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LEGAL UPDATES

- CONTOURS OF SECTION 319 CRPC RE-ELUCIDATED

Two judge Bench of D.Y. Chandrachud and M.R. Shah delivered a judgment in *Manjeet Singh v. State of Haryana* (Crl. Appeal No. 875 of 2021) reiterating the contours of Section 319 of Code of Criminal Procedure Code, while dealing with the power of court in initiating the proceedings against any such other persons, the court believes if such offence has been committed by such persons. The Court also vests with the Discretionary Power.

The Bench set aside the Judgment of High Court and trial court wherein the application filed under section 319 CrPC by the complainant to summon the Private Persons for arraying them as an accused persons in the trial proceedings that were going under Section 302, 307, 341, 148 and 149 IPC.

The Hon'ble Supreme Court categorically held that their observations are only prima facie restricted to exercising powers under Section 319 CrPC and left for the trial court to decide such application on merits and as per law and the evidence adduced before it.

In case of *Hardeep Singh v State of Punjab* (2014 3 SCC 92) , the apex court held that powers u/s 319 CrPC can be exercised at any stage before the completion of trial.

This bench referred to the case of *Rajesh v. State of Haryana* 2019 6 SCC 368 wherein in that case, this court held that at the stage of giving opportunity to complainant to file a protest Petition, plea before trial court to summon other persons as well as who were named in FIR, but not been named in chargesheet , in such situation also, the court is not toothless by virtue of section 319 CRPC.

This Hon'ble Court dealt with the substantial questions raised before it for consideration such as – a) any stage of exercising power u/s 319, b) interpretation of term 'evidence' used in section 319(1)CrPC i.e. can it be used only at stage cross examination or in chief examination stage as well etc.

The apex court elucidated the scope and power enshrined under section 319 CRPC which are given as below:

- i. That while exercising the powers under Section 319 CrPC and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished;
- ii. for the empowerment of the courts to ensure that the criminal administration of justice works properly;
- iii. The law has been properly codified and modified by the legislature under the CrPC indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law;
- iv. To discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished;
- v. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial
- vi. Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it;
- vii. The court is the sole repository of justice, and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency;
- viii. Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial;
- ix. The power under Section 319(1) CrPC can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pretrial stage intended to put the process into motion;

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By virtue of Section 319 Cr.P.C the Ld. Court has vide power to call/summon any person as well who were named in the FIR but not implicated in the charge sheet. In that case also the court is still not powerless by virtue of section 319 Cr.P.C and person can be summoned to face the trial provided that during the trial some evidence surfaces against the proposed accused/or summoned person. The power under section 319 Cr.P.C can be exercised at any stage from commencing of the trial and recording of evidence/depositions and before the conclusion of the trial at any stage..

- x. The court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence;
- xi. The word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents;
- xii. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation;
- xiii. If the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s);
- xiv. That the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319 CrPC can be exercised;
- xv. That power under Section 319 CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not wait till the said evidence is tested on cross-examination;
- xvi. Even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses)
- xvii. While exercising the powers under Section 319 CrPC the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.

: Kartikey Yadav, Senior Associate

- Income Tax Rules tailored to suit Insolvency and Bankruptcy Code, 2016.

The Income-tax (24th Amendment) Rules, 2021 notified by the Tax Department now allow resolution professionals registered with Insolvency and Bankruptcy Board of India (IBBI) appointed by the National Company Law Tribunal (NCLT) to verify the tax returns of companies undergoing bankruptcy. The amended Rules also casts an obligation on the resolution professional to follow the rules meant for tax return preparers of certain assesseees. Furthermore, the authorized representatives who prepare tax returns for assesseees are required to furnish details of the documents given by the assessee for preparation of the return as well as details of the scope and findings of any examination the representative has done on such documents.

The new rules authorize the resolution professional to furnish this information in the case of a company undergoing bankruptcy proceedings. The key idea is to align the two laws and make sure there is no gap in the regulatory process so as to ensure responsibility and accountability. The amendment is expected to help the insolvency resolution process by clarifying the role of the resolution professional under the Income Tax Act. The government is keen to avoid delays in the insolvency resolution process as many cases have overshoot the 180 days period stipulated in the Insolvency and Bankruptcy Code, 2016 (IBC) to finalize a resolution plan.

: Karan Valecha, Senior Associate

- MAHA RERA NOTIFICATIONS.

"Garage", "Covered Parking Space" and "Open Parking"

Maharashtra Real Estate Regulatory Authority ("MAHA RERA") vide its Circular No. 36 / 2021, No. MAHA RERA / Secy / File No.27 /152/ 2021 dated 30th July, 2021 has issued directions to clarify the following with respect to garage, covered parking space and open parking:

- Open parking spaces are provided free of FSI;
- Promoters are not entitled to sell/allot open parking areas for monetary consideration;

- Open parking areas, garage and covered Parking space should be specifically marked and numbered at the real estate project site in accordance and as per approved / sanctioned plans and tagged to the apartment to which it is allotted; and
- Garage and/or covered parking space when sold/allotted for monetary consideration, the type, numbers and size as well as the place where such garage or covered parking space is situated should be mentioned in the Agreement for Sale being entered into and the plan showing the exact location / allotment along with the particulars as aforesaid should be annexed to the Agreement for Sale.

Execution of registered conveyance deed of a real estate project.

Maharashtra Real Estate Regulatory Authority ("MAHA RERA") vide its Order No. 20 / 2021, No. MAHA RERA / Secy / File No.27 /150/ 2021 dated 28th July, 2021 has issued directions with respect to execution of registered conveyance deed of a real estate project:

- Submit quarterly up-to-date status report regarding steps initiated by the promoter for execution of the registered conveyance deed. Such up-to-date status firstly shall be submitted along with the quarterly up-to-date status of the project, that the promoter shall be submitting immediately after application for obtaining occupancy certificate is submitted to the competent authority;
- Execute the registered conveyance deed as per Section 17 of the RERA Act, within three months from the date of receipt of the occupancy certificate.

Failure on the part of the promoter to submit quarterly up-to-date status report as aforesaid as well as non-execution of the registered conveyance deed in terms of mandate contained in Section 17 of the RERA Act shall be considered as violation of provisions of the RERA Act, rules and regulations made thereunder and further action in terms of the provisions of the RERA Act shall be taken as against the Promoter.

: Karishma Hans, Senior Associate

- **Investigating Officer is not duty bound to arrest each and every accused.**

On 18.08.2021, a bench of Hon'ble Supreme Court of India, comprising of Justice Sanjay Kishan Kaul and Justice Hrishikesh Roy held that Section 170 of the Code of Criminal Procedure (Cr.P.C.) does not impose an obligation on the Officer-in-charge to arrest each and every accused at the time of filing of Chargesheet under section 173 Cr.P.C.

The Court further observed that there is a practice of Trial Courts in India of insisting the investigating officer to take the accused persons into custody as a prerequisite formality to take chargesheet on record, which is against the intent of Section 170 of Cr.P.C.

Section 170. Cr.P.C- Cases to be sent to Magistrate when evidence is sufficient.

(1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the officer in charge of a police station forward an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the facts and circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the Chief Judicial Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

Lexstone Insight:

Investigating Officer is not duty bound to arrest each and every accused at the time of filing of chargesheet.

(4) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it and shall then send to the Magistrate the original with his report.

In the case in hand, which was an appeal against rejection of application for grant of Anticipatory Bail, the Hon'ble Apex Court observed that the trial court had taken a view that unless the accused is taken into custody, chargesheet will not be taken on record in view of section 170 Cr.P.C.

The Hon'ble Court while addressing the aforesaid issue held that:

"The Delhi High Court is not alone in having adopted this view and other High Courts apparently have also followed suit on the proposition that criminal courts cannot refuse to accept a chargesheet simply because the accused has not been arrested and produced before the court".

The Hon'ble Court while interpreting the word 'custody' used in section 170 Cr.P.C. observed that it does not intend to take the accused into Police or Judicial custody, rather the intent is to present the accused before the court while filing the chargesheet.

: Sahil Kumar, Principal Associate

- Asset Monetization Mechanism.

Union Finance Minister has launched an Asset Monetization mechanism of Central Public Entities. Monetization of operating Public Infrastructure Assets has identified as a key means for sustainable infrastructure financing. Towards this, the Union Budget has provided for preparation of a 'National Monetization Pipeline' (NMP) of potential brownfield infrastructure assets. NITI Aayog in consultation with infra line ministries has prepared the detailed report on NMP. The Pipeline has been prepared based on inputs and consultations from respective line ministries and departments, along with the assessment of total asset base available therein.

NMP intends to provide a medium-term roadmap of the program for public asset owners, along with visibility on potential assets to private sector. Report on NMP has been organized into two volumes. Volume I is structured as a guidance book, detailing the conceptual approaches and potential models for asset monetization. Volume II is the actual roadmap for monetization, including the pipeline of core infrastructure assets under the Central Govt.

Currently, only assets of central government line ministries and CPSEs in infrastructure sectors have been included. The aggregate asset pipeline under NMP over the four-year period, FY 2022-2025, is indicatively valued at Rs 6 lakh crore. The estimated value corresponds to 14% of the proposed outlay for Centre under NIP (Rs 43 lakh crore). This includes more than twelve-line ministries and more than 20 asset classes. The sectors included are roads, ports, airports, railways, warehousing, gas & product pipeline, power generation and transmission, mining, telecom, stadium, hospitality, and housing.

The framework for monetization of core asset monetization has three key imperatives.

- Monetization of 'Rights' not 'Ownership', Asset to be handed back at the end of the transaction life.
- Brownfield de-risked assets, stable revenue streams.
- Structured partnership under defined contractual framework with strict KPIs and performance standards.

This includes selection of de-risked and brownfield assets with stable revenue generation profile with the overall transaction structured around revenue rights. The primary ownership of the assets under these structures, hence, continues to be with the Government with the framework envisaging hand back of assets to the public authority at the end of transaction life.

The end objective of this initiative to enable 'Infrastructure Creation through Monetization' wherein the public and private sector collaborate, each excelling in their core areas of competence, to deliver socio-economic growth and quality of life to the country's citizens.

: Harneet Kaur, Senior Associate

ARTICLES FOR PEER REVIEW

- ADOPTION OF A GIRL CHILD BY A SINGLE HINDU MALE

INTRODUCTION

The concept of adoption under the earlier Hindu law, was considered as more sacramental than secular. The child who was being adopted under the old Hindu laws was considered equivalent to a child who is naturally conceived. As per old Hindu Law beliefs, only male children were adopted so as to enable one in the continuance of the lineage, and it was also important to perform one's last rituals. However, like any other law the adoption law in India has also been developed and the old, obsolete and superstitious beliefs of adoption law in India have been set-aside as people are now more open minded while adopting a child.

It was in furtherance of this unbiased mindset that the Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as "HAMA, 1956") was enacted after independence and came into effect on 21.12.1956, whereby the scope of adopting a child was enlarged and the said statute aimed at eradicating all the gender-biased prejudicial provisions. Before the enactment of HAMA, 1956 only male children could be adopted however, the Act, 1956 now enables the adoption of female children as well. The HAMA, 1956 extends to all of India and is applicable on all Hindus domiciled in India and to any person who is a follower of Virashaiva, Lingayat or a follower of Brahmo, Prarthana or Arya Samaj. The provision of HAMA, 1956 however, do not apply to any other person who is not a Muslim, Christian, Parsi or Jew by religion as mentioned under Section 2 of HAMA, 1956.

Section 15 of the HAMA, 1956 provides that once adoption is made under the provisions of the HAMA, 1956, the same becomes final and is irrevocable as the same cannot be cancelled by the adopter and neither can the adopted child renounce his/her adoptive parents and return to his/her family of birth. Thus, as per the provisions of the HAMA, 1956 once a child is adopted by his or her adoptive parent(s) then the adopted child is separated from his or her biological parents and the said adopted child becomes the legitimate child of his adoptive parent(s).

POSITION OF SINGLE HINDU MALE IN RESPECT OF ADOPTION

Section 7 of the HAMA, 1956 provides that a Hindu major who is of sound mind whether bachelor, widower, divorcee or married can make an adoption. Further, Section 11 (iii) of the HAMA, 1956 provides that if the adoption is being made by a Hindu male and the child to be adopted is a female then there has to be an age difference of 21 years between them, otherwise the said adoption would be void. The relevant sections have been reproduced herein under:

Section 7.- Capacity of a male Hindu to take in adoption:

Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation.— If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

Section 11.- Other conditions for a valid adoption:

In every adoption, the following conditions must be complied with:-

- i. if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;*
- ii. if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;*
- iii. if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;*
- iv. if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;*
- v. the same child may not be adopted simultaneously by two or more persons;*
- vi. the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth 1 [or in the case of an abandoned child or child whose parentage is not known, from the place or family where it has been brought up] to the family of its adoption:*

Provided that the performance of datta homam shall not be essential to the validity of adoption.

It has been provided under Section 14 of the HAMA, 1956 that when a widower or a bachelor Hindu male adopts a child then the wife whom he subsequently marries shall be deemed to be the step-mother of that adoptive child. The relevant section is being reproduced herein under:-

Section 14.- Determination of adoptive mother in certain cases:-

- (1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.*
- (2) Where an adoption has been made with the consent of more than one wife, the senior most in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.*

- (3) *Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.*
- (4) *Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child.*

CONDITIONS TO BE FULFILLED FOR ADOPTION BY HINDU MALE

Section 11 of the HAMA, 1956 provides the conditions needs to be fulfilled by a Single Hindu Male adopting a girl child for the said adoption to be held as valid which are as follows:-

The Hindu male who wants to adopt a daughter should not have a daughter or son's daughter (whether by legitimate blood relation or by adoption) living at the time of adoption (Section 11(ii) of the HAMA, 1956);

The Hindu single male who wants to adopt a daughter needs to be at least 21 years older to the adoptive daughter (Section 11(iii) of the HAMA, 1956);

The child to be adopted must be a Hindu (Section 10 of the HAMA, 1956); and

The parent(s) or the guardian of the child to be adopted, must give the child in adoption and the adoptive parent(s) must take the child in adoption with the intent to transfer the child from the family of its birth to the family of its adoption.

WHO CAN BE ADOPTED?

As per the provisions of the HAMA, 1956 any child legitimate or illegitimate, or who has been abandoned both by his or her father and mother, or whose parentage is not known can be adopted if they fulfil the following criteria:-

- (1) The child must be Hindu (also applies to Buddhist, Jains and Sikhs);
- (2) The child to be adopted should not have been previously adopted by anyone;
- (3) The child to be adopted is below the age of 15 years; and
- (4) The child should not be married.

PROCEDURE FOR ADOPTION OF THE CHILD UNDER THE HAMA, 1956

As per the provisions of the HAMA, 1956 if a single Hindu Male wants to adopt a female child then he must make an appeal to the Child Welfare Agency which is legally certified and eligible for the registration of the adoption parent and the child. The said Agency also needs to be certified by the Central Resource Adoption Authority, New Delhi.

After the completion of the process of the registration, a registered agent from the company conducts the interview of the adoptive parent and the said Agent would try to find out the true intention of the adoptive parent for adopting the child. The Child Welfare Agency is also entrusted with the duty to ensure that the atmosphere and other things which are otherwise crucial for the development of the child are suitable and once the Agent is satisfied that all the requirements are sufficient for the child to be adopted then only further process will be carried out.

Once the adoptive parent gets the clearance from the Child Welfare Agency then a petition under Section 9 of the HAMA, 1956 is filed before the concerned Court so that the Court proceedings for adoption may be initiated. Lastly, the concerned Court after being satisfied that all the valid conditions for adoption are being fulfilled by the adoptive father will pass a decree for adoption and the same shall become final.

OVERRIDING EFFECT OF HAMA, 1956

Section 4 of the HAMA, 1956 gives an overriding effect to the HAMA, 1956 over any other text, rule or interpretation of the Hindu law or any custom or usage prevalent before the commencement of the HAMA, 1956 and further over any other law in force immediately before the commencement of the HAMA, 1956 in so far as it was inconsistent with the provisions of the legislation. Section 4 is being reproduced herein under:-

“Section 4.- Overriding effect of Act- Save as otherwise expressly provided in this Act,-

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.”

Section 5 of the HAMA, 1956 provides that no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisions of the HAMA, 1956 and if any adoption is made in contravention of the provisions of the Act, 1956 then the same shall be held as void. Section 5 is being reproduced herein under:-

“Section 5.- Adoptions to be regulated by this Chapter-

(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favor of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.”

Section 56 of the Juvenile Justice (Care and Protection) Act, 2005 clearly stipulates that nothing in the said Act, 2005 shall apply to the adoption of the children made under the provisions of the HAMA, 1956. The said Section is being reproduced herein under:-

“Section 59.- Adoption-

- (1) Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder, and the adoption regulations framed by the Authority.
- (2) Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority.
- (3) Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956 (78 of 1956).
- (4) All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority.
- (5) Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a foreign country without a valid order from the Court, shall be punishable as per the provisions of section 80.”

CONCLUSION

Thus, as per the provisions of the HAMA, 1956 adoption of a female child by a Single Hindu male is permissible if all the requisite conditions as specified under Section 7 read with Sections 9 and 11 are being fulfilled by the Adoptive father and if the child to be adopted satisfies the criteria as stipulated under Section 10 of the HAMA, 1956. Further, the Hon'ble Supreme Court in *Sitabai & Anr. versus Ram Chandra* reported in (1969) 2 SCC 544 has observed that a Single Hindu male can take in adoption a child (male or female) while interpreting Section 7 of the HAMA, 1956. The relevant para is being reproduced herein under:-

“5. It is clear on a reading of the main part of Section 12 and sub-section (vi) of Section 11 that the effect of adoption under the Act is that it brings about severance of all ties of the child given in adoption in the family of his or her birth. The child altogether ceases to have any ties with the family of his birth. Correspondingly, these very ties are automatically replaced by those created by the adoption in the adoptive family. The legal effect of giving the child in adoption must therefore be to transfer the child from the family of its birth to the family of its adoption. The result is, as mentioned in Section 14(1) namely where a wife is living, adoption by the husband results in the adoption of the child by both these spouses; the child is not only the child of the adoptive father but also of the adoptive mother. In case of there being two wives, the child becomes the adoptive child of the senior-most wife in marriage, the junior wife becoming the step-mother of the adopted child. Even when a widower or a bachelor adopts a child, and he gets married subsequent to the adoption, his wife becomes the step-mother of the adopted child. When a widow or an unmarried woman adopts a child, any husband she marries subsequent to adoption becomes the stepfather of the adopted child...”

: Swati Bhardwaj, Senior Associate

- THE ART OF SURVEILLANCE BY STATE

The art of surveillance in India is as old as the erstwhile British laws which continue to run the operations even today. That section 5 of the Indian Telegraph Act, 1885 empowers the government or state to take possession of licensed telegraphs and to order interception of messages. On the occurrence of any public emergency, or in the interest of public safety, the Central government or State government or any person specifically authorized by the Central or State government, if satisfied that it is necessary or expedient to do so, may take temporary possession of any telegraph established, maintained or worked by any person licensed under the Indian Telegraph Act.

Noteworthy to mention that a telephone being a form of telegraph also falls under the purview of the Indian Telegraph Act, 1885.

That Justice Kuldeep Singh while passing the landmark judgment in **People's Union for Civil Liberties Vs Union of India, AIR 1997 SC 568** held that, *"Telephone - Tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of subrosa operation as a part of its intelligence outfit but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day."*

However, in the aforementioned judgment the Hon'ble Supreme Court, also held that right to privacy was a part of right to life and personal liberty enshrined under Article 21 of the Constitution and once a fact is established as a case constituting a right to privacy, Article 21 would be attracted and the said right cannot be curtailed, except according to the procedure established by law.

That the Hon'ble Supreme Court has also laid down certain broad guidelines, which the Government is required to adhere to, while intercepting any message as per Section 5(2) of the Telegraph Act, which are as mentioned hereinbelow:-

1. An order for telephone-tapping in terms of Section 5(2) of the Act shall not be issued except by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department the Government of India and the State Governments not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned with one week of the passing of the order.
2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the order.

3. The matters to be taken into account in considering whether an order is necessary under Section list of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.
4. The interception required under Section 5(2) of the Act shall be the interception of such communications as are sent to or from one or more addresses specified in the order belong an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises described in the order.
5. The order under Section 5(9) of the Act shall, unless renewed, case to have effect at the end of the period of two month from the date of issue. The authority which issued the order may, at any time before the end of two-month period renew the order if it by the State Government.
 - (a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2) of the Act. Where there is or has been an order whether there has been any contravention of the provisions of Section 5(2) of the Act.
 - (b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material.
 - (c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months.
6. The authority which issued the order shall maintain the following records:
 - (a) the intercepted communications,
 - (b) the extent to which the material is disclosed,
 - (c) the number of persons and their identity to whom any of the material is disclosed.
 - (d) the extent to which the material is copied and
 - (e) the number of copies made of any of the material.
7. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act.
8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Act.
9. There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed 5(2) of the Act, it shall record the finding to that effect.

Thus, in view of the guidelines laid down by the Hon'ble Supreme Court, any interception of communication in any manner whatsoever by the Authorised law enforcement agencies (for e.g. CBI, DRI, ED, CBDT, RAW & NIA etc.) is to be carried out in strict compliance and in accordance with Section 5(2) of the Telegraph Act, 1885 read with Rule 419A of the Indian Telegraph (Amendment) Rules, 2007.

Further, in addition to the powers with the state under the Telegraph Act vide Section 69 of the Information Technology Act, 2000 further empowers the Central Government or even a State Government to intercept, monitor or decrypt the information generated, transmitted, received or even stored in any computer resource in the interest of the sovereignty or integrity of India, the security of the State or in the interest of maintaining public order.

It is important to note that as the technology has undergone a massive change, the Telegraph Act 1885 deals only with the interception of calls and whereas, the Information technology Act, 2000 read with Information Technology (Procedure for Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 deals specifically with the interception of electronic data.

The detailed procedure enshrined in Information Technology (Procedure for Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, provides the following safeguards :

1. Recording of reasons for interception of any information.
2. Direction for interception shall not exceed 60 days from the date of its issue. It could be further renewed but the period shall not exceed the total period of 180 days.
3. Destruction of records of information obtained from such interception with six (6) months unless such information is required for functional needs.
4. Further, there is a confidentiality obligation on the intermediaries not to disclose any information obtained to third party.

However, in the wake of recent ongoing case of Pegasus Spyware, there is an allegation of use of a spyware to hack into the mobile phones of the users and Section 43 of the Information Technology Act, 2000 does not allow hacking of the computer, computer system or computer network (mobile phones) by any person.

Lexstone Insight: Telephone Tapping would violate Article 21 of the Indian Constitution and also violate the right to freedom of speech and expression under Article 19 unless it was carried out by the set procedure established by law.

: Rohit Kaul, Principal Associate

- Succession Certificates in India

Succession means : "The law and procedures under which beneficiaries become entitled to property under a testator's will or on intestacy." A certificate granted by a competent court to collect the debts and securities of the deceased, as also to receive interests or dividends on and to negotiate or transfer securities. A document through which the disposition of deceased's property is made is called succession certificate. This certificate is given under section 370-390 of the succession act.

The Indian Succession Act, 1925 defines a succession certificate as a certificate issued by a court to the legal heirs of a deceased to establish the authenticity of the heirs and give them the authority to inherit debts, securities and other assets of the deceased. The purpose of a succession certificate is limited in respect of debts and securities such as provident fund, insurance, deposits in banks, shares, or any other security of the central government or the state government to which the deceased was entitled. Its main objective is to facilitate collection of debts on succession and afford protection to the parties paying debts to the representatives of the deceased person.

A succession certificate may be used in situations where banks, financial and private institutions release funds to the nominee (where such nominee is not the legal beneficiary of the asset) and the nominee refuses to cooperate in distribution of the asset to the legal beneficiary. A succession certificate, strictly speaking, does not effect adjudication of title of the deceased far less than that of the holder as regards the debts and securities covered thereunder. Yet, simply to afford protection to the parties paying the debts. The grant of succession certificate is conclusive against the debtor.

A succession certificate is effect throughout the whole India as per section 380 of The Indian Succession Act, 1925 (herein after referred as the Act). According to sections 381 and 386 of the Act, a succession certificate is conclusive as against the person/persons liable to whom full indemnity is afforded (make available) for payments made. But, despite the succession certificate is only conclusive of the representative title of the holder thereof as against the debtors, a suit of declaration will not lie that the holder of the certificate is not the legal representative of the deceased. Similarly, a succession certificate may be useful to prove genuineness of the claimant where the inheritance amount is substantial. Additionally, in certain states, a probate (meaning a copy of the will, if it exists, authenticated by the Court) and a succession certificate are compulsory to transfer the title of an immovable property.

Application for Certificate

Application for succession certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the C.P.C for the signing and verification of a plaint by or on behalf of a plaintiff. Following are the particulars for the application of succession certificate.

- (i) Date of death of deceased
- (ii) Place of residence of deceased
- (iii) Family of Deceased and their respective residences.
- (iv) Right of Petitioner: The application must show some title or interest in the debt or security, in respect of which they has applied for the certificate. If two or more persons apply, the court must decide who has the preferential claim.
- (v) Absence of any impediment
- (vi) Debts or security in respect of which the certificate is applied for.

Competent Court to grant succession certificate:

Section 371 of the Act explains that - "The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this part." Following are the some important points of section 371:

- (i) Application : Application for succession certificate will be presented before a District Judge.
- (ii) Residence of Deceased with his Jurisdiction : The application will be presented before such District Judges within whose jurisdiction the deceased was ordinarily residing at the time of his death.
- (iii) No fixed place of Residence : If the deceased had no fixed place of residence at the time of his death, then application will be presented before such-district Judge within whose jurisdiction any part of the property of the deceased may be found.

Grant of Succession Certificate- Certain Restrictions:

Under the following circumstances, no succession certificate can be granted.

- i) under section 370 (1) of the Act, as to any debt or security to which a right is required to be established by probate or letters of administration;
- ii) that too, if sections 212 of the Act applies;
- iii) if section 213 of the Act applies;
- iv) that is to say that where law requires probates or letters of administration as mandatory to establish right to property as in the cases of Parsis, Jews, East Indians, Europeans and Americans.
- v) Provided that nothing will prevent as to granting a succession certificate to any person entitle to the effects of a deceased Indian Christian or any part thereto pertaining to any debt or security, that the right can be established by letters of administration.

Effect of Succession Certificate:

To know the effect of succession certificate, it is apt to see section 381 of the Act. The succession certificate simply affords protection to the parties paying debts. It is thus clear that there is absolutely no adjudication of title of the deceased.

Section 376 of the Act provides that the succession certificate can be extended in respect of any debt or security not originally specified therein and if such extension is ordered, it shall have the same effect as if the debt or security to which the succession certificate is extended had been originally specified. The District Judge can extend a succession certificate only on the application of the holder of a succession certificate and not of any other person.

Case laws:

In the case of *Muthia vs Ramnatham*, 1918 MWN 242, it was held that the grant of certificate gives to the grantee a title to recover the debt due to the deceased, and payment to the grantee is a good discharge of the debt." In the case of *Srinivasa vs Gopalan*, , it was held that " The question whether the debt belonged to the deceased is not a matter to be decided on an application for a succession Certificate."

In the case of *Paramananda Chary vs Veerappan*, AIR 1928 Madras 213: 82 IC 604, it was held that "The grant of succession certificate is conclusive against the debtor. Even if another person turns out to be the heir of the deceased, it does not follow that the certificate is invalid."

In the case of *Ganga Prasad vs Saudan*, it was observed that section 381 of the Act protects the debtors and affords full indemnity to the persons liable to pay the debts and in respect of the securities covered by the certificate as persons having the same paid in "good faith".

Legal Heirship Certificate

A number of other documents such as legal heirship certificate, nominations and death certificate may be procured, as an alternative to a succession certificate, for the purpose of establishing an inheritance or aiding in the transfer of assets from the deceased. It is comparatively easier to obtain these documents. In some cases, a legal heirship certificate may be relied upon in the place of a succession certificate merely because family members are able to obtain a legal heirship certificate with much ease and speed. Therefore, families typically first apply for a legal heirship certificate and in the event a legal heirship certificate is not accepted by the relevant authority for any reason, then a succession certificate is applied for.

A legal heirship certificate establishes the relationship of the heirs to deceased for claims relating to pension, provident fund, gratuity or other service benefits of central and state government departments, specifically when the deceased has not selected a nominee. Banks and private companies also accept such certificates for allowing transfer of deposits, balances, investments, shares, etc.

Legal Heirship Certificate vis-à-vis Succession Certificate

A legal heirship certificate is issued to identify the living heirs of a deceased person whereas succession certificate is issued to establish the authenticity of the heirs and give them the authority to inherit debts, securities and other assets that the deceased may have left behind.

Conclusion :

Succession certificate is to provide speedy remedy and quick decision in succession matters so that legal heirs of deceased may have their share in movable assets ascertained, allocated and disbursed as there may be a needy family requiring immediate disbursement of amount to meet, its merging and day to day needs of life.

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