

Lawgist

By ACE LEGAL

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DAILY FROM: AHMEDABAD, CHANDIGARH, DELHI, JAIPUR, KOLKATA, LUCKNOW, MUMBAI, NAGPUR, PUNE, VADODARA JOURNALISM OF COURAGE

Justices Gogoi, Chelameswar, Joseph and Lokur speak out | 'Twenty years later, wise men shouldn't say we sold our souls' | MoP delay, allocation of cases, including Loya's, raised with CJI

Their Lordships Object

What's Inside ?

A headway to Judicial Evolution

Motor Vehicle Act, 1988: Recent Development

Important Judgements of 2018

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Penecial Formative Legislation for Moral Ailments



Govt cautious, Opp weighs options, says probe issues

MANOJ C.G, LIZ MATHEW & RAVISH TIWARI
NEW DELHI, JANUARY 12

WITH THE four most senior judges of the Supreme Court publicly questioning the functioning of the apex institution, a "shocked" government struck a cautious note, with Minister of State for Law P.P. Chaudhary saying that the judiciary "will sort out the matter itself" and Attorney General K.K. Venugopal adding that their press conference "could have been avoided".

Govt shouldn't interfere, CJI should resolve: former CJIs

KAUNAIN SHERIFF M
NEW DELHI, JANUARY 12

EXPRESSING "SHOCK" over the unprecedented press conference Friday by the four most senior judges of the Supreme Court, former Chief Justices of India said the government should not "interfere" in the matter, and that the CJI should "resolve the crisis with statesmanship".

Issues are not personal, but institutional: Justice Joseph

LIZ MATHEW
NEW DELHI, JANUARY 12

THE ISSUES raised by the four most senior judges of the Supreme Court at an unprecedented press conference Friday were not "personal" but "institutional" and should be resolved, Justice Kurian Joseph told The Indian Express.

Govt weighs options to amend UID law

DATA: WHAT CAN BE KEPT, WHAT'S TO BE DELETED

WELFARE SCHEME BENEFITS CAN'T BE DENIED

Can Be Stored

Can't Be Collected

Has To Be Deleted

WHAT THE COURT SAID

WELFARE SCHEMES ARE PORTABLE

Govt weighs options to amend UID law

New Delhi: The government on Wednesday appeared to be weighing options to amend the Aadhaar Act, which was passed by the Lok Sabha in 2016. The government is reportedly considering amending the Aadhaar Act to allow the government to use Aadhaar for welfare schemes and to allow the government to use Aadhaar for welfare schemes.

Statutory status, P 18

hanchud: 'Tool to make You Don't Have To Link Phone Or Bank A/c; Pvt Cos Can't Demand No.

NEW DELHI: The Supreme Court on Wednesday upheld the validity of the Aadhaar Act, saying it is a beneficial legislation, but voided out provisions which had potential for misuse.

ADULTERY CAN TAKE YOU TO COURT, NOT TO JAIL

What's struck down:

Section 497 of Indian Penal code that said: "Whoever has sexual intercourse with a person who is... the wife of another man, without the consent... of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery"

The problem:

It treated woman as victim of the offence and as 'property' of her husband. It was not an offence if a man had sexual intercourse with a woman after getting her husband's consent

After the judgment:

Adultery can be a ground for divorce but it's no more a criminal offence attracting up to 5 years' jail term

Govt's problem:

Centre in its affidavit before the apex court had said that it would be against the sanctity of marriage to dilute the offence of adultery

Keep in mind:

Though adultery per se is no longer a crime, if any aggrieved spouse commits suicide because of adultery, it can be treated as



“Making adultery a crime is retrograde and would mean punishing unhappy people... any law which dents individual dignity and equity of women in a civilised society invites the wrath of the Constitution”

Ostensibly, society has two sets of standards of morality for judging sexual behaviour. One set for its female members and another for males... A society which perceives women as pure and an embodiment of virtue has no qualms of subjecting them to virulent attack: to rape, honour killings, sex-determination and infanticide

THE TIMES OF INDIA

WORLD TOURISM DAY

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SC Upholds Constitutional Validity Of Unique ID, Dissenting Judge Calls It A 'Violation Of Fundamental Rights'

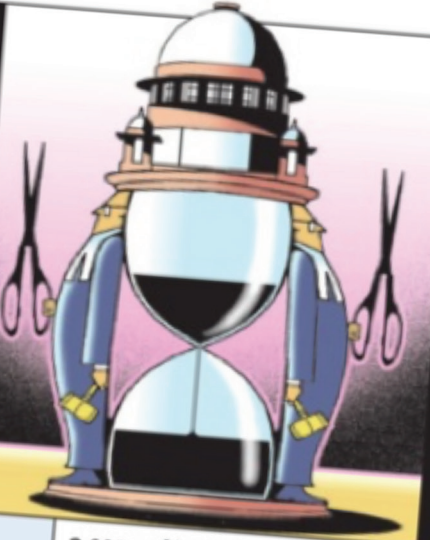
MAGISTERIAL CONCERNS

WHAT ARTICLE 124(2) SAYS
Every SC judge to be appointed by President after consulting judges of SC & HCs as the President deems necessary. In appointing a judge other than the chief justice, CJI must always be consulted

ARTICLE 217
Every HC judge will be appointed by the President after consulting CJI, state's governor and for a judge other than the CJI, the state's CJ

Executive had primacy and role of judiciary was advisory/consultative. During the Constituent Assembly debates, framers of the Constitution, several of them lawyers, emphasized the distinction between "consultation" & "concurrence". The requirement to consult the CJI in the appointment is a unique feature of the Constitution

This system continued in 1981 where CJI initiated appointment of a judge, then considered by the President



reference, a 9-judge bench reaffirmed the 1993 judgment enlarged SC panel from 2 judges to 4. This became the collegium system

Collegium system drew charges of nepotism

Late Justice J S Verma, one of the authors of the 1993 judgment, later said he erred

“My 1993 judgment has been... misunderstood and misused... Some rethink is required... my judgment says the appointment process of SC and HC judges is... a joint... exercise between the executive and the judiciary both taking part

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Letter to our readers

We are happy to bring to your hands the maiden issue of The Law-gist as a summarized restatement of law; legislations and pronouncements both. The Law-gist, as of now, is a yearly journal introduced not only for the sake of lawyers and jurists but also as an endeavor to simplify the technical language of pronouncements and legislations to make it useful also for people who have little to do with legal terminology and legal language in their day to day lives as every person, being subject to law, has to deal with it directly or indirectly at sometime or another.

The Law-gist summarizes the important judgments pronounced by the Supreme Court in recent past on the topics of the common and general interest. This issue explores the ratio decidendi of the judgments of the Supreme Court of India on Arbitration law, Insolvency law, consumer protection law, Debt recovery law etc. The last year has particularly been a milestone for the interpretation of the Insolvency and Bankruptcy Code, 2016.

Year 2018 also witnessed some important enactments in the form of constitutional amendments and legislations for example the Constitution (103rd Amendment) Act, 2018 introducing, for the first time, the economic weakness as a qualification for reservation along with the existent socially and educational backwardness, though undefined so far. The parliament also enacted The Fugitive Economic Offenders Act, 2018 to specifically cover the economic offenders fleeing from the country to evade the process of law. The important legislations enacted and pending enactments, have been discussed to provide the overview of the Bills and Acts. We have also tried to bring across our perspective to the latest legal developments as a food for thought to churn out the reforms, for the law being ever dynamic and progressive, matching its pace with the multidirectional changes in the society.

We wish to reach out, also, to those who believe that law is lawyer's business and is confined to the court premises as the abuse of law is inversely proportional to its awareness and therefore the more the interest and awareness of law amongst the masses the stronger the rule of law becomes.

With this hope, we convey all our best wishes to you all extending our welcoming invitation to your valuable comments and suggestions.

Happy 2019.

Sincerely Yours
Dr. Sarvam Ritam Khare

Introducing Our Legal Luminaries Series – I



Shri Vivek K. Tankha
Senior Advocate / Member – Rajya Sabha

Shri Vivek Tankha was designated as a Senior Advocate by the Full Court of the High Court of Madhya Pradesh in year 1999 and was appointed as the Advocate General of Madhya Pradesh on 16th Feb, 1999 as the youngest Advocate General in Madhya Pradesh. During his term, he played pivotal role in resolving the dispute between states of Madhya Pradesh and Chhattisgarh while the later was being carved out from Madhya Pradesh. He was the first Advocate to be appointed as the Additional Solicitor General of India from Madhya Pradesh. As an Advocate, he has in his belt numerous illustrious and high process cases to have successfully sailed through including the Arunachal Pradesh President's Rule case. He is also known for

his assiduousness in taking up social causes. He has been appearing pro-bono for the social causes and the persons who cannot afford to litigate their just and rightful causes on their own.

Mr. Tankha was elected in the Upper House of the Parliament in year 2016 from Madhya Pradesh and had been an important part of the law making process of country with his usefull insights in the Constitution (122 nd Amendment) Bill, The Fugitive Economic Offenders Bill, The Prevention of Corruption (Amendment) Bill, The Admiralty Bill and so on.

For being an inspiration for our fraternity, we express our admiration and wish him best.



“2018 - A HEADWAY TO JUDICIAL EVOLUTION”

By Dr. Sarvam Ritam Khare



“What has so far been endeavoured in the last year or is there in the offing has been very briefly discussed here. However, in order to keep pace with the changing society, we require more comprehensive, futuristic, qualitative structural reforms”

Justice V.R. Krishna Iyer, The people’s Judge and often referred to as conscience keeper of justice in India, had written:

“Indeed when life marches, law cannot lag behind. Therefore, Indian law cannot afford to remain feudal or Victorian or even Nehruvian or Marxian.”

‘Law’ herein includes its institutions as well as the administration of justice.

2018 had been an unusual year for Supreme Court of India for unaccustomed events. Supreme Court had been in veneration for its functioning on the administrative side i.e. by seeing an unprecedented press conference by the Judges of the Supreme Court itself from the master of roster controversy to collegium proceedings regarding the appointment and elevation of judges to Supreme Court. India even witnessed an impeachment motion against its Chief Justice, that too being rejected as baseless in its motion itself. The events preceding and succeeding the motion and political parties taking sides had unfortunately discoloured a rather austere exercise into a political one. I believe the stirrings shall culminate in positive improvement of the institution.

On the other hand the year has marked Supreme Court as a champion of gender justice for its series of landmark judgements i.e. declaring the practice of ‘triple talaq’ as unconstitutional; decriminalizing gay sex under section 377 of the Indian Penal Code; declaring Adultery under section 497 as unconstitutional and allowing women of all age to enter

into Sabarimala Temple changing the centuries old tradition.

The Supreme Court in Navtej Singh Johar Vs Union of India¹, while dealing with the rights of LGBT community vis a vis section 377 IPC have introduced terms “Constitutional Morality” and “Transformative Constitutionalism”. The concept of Transformative Constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein the ideals of justice, liberty, equality and fraternity as set out in the Preamble of our Constitution. The theory of Constitutional Morality gives precedence to constitutional principles over all other moral principles and values widely referred as ‘majoritarian view’ or ‘popular perception’.

Supreme Court, apart from championing the cause of gender justice, recognized some more important fundamental rights this year. The Right to Privacy, recognized by the nine-judge bench of the Supreme Court of India played pivotal role for considering the constitutionality of Adhar Act 2016. Though Adhar was held constitutional but was declared non-mandatory and sections 33(2), 47 and 57 of Adhar Act, 2016 were struck down as unconstitutional². In a major deviation from the precedents, the ‘Right to die with a dignity’ was held to be fundamental right while legalizing ‘passive euthanasia’ in India under certain circumstances by recognizing ‘living Will’³.

As an important electoral reform, candidates contesting polls were directed to reveal the sources of income of their wife and children along with themselves⁴. The law as stated with its effective

implementation along with The Prohibition of Benami Property Transactions Act can go a long way to check corruption.

Out of all the reforms, one of the most important and the long due is the judicial reforms, ambiting in it from institutional reforms and educational reforms to the training of lawyers, appointment of judges and the judicial discipline for both the bar and the bench. Judiciary, apart from being the interpreter of law and so to trailblaze the executive function of the government, is also bestowed with a unique function of the adjudication of rights of the people, which is not vested with legislature and therefore Judiciary acts as a check upon the legislature as well as Executives. As Lord Denning quotes: “So we come up against Juvenel’s question, ‘Sed quis custodiet ipsos custodies?’ (But who is to guard the guards themselves?). The question was asked in the United States at the time of President Roosevelt’s New Deal in 1935. It may be asked here again before long.”

Let us discuss some other judgments, pending cases and also the suggestions from eminent jurists, which, in my opinion, can prove to be milestones for long due judicial reforms in India are summarized below:

(i) Live Streaming of Supreme Court hearings: Swapnil Tripathi vs Union of India⁵, Three judge bench of the Supreme Court permitted the live streaming of Supreme Court proceedings to effectuate the public’s right to know. Live Streaming would facilitate live telecast of the court proceedings with exception of few cases, where live streaming would prejudice the

1 (2018) 10 SCC 1

2 K. S. Puttaswamy vs Union of India, (2018) 1 SCC 809

3 Common Cause Vs Union of India and Ors. (2018) 5 SCC 1

4 Lok Prahari Vs Union of India, (2018) 4 SCC 699

5 (2018) 10 SCC 639

rights of parties. Live Streaming will allow the litigants to watch their hearings and shall increase the pressure to perform on the advocates and to use the discretionary power carefully on judges. The Apex court rightly observing as "Sunlight is the best disinfectant" emphasized the significance of live streaming as an extension of the principle of open courts and open hearing.

(ii) Filing up of Vacancies in lower judiciary: Supreme Court hauled up the states / High Courts to fill up more than 5000 vacant posts in the lower judiciary and directed " to ensure prompt and timely appointments against the vacant posts and to draw up a plan / scheme to fill up the deficiencies in infrastructure and manpower.

However, with almost 1 judge per 60000 persons (about 19 judges per million) against the law Commission benchmark of 50 judges per million (1 judge per 20000 persons), and there would be shortage of 4000 court rooms, if all the present vacancies are filled. Out of a requirement of approximately 70000 judges as stated by Justice T.S. Thakur, the present working strength is around 16000. It is argued that the figure of 70000 is an inflated figure and we need much less as difference between the number of cases filed and number of cases decided is not vast. The argument seems to be lop-sided without basing itself upon the qualitative analysis of adjudications. We will be discussing the quality aspect in later part.

(iii) Legal Education: For effective administration and delivery of justice in accordance with law, the quality of lawyers and judges cannot be compromised with. What is most important is the inculcation of the judicial values in the law officers. Supreme Court has time and again raised its concerns over the quality of legal education in India. Justice S.A. Bobde showed his concern by advising the Bar Council of India to be more vigilant and inspect the law colleges. This concern was followed by issuance of notice to

the Bar Council of India by Supreme Court on a petition filed by M.Vasantha Raja seeking "to curb the practice of selling law degrees by letter pad law colleges".

However, the thrust so far has been on the fulfilling of minimum requirements for running of Law Colleges as provided in the relevant Rules which is not enough for there is a dire requirement to overhaul the system right from revising the syllabi to extending effective practical training and most importantly to inculcate the judicial virtues. Unfortunately, while selecting judges, what we ignore most is to examine the judicial virtuosity in candidates.

(iv) Appointment of Professional Court Managers and facilities to be provided in court buildings/ judicial infrastructure: recognizing the poor judicial infrastructure, particularly in interior parts of the country, the Supreme Court in All India Judges Association & Ors Vs. Union of India laid down standards and mandatory facilities in the court buildings across country which also included professional court managers having MBA degree. Other than Court Managers, Supreme Court also directed for provisions in the court building i.e. court rooms, litigants waiting rooms, conference halls, video conferencing rooms etc.

(v) Witness Protection Scheme, 2018: The Supreme Court approved the Witness Protection Scheme, 2018 presented by the Union of India and directed all the States and Union Territories to implement it and set up Vulnerable Witnesses Deposition Complexes at earliest. This is expected to be milestone for criminal justice system which relies heavily on witnesses⁶.

(vi) Litigation Funding: During Law Day celebrations, the eminent jurist and the Attorney General of India, Mr. K. K. Venugopal footed the idea of litigation funding by a third party as a cure to problem of access to justice. The concept of litigation funding financing of a case by a third party to the dispute, which at present is illegal

in India under the Law of Contracts and is unethical on the part of Advocates under the Advocates Act.

Its though agonizing that sparing a few, it is hard if not impossible for the commons to endure the long prolonging litigation and its rising expenses to which litigation funding may be a viable option in securing access to justice to all. This can also bring a balance of resources between the parties where there is financial disparity of one being financially superior to another.

What has so far been endeavoured in the last year or is there in the offing has been very briefly discussed here. However, in order to keep pace with the changing society, we require more comprehensive, futuristic, qualitative structural reforms. For any reform to be permanent, education is the key as no change can be permanent unless it is driven by the free will of its subjects. The knowledge and understanding of Law is necessary for every human being as Law has inextricable influence in every person's life at least under the rule of Law. Sir Edward Coke pens down the importance of knowledge of law in following words-

"There is no jewel in the world comparable to learning: no learning so excellent both for Prince and subject, as knowledge of laws; and no knowledge of laws (I speak of human) so necessary for all estates and for all causes, concerning goods, lands or life, as the common laws of England."

I, therefore, plead for the widest dissemination of the knowledge of law, at all levels and through all means and for the establishment of Research institutions for honest continuous audit of our judicial system to bring direction and pace to the process of judicial evolution.

(The Author is an Advocate on Record in the Supreme Court of India and the views expressed are his personal views)

6 Mahender Chawla & Ors. Vs Union of India; WP (CrI) No. 156/2016 Judgement dated 5.12.2018;

Hoffmann –La Roche AG & Ors., the Competition Commission of India ordered an investigation into Swiss pharmaceutical giant Roche for unfair business practices based on a prima facie case of misusing its dominant status to keep competition out for its breast cancer medicine Trastuzumab (in direct contravention of Section 4(2)(c) of the Competition Act). In another important case of Monsanto Technology LLC & Ors. V. Nuziveedu Seeds Ltd. & Others a biotech giant Monsanto was seeking an injunction on the use of its technology after the termination of its agreement with Nuziveedu Seeds. A single judge of the Delhi High Court held that the termination was invalid and illegal, and issued a direction that the agreement of 2015 shall prevail. It also maintained that the trait (technology) value as fixed by the central government from 2015-16 shall come into place, and that the agreement should be modified. However, a Division Bench of the same High Court stayed the order of the Single Judge, rendering the contracts inoperable and bringing the parties back to status quo. Explaining the contours of research exemption under 107 A of the Patents Act 1970 in Bayer Corporation v Union of India, the Delhi High Court ruled that “export’ of a patented invention for experimental purposes is also covered under Section 107A of the Patents Act, 1970 (India’s Bolar exemption) and thus does not amount to patent infringement.” However, a Division Bench stayed the single judge decision and asked Natco to file a separate application seeking permission for exporting the drug for experimental purposes. The court provided a rationale for doing this by observing that it would be permitted to export only a limited quantity of the drug for experimental uses. Given the evolving nature of patent disputes,

the courts shaping the patent jurisprudence may take its due course of time to bring uniformity and consistency in decision-making. In trademark case Toyota Jidosha Kabushiki Kaisha vs M/S Prius Auto Industries Limited on 14 December, 2017, the Supreme Court reiterated that IP rights are “territorial” and not “global”. A bench comprised of Justices Ranjan Gogoi and Navin Sinha maintained that “for a global brand to claim exclusive use of a trademark or brand name in India, it must be able to prove that the name had acquired substantial popularity in the Indian market when it got registered by another person or company.” In another significant development, 114-year-old Taj Mahal Palace becomes first Indian building to get trademark. No such attempt had been made for the registration of an architectural design as trademark since the inception of the Trade Marks Act 1999. An enthusiastic Rajendra Misra, general counsel of Indian Hotels Company (IHCL), which runs the Taj Mahal Palace opined “We have done this to protect the distinctiveness of the building.” In another significant development Indian Medical Association (IMA) obtained no objection certificate from the IPO to trademark a red cross with the letters “Dr” in the centre on a white background. The said Certificate from the IPO states, “no trademark identical with or deceptively similar to the said artistic work has been registered or applied for registration under the Trademarks Act, 1999, as per computer record of this office.” IMA’s choice of emblem created controversy as it resembled with the emblem of the International Committee of the Red Cross, which has been recognised since the 1864 Geneva Convention as a distinctive sign for medical relief teams on battlefields.

In addition to patents and trademark cases, copyright cases relating to cinema gained momentum lately. Bombay High Court said no to the remix of the famous song “Kah doon Tumhe” from the Movie Deewar in the movie Baadshaho by confirming injunctions. However, the confusion as to where remixes fit properly under the Copyright Act is still elusive. In an online movie piracy episode, Indian Internet service providers blocked access to the Internet Archive. The step was taken after the Madras High Court order asking Internet service providers to block the nearly two-decade-old digital library and 2,500-plus other websites. The makers of Jab Harry Met Sejal and Lipstick Under My Burkha, had petitioned the court seeking a ban on websites that were allegedly streaming or hosting these movies. The decision created a debate whether blocking in such a way may regard the fair accessibility of people or some other viable options should be looked into. As regards to the arrest relating to copyright violations, the Rajasthan High Court held in Deshraj v. State of Rajasthan that the police does need a warrant to take action against a person accused of copyright infringement, since it is a ‘non cognizable’ offence. The popular DU photocopy case seems to reach its finality (at least for the time being) after the refusal of the Indian Reprographic Rights Organisation (IRRO)’s SLP by the Supreme Court bench consisting of Justices Ranjan Gogoi and Navin Sinha. The Court questioned IRRO as to how their appeal is even maintainable, when the original suit filed before the Delhi High Court had been withdrawn by the plaintiffs (publishers) and the IRRO was merely an intervener in the lower court proceedings. As of now, though the case seems to be settled in favour of student’s access to published materials,

however, the courts should be prepared to strike a delicate balance between the interests of authors, publishers students and other stakeholders keeping in view the ultimate object of Copyright i.e. promoting creativity. The last years has been a happening year for Intellectual Property Rights that set an excellent platform for its development in the coming years.

There is a need to identify the missing links in IPR value chain to translate the policy goals into reality. The IPR regime is still encountered with many challenges such as illiquidity in IP market, high transactional costs, information asymmetries, lack of an efficient business model for IPR and complex process of setting disputes. However, many of these asymmetries have been identified

and approached with a committed intent by the Government, IP Office and judiciary and this creates a great hope for developing IPR culture in India at the gross root level and promoting respect for the same. May the slogans of Make in India, Startup India and Standup India move way beyond the popularity realm and touch the base of reality! Have a great 2019!



[Supreme Court of India] on Arbitration Law post 2017 Amendment

By
Urvi Kuthiala Malik



2017 have been a milestone year for the Arbitration Law in India because of the major amendments carried out in the Arbitration and Conciliation Act, 1996. However, in all these years post amendment, the matters before the Apex court were under the old and the new Act, pre and post amendment, but on careful reading of the same, the effect of the amendments in its judgments is apparent. We will examine some of the important ones of them.

Arbitration and Conciliation Act, 1940

While Adjudicating cases under the Arbitration and Conciliation

Act, 1940 the Apex Court confirmed the status of “orders passed by Arbitrators” to be at par with “Orders passed by the Courts” for all purposes including that of applicability of contempt law and thus can be enforced under Code of Civil Procedure in the same manner⁷. The Supreme Court also summed up the principles to be followed by the appellate courts, while adjudicating appeals against the Arbitral Awards. They are: (i) Re-appreciation of evidence is unknown to proceedings under section 30 of Act; (ii) The Arbitrator is final arbiter of dispute; (iii) The Award cannot be challenged on

the ground that he drew up his own conclusions on failure to appreciate facts i.e. there is limited scope to challenge the finding of facts; (iv) Where reasons have been assigned by the Arbitrators, the reasonableness of reasons cannot be examined by the Courts; (v) Where two view are possible on question of law and the Arbitrator has taken one of those, the Court shall not interfere with the view taken by the Arbitrator. However Courts can interfere when the order is perverse in law⁸. In *Ambica Constructions Vs Union of India*⁹, the Apex Court held that Arbitrators can grant interest pendent lite despite a specific bar

7 *Alka Chandewar Vs Shamshul Israr Khan*, (2017) 16 SCC 119

8 *Sharma & Associates Contractors (P) Ltd. Vs Progressive Construction Ltd.* (2017) 5SCC 753

9 (2017) 9SCC 511

on grant of interest under the contract.

The Arbitration and Conciliation Act, 1996

Arbitration Clause and Arbitration Agreement: A mere clause in the agreement providing for the final adjudication by officer of one party having jurisdiction over subject matter of the contract was held as not an Arbitration Clause¹⁰. While interpreting section 8 of the Act, the Supreme Court, while upholding *P. Anand Gajapathi Raju*¹¹, reiterated that “merely because agreement has come to an end by its termination by mutual consent, the arbitration clause does not get perished nor is rendered inoperative. The Civil

Courts would not have jurisdiction to entertain such suit after an application under section 8 of the Act is made for Arbitration.”

However, in a tenancy matter i.e. suit for eviction on the ground of expiry of lease by efflux of time, the eviction suit was held maintainable despite the arbitration clause following the judgments in *Novrang Studios*¹² and *Booz Allen and Hamilton Inc*¹³.

In *Oriental Insurance Company Limited v. M/s Narbheram Power and Steel Pvt. Ltd.*¹⁴, The Supreme court, while considering the clause effecting the arbitrability of the dispute, held (a) That the parties are bound by the clauses enumerated in the policy and the

court does not transplant any equity to the same by rewriting a clause. (b) That an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. (c) That if a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest. In this case Clause 13 of the Agreement categorically postulated that if the insurer has disputed or not accepted the



10 *Chief Executive Officer, Master Tours and Travels V. Amarnath Shrine Board*, (2016) 16 SCC 661

11 (2000) 4 SCC 539

12 (1981) 1 SCC 523

13 (2011) 5 SCC 532

14 (2018) 6 SCC534

liability, no difference or dispute shall be referred to arbitration. Thus, such a situation squarely fell within the concept of denial of disputes and non-acceptance of liability.

*Cheran Properties Limited v. Kasturi and Sons Limited and Ors*¹⁵. - In this case, the Supreme Court Bench while deciding the issue whether a non-signatory to an arbitration agreement is bound by the same or not, the Apex Court has held that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. The Court's observation was that the fact that the appellant was not a party to the arbitral proceedings will not conclude the question as to whether the award can be enforced against it on the ground that it claims under a party.

*Kerala State Electricity Board and Anr. v. Kurien E. Kathilal*¹⁶ - In this case, the Supreme Court however put the condition of specific consent by the parties while holding that reference of the parties to the arbitration, oral consent given by the counsel without a written memo of instructions does not fulfill requirement under section 89 of the Code of Civil Procedure.

Seat of International Commercial Arbitrations: Now coming to the seat of Arbitration, which is usually a delicate point of major controversy specially in International Commercial Arbitrations, The Supreme Court of India, confirmed that in arbitration clause not specifying the 'seat of arbitration' but the other clause

refers for the arbitration to be conducted by ICC Rules of Arbitration, the said Rules shall be construed as being read in the Arbitration Clause as well and seat shall be determined under ICC Rules and it shall be further governed by the law of the State in which the Arbitration proceedings took place¹⁷. In *Centrotrade Minerals & Metal Inc Vs Hindustan Copper Ltd.*¹⁸ it was also held that a detailed examination is required to be undertaken by the Court to discern from the agreement and surrounding circumstances the intention of the parties as to whether a particular place mentioned refers to the "venue" or "seat" of the Arbitration. An agreement as to seat of arbitration not only brings in the law of that country but also gives the Courts of that country the exclusive jurisdiction over the matter for all purposes. In *Bhatia International*¹⁹ it was observed that in cases of International Commercial Arbitrations held outside India, the provisions of Part-I of the 1996 Act shall apply unless the parties exclude all or any of its provisions. This was reiterated in the cases referred above and further explained that reference to ICC Rules of Arbitrations would exclude the application of 1996 Act. However the *Centrotrade Minerals Inc* case affirms the rights of parties to have autonomy to decide on procedural law as well as the seat of Arbitration. The judgment of *Roger Shashua Vs Mukesh Sharma*²⁰, overruled the principle of concurrent jurisdiction to be with the country having closest and most real connection as laid down

in *Singer Co.*²¹ for being inapplicable in light of 1996 Act.

Deciding the question of the seat of Arbitration in domestic arbitration cases, the Supreme Court re-affirmed the principle holding that once the seat of Arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the Courts which exercise supervisory powers over the arbitration and it attracts the law applicable to such location, however it is open to the parties to hold meetings at any place which is of convenience to all the concerned, but that does not change the seat of arbitration²².

Arbitration Procedure: *Velugubanti Hari Babu Vs. Parvathini Narsimha Rao*²³ held that the validity and genuineness of arbitration agreement is to be decided before appointing the Arbitrator under section 11. *Duro Felguera S.A. Vs. Gangavaram Port Ltd.*²⁴ summarized the present law under section 11,12 and 16 after the 2015 amendment of 1996 Act as (1) it is only the Chief Justice who can hear an application under section 11 of the Act. The power can further be delegated to other judges as well; (2) Now all preliminary issues have been left open for the Arbitral Tribunal to decide in terms of Section 16 of the Act; (3) The amending Act has in sub-section 6-B categorically provided that the designation of any person or institution by the Supreme Court would not be construed as delegation of judicial power. The order passed by a designated person or institution would continue to be regarded as

a judicial order;(4) It has been provided under section 7 that the order passed under this section shall not be appealable. This change means that finality is attached to the order passed under this section and it would not be subject to further examination by an appellate Court; (5) Before appointing any arbitrator, a declaration in writing has to be obtained in terms of section 12(1) of the Act to ensure that the appointed arbitrator shall be independent and impartial and also harmonizes the provisions of section 11 and 12 of the Act. Neutrality of arbitrator has to be maintained²⁵; (6) The amending Act has introduced sub section 13 in section 11 which provides that an application under this section shall be disposed of at the earliest and as far as possible within 60 days after service of notice on the opposite party; (7) High Courts have been directed to make necessary rules to determine the fee structure of Arbitrators however a model fee structure has been given in Schedule IV of the amending Act, which would not, though, be applicable in International Commercial Arbitration and domestic arbitration where the fee has already been agreed by the parties in terms of the rules of the arbitral institution.

It was held that the Courts, in exercise of jurisdiction under section 11 of the Act, can nullify the appointment of arbitrator made by the authorities when there is

failure of procedure or ex-facie contravention of the inherent facets of the arbitration clause²⁶. Contrary to the position as given above regarding 1940 Act, the Supreme Court has held the 1996 Act to be a complete code in itself and thus no applicability of the Code of Civil Procedure has been conceived in the Act. The party's right to file cross objections has been held unavailable²⁷. One of the things which comes to notice in Arbitration law has been the assignment of validity to "Two-Tier Arbitration" theory by liberally interpreting section 35 of the Act holding that the expression "final and binding" in section 35 of 1996 Act does not mean final for all intents and purposes and finality is subject to any recourse that an aggrieved party can take under the statute or the agreement²⁸.

Arbitration Clause Does not Bar Filing of Complaint before the Consumer Forum

*M/S Emaar MGF Land Limited & Anr. v. Aftab Singh*²⁹, the Two-Judge Bench of the Supreme Court agreed with NCDRC's holding in July 2017 whereby, the National Commission ruled that an Arbitration Clause in Buyer's Agreement cannot circumscribe the jurisdiction of a Consumer Forum, notwithstanding the amendments made to Section 8 of the Arbitration Act.

A three judge bench of the Hon'ble National Consumer Disputes Redressal Commission, has

discussed the amendment to Section 8 at length and rejected the contentions raised by the Developer/ Builder and has held that (i) the disputes which are to be adjudicated and governed by statutory enactments, established for specific public purpose to sub-serve a particular public policy are not arbitrable; (ii) there are vast domains of the legal universe that are non-arbitrable and kept at a distance from private dispute resolution; (iii) the subject amendment was meant for a completely different purpose, leaving status quo ante unaltered and subsequently reaffirmed and restated by the Hon'ble Supreme Court; (iv) Section 2(3) of the Arbitration Act recognizes schemes under other legislations that make disputes non-arbitrable and (iv) in light of the overall architecture of the Consumer Act and Court-evolved jurisprudence, amended sub-section (1) of Section 8 cannot be construed as a mandate to the Consumer Forums, constituted under the Act, to refer the parties to Arbitration in terms of the Arbitration Agreement.

Consequently, the arguments raised on behalf of the Builder were rejected and it was held that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Forum, notwithstanding the amendments made to Section 8 of the Arbitration Act.

15 (2018) 16 SCC 413

16 (2018) 4 SCC 793

17 *Imax Corporation Vs. E City Entertainment (India) (P) Ltd.*, (2017) 5 SCC 331

18 (2017) 2 SCC 228

19 (2002) 4 SCC 105

20 (2017) 14 SCC 722

21 (1992) 3 SCC 551

22 *Indus Mobile Distribution (P) Ltd. Vs Datawind Innovations (P) Ltd.*, (2017) 7 SCC 678

23 (2016) 14 SCC 126: AIR 2016 SC 3285

24 (2017) 9 SCC 729

25 *Voestalpine Schienen GmbH Vs. DMRC*, (2017) 4 SCC 665

26 *TRF Ltd. Vs Energo Engg. Projects Ltd.*, (2017) 8 SCC 377

27 *MTNL Vs Applied Electronics Ltd.* (2017) 2 SCC 37

28 *Centrotrade Minerals and Metals Inc Vs Hindustan Copper Ltd.* (Supra)

29 2018 SCC OnLine SC 2378

THE MOTOR VEHICLE ACT, 1988: RECENT DEVELOPMENTS

By
Shweta Chaurasia



Whether or not negligence has taken parts in taking away the lives of others and the origin turns out to be the lack of responsibility. As Douglas Horton, an academic leader has once said:

"Drive slow and enjoy the scenery- drive fast and join the scenery"

Well it's very obvious that one should not join the scenery or the law will take its course.

Brief Introduction: The Motor Vehicles Act, 1988 in India came into force on 1st July, 1989 which

governs all aspect of the road transport vehicles. It however replaced the Motor Vehicles Act, 1939 which earlier replaced the Motor Vehicles Act, 1914. The Act contains various legislative provisions regarding registration of motor vehicles, third party insurance, licensing of drivers/conductors, control of Motor Vehicles through permits, special provisions relating to state transport undertakings, traffic regulations, liabilities and penalties and is thus a complete code regulating the motor transportation and claims arising therefrom. The purpose of the present Act has

always been to avoid negligence in terms of road accidents but since the generation is taking a step ahead everyday; an increasing numbers of road accidents are reported each year and for the purposes of reaching the efficacious remedy, the Motor Vehicles (Amendment) Bill, 2017 was also introduced.

Important Pronouncements:

The Hon'ble Supreme Court reiterated the legal position in Naveen Kumar V. Vijay Kumar³⁰, (2018) 3 SCC 1 and held that it the registered owner whose name is registered with the RTO records will be held liable for the accident

caused by the vehicle and therefore, even if the vehicles is transferred to any other person and if the name of the person is not reflected in the records of the RTO, original owner will continue to be liable and also held that the definition in Section 2(30) of the MV Act, 1988, is in the nature of exception which applies where the motor vehicle is a subject to hire-purchase agreement or of an agreement of lease or hypothecation otherwise the definition stipulates that for the purposes of the said Act, the person in whose name the motor vehicle stands registered is treated as the owner.

In Amrit Paul & Anr. V. Tata AIG General Insurance³¹ (2018) 7 SCC 558, the Hon'ble Supreme Court emphasized on "use" as well as "transport vehicle" and made it a clear aspect that the permit has to be issued by the Competent Authority under the MV Act, 1988 for use of a motor vehicle as a transport vehicle and held that if a transport vehicle without a permit is involved in an accident then the insurer will not be liable, as the absence of permit is a statutory breach.

The principle of Stare Decisis must be followed in law and while deciding the issue that when vehicles are uninsured and the Owners of the said Vehicle could not pay compensation then the responsibilities lies upon whom? However this issue was dealt in Jai Prakash V. NICL and Ors.³² Recently the Hon'ble Supreme Court in Usha Devi & Anr. V. Pawan Kumar & Ors.³³ directed all the States and Union Territories (UT's) to formulate a more comprehensive scheme for

payment of compensation to victims of road accidents, in place of the present system of third party insurance. The Bench headed by Former Chief Justice Dipak Misra has observed that where the vehicle is not covered by a policy of insurance against the third party risk then the motor vehicle shall be sold off in public auction and proceeds thereof shall be used for the purpose of satisfying the compensation that may be awarded in a claim case arising out of such accident and also directed the Chief Secretaries of each of the States to bring out necessary notification issued by the Govt. of NCT of Delhi (Delhi Motor Accident Claims Tribunal Rules, 2008) pursuant to the decision in Jai Prakash (Supra).

While considering, whether the claim would be maintainable on the basis of the fault and negligence on the account of one's own rash and negligent driving, in the case of National Insurance Company Ltd. V. Ashalata Bhowmik & Ors.³⁴, the Apex Court has held that the claimant cannot maintain a claim and also can nevertheless make the insurance company pay for the same in such cases, however, the bench observed that since the indemnification extended to personal accident of the deceased is limited to Rs. 2 lac under the Contract of Insurance, the legal representatives are entitled for that amount only.

The Motor Vehicles (Amendment) Bill, 2017: The Motor Vehicles (Amendment) Bill, 2017 was introduced in the Parliament and is pending enactment and promulgation. Some of the important proposals are; a)

Aadhaar to be mandatory for getting driving license and vehicle registrations; b) for deaths in hit and run cases, the State shall provide a compensation of Rs. 2 Lac or more to victim's family (at present the amount is Rs. 25,000/-); c) in cases of traffic violation by juveniles, the guardian or owner of the Vehicle would be held responsible unless they prove the offence was committed without their knowledge (Note: the registration of the vehicle in question will be cancelled, the juvenile will be tried under Juvenile Justice Act); d) It removes the cap on liability of third party Insurance however the 2017 Bill provides maximum liability for the third party insurance in motor accidents; in case of death Rs. 10 lac; in case of grievous injury Rs. 5 lac; e) the time limit for renewal of driving license is increased from one month to one year before and after expiry; f) a time limit of six months has been specified for an application for compensation for the Road Accidents; g) Contractors, consultants and civic agents will be held for faulty designs, construction or poor road maintenance causing road accidents (persons found guilty can be penalized up to Rs. 1 Lac) etc.

The Bill, most importantly takes into account the taxi – aggregators (to cover online taxi operators i.e. Ola, Uber, etc) and digitization of the licensing authorities. Hopefully the legislation and the progressive interpretation of the same will prove to be a milestone in reducing the number of road accidents in India and bring certainty to the law and the claims thereunder.

30 (2018) 3 SCC 1

31 (2018) 7 SCC 558

32 (2010) 2 SCC 607

33 Usha Devi & Anr. V. Pawan Kumar & Ors. [Civil Appeal No. 9936-9937/2016 decided on 13.09.2018]

34 National Insurance Company Ltd. V. Ashalata Bhowmik & Ors. [Civil Appeal No. 9100 of 2018 decided on 31st August 2018]



SECTION – A IMPORTANT JUDGEMENTS IN 2018

The important judgments have been summarized topic wise for quick and ready reference of the readers. The Supreme Court has passed more than 2000 judgments in year 2018, all of which cannot be summarized herein for practical constraints. An effort has been made to pick and choose the topics and judgments on the basis of their public utility. Laws like Debt Recovery and Insolvency are consciously summarized as the said laws are relatively new and too much information about them is not in the public domain despite them touching the lives of common people in a more intrinsic manner. Ignorance of these laws may affect the people at the receiving end dangerously and irreparably. One of the examples are the home buyers across India, where the builders have gone into insolvency proceedings. Recent and useful judgments of Consumer Protection Act have also been summarized and reproduced.

I. ARBITRATION LAW

1. The Government of Haryana PWD Haryana (B and R Branch) vs. M/s G.F. Toll Road Pvt. Ltd and Ors. Civil Appeal No. 27/2019, Judgment dated: 3/1/2019

The Supreme Court held that 1996 Act did not disqualify a former employee from acting as an Arbitrator provided there are no justifiable doubts as to his independence and impartiality. The Court further held that the position remains unchanged even after 2015 amendment while interpreting First entry to the Fifth Schedule.

2. M/s Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. Vs M/s jade Elevator Components [Arbitration Petition (C) No. 22/2018 Order dated 14/9/2018]

If from the clauses of the Arbitration Act, the intention for resolving a dispute through Arbitration process is seen, Arbitrator should be appointed.

(Also refer to Oriental Insurance Company Limited v. M/s Narbheram Power and Steel Pvt. Ltd. citation)

3. Cheran Properties Limited v. Kasturi and Sons Limited and Ors.; (2018) 16 SCC413

- When Arbitration Agreement is binding on a non-signatory ?

In certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. The Court's observation was that the fact that the appellant was not a party to the arbitral proceedings will not conclude the question as to whether the award can be enforced against it on the ground that it claims under a party. Thus, in such cases the Court is called upon to consider whether the test embodied in

Section 35 is fulfilled so as to bind the non-signatory party to the agreement.

4. M/S Emaar MGF Land Limited &Anr. v. Aftab Singh, [Review Petition (C) Nos. 2629-2630 of 2018 in Civil Appeal Nos. 23512-23513 of 2017]

An Arbitration Clause in Buyer's Agreement cannot circumscribe the jurisdiction of a Consumer Forum, notwithstanding the amendments made to Section 8 of the Arbitration Act.

5. Kandla Export Corporation &Anr. v. M/s OCI Corporation &Anr. ; (2018) 14 SCC 715

In this recent case of February, 2018, the Supreme Court has held that appeals filed under Section 50 of the Arbitration Act would have to follow the drill of Section 50 alone and not Section 13(1) of the Commercial Courts Act on the ground that Arbitration and Conciliation Act is a self contained code.

6. MD Frozen Foods Pvt. Ltd. Vs Hero Fincorp Ltd. ; (2017) 16 SCC 741

A claim of money by a bank or a financial institution cannot be treated as right in rem which is not arbitrable. Such claims are right in personam and are arbitrable.

All disputes relating to the rights in personam are arbitrable and, therefore, the choice is given to the parties to choose this alternative forum.

7. Elite Engg & Construction (Hyd) Pvt. L Vs Techtrans Construction India (P) Ltd. ; (2018) 4 SCC 281

Where a contract between the parties provides that execution or performance of that contract shall be in terms of another

contract (which contains terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, terms of referred contract, unless there is a special reference to arbitration clause also.

8. Ultratech Cement Ltd. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.; (2018) 15 SCC 210 –

Interim arrangement under section 9 can be made even after the Arbitral Award is pronounced

Under section 9, an interim measure can be allowed in favour of a party who moves such application either before the commencement of the Arbitration proceedings, or during the pendency of arbitration proceedings, and even after the making of the arbitral award but before it is enforced in accordance with section 36 of the Arbitration and Conciliation Act, 1996.

9. HRD CorpnVs GAIL (India) Ltd. (2018) 12 SCC 471: Impartiality and Independence of Arbitrator- How can it be determined ?

Any doubts as to impartiality and independence of an arbitrator are only justifiable if a reasonable third person having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case in reaching his or her decision- Further this test requires taking a broad and commonsensical approach to the items stated in Schs. V and VII. This approach would therefore require a fair construction of the words used therein- neither tending to enlarge or restrict them unduly.

10. BCCI Vs Kochi Cricket (P) Ltd. (2018) 6 SCC 287: - General prospective effect of Amendment Act, 2015

The scheme of section 26 is that the amendment act is prospective in nature, and will apply to those proceedings that have commenced, as understood by section 21 of the principal Act, on or before the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act come into force; (unless the parties agree to be governed by the Amendment Act, 2015)- However, the prospective nature of the Amendment Act, 2015 is not in relation to matters of procedure.

II. CONSUMER PROTECTION LAW

1. Rosedale Developers (P) Ltd Vs Aghore Bhattacharya; (2018) 11 SCC 337

The jurisdiction of consumer courts under Consumer Protection Act is not barred even if the remedy of Arbitration is available to complainant.

2. Paramount Digital Colour Lab Vs AGFA India Pvt. Ltd, (2018) 14 SCC 81 ; AIR 2018 SC 3449

The dissolution of the company which sold defective products to the consumers does not absolve its Managing Directors and / or General manager to make good the loss. The managing Director / general Manager are jointly and severely liable even after dissolution of the company

3. Paramount Digital Colour Lab Vs AGFA India Pvt. Ltd, (2018) 14 SCC 81 ; AIR 2018 SC 3449

Buyer of goods of services to start a small scale business for earning livelihood – is a

consumer within the definition of section 2(1)(d) of Consumer Protection Act. Facts showed that unemployed appellant took a loan and purchased a machine from respondents by paying a demand draft of Rs. 62 lakhs – said loan was to start a business of photography on a small scale for earning livelihood by self employment- It cannot be said that the appellants are not consumers.

4. Meenakshi Saxena Vs ECGC Ltd. ; (2018) 7 SCC 479: AIR 2018 SC 2831

The whole purpose of the executing court is to enforce the verdict of the court. Executing court while executing the decree is only concerned with the execution part of it but nothing else. The court has to take the judgment in its face value. It is settled law that executing court cannot go beyond the decree. But the difficulty arises when there is ambiguity in the decree with regard to the material aspects. Then it becomes the duty of the court to interpret the decree in the process of giving a true effect to the decree. At that juncture the executing court has to be very cautious in supplementing its interpretation and conscious of the fact that it cannot draw a new decree. The executing court shall strike a fine balance between the two while exercising this jurisdiction in the process of giving effect to the decree.

5. Pishora Singh vs State of Punjab ; (2018) 13 SCC 216: AIR 2017 SC 2696

Banks are liable to encash FDRs even if they are mistakenly issued or the customer did not possess amount equivalent to amount in the FDR in his account- If FDR was issued to the customer in

fraudulent manner, then it is obligatory for banks to take action against such employees.

6. Fortune Infrastructure vs Trevor D'Lima ; (2018) 5 SCC 442: AIR 2018 SC 2975

Possession should have been given within a reasonable time period of three years – As this is not done and till date of judgment, and further, there is no redevelopment of property, it must be concluded that there is deficiency of service within meaning of section 2(1) (g) of the Act.

7. I.C. Sharma Vs Oriental Insurance Co. Ltd. ; (2018) 2 SCC 76: AIR 2018 SC 416

Insurance company cannot deny its liability if it had not sought details of item wise valuation at the time of issuing policy / thereafter.

{The manner in which the valuation is to be done is explained and illustrated}

8. Bijoy Sinha Roy Vs Bishwanath Das; (2018) 13 SCC 224

Considering foreseeable post surgery complications, performing surgery in a hospital not having ICU or adequate facility amounts to medical negligence. {Tests for determination of medical negligence explained}

III. DEBT RECOVERY LAW

1. State bank of Travancore Vs Mathew K.C. (2018) 3 SCC 85; AIR 2018 SC 676

Under SARFAECI Act, writ is normally not maintainable on the disposal of objections u/s 13(3-A) as the remedy under SARFAECI Act is available u/s 17 of the Act.

2. Pradeshiya Industrial Development Corporation Ltd. Vs Hindustan Aeronautics Ltd. ;

(2018) 15 SCC 216, AIR 2018 SC

Payment of Principal and contractual interest by State on bonds for which it stood as guarantor – In the present case, following the ruling in Hindustan Unilever Ltd Case [Civil Appeal No. 6126/2008] and exercising powers under Article 142, it was held that the State is responsible for the payment of principal along with the contractual interest where it stood as guarantor and the borrower has defaulted. The officers of State were bound by personal liability for any delay caused.

3. M.D. Frozen Foods Exports Pvt. Ltd Vs Hero Fincorp Ltd. (2017) 16 SCC 741 ;AIR 2017 SC 4481

SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand. [Nature, purpose and scheme of the Act explained]

4. P.Vijaya Kumar vs Indian Bank ; (2018) 14 SCC 735: AIR 2018 SC 759

Respondent bank filed application before DRT for recovery of 62,96,582-68 along with interest. Settlement arrived at before Lok Adalat on an amount of 34.5 Lacs payable within three months. It was agreed that if the borrower fails to make payment within three months, the respondent bank will be entitled to recover full entire amount. Borrower failed to make the payment within stipulated time- she repaid sum

of Rs. 41 lakhs as on 29.10.2006- she sought extension of time and condonation of delay from DRT – application dismissed by DRT- DRAT condoned delay and extended time- High Court set aside the order passed by the DRAT – Held: Under these circumstances, High Court ought not to have interfered with the order passed by the DRAT. Further held in totality of facts, interest of justice would be met if delay is condoned by making appellant borrower to pay simple interest of 24% on Rs. 34.5 Lakhs (settlement amount) from 10.9.2004 to 29.10.2006. Compensation of Rs. 10 lakhs awarded in favour of the bank- outer limit of 45 days from date of order given for repayment of amount.

IV. INSOLVENCY AND BANKRUPTCY LAW

1. B.K EDUCATIONAL SERVICES PVT LTD VERSUS PARAG GUPTA AND ASSOCIATES, Civil Appeal No(s). 23988/2017 Date of Judgement: 11/10/2018

The Supreme Court held that the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code from the inception of the Code, Article 137 of the Limitation Act gets attracted. "The right to sue", therefore, accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act may be applied to condone the delay in filing such application.

2. Innovative Industries Ltd. vs ICICI Bank; (2018) 1 SCC 407:

AIR 2018 SC 4084

(i) Difference between Initiation of corporate Insolvency resolution process by an Operational and Financial creditor – Held:- Operational Creditor u/s 8 first serves notice of the unpaid debt to the operational debtor and the moment there is existence of dispute, the operational debtor gets out of the clutches of the court whereas in the case of financial debtor, the tribunal has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy that the default has occurred and the existence of dispute doesn't matter.

(ii) Once an insolvency professional is appointed to manage the affairs of the company, the erstwhile Directors who are no longer in management cannot maintain an appeal on behalf of the Company.

3. Mobilox Innovations Private Limited vs. Kirusa Software Private Limited ; 2018 1 SCC 353

The existence of the real dispute should culminate in the rejection of the application for initiating corporate insolvency in the case of operational debt – So long as the dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application- Moreover, the existence of the dispute and /or the suit or arbitration must be pre-existing i.e. before the receipt of the demand notice or invoice.

4. Macquarie Bank Ltd. Vs Shilpi Cable Technologies Ltd. ; (2018) 2 SCC 674: AIR 2018 SC 498

(i) There is no clear disharmony between the Insolvency Code and Advocates Act, which cannot be resolved by harmonious construction, it is clear that both statutes must be read together. A conjoint reading of the section 30 of the Advocates Act and Section 8 and 9 of the Insolvency Code with Adjudicatory Authority Rules and Forms thereunder would yield the result that the notice sent on behalf of an operational creditor by a lawyer would be in order.

(ii) Foreign banks or Non-scheduled banks i.e. such financial institutions as are not included u/s 3(14) and therefore not barred for invoking insolvency proceedings.

5. Transmission Corporation Of Andhra Pradesh Limited Versus Equipment Conductors And Cables Limited ; 2018 SCC OnLine SC 2113

Existence of an undisputed debt is sine qua non of initiating CIRP. It also follows that the adjudicating authority shall satisfy itself that there is a debt payable and there is operational debt and the corporate debtor has not repaid the same.

6. Arcelormittal India Private Limited versus Satish Kumar Gupta & ors.; Civil Appeal nos.9402-9405 of 2018, Date of Judgment: 4/10/2018

The only reasonable construction of the Code is that a balance should be maintained

between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible. A reasonable and balanced construction of this statute would therefore lead to the result that, where a resolution plan is upheld by the Appellate Authority, either by way of allowing or dismissing an appeal before it, the period of time taken in litigation ought to be excluded. This is not to say that the NCLT and NCLAT will be tardy in decision making. This is only to say that in the event of the NCLT, or the NCLAT, or this Court taking time to decide an application beyond the period of 270 days, the time taken in legal proceedings to decide the matter cannot possibly be excluded, as otherwise a good resolution plan may have to be shelved, resulting in corporate death, and the consequent displacement of employees and workers.

7. Surendra Trading Company v. Juggilal Kamalapat Jute Mills co. Ltd ; (2017) 16 SCC 143: AIR 2018 SC 186

Prescribed period of 7 days for removal of defects in application for initiation of corporate insolvency resolution process not mandatory and can

be condoned by the adjudicating authority on showing sufficient cause.

8. Alchemist Asset Reconstruction Co. Ltd. vs Hotel Gaudavan Pvt. Ltd ; (2018) 16 SCC 91 : AIR 2018 SC 5124

Once moratorium after admission of petition under code commences, section 14(1)(a) expressly stops institution or continuation of pending proceedings against corporate debtors.

9. Uttara Foods and Feeds Pvt. Ltd VsMonaPharmachem ; (2018) 15 SCC 587: AIR 2018 SC

In the present case, utilizing powers under Article 142 of the Constitution of India, settlement between the parties taken on record and NCLT order set aside- However in view of the judgment of this court in Lokhandwala Kataria Construction Pvt. Ltd vs Nisus Finance and Investment Manager LLP, (2018) 15 SC 589, wherein it was inter alia held that the NCLAT prima facie could not avail its inherent powers to allow a compromise to take effect after admission of the insolvency petition, observed that in order to obviate unnecessary appeals being filed before the Supreme Court, the relevant rules be amended by the competent authority to as to include such inherent powers.



PARLIAMENT OF INDIA

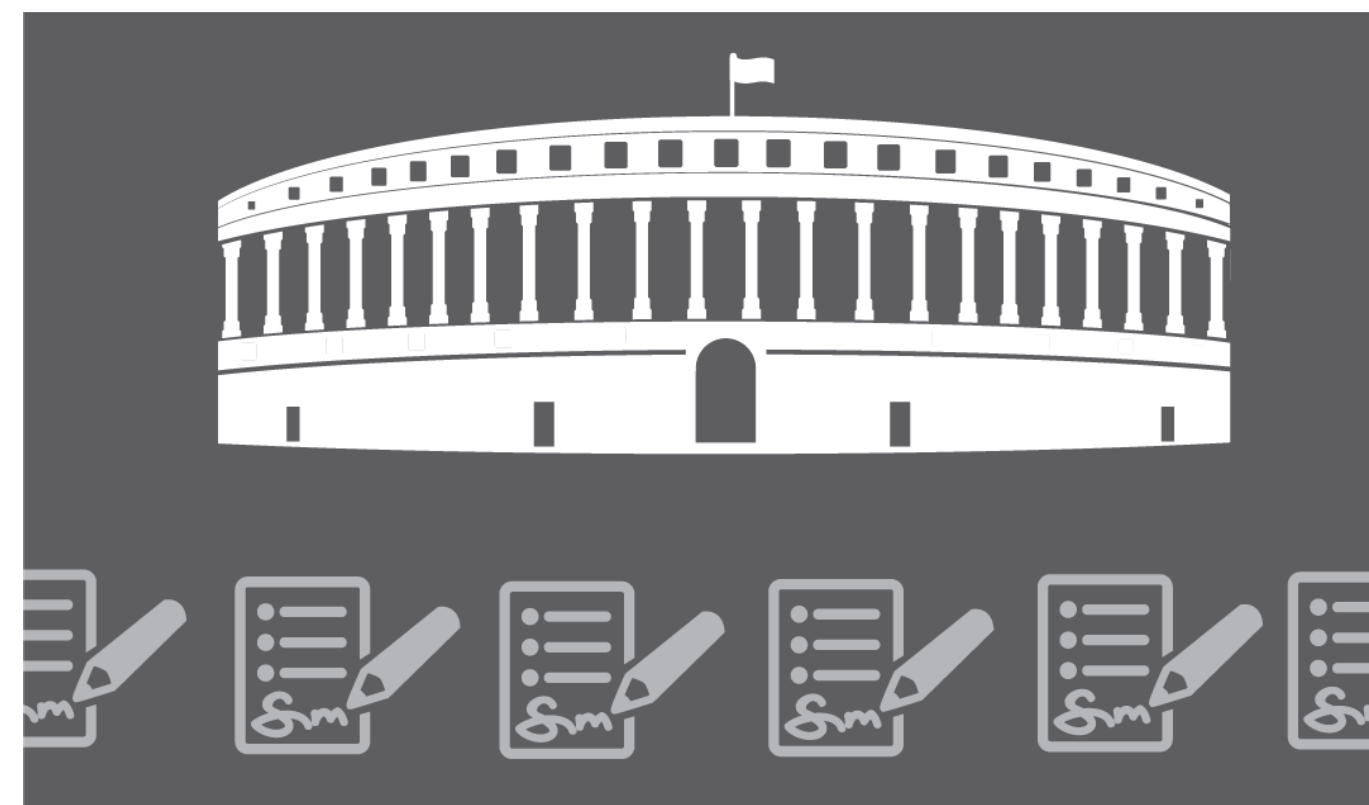
PART - B IMPORTANT LEGISLATIONS AND BILLS OF 2018

The Year 2018 witnessed two Constitutional Amendments, along with promulgation of several Ordinances and statutes. An brief introductory summary of some of the legislations, Acts and Bills of quotidian application, is given hereunder.

S. No.	Act	Summary
Constitutional Amendments		
1.	The Constitution of India (102th Amendment) Act, 2018	Grant of Constitutional status to National Commission for Backward Classes.
2.	The Constitution of India (103rd Amendment) Act, 2018	Grant of 10 % reservation to economically weaker section. Article 15 and 16 amended to add economically weaker class.
Statutes		
1.	The Insolvency and Bankruptcy (Second Amendment) Act, 2018	It's the second amending act of the Insolvency and Bankruptcy Code. Key Features: <ol style="list-style-type: none"> Section 5 (interpretation clause) was amended to include personal guarantors of corporate debtors under the ambit of Insolvency Law; Application of the Insolvency code extended to cover Proprietorship firms also. Provisions regarding resolution professionals and the submission of resolution plan were amended; Prohibition of sale of distressed assets to the disqualified person (against whom insolvency proceedings are going on) was introduced. The amendment introduced a new section 235 A providing for penalty of Rs. 1 Lac to 2 crores for contravening the provisions of the Code.
2.	The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018	This amendment Act was passed to amend the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. The Commercial Court, Commercial Division, Commercial Appellate Division of High Courts Act, 2015 was enacted to ensure speedy disposal of commercial disputes. Key Features: <ol style="list-style-type: none"> Establishment of commercial courts at district level within the jurisdiction of all 24 High Courts; State governments may set up commercial appellate courts at the district level in areas where high courts do not have original jurisdiction. Introduces mandatory mediation before the filing of a suit, in cases where no urgent relief is sought by the parties. The mediation to be completed within three months further extendable by two months.

S. No.	Act	Summary
Statutes		
3.	The Criminal Law (Amendment) Act, 2018	The Criminal Law (Amendment) Act, 2018 amends Indian Penal Code, Indian Evidence Act, Criminal Procedure Code and POCSO Act with respect to punishment, evidence and trial of the sexual offenders: Key Features: Indian Penal Code: <ol style="list-style-type: none"> Section 376 (1) is amended to enhance the minimum punishment from seven years to a minimum of 10 years and with fine and further under clause (3) of section 376 (rape on woman under sixteen years of age) the minimum punishment prescribed is enhanced to twenty years and with fine; Section 376 AB added to provide for a minimum punishment of twenty years extendable to life imprisonment and with fine and death penalty for committing rape on women less than 12 years of age; Section 376 DA added providing for life imprisonment and with fine for committing rape by two or more persons (constituting a group) on a woman less than sixteen years of age to everyone having committed the crime in furtherance of common intention; Section 376 DB added to provide for life imprisonment and with fine or death penalty for committing rape by two or more persons (constituting a group) on a woman less than twelve years of age to everyone having committed the crime in furtherance of common intention Corresponding amendments in sections 166A, 228A and 376 E were made. Indian Evidence Act: Section 53A and 146 were amended to include the newly added sections in IPC. Code of Criminal Procedure: <ol style="list-style-type: none"> Section 374 Cr.P.C. is amended to provide a time frame of six months for the disposal of appeal in cases of sexual offences under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB and 376E. Section 438 (anticipatory bail) is amended to exclude its applicability in case of offence under section 376(3), 376AB, 376DA and 376DB; Section 439 (regular bail) amended to provide for minimum 15 days notice to public prosecutor before granting bail for the offences under section 376(3), 376AB, 376DA and 376DB; Corresponding amendments in other sections e.g. 154, 161, 164, 173 etc were made; Protection of Children from Sexual Offences Act, 2012: Section 42 of the Act was amended to include the newly added sections in the Indian Penal Code

S. No.	Act	Summary
Statutes		
4.	The Fugitive Economic Offenders Act, 2018	<p>Statement of Objects and Reasons: An Act to provide for measures to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India and for matters connected therewith or incidental thereto.</p> <p>Key Features:</p> <ol style="list-style-type: none"> Fugitive economic The Bill provides for a person to be declared as a offender (FEO) if: <ol style="list-style-type: none"> An arrest warrant has been issued against him for any specified offences where the value involved is over Rs 100 crore, and He has left the country and refuses to return to face prosecution. To declare a person an FEO, an application will be filed in a Special Court (designated under the Prevention of Money-Laundering Act, 2002) containing details of the properties to be confiscated, and any information about the person's whereabouts. The Special Court will require the person to appear at a specified place at least six weeks from issue of notice. Proceedings will be terminated if the person appears. The Bill allows authorities to provisionally attach properties of an accused, while the application is pending before the Special Court. Upon declaration as an FEO, properties of a person may be confiscated and vested in the central government, free of encumbrances (rights and claims in the property). Further, the FEO or any company associated with him may be barred from filing or defending civil claims.
5.	The Scheduled Caste and the Schedules Tribe (Prevention of Atrocities) Amendment Act, 2018	<p>The Act amends the existing The Scheduled Caste and Schedule Tribe (Prevention of Atrocities) Amendment Act, 1989 to add a new section 18A in the act. Section 18A reads as:</p> <p>"18A. (1) For the purposes of this Act,—</p> <ol style="list-style-type: none"> preliminary enquiry shall not be required for registration of a First Information Report against any person; or the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply. <p>(2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."</p>



IMPORTANT BILLS INTRODUCED IN 2018

There are several Bills pending before the Legislature. The salient features of some of the important bills are summarized hereunder

THE ARBITRATION AND CONCILIATION (AMMENDMENT) BILL, 2018

Passed in Lok Sabha on July 18, 2018, the Bill seeks to amend the Arbitration and Conciliation Act, 1996. The highlights of the Bill are:

- The Bill seeks to establish an independent Arbitration Council of India for promotion of Arbitration, Conciliation, mediation i.e. alternate dispute resolution mechanisms in India;
- The Bill provides for the designation of arbitral institutions by the Supreme Court and/or High Courts for the appointment of the arbitrators in cases of dispute

between the partieschanging the existing system of appointment of arbitrator/ arbitration tribunal by the Supreme Court/ High Court or the District court;

- It further amends to provide time frame for filing written statement and removing the time limit in conclusion of 12 months in InternationalCommercial Arbitration.

THE CONSUMER PROTECTION BILL, 2018

Already passed in the Lok Sabha on 20.12.2018, the Bill is proposed to replace the existing Consumer Protection Act, 1986. The Bills comes up with a lot of

improvements over its predecessor in terms of establishment of Central Consumer Protection Authority and the Consumer Protection Councils in addition to consumer commissions. More importantly it seeks to introduce penal provisions for unfair trade practices and provides for penal punishment for the same.

The Bill maintains the present three tier system i.e. at district, state and national level, though converts the district forum into a district commission, the Bill proposes to increase the pecuniary jurisdiction of the forums and commissions by defining common unfair practices for example unfair trade practices,

false and misleading advertisements, adulteration and selling spurious goods.

The Central Consumer Protection Authority, proposed to be established under this Bill is to have wide powers in order to promote and protect the interests of the Consumers by way of checking the unfair trade practices and have independent powers to prevent unfair trade practices, check false and misleading advertisements, enquire or investigate into any unfair trade practice complaint and pass appropriate orders to prevent it. The authority is empowered to even sue and bring action against manufacturer or trader before the District, State or National Commission. The orders passed by the Authority shall be appealable before the National Commission. The disobedience of the orders passed by the Central Consumer Protection Authority under section 20 and 21 shall attract the imprisonment for the period upto six months or fine upto Rs. 20 lakhs or both.

Additionally the Bill also seeks to establish Consumer Protection councils, at National, State and district level as an advisory body to the State for the promotion and protection of the interests of consumers.

The remedy of product liability has been specifically introduced for the first time in the form of product liability action to compensate for the losses suffered because of the defective goods and services.

The Bill also proposes to have penal provisions and punish by

way of imprisonment and fine, the convicts for misleading advertisement, manufacturing, selling or storing of adulterated and spurious goods.

THE TRAFFICKING OF PERSONS(PREVENTION, PROTECTION AND REHABILITATION) BILL, 2018

The Statement of Objects and Reasons of this Bill reads as 'to prevent trafficking of persons, especially women and children and to provide care, protection and rehabilitation to the victims of trafficking, to prosecute offenders and to create a legal, economic and social environment for the victims and for matters connected therewith or incidental thereto.' . At present the issue of trafficking is covered by the provisions of The Immoral Trafficking Act, Bonded Labour Regulation Act, 1986, The Child Labour Regulation Act, 1986 etc. The Bill, majorly, impresses upon the coordination between the state government, central government and foreign countries to curb trafficking.

The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 has following salient features:

The Bill seeks to classify trafficking into 'trafficking' and 'aggravated trafficking'. The aggravated trafficking includes trafficking for the purposes of: (i) forced labour, (ii) bearing children, (iii) inducing early sexual maturity by administering chemical substances or hormones, or (iv) begging. The punishment for 'aggravated trafficking' is rigorous imprisonment for a term which

shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than one lakh rupees.

The Bill establishes National Anti- Trafficking Bureau at national level to investigate trafficking cases and implementation of the Act. Key functions of the Bureau include coordinating and monitoring surveillance and taking preventive steps at source, transit and destination points; coordinate between law enforcement agencies; increasing international cooperation with authorities abroad for intelligence sharing, and mutual legal assistance.

The Bill provides for the establishment of Anti-Trafficking Relief and Rehabilitation Committees (ATCs) at the national, state, and district levels. These Committees will be responsible for: (i) providing compensation to victims, (ii) repatriation of victims, and (iii) re-integration of victims in society, among others.

The Bill also proposes to obligate the state government to appoint a State Nodal Officer to be responsible for: (i) follow up action under the Bill, as per the instructions of the State Anti-Trafficking Committee, and (ii) providing relief and rehabilitation services. The state government will also appoint a Police Nodal Officer at the state and district levels. The state government will also designate Anti-Trafficking Police Officers for each district, to deal with all matters related to trafficking in the district.



PENECIAL FORMATIVE LEGISLATION FOR MORAL AILMENTS

By
Dr. Sarvam Ritam Khare

A case for Pre-natal Education Regime



We wonder, while starting to enumerate the evils rampant in the present day society as to where lies the root cause of all kinds of corrupt practices, crimes against women, children, senior citizen, differently abled persons etc, violence, law-breaking tendencies and insensitivity towards human-ness. Then, following the trail of answers, we encounter poverty, population-explosion causing unemployment, deforestation, pollutionand so on, lack of educational orientation to morality and finally the absence of right philosophy of life, the widest range of which was the summum-bonum of Indianism. Then arises the need to find the solutions.

During the decade of sixties, the Mother of Sri Aurobindo Ashram, Puducherry had showed the way to the to-be parents, for collaborating with Nature in her present endeavor to advance human evolution by introducing a new human race, capable of using intuitive and over mental faculties in place of mental ones. The way was of PRE – NATAL and even pre-conceptual education. The example of Abhimanyu, the son of Arjun in Mahabharat, who learnt the extraordinary strategy of entering into the formation of 'Chakra'vyuh', during the period when he was still in the womb, indicates towards the methodology of genetic teaching and learning.

The aforesaid idea has been put into practice in recent years in very small socio-circles in Gujarat,

Madhya Pradesh, but it needs to extend widely in India and as a holistic Government program through proper legislation, policy and schemes providing all facilities of Pre – Natal Education in each and all 'Aanganbaris' of the Country run under the department of 'Women and Child Welfare', which possesses the necessary infrastructure, the staff and related programs. All, what is needed more, is to provide the relevant audio – visuals, proper training to educators, the syllabus (containing yoga, meditation, music and games to enhance cheerfulness, affinity with nature, science, fine arts, poetry, drama, debates to develop reasoned thinking and high tastes) the multipurpose contents and an effective awareness drive. A collateral

legislation to provide the adequate infrastructure and appropriate environment and care for the to-be-parents is what is needed. Necessary amendments in Education Policy, medical statutes aided with therapies i.e. music, yoga, diet etc and broadcasting regime need to supplement to implement the pre-natal and neo-natal policy.

The said policy regime flowed by legislation and effective implementation is the panacea not only to free the next generation from moral ailments for building an evolved society but also would act upon the present generation and create a psychological environment under which the present immoral intrepidity would by and by decay.

About us



ACE LEGAL is a full service law firm having its offices at New Delhi and Gurugram. It renders comprehensive professional services in all major fields of law. Our firm comprises of experienced and dynamic legal experts who provide innovative legal solutions to our clients. A perfect combination of legal skills and youthful exuberance makes our approach and strategy unique in the field of law. We are Litigation as well as Corporate Law firm with experts exclusively dedicated teams respectively.

On the litigation side, apart from representing our clients on all for at PAN India basis, our Law Firm is registered as an Advocate on Record in the Supreme Court of India. Before the Delhi High court, we have under our belt some of the illustrious reported cases. We also represent our clients before NCLT, DRT, Consumers Commissions and Forums.

On the Corporate side, we do structuring of juristic bodies, Acquisitions, Mergers, Corporate and Government compliances, Contract Drafting etc.

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Vrinda, besides being an LL.M. is a regular face before Delhi High Court and NCDRC and has been representing class actions before NCDRC against the defaulting Builders. She specializes in corporate compliance, IPR and consumer affairs. She has successfully served the offshore multinational clients for their compliances in India and Europe and secured her client's Intellectual Property Rights internationally.

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