JURISPRUDENCE: LITERARY SOURCES OF LAW- ACADEMIC WRITINGS & TEXTBOOKS

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ABSTRACT

The meaning of the term "sources of law" differs from writer to writer. The positivists use the term to denote the sovereign or the State who makes and enforces the laws. The historical school uses the term to refer to the origins of law. Others use it to indicate the causes or subject matter of law. Prof. Fuller, in his "Anatomy of the Law", states that a judge interprets and applies certain rules to decide upon a case. Such rules are obtained from various places which are known as "sources". He further goes on to give examples of the common sources of law such as codified laws, judicial precedents, customs, juristic writings, expert opinions, morality and equity. Holland has defined the term to mean the sources of the knowledge regarding law.

The Early English Judges who administered the law, had brought in their own notions, in form of Judicial Precedents, thus influenced the development of law and eventually it became an important Source of Law. Apart from this, Academic Writings and Textbooks of Jurists were also given importance with regard to their Persuasive and Authoritative Value.

LITERARY SOURCES OF LAW

ACADEMIC WRITINGS & TEXTBOOKS

They are basically those documents that have been referred to by Universities & Students. Generally authored by Academic Staff, Practicing Councils and Lawyers.

It is a long- form of publication, as opposed to a short- form of publication like an article, and is the result of in- depth academic research, usually over a period of years, making an original contribution to a field of study.

These books are the perception of the author, writing the book. It is the courts choice, if it is well recognized, it may have authoritative value.

Examples:

- Salmond – on Jurisprudence
- Pollock- on Contracts
- Sutherland – on Criminology
- Williams – on Criminal Law
- Kanga & Palkhivala – on Income Tax
- J.G. Starke- on Public International Law

Following are 5 case laws where Academic Writings & Textbooks have been referred:

In Sri Ram Pasricha v. Jagannath and Ors. (1976)

Civil Appeal No. 1223 of 1975

This was an appeal by the defendant – tenant by certificate from the judgement of the Calcutta High Court. The question was- Whether a landlord who is a co- owner of the premises with others is "the owner" within the meaning of S.13(1)(f) of the West Bengal Premises Tenancy Act, 1956.

The plaintiff was only a co- sharer owner of the suit premises being one of the heirs of his father, who originally owned the property. He instituted a suit for eviction of the defendants in Dec. 1962, on the twin pleas of default in payment of rent and reasonable requirement of the premises for his own occupation as well as for the occupation of the members of his joint family.

The Single Bench of the High Court accepted the contention of the defendants and dismissed the suit observing: "It will not be sufficient if the reasonably requirement is of all members of

the family of co- owners but such co- owners must again be the landlords who are only made entitled to a decree for recovery of the possession under Sec. 13(1)(f)."

The Division Bench of the High Court did not agree with the Single Judge and set aside the decision and declared the suit for eviction. The Division Bench held: "In our opinion a co-owner is as much as absolute owner as a sole owner is with reference to the interest held by him."

Mr. V.S. Desai, Senior Advocate on behalf of the Respondent referred to **Salmond**- on Jurisprudence (13th Edn.), Chapter. 8 (Ownership), para 46 at p. 254"

"As a general rule a thing is owned by one person only at a time, but duplicate ownership is perfectly possible. Two or more persons may at the same time have ownership of the same thing vested in them. This may happen in several distinct ways, but the simplest and most obvious case is that of co- ownership, partners, for example, are co- owners of the chattels which constitute their stock – in – trade, of the lease of the premises on which their business is conducted, and of the debts owing to them by their customers. It is not correct to say that property owned by co- owners is divided between them, each of them are owning a separate part. It is an undivided unity, which is vested at the same time in more than one person… The several owner-ship of a part is a different thing from the co- ownership of the whole. So soon as each of two- owners begins to own a part of the thing instead of the whole of it, the co-ownership has been dissolved into sole ownership by the process known as partition. Co-ownership involves the undivided integrity of what is owned."

Jurisprudentially it is not correct to say that a co- owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part- owner or a fractional owner of the property.

As all the submissions of the appellant failed, the appeal was dismissed.

In Darshan Singh v. State of Punjab, (2010) 2 SCC 333

Criminal Appeal No. 1057 of 2002

The dispute was between very close and intimate family members. Deceased Gurcharan Singh was the brother of Bakhtawar Singh and uncle of Darshan Singh. The agriculture fields of both brothers, Gurcharan Singh and Bakhtawar Singh were situated adjoining to each other. Gurdish Singh, and his father, Gurcharan Singh were irrigating their aforesaid fields and were also mending its ridges and at that time Gurdev Singh, and Ajit Singh were also present there.

In the meantime, Darshan Singh and Bakhtawar Singh came there from the side of their fields raising lalkaras and abused the complainant party. Darshan Singh, accused was armed with DBBL gun and his father Bakhtawar Singh was carrying a gandasa and they were saying that they would teach a lesson to the complainant party for cutting the ridges.

According to the prosecution, Bakhtawar Singh gave a gandasa-blow causing injuries on the chest of Gurcharan Singh. Gurcharan Singh was also having a gandasa with him and in order to save himself he also caused injury on the head of Bakhtawar Singh.

Thereafter, Darshan Singh fired two shots from his licensed gun which hit Gurcharan Singh in the chest. Gurcharan Singh fell down and died at the spot. Gurdish Singh and others retraced their steps in order to save themselves. Both the accused in order to save themselves ran towards their respective houses.

Darshan Singh and Bakhtawar Singh pleaded non- guilty & claimed to have acted in self-defence.

The court referred to Sec. 96, 97, & 100 of IPC.

> "96. *Things done in private defence*.
>
> 97. *Right of private defence of the body and of property*.
>
> 100. *When the right of private defence of the body extends to causing death"*

Both Darshan Singh and Bakhtawar Singh were acquitted by the Sessions Court, Ludhiana. The said judgment of acquittal was set aside by the High Court of Punjab and Haryana at Chandigarh. Darshan Singh and Bakhtawar Singh filed appeal against the said judgment before the Supreme Court.

The Court referred to the following books:

- Hari Singh Gaur in his book on *Penal Law of India* (11th Edn., 1998-1999) aptly observed that self-help is the first rule of criminal law. It still remains a rule, though in process of time much attenuated by considerations of necessity, humanity, and social order.
- According to Bentham, in his book *Principles of Penal Laws*, "the right of defence is absolutely necessary". It is based on the cardinal principle that it is the duty of man to help himself.
- The right to protect one's own person and property against the unlawful aggressions of others is a right inherent in man. The duty of protecting the person and property of others is a duty which a man owes to society of which he is a member and the preservation of which is both his interest and duty. It is, indeed, a duty which flows from human sympathy. As Bentham said:

  "It is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong. It is a noble movement which makes us forget our danger at the first cry of distress…. It concerns the public safety that every honest man should consider himself as the natural protector of every other."

- A legal philosopher Michael Gorr in his article "Private Defense" (published in the journal *Law and Philosophy* Vol. 9, No. 3/August 1990 at p. 241) observed as under:

  "Extreme pacifists aside, virtually everyone agrees that it is sometimes morally permissible to engage in what Glanville Williams has termed 'private defence' i.e. to inflict serious (even lethal) harm upon another person in order to protect oneself or some innocent third party from suffering the same."

  The Supreme held:

  "The role attributed to the appellant is fully covered by his right of private defence. Consequently, the appellant is acquitted. The appellant was released on bail by this Court. He need not surrender. The appeal is accordingly allowed and disposed of."

SBI v. Indexport Registered, (1992) 3 SCC 159

Civil appeal N. 1888 of 1992

The appellant – Bank granted a Packing Credit Facility to the respondent 1 firm to the extent of Rs. 1 lakh. The firm consisted of 2 partners – one 'A' (since deceased) and respondent 2 (defendant 2). Respondent 2 created an equitable mortgage of his shop as security and respondent 4. Father of 'A' stood as guarantor for the loan.

The appellant filed a suit for money decree against the respondents, impleading respondent 3, the mother of 'A' in place of the deceased son who had died prior to filing the suit.

The trial court passed a composite decree comprising of a personal money decree against all the defendant – judgement debtors (respondents 1 to 4) for recovery of the decretal amount with interest and costs as also a mortgage degree only against defendant 2, entitling the Bank to sell the mortgaged shop in case of non- payment of the decretal amount within 3 months from the date of decree.

The appellant filed an application for execution of the decree against the guarantor (respondent 4).

The appeal was directed against the judgment of the High Court of Delhi, whereby the High Court was pleased to dismiss the revision petition filed by the appellant-Bank against the judgment of the Additional District Judge, Delhi, whereby the Additional District Judge, Delhi, relying upon the decision of this Court in *Union Bank of India* v. *Manku Narayana* [(1987) 2 SCC 335 : AIR 1987 SC 1078] dismissed the Execution Application No. 39 of 1985 against respondent 4 (judgment debtor-Guarantor).

- Section 128 of the Indian Contract Act itself provides that "the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract".

Along with many case laws, the court referred to some books:

- In Pollock & Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at page 728 it is observed thus:

  "*Coextensive*.— Surety's liability is coextensive with that of the principal debtor.

  A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."

- In *Chitty on Contracts*, 24th Edition, Volume 2 at page 1031 paragraph 4831 it is stated as under:

  "*Conditions precedent to surety*.— Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."

- In *Halsbury's Laws of England*, Fourth Edition, Vol. 20, paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for".

  The Supreme Court held:

  "The result is that the appeal is allowed and the impugned orders of the High Court and of the learned Additional District Judge are set aside and it is held that the decree-holder is entitled to proceed against the guarantor (judgment-debtor 4) for the execution of the aforesaid decree."

  "In view of the result of the appeal, the decree-holder-bank will be entitled to proceed against judgment-debtor 4 to the extent of the decretal amount recoverable from the bank guarantee furnished by him and also to proceed in execution in accordance with law for the balance amount, if any."

In Khenyei v. New India Assurance Co. Ltd., (2015) 9 SCC 273

In the appeals, the main question which arose for consideration was, whether it is open to a claimant to recover entire compensation from one of the joint tortfeasors, particularly when in the accident caused by composite negligence of drivers of trailer-truck and bus has been found to be 2/3rd and 1/3rd extent, respectively.

In the instant cases the injuries were sustained by the claimants when two vehicles—bus and trailer-truck collided with each other. New India Assurance Co. Ltd. is admittedly the insurer of the bus. However, on the basis of additional evidence adduced, the High Court came to the conclusion that New India Assurance Co. Ltd. is not the insurer of the trailer-truck, hence is not liable to satisfy 2/3rd of the award.

The court was of the view that: "It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tortfeasors. In a case of accident caused by negligence of joint tortfeasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tortfeasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the court. However, in case all the joint tortfeasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter se equities between them at an appropriate stage. The liability of each and every joint tortfeasor vis-à-vis to the plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tortfeasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant."

The following writings were referred:

- In *Law of Torts*, 2nd Edn., 1992 by Justice G.P. Singh, it has been observed that in composite negligence, apportionment of compensation between two tortfeasors is not permissible.
- In *Law of Torts* by Winfield and Jolowicz, 17th Edn., 2006, the author has referred to *Performance Cars Ltd.* v. *Abraham* [(1962) 1 QB 33 : (1961) 3 WLR 749 : (1961) 3

All ER 413 (CA)] , *Baker* v. *Willoughby* [1970 AC 467 : (1970) 2 WLR 50 : (1969) 3 All ER 1528 (HL)] , Rogers on *Unification of Tort Law: Multiple Tortfeasors*, *Great North Eastern Railway Ltd.* v. *Hart* [2003 EWHC 2450 (QB)] , *Mortgage Express Ltd.* v. *Bowerman & Partners* [(1996) 2 All ER 836 (CA)] and observed thus:

"Where two or more people by their independent breaches of duty to the claimant cause him to suffer distinct injuries, no special rules are required, for each tortfeasor is liable for the damage which he caused and only for that damage. Where, however, two or more breaches of duty by different persons cause the claimant to suffer a single, indivisible injury the position is more complicated. The law in such a case is that the claimant is entitled to sue all or any of them for the full amount of his loss, and each is said to be jointly and severally liable for it. If the claimant sues Defendant A but not B and C, it is open to A to seek 'contribution' from B and C in respect of their relative responsibility but this is a matter among A, B and C and does not affect the claimant. This means that special rules are necessary to deal with the possibilities of successive actions in respect of that loss and of claims for contribution or indemnity by one tortfeasor against the others. It may be greatly to the claimant's advantage to show that he has suffered the same, indivisible harm at the hands of a number of defendants for he thereby avoids the risk, inherent in cases where there are different injuries, of finding that one defendant is insolvent (or uninsured) and being unable to execute judgment against him. Even where all participants are solvent, a system which enabled the claimant to sue each one only for a proportionate part of the damage would require him to launch multiple proceedings, some of which might involve complex issues of liability, causation and proof. As the law now stands, the claimant may simply launch proceedings against the 'easiest target'. The same picture is not, of course, so attractive from the point of view of the solvent defendant, who may end up carrying full responsibility for a loss in the causing of which he played only a partial, even secondary role. Thus, a solicitor may be liable in full for failing to point out to his client that there is reason to believe that a valuation on which the client proposes to lend is suspect, the valuer being insolvent; and an auditor will be likely to carry sole responsibility for negligent failure to discover fraud during a company audit. A sustained campaign against the rule of joint and several liability has been mounted in this country by certain professional bodies, who have argued instead for a regime of "proportionate liability" whereby, as against the claimant, and

not merely among defendants as a group, each defendant would bear only his share of the liability. While it has not been suggested here that such a change should be extended to personal injury claims, this has occurred in some American jurisdictions, whether by statute or by judicial decision. However, an investigation of the issue by the Law Commission on behalf of the Department of Trade and Industry in 1996 led to the conclusion that the present law was preferable to the various forms of proportionate liability."

- Pollock in *Law of Torts*, 15th Edn., has discussed the concept of composite negligence. The relevant portion at p. 361 is extracted below:

"Another kind of question arises where a person is injured without any fault of his own, but by the combined effects of the negligence of two persons of whom the one is not responsible for the other. It has been supposed that A could avail himself, as against Z who has been injured without any want of due care on his own part, of the so-called contributory negligence of a third person B. It is true you were injured by my negligence, but it would not have happened if B had not been negligent also, therefore, you cannot sue me, or at all events not apart from B. Recent authority is decidedly against allowing such a defence, and in one particular class of cases it has been emphatically disallowed. It must, however, be open to A to answer to Z: You were not injured by my negligence at all, but only and wholly by B's. It seems to be a question of fact rather than of law (as, within the usual limits of a jury's discretion, the question of proximate cause is in all ordinary cases) what respective degrees of connection, in kind and degree, between the damage suffered by Z and the independent negligent conduct of A and B will make it proper to say that Z was injured by the negligence of A alone, or of B alone, or of both A and B. But if this last conclusion be arrived at, it is now quite clear that Z can sue both A and B."

At p. 362 the author has observed as:

"The strict analysis of the proximate or immediate cause of the event: the inquiry who could last have prevented the mischief by the exercise of due care, is relevant only where the defendant says that the plaintiff suffered by his own negligence. Where negligent acts of two or more independent persons have between them caused damage to a third, the sufferer is not

driven to apply any such analysis to find out whom he can sue. He is entitled, of course, within the limits set by the general rules as to remoteness of damage, to sue all or any of the negligent persons. It is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover in the whole more than his whole damage."

The Court held that:

(i) In the case of composite negligence, the plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis-à-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/Tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of the payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/Tribunal, in the main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/Tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.

(v) Resultantly, the appeals are allowed. The judgment and order passed by the High Court is hereby set aside. Parties to bear the costs as incurred.

In Commissioner of Income Tax v. Bankipur Club Ltd (1997) 5 SCC 394

The question in the appeals was whether the assessee members (club, social action groups) were entitled to exemption for the receipts or surplus arising from the sales of drinks, refreshments, etc, or amounts received by way of rent for letting out buildings or amounts received by way of admission fees, periodical subscriptions and receipts of similar nature, from their members.

The supreme court held: "The receipts for the various facilities extended by the clubs to their members, as stated as part of the usual privilages, advantages and conveniences, attached to the membership of the club, cannot be said to be 'a trading activity'. The surplus – excess of receipts over the expenditure – as a result of mutual arrangement, cannot be said to be 'income' for the purpose of the IT Act."

The Court referred to the following:

- In *Halsbury's Laws of England*, 4th Edn., Reissue, Vol. 23, paras 161 and 162 (pp. 130 and 132), the relevant law is stated thus:

"Where a number of persons combine together and contribute to a common fund for the financing of some venture or object and will in this respect have no dealings or relations with any outside body, then any surplus returned to those persons cannot be regarded in any sense as profit. *There must be complete identity between the contributors and the participators*. If these requirements are fulfilled, it is immaterial what particular form the association takes. … trading between persons associating together in this way does not give rise to profits which are chargeable to tax."

- *Simon's Taxes*, Vol. B, 3rd Edn., paras B1.218 and B1.222 (pp. 159 and 167), formulate the law on the point, thus:

"… it is settled law that if the persons carrying on a trade do *so in such a way that they and the customers are the same persons*, no profits or gains are yielded by the trade for tax purposes

and therefore no assessment in respect of the trade can be made. Any surplus resulting from this form of trading represents only the extent to which the contributions of the participators have proved to be in excess of requirements. Such a surplus is regarded as their own money and returnable to them. In order that this exempting element of mutuality should exist it is essential that the profits should be capable of coming back at some time and in some form to the persons to whom the goods were sold or the services rendered."

- In *British Tax Encyclopaedia* (I), 1962 Edn. (edited by G.S.A. Wheatcroft) at pp. 1200 and 1201, dealing with "mutual trading operations", the law is stated thus:

"In several early cases there were dicta to the effect that a man could not make a profit by trading with himself; this developed into the proposition that when persons contribute to a common fund in pursuance of a scheme for their mutual benefit, having no dealings or relations with any outside body, they cannot be said to have made a profit when they find they have overcharged themselves and that some portion of their contributions may be safely refunded. It has also been established *that the same principle applies although the contributors incorporate themselves into a separate entity to carry out the mutual scheme and the surplus contributions are put to reserve and not immediately returned*. For this doctrine to apply it is essential that all the contributors to the common fund are entitled to participate in the surplus and that all the participators in the surplus are contributors, *so that there is complete identity between contributors and participators*. This means identity as a class, so that at any given moment of time the persons who are contributing are identical with the persons entitled to participate; it does not matter that the class may be diminished by persons going out of the scheme or increased by others coming in."

- In *The Law and Practice of Income Tax*" (8th Edn., Vol. I, 1990) by Kanga & Palkhivala at p. 113, thus:

"… 'The contributors to the common fund and the participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what he has paid.' The Madras, Andhra Pradesh and Kerala High Courts have held that the test of mutuality does not require that the contributors to the common fund should willy-nilly

distribute the surplus amongst themselves: it is enough if they have a right of disposal over the surplus, and in exercise of that right they may agree that on winding up the surplus will be transferred to a similar association or used for some charitable objects."