denial of promotion as an unfair labour practice, it directed the appellant to be promoted as clerk with consequential benefits, from the date his juniors were promoted. Reversal of this decision by the division bench of the High Court under article 226 was termed as irrational or perverse by the apex court as the bench misapplied the principles of judicial review.

Vishwa Bharati is of national importance, destruction of its ambiance can not be permitted

In Sushanta Tagore & Ors. v. Union of India & Ors (SLP (Civil) Nos. 23803 of 2004) the residents of Santiniketan in Distt. Birbhum of West Bengal filed a PIL before the Calcutta High Court aggrieved by encroachment upon ambiance and environment because of indiscriminate constructions in Khoai areas which are created by unique natural process and cannot be restored by man. The same was argued to be in disregard of the pollution control laws, and endangered the tradition of Vishwa Bharati.

The question before the Supreme court was whether the construction work in Santiniketan be allowed to continue knowing that it would destroy ambiance of Vishwa Bharati and change the place beyond recognition or to not allow it with a view to preserve the ambiance of Vishwa Bharati.

The Supreme Court found that if by reason of any activities the tradition and special features of the Vishwa Bharati are not preserved the very purpose of the Act would be defeated. It emphasised that in spite of the fact that changes are occurring throughout the country the tradition of Vishwa Bharati has to be maintained. Further High Courts opinion about the impracticability in monitoring the activity in the practical world was also found incorrect. The apex court also said that it is imperative to maintain ecological balance keeping in mind the Directive Principles of State Policy, Article 21 and Article 51A (g) of the Constitution. It said that development though important, it has to be sustainable and while the provisions of the Development Act have to be considered the provisions of other Acts can not be ignored. However as construction was already under way and huge investments were already made, the court did not find it appropriate to stop them but it directed SSDA to keep in mind the provisions so mentioned in future. The court thus disposed of the appeal.

Who seeks equity must come with clean hands

In Kanchusthabam Satyanarayana & Ors. v. Namuduri Atchutaramayya & ors. (Civil Appeal Nos. 6892-6893 of 1999) the appellant, who was owner of certain coconut gardens had filed a petition for eviction of his tenant (Respondent) under the Andra Pradesh Tenancy Act (APT Act). The eviction order was passed and the appellant obtained possession. TA No. filed by the respondent was allowed by the sub-collector. The Tehsildar ordered handing over of possession to the respondent. The appellant filed a writ challenging the order of the sub-collector of fresh disposal and of restoring of possession to the respondent-tenant and obtained a stay, which however was vacated later. The appellant then filed an original suit for permanent injunction restraining the respondent from interfering with his possession, which was decreed, and later affirmed, by the appellate court. The High Court on second appeal filed by the respondent vacated the injunction and held that civil court had no jurisdiction to allow the injunction in the light of section 16 of the APT Act and also the jural relationship between the parties. Also continued possession of the appellant in disregard of the orders of the sub collector amounted to wrongful possession. In such a case equitable relief of permanent injunction could not be granted.

The question before the apex court was whether the equitable relief of permanent injunction could have been granted to party who himself had taken the benefit of the jurisdiction of different authorities.

The court said that if it were accepted that tenancy courts had no jurisdiction then also in equity the respondent would be put back in possession of the land as even the appellant had obtained the possession under it. Further as equitable relief must be granted on the considerations of Equity and Justice the appellant who was guilty in equitable conduct cannot claim such relief. Having himself obtained the advantage the appellant cannot be allowed to retain the advantage by turning around and challenging the jurisdiction of those authorities. The Supreme Court thus gave respondent the liberty to seek possession pf land according to law.

Illegal Gratification

V. Radhakrishna Reddy v. State of A.P.
(Criminal Appeal No.709 of 1999, decided on January 11, 2005.)

Sampat Kumar wanted to set up a small scale industry and for that purpose he was required to apply for registration of the industry as a small scale industry. He was asked by incharge General Manager of the District Industries a sum of Rs.200/- for granting him the requisite certificate which he reduced to 150/- after pursuation. Attender also asked for Rs. 20 /- for getting the certificate signed and issued from the office. Both of them were booked under Prevention of Corruption Act, 1988. The High Court by its impugned judgment and order affirmed the conviction of the appellant under the Act. The question was whether the amount paid to him was paid to him by way of illegal gratification or it was paid for any other lawful purpose. The Supreme Court upholding the conviction said that if the amount was for a lawful purpose it would have been paid by treasury in challan and not in cash.

Revisional Jurisdiction

K. G. Arumugham v. K.A. Chinnappan (Civil Appeal Nos. 5923- 5924 of 1999)

The appeals were filed against the common order passed by a single judge of the Madras High Court arising from *an order of the principal sub-judge. The respondents filed a suit in the munsif court for permanent injunction for restraining the plaintiffs from interfering with property agreed to be sold to the respondents. The Munsif court returned the plaint as not having pecuniary jurisdiction to represent the same within two months to judge of competent jurisdiction. The appellants filed a revision petition to high court which set aside the order passed by the sub-judge. Meanwhile respondents filed review petition in the high court against the order of the subordinate court which was dimissed. Thereafter, the respondents again filed revision petition in the high court which was allowed. The apex court held that the respondents because of their own conduct have shown that suit for specific performance would not be maintainable as they did not represent the plaint within a period of two months as directed by munsif court instead they did so only after seven long years. The present attempt of the respondents was in the nature of second review which could not be permitted and the single judge has acted in the manner as if it was hearing an appeal against the earlier order passed by the single judge or as if he was sitting in a review jurisdiction. The single judge was bound by the earlier order of high court as sitting in coordinate jurisdiction. Appeal was allowed.*

Wrong Application of aforesaid decisions by Tribunal

Collector of Central Excise, Pune v. M/S Bajaj Tempo Ltd.(Civil Appeal No 3840 of 1999)
The question before the court was whether reimbursement of advertisement expenses by the manufacturer from the dealers after initially incurring the same, is includible in the assessable value.M/S Balaji was issued a show cause notice by the department alleging that the assessee has failed to disclose and failed to pay appropriate duty on the expenses incurred on its publicity of goods i.e motor vehicles manufactured by him. The assessee denied the charges on the ground that he incurred the expenses on behalf and request of the dealers. Adjudicatory authority found that the assessee got it reimbursed from dealers through debit notes which were not disclosed by him and these charges are includible in the assessable value. Aggrieved by the order passed by the adjudicating authority the assessee preferred appeal to the Customs, Excise & Gold (Control) Appellate Tribunal which allowed the appeal. The apex court held that tribunal and adjudicating authority has not taken the conceptual difference between expenses and reimbursement and tribunal wrongly applied the aforesaid decisions to the present facts. The matter was remitted to the adjudicating authority for fresh decision.

Grant of injunction for Trademark abuse

Dhariwal Industries Ltd. & Anr. V. M/s M.S.S. Food Products
Civil Appeal No. 1407 of 2005 decided on February 25, 2005.

The plaintiff claims prior use of the mark Malikchand and prays for interim injunction against the defendant to use the mark Manikchand which is claimed to be deceptively similar to the plaintiffs mark. Neither party has a registered trademark for the respective marks (Malikchand/Manikchand) claimed by them. The defendant claimed that he has been using the mark Manikchand for quite some time and the same has acquired great popularity leading to large volumes of trade and hence should not be injuncted.

The Supreme Court relied on the prima facie view taken by the Trial Court and the High Court on prior user and chose not to interfere with the lower courts decisions in granting injunction in favour of the plaintiffs against defendants use of the mark Manikchand.

Scope of Second Appeal in a High Court

The Supreme Court in Govindaraju v Mariamman (Civil Appeal No. 2292 of 1999) reiterated with approval the ratio laid down in *Santosh Hazari* v *Purushottam Tiwari (Deceased) by LRs.* (2001) 3 SCC 179 and held that scope of jurisdiction in second appeal in a High Court under section 100 of Code of Civil Procedure is limited to the substantial question of law framed at the time of admission of appeal or additional questions of law framed at a later date after recording reasons for it. The Apex Court also observed that a high court does not have jurisdiction, in second appeal, to re-appreciate the evidence unless until it is satisfied that there was misreading of evidence or based on no evidence. The Supreme Court, in this case, held that the single judge did not address the substantial question of law and also erred in re-appreciating the evidence.

Inconsistency in Evidence given by Witness: Death Sentence reversed.

Jagjit singh was found guilty under section 302, 460 and 458 read with section 34 of IPC and was sentenced to death, which was confirmed by the High Court. A seven years old girl child was the main witness of the case. The Supreme Court in *Jagjit Singh @ Jagga v State of Punjab (Criminal Appeal No. 226 of 2004)* observed on perusal of statements made by various witnesses that though the child witnessed the incident and was injured in the incident that took place but it could not be shown that she knew the accused before hand. The Apex Court observed that the name of the accused was suggested to her by her father. The Court observed that no motive could be found for killing the one of the deceased who was the uncle of the accused, as they were sharing congenial relationship with each other. However, the court cautioned that we should not be understood to say that it is necessary to prove motive for the commission of an offence even when there is satisfactory direct evidence in proof thereof.

All Members of Unlawful Assembly Vicariously Liable for Murder

Seven appellants filed a special leave in the Supreme Court in *Rameshwar Pandey & Ors.* v.*State of Bihar (Criminal Appeal No. 604-605 of 2004)* against their conviction under sections 302/34, 120B, 364 and 384/34 IPC and section 27 of the Arms Act. In an incidence, a group of people surrounded five male members of the family and tied their hands behind their back. Four ladies of the house witnessed the incident from the roof. Later the group took them towards south and soon after all five were killed and witnesses heard the sound of gun shots. The ladies did not witness the actual killing. The Supreme Court observed in this particular case that an unlawful assembly with common objective was proved. In such circumstances, it may be that the actual shooting may have been done by one or some of the appellants only but applying the principle enshrined in Section 149, each one of them must be held vicariously liable for the offence committed even by some of them. The apex court observed that all the members of the assembly must be attributed the knowledge that it was likely that the offence of murder may be committed.

Granting Bail: *Pappu Yadav* & *Jayendra Saraswati* Distinguished

Bail granted by High Court of Patna to Pappu Yadav on the 8th application made by him, is challenged in the SLP in *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappy Yadav & Anr. (Criminal Appeal No. 1129 of 2004).* The Supreme Court quashed the decision of the High Court granting bail and made following observations:

1. Persons accused of bailable offences are entitled for bail if the court concerned come to the conclusion that the prosecution has failed to establish a prima facie case against him or if the court is satisfied for reason to be recorded that in spite of the existence of prima facie case, there is a need to release such persons on bail.
2. Bail once refused can be granted subsequently if there is a change in the fact situation or in law requiring earlier view being interfered. In this particular case, no such change was there and hence the bail was dismissed by the Supreme Court.
3. Though principle of res judicata and such analogous principles do not apply to bail application, the courts are bound by the decisions given by superior forum even in bail matters. In this case, the Supreme Court observed that the decision given by it in *Kalyan Chandra Sarkar v Rajesth Ranjan Alias Pappy Yadav and Anr. [(2004) 7SCC 528]* regarding existence of prima facie case would bind the High Court in this case.
4. The court should bear in mind that each case rests on its own facts and similarity of facts in one case cannot be used to bear in mind the conclusion of facts in another case. Hence, it observed that the decisions given in *Kalyan Chandra Sarkar v Rajesth Ranjan Alias Pappy Yadav and Anr. [(2004) 7SCC 528] and Jayendra Saraswati (Criminal Appeal No. 44 of 2005)* are different based on different fact situations. Decision in late case does not over rule even by implication the judgement given in the former case.
5. It is well-established principle that while considering the ratio laid down in one case, the court will have to bear in mind that every judgement must be read as applicable to the particular facts proved or assumed to be true. *(Pandurang and Anr.* v.*State of Hyderabad [(1955) 1 SCR 1083].*

Benefit of reservation not extended by marriage

A woman does not become a member of a Scheduled Tribe for the purpose of reservation even if she is married to a man belonging to the Scheduled Tribe. Nor does she get the status even if her mother belongs to the Scheduled Tribe if she was not brought up and accepted as a member of that community. The Supreme Court in *Sobha Hymavathi Devi v. Setti Gangadhara Swamy & Ors.* Civil Appeal Nos. 4413-4414 of 2003, an election petition, held that the petitioner belonged to the caste of her father, Patnaik sister Karnam rather than Bhagatha community a scheduled tribe to which her mother belonged. Her election from the constituency reserved for ST was set aside by the Supreme Court.

Levy of luxury tax on tobacco products

Godfrey Phillips India Ltd. & Anr. v. *State of UP* (Jan 20,2005)

The assesses/ appellants were either manufacturers dealers or sellers of tobacco and tobacco products. They challenged the imposition and levy of a luxury tax on tobacco and tobacco products by treating them as luxuries within the meaning of the word in Entry 62 of List II of the seventh schedule of the Constitution. This entry relates to the exclusive power of the State legislature to make laws with respect to taxes on luxuries. State legislations of West Bengal, Uttar Pradesh and Andhra Pradesh were challenged. The principle question involved was the ambit of Entry 62 of List II. The core controversy was that if the matter in pith and substance is referable to Entry 54 of List II within the words taxes on the sale or purchase of goods in that entry (as the assesses claimed), then the tax would be subject to certain constitutional curbs on the power of State to levy sales tax on tobacco. If on the other hand it is referable to Entry 62 of List II as a tax on luxury there would be no such restriction. It was contended that the word luxuries in the Entry could not be construed to mean goods and it has been used in the sense of an activity or service. It was also contended that the Acts were beyond legislative powers of State and were violative of Articles 286 and 301 of the Constitution and were a device to avoid the operation of Additional Duties of Excise (Goods of Special Importance) Act, 1957 (ADE Act). The only way through which such a state law could be validated would be through Art. 304(b).

States of UP, WB, AP contended that the word luxury is applicable to both services and commodities and tax on luxury has been recognized for a long time as a separate and distinct kind of tax. The reference to sale consideration in the Act was only for the purposes of fixing the value of the element of luxury for the purposes of taxation, thus there is no question of infringement of Article 286 nor is the Act a devise to avoid the ADE Act. Entry 62 List II envisaged a tax on luxury goods. Whereas duties of Excise, Customs and sales tax are not directly on the goods but with reference to goods and the taxes are leviable on the events of manufacture, import/export and sale. On Art. 301 it was submitted that the levy does not impact on the movement of tobacco or trade in tobacco as interstate transactions were exempt. The Supreme Court held that where there is a possibility of legislative overlap, courts have resolved the issue according to the settled principles of construction. Given the language of Entry 62 and legislative history Entry 62 of List II does not permit the levy of tax on goods or articles. The Acts were thus struck down while scope of Entry 62 List II and other issues raised were left open.

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