



SJA NEWSLETTER

Monthly Newsletter published by the
Jammu & Kashmir State Judicial Academy

Volume - 5, Issue 9

September, 2012

Chief Patron

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Chief Justice

Judge-In-Charge

Hon'ble Mr. Justice
Mansoor Ahmad Mir

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SUBSCRIPTION RATES

Single Copy : Rs. 20.00

Annual : Rs. 240.00

(Payment only through D.D. in favour of the
Jammu & Kashmir State Judicial Academy)

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Topic of the Month

Identification Evidence

Evidence of identification has to be judged on the basis of various facts and circumstances of the case. It is not possible to lay down any hard and fast rule as to when such evidence can be believed. Even without prior test identification parade (TIP), Identification in Court can be believed. Identification in court of accused not known earlier to the eyewitnesses and after seeing photographs of accused is not acceptable. If the witness in the court has identified an accused who was not previously known to him, the evidence regarding identification can be acted upon only when the prosecution is able to clarify as to how the witnesses came to pick out that particular accused person. Identification may be by body shape, gait, manner of walking and voice. Prudence requires corroboration of identification in court, by means of a prior TIP. Absence of TIP is not fatal if accused were known earlier to the witness or if accused were sufficiently described in the complaint or if accused had been arrested at the spot. If the witness fails to identify the accused in Court, result of earlier TIP is of no use. The facial features of accused may be imprinted in the mind of witnesses. Other facts such as confession or other corroboration can support identification in court. Result of TIP is not substantive evidence; it can be used only for corroboration or contradiction. The evidence of eyewitnesses identifying the accused as the assailants in court is substantive evidence. Accused cannot take advantage of his own refusal to take part in TIP. Consider the following case. No TIP was conducted regarding gold

ornaments allegedly of the deceased and seized from the accused under section 27. The articles were of common use and could be found in any town, no family member identified them as belonging to the deceased. The deceased did not wear them at the relevant time. The only witness who identified the ornaments was a shopkeeper who had no special reason to identify them and whose shop was five or six kms away and had never met the deceased. In these circumstances the Supreme Court did not accept that the ornaments have been properly identified as those belonging to the deceased. TIP must be held as early as possible. Whether delay matters is to be decided on the facts of a particular case. In the case of a robbery in a train where culprits and eyewitnesses travelled in the same compartment for several hours, the witnesses would have become familiar with the identity of the culprits and delay in holding TIP would be of no consequence.

TIP belongs to the stage of investigation. There is no legal obligation on the investigating officer to conduct TIP. There is no legal right in the accused to insist on it. Evidence of identification in court is not rendered inadmissible for want of TIP. The weight to be attached to the identification made in court for the first time is a matter for the court to decide. The court may be impressed by the evidence of a particular eye witness as evidence which can be safely relied without previous TIP. Purpose of a TIP is to have corroboration of the evidence of eyewitnesses in the form of earlier identification; but, if the evidence of identification in court is found reliable, absence of corroboration by TIP would not matter. TIP is a check upon the memory of a witness based on first impressions and to enable the prosecutor to decide whether all or any of the cited eyewitnesses are to be examined. TIP

strengthens identification made in court. It is a rule of prudence to look for corroboration of the evidence in court of a witness as to identity of the culprit, in the form of an earlier TIP. This rule of prudence has exceptions; when, for example, the court is impressed by a particular witness on whose evidence it can safely rely without such corroboration. A properly conducted TIP assures the investigating agency that investigation proceeds in the right direction. It also helps in testing the memory, veracity, and trustworthiness of witness. It enhances the trustworthiness of evidence given in court regarding identity of culprits. Result of TIP is not substantive evidence. Either side cannot use it, otherwise than for purpose of contradiction or corroboration.

In a case of rape, the victim may have had the opportunity to observe the features of the attacker who put her to shame and his face may be imprinted in her memory. Where rape victim had seen the assailant before and during the occurrence, her brother who came there on hearing her cries saw accused running away, father and neighbors who rushed to the scene caught accused persons and they allegedly confessed their guilt and names of accused are stated in the FIR, absence of TIP did not affect the prosecution case. When witnesses had stated that they knew the accused persons and that they clearly identified them in lantern light, holding of a test identification parade was not necessary. The claim of a witness that he identified an accused who was not a close acquaintance by recognizing his voice from short replies given by the accused is not reliable.

Police are entitled to show photographs of suspects to confirm whether investigation is proceeding in the

right direction, provided the witnesses had given the identifying features of the assailants. Such features could be confirmed by showing them photographs. This should not involve showing a single photograph, but by showing them photographs of several persons. If the suspect is available for identification (by video or otherwise), photographs shall not be shown in advance to the witness. There are no statutory guidelines in this behalf in India.

[Abstracted from NJA Occasional Paper Series No. 6 titled "Appreciation of Evidence in Criminal Cases" by Hon'ble Mr. Justice (Retd.) U.L. Bhat, Former Chief Justice, Gauhati High Court and High Court of Madhya Pradesh]

ACADEMY NEWS

1. Orientation training programme for Sub-Judges and Munsiffs of District Anantnag, Pulwama and Kulgam at Anantnag



Hon'ble Mr. Justice Mohammad Yaqoob Mir
addressing the Judicial Officers

Under the guidance and patronage of Hon'ble Shri Justice M.M. Kumar, Chief Justice (Patron Chief) and Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge Incharge, State Judicial Academy, orientation training programme for Sub-Judges and Munsiffs of District

Anantnag, Pulwama and Kulgam was organized by the Jammu and Kashmir State Judicial Academy at District H.Q. Anantnag on 9th of September, 2012 consistent with the policy of Judicial Academy to reach out the Judicial Officers posted in remote areas of the State. The programme was conducted by Shri Abdul Wahid, Director, State Judicial Academy.

In his introductory remarks, Director, State Judicial Academy extended warm welcome to Hon'ble Mr. Justice Mohammad Yaqoob Mir for gracing the occasion and stated that the Judicial Academy is engaged in providing comprehensive training and judicial education to the Judicial Officers on different topics with the aim of improving their performance in the delivery of justice both quantitatively and qualitatively. Beside other things, the Academy strives to imbibe Judicial ethics and standard of Judicial conduct and updating the knowledge of law and practice in selected areas for Judicial Officers. Such programmes have already conducted in other districts.



Judicial Officers of District Anantnag,
Pulwama and Kulgam

The topics chosen for the orientation programme were "Judicial Ethics and Conduct" and "Development of Mediation as a Tool of qualitatively

Justice”.

Director, State Judicial Academy stated that topics for the orientation programme are no less important in the present scenario as the society places the judges at highest pedestal, thus the judges have a corresponding responsibility of observing highest ethical values. Concept of mediation as one of the modes of alternate dispute resolution has got statutory recognition and is now considered as a best process mainly intended for the benefit or public whereby qualitative justice can be ensured to the litigant parties *inter se*.

Hon'ble Mr. Justice Mohammad Yaqoob Mir exhaustively dealt with the topics. Key note address of His Lordship is reproduced hereunder :-

“To begin with the word 'ethics' is to be explained as to what it means. Different people tend to equate ethics with different notions; some relate it to religion, some to feelings, some to what law requires and some to standards of behaviour of the society but in essence ethics refers to well founded standards of right or wrong i.e. what humans ought to do in terms of rights, obligations, benefits to society and fairness.

On judicial ethics it shall be quite useful to quote what Walt Whitman has said:

“Great is Justice !

Justice is not settled by legislators and laws - it is in the Soul;

It cannot be varied by statutes, any more than love, pride, the attraction of gravity, can;

It is immutable - it does not depend on majorities majorities or what not, come at last before the same passionless and exact tribunal.

For justice are the grand natural lawyers, and perfect judges - it is in the Souls;

It is well assorted - they have not studied for nothing - the great includes the less;

They rule on the highest grounds - they oversee all eras, states, and administrations.

The perfect judge fears nothing he/she could go front to front before God;

Better the perfect judge all shall stand back life and death shall stand back -heaven and hell shall stand back.

Ethical standards enjoin virtues of honesty, compassion, and loyalty. In any case the standards to be maintained are required to be reasonable and well-founded. Moral beliefs, moral conduct, strenuous efforts to help shaping of the institution so as to make it to live up to standards. It is only the highest ethical standard which has made the institution of Judiciary most virtuous, impressive and result-oriented.

Judges discharge divine duties that is why it is often said that the judges are chosen by divinity, therefore, judicial ethics and conduct are more delicate, slightest slip in the conduct or in maintaining the ethics makes the position of a Judge shaky, which in turn disturbs the elegant face of the institution of Judiciary. When a Judge is chosen by the divinity, so his or her ethics and conduct gets illuminated. For achieving the desired height so as to add to the magnificence to the temple of justice i.e. institution of Judiciary, what conduct a Judge is required to possess:-

1. A judge shall uphold and promote the independence, integrity, and impartiality and avoid impropriety even the appearance of impropriety.

2. A judge shall perform the duties of judicial office competently, and diligently.

3. A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the integrity or impartiality of the judiciary.

It shall be apt to quote as to what Hon'ble Chief Justice of India, Shri Sarosh Homi Kapadia has observed:

“Judges must be clean and must not force their philosophy on society or governments”.

“Judges are required to be little aloof and isolated from society at large and should not be in contact with lawyers, individuals or political parties, their leaders or ministers, unless it be on purely social occasions.”

His Lordship the Hon'ble Chief Justice further observed that, when one enters the judge's world, one inevitably has to impose upon himself certain obvious restrictions.”

It shall be quite useful to quote various canons relating to the code of judicial conduct as evolved from time to time:-

1. The integrity and independence of the judiciary to be maintained.
2. Avoiding impropriety and the appearance of impropriety in all of the judge's activities.
3. Impartial and diligent discharge of judicial duties.
4. Refraining from inappropriate political discussions.
5. The topmost seven qualities of a Judge shall be:-
 - A. Diligence;
 - B. Courtesy;
 - C. Sympathy;

- D. Patience;
- E. Knowledge of the Law;
- F. Intelligence; and
- G. Sense of fair play.

Public confidence is critical to the administration of justice. The said confidence can be reposed more and more and maintained to the highest level only when judges possess the aforesaid qualities and uphold highest ethical values.

The next topic is related to one of the modes of alternate dispute resolution (ADR) i.e. 'MEDIATION'.

Mediation is one of the alternate modes of consensual dispute resolution. It in fact has originated in the United States. It is an innovative way connected with the judicial reforms. In the context of prevalent position the judicial officers have to develop various attributes such as;

- 1 Connection with parties,
- 2 Active listening
- 3 Handling of sensitive dispute
- 4 Selection of cases fit for mediation.

Incorporation of Section-89 of Civil Procedure Code in pursuance to amendment of 2009 which became effective from 20th March 2009 provides modes and methods and the procedure for having resort to one of the four methods for alternate dispute resolution. Section-89 of the Central Code par-materia with the State Code has been interpreted in the judgment rendered by the Hon'ble Apex Court in the case 'Afcons Infrastructure Limited and Anr. Vs. Cherian Verkey Construction Company Private Ltd. And ors., (2010) 8 SCC, P.24. Now the procedure to be adopted by the courts under Section 89 as summarized by the Hon'ble Apex

Court, provides that when the parties are not agreeable for settlement and conciliation for want of consensus then the courts shall refer the matter to any one of the other three ADR processes in order of preference which include mediation, i.e. when questions are complicated and requires rounds of negotiations then court has to send the matter for mediation.

The object of Alternate Dispute Resolution has to bring peace and harmony in the society and to create a win-win position for both the parties, such type of dispute resolution does not leave the scars so as to leave chance for the parties to get irritated as and when such scars are touched.

Since the mediation has the direct effect to reduce conflict and the work load of courts but it cannot be the substitute for easy accessible judicial system.

The judges have an important role in the development of mediation. They shall be able to give information, arrange information sessions on mediation and invite the parties for mediation and refer the cases to mediation. It is essential for the judges when referring the parties to mediation to promote general public confidence in the mediation process and assure quality mediation. It is for the judges to foster for amicable dispute resolution. For doing so they are required to have full knowledge and understanding of the process and then the benefits of mediation.

The Hon'ble Apex Court in the above referred judgment in para-27 & 28 has clearly indicated illustratively as to which type of case can be considered to be suitable for ADR process and which cannot. The suitability and unsuitability vis-à-vis categorization of cases as detailed therein are not exhaustive or rigid which again leaves it open for the Judicial

Officers to show their wisdom in identifying many other such cases to be fit for alternate dispute resolution.

The Jammu and Kashmir Civil Procedure Alternate Dispute Resolution and Mediation Rules 2009 are to be adhered to, with the modification to the extent indicated in the above referred judgment rendered by Hon'ble Apex court which is now the law. The judges are required to inform the parties in accordance with alternate dispute resolution and mediation rules, the safeguards, protections as are available to them as against the sharing of their secrecies, ideas and suggestions.

What is required is that Judicial Officers shall have to get themselves acquainted with the basic object of the rules of mediation prescribed and then while acting as referral judges have to adhere to the procedures as prescribed with modification to the procedure under Section 89 of CPC as clearly indicated in the 'AFCON' judgment.

It is also to be made clear that normally attempt for suggesting to the parties to have resort to one of the modes of alternate dispute resolution has to be done at the time of recording the statement of the parties as required under Order 10 Rule 1 CPC.

Order 32(A) of CPC also provides for attempt for reconciliation on the part of the Judicial Officer so this provision is also to be kept in view by the referral judges."

After His Lordship's address, there was lively interactive session with the officers. Some misconception regarding mediation as an Alternate Dispute Resolution and the impediments which come in the way of its implementation were discussed and removed during the interactive session. The interactive session was most instructive, educative

and useful for the officers.

2. Oath Ceremony of Advocates of Jammu province

Under the guidance and instructions of Chief Justice (Chief Patron, State Judicial Academy) Justice M.M. Kumar, and Incharge, State Judicial Academy, Justice Mansoor Ahmad Mir State Judicial Academy today organized a simple but impressive function to administer oath and distribute Advocate license to the new entrants to the legal profession at the State Judicial Academy's complex, Jammu.



Newly enrolled Advocates taking oath

The function was presided over by Director, J&K State Judicial Academy Mr. Abdul Wahid. Before delivery of enrolment certificates (Advocates' license) to the 45 Advocates of Jammu province, the recipients were administered oath by the Director, State Judicial Academy.

In his address, , Director, J&K State Judicial Academy, Mr. Abdul Wahid congratulated newly enrolled Advocates and welcomed them to the fraternity of legal profession. He enlightened them on the professional ethics and conduct. He exhorted the newly Advocates to imbibe ethical values both in private and public life and urged them to conduct

themselves in the court during proceedings in the dignified manner, maintain the decorum of the Court and assist the court honestly and truthfully to the best of their knowledge and capacity in the dispensation of justice as the justice delivery system is incomplete without the assistance of the lawyer to the court.

The Director told the newly Advocates that an Advocate is not a free man to do whatever he likes after obtaining license to practice. There are certain duties and responsibilities cast upon them by the statute as to the manner in which they should conduct themselves as a professional lawyer. Their conduct, discipline, rights and duties are regulated by a Statute known as Advocates Act, 1961 and the Rules framed there under.

LEGAL JOTTINGS

Legal briefs from High Court of J&K

[Case : LPA No : 257 of 2006

Abdul Ahad Sofi v. Chairman, H/U D SDA & Ors.

Coram : Hon'ble Mr. Justice M.M. Kumar, Chief Justice and Hon'ble Mr. Justice Hasnain Masoodi

Date of Decision : 20-07-2012

(Per Chief Justice)]

Subject Index : Whether a post could be abolished by the competent authority, which may result in deprivation of promotion to an employee who had been working in the feeder cadre Held : Yes.

Appellant appointed as Driver in the SDA, two post of driver upgraded to grade of Chauffeur carrying higher pay. Appellant and one Mussa Malla were given the benefit of upgradation and placed in the higher pay scale. On

11-06-1999, one post of Foreman in the grade of Rs 5700-10100 was created and Musa Malla being senior most Chauffeur was given promotion to the said post. After his superannuation, post of foreman became available. This post was abolished vide order dated 14-05-2005 by the respondent despite representation made by appellant for considering his case for promotion to the said post. The abolished post was reduced to the post of Driver by addition to the strength of driver.

Appellant challenged the said order by way of writ petition, writ was dismissed by Hon'ble Single Judge and placed reliance on *N. Ramanatha v. State of Kerala*, AIR 1973 SC 2641. In this authority, it was held that :

“the Government has right to abolish a post and the power to create or abolish a post is not relatable to doctrine of pleasure envisaged by Article 310 of the Constitution.”

Appellant preferred an appeal. The argument of counsel for the appellant that post of Foreman in the higher pay scale was created to break stagnation by providing avenues of promotion to the Chauffeurs and that post cannot be arbitrarily created or abolished without there being any justification on facts, was not accepted by the Hon'ble Division Bench. Held : It is well settled that creation and abolition of posts; formation and structuring of restructuring of cadres, prescribing the source; and mode of recruitment and qualifications; and criteria of selection are matters which fall within the exclusive domain of the employer. Such decisions of the employers are not immune from judicial review. However, the court would be extremely cautious and circumspect in tinkering with the exercise of discretion by the employer.

Official Liquidator v. Dayanand and Ors. (2008) 10 SCC 1 and *State of Haryana v. Navneet Verma*, (2008) 2 SCC 65 relied upon.

[OWP No. 305 of 2012]

M/s Hassan Road Construction Ltd. v. State of J&K & Ors.

Date of Decision: 08-05-2012

Bench: Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge

Subject Index: Constitution of India - Arts. 226, 14 - Invitation of tenders Resurfacing of runway - Project cost Rs. 93.00 Crores - Manual of Contracts 2007 CVC guidelines - Paras 3.5.5.1 and 3.5.5.2 - Prequalification criteria raised from Rs.5.00 Crores to Rs. 30.00 Crores - Petitioner an SS Class Contractor - Issue of Tender Documents - Rejection of - Writ jurisdiction - Eligibility criteria - Seeking direction for relaxation - Whether can be invoked for - Held, No.

- Petitioner earlier granted relaxation - Annexure 'C' to the writ petition - whether can be a ground for petitioner to seek consideration for allotment of tender - Held, no.

Held: The discretion to exercise the writ jurisdiction is generally aimed at for public good. Here, in the instant case, the petitioner has neither been deprived nor infringed of any of his rights, not to speak of a substantial right. ... The power of fixing or re-fixing the criteria for allotment of works is for the respondents to administer in terms of CVC Manual, and it is expected of the contractors, construction companies to comply with the requisite criteria in order to fulfil the requirements of the tender and prove its eligibility. If any contractor is not fulfilling the requisite demand, which is not unjustified either, but based on the guidelines, is, because of being ineligible, excluded automatically from the zone of consideration.”