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IMPORTANT CASE LAWS

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SUPREME COURT CITATIONS CIVIL CASES

2011-5-L.W. 54

**Ganeshi (D) through LRs & Ors
Vs
Ashok & Anr**

C.P.C., Section 100 / Finding of the First Appellate Court that the Family Settlement is not a transfer of property, and bona fide to avoid disputes in the family and that the earlier decree in Civil Suit of 1978 was only in pursuance of that Family Settlement was right, held, hence it could not be interfered with in Second Appeal – As the judgment of the first appellate court was the last court of facts, the findings of fact given by it are based on relevant evidence and hence the High Court was not justified in interfering with those findings.

Family Settlement – Not a transfer of property.

Appeal before Supreme Court arose out of suit for declaration that the decree passed in the earlier suit of 1978, relating to the suit land be declared null and void and a declaration be given that the plaintiffs have a right to inherit the suit land on the death of defendant No. 1 and in the alternative for declaration that the alienation of the suit land made by defendant No. 1 in favour of defendants 2 to 5 by the aforesaid judgment and decree dated 27.10.1978 is null and void being against the custom and will not operate against the right for succession of the plaintiffs and other heirs of defendant No. 1 on his death.

The trial court decreed the suit holding that the judgment and decree dated 27.10.1978 amounts to alienation and without consideration and legal necessity. It was held that the decree created new rights in defendants Nos. 2 to 5, and it cannot be said to be based on family settlement. Any alienation of immovable property of value of ₹ 100/- had to be registered and in the present case, the alienation is not by a registered document.

First appellate court held that plaintiffs Nos. 1 & 2 (respondents in the first appeal) was given land in 1969 by way of gift by Geneshi and because of this there was some unrest in the family, and hence the family settlement was made.

In second appeal, the High Court has set aside the judgment of the first appellate court and restored the judgment of the trial court. **Held:** the judgment of the High Court cannot be sustained. It is well settled that the High Court in second appeal cannot interfere with the findings of fact of the first appellate court.

A family settlement is not a transfer of property, as rightly held by the first appellate court. The first appellate court held that the family settlement was bona fide to avoid disputes in the family. The decree in Civil Suit No. 476 of 1978 was only in pursuance of that family settlement, and hence it could not be interfered with.

2011-5-L.W. 73

**Ramesh Kumar & Anr
Vs
Furu Ram & Anr**

Fraud / Agreements, awards and decrees obtained by fraud, null and void, Setting aside of, Scope, Facets of Fraud,

Contract Act (1872), Section 17 / 'Fraud'; Ingredients of,

Arbitration Act (1940), Sections 14, 17 / Awards, Decree in terms of Award obtained by fraud, Collusion, Setting aside of, Entire Proceedings, sham and bogus, Sections 32, 33 / Bar of suit, Scope,

Registration Act (1908), Sections 17, 49 / Unregistered Arbitration Award, Stamp Fraud,

Evidence Act (1872), Section 114 / Illustration (g),

Practice / Arbitration Awards, Registration, Stamp duty, Evasion of.

Appellants sought a declaration that the orders dated 30.3.1992 passed by the Senior Sub-Judge, Kurukshetra in C.S.No.366 and 367 of 1992 (directing that decree be drawn in terms of the awards dated 13.3.1992); as also the agreements dated 12.3.1992 and the awards dated 13.3.1992 which led to such decrees, were null and void, as they were the result of fraud and misrepresentation; and that the mutations of properties obtained on the basis of the said decrees were also null and void.

Held: Respondents had conspired with DW 1 and Dw 3 and got certain documents prepared and persuaded appellants to give their consent by misrepresenting to them that they were giving consent for giving their lands for cultivation to respondents for a period of one and half years as per the settlement.

Respondents wanted to avoid payment of stamp duty and registration charges on the sale deeds – They were advised by their lawyer that they could get decrees from a Civil Court in terms of an arbitration award so that sale deeds need not be executed and stamp duty and registration charges need not be paid – It was decided by the respondents on the advice of their lawyer to get arbitration awards declaring them as owners and also get court decrees in terms of the awards.

Agreements, arbitration awards and decrees were sham and nominal, the object of respondents being to evade the stamp duty and registration charges payable with respect to a sale deed, by obtaining decrees from the court in terms of the awards which declared their title.

There can be a reference to arbitration only if there is a dispute and there is an agreement to settle the dispute by arbitration – Respondents, on the advice of their advocate decided to have a nominal and sham arbitration proceeding and award and get decrees made in terms of the award, only to avoid stamp duty and registration charges.

Entire procedure was fraudulent because (i) there was no dispute between the parties; (ii) there was no reference of any dispute to arbitration; (iii) the reference agreements were prepared and executed in pursuance of a pre-existing arrangement to have a collusive award; (iv) the arbitrator was not required to decide any dispute between the parties, nor was there any adjudication of the dispute by the arbitrator.

Modus operandi adopted by the respondents to obtain title to lands without a conveyance and without incurring the stamp duty and registration charges by obtaining a sham and collusive arbitration awards when there was no dispute, and then obtaining a nominal decree in terms of the said awards, would be a fraud committed upon the court and the State Government by evading liability to pay the stamp duty and registration charges.

Irregularities, illegalities, suppressions and misrepresentations which culminated in the orders directing that the awards be made decrees of the court, show that the decrees in terms of the awards were obtained fraudulently.

Awards are clearly documents which purport or operate to create and declare a right, title or interest in an immoveable property of the value of more than ₹ 100 which was not subject of the dispute or reference to arbitration – Awards were compulsorily registrable - Unregistered awards which are compulsorily registrable under section 17(1) (b) could neither be admitted in evidence nor can decrees be passed in terms of the same.

If the parties had already settled their disputes and the arbitration award was only a ruse to avoid payment of stamp duty and registration with respect to a sale deed and declare a title in persons who did not have title earlier, then the entire proceeding is sham and bogus.

(2011) 8 Supreme Court Cases 249

Ramrameshwari Devi and Ors

Vs

Nirmala Devi and Ors

Civil suit – Abuse of process of court – Dilatory tactics – Consequent harassment of opposite party, wastage of court's time and benefit to wrongdoer under existing system of administration of civil litigation – Wrongdoer should not get benefit out of frivolous litigation – Steps for improving the system – Penal costs, mesne profits and prosecution for perjury.

Prolonging trial by creating obstacles by making frivolous applications or filing forged documents with motive of avoiding dispossession of unauthorized persons (defendants) from immovable property of plaintiff – Even if wrongdoers are ultimately evicted from property by court after a long lapse of time, they are not generally adequately punished – Thus there is an inherent gain or incentive for wrongdoers under present system which requires to be eliminated.

Steps laid down for trial courts for improving the existing system – Court should scrutinize, check and verify pleadings and documents filed by parties immediately after filing of plaint – It should prepare a complete schedule and fix dates for all stages of suit at time of filing of plaint – It should resort to discovery and production of documents and interrogatories at the earliest.

It should impose actual, realistic and proper costs on wrongdoers, grant mesne profits at market rate to affected party and also order prosecution of wrongdoer for perjury in appropriate cases – Principle of restitution should be fully applied.

Ad interim ex parte injunction should be granted only in exceptional cases and ordinarily court should issue short notice to defendants and pass appropriate order only after hearing parties concerned – If any party is found to have obtained ex parte injunction on the basis of false pleadings and forged documents, it should be punished.

Court should resolve human or commercial problem involved in the case in accordance with settled principles of law and justice - Civil Procedure Code, 1908 – Ors. 6, 7, 8, 11, 14, 18, Or. 20 R. 12 and Ss. 35, 35-A and 144 – Restitution – Disgorgement of gains of wrongdoer – Litigant making unjust gains from abuse of process of court – Disgorgement of such gains – Specific Relief Act, 1963 – Ss. 5 and 6 – Penal Code, 1860, Ss. 191 to 193 and 196 to 200.

Civil Procedure Code, 1908 – Or.39 Rr. 1, 2, 3 & 3-A, Or. 20 R. 12 and S. 144 – Ad interim ex parte injunction – Principles for grant of – Should be granted only in exceptional cases – Ordinarily, court should pass appropriate order only after issuing short notice to defendant and hearing both parties – While granting ex parte injunction, court should record undertaking from applicant that he would pay full restitution, mesne profit at market rate and actual costs in the event of dismissal of the application and suit – If anyone obtains ex parte injunction on false pleadings and forged documents, he should be prosecuted for perjury and adequately punished – If ex parte injunction is granted, court should dispose of injunction application at the earliest preferably as soon as defendant appears in court – Ad interim ex parte injunction should be granted only for a short period i.e. one week or so – Penal Code, 1860 – Ss. 191 to 193 and 196 to 200 – Practice and Procedure – Interim orders.

Civil Procedure Code, 1908 – Ss. 35, 35-A and 35-B – Realistic costs – Determination of – Abuse of process of court – Frivolous and dishonest litigation causing harassment to opposite party and wastage of court's time – Disgorgement of gains of wrongdoer – Factors to be considered for determining actual and realistic costs – Prevalent fee structure of lawyers – Other miscellaneous expenses which have to be incurred towards drafting and filing of counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc. – How long defendants or respondents were compelled to contest and defend the litigation in various courts – Relevance of – Costs of ₹ 2 lakhs imposed on appellants by Supreme Courts in addition to ₹ 75,000 costs imposed by High Court – Constitution of India – Art. 136 – Exemplary costs – When warranted – Penal Code, 1860 – Ss. 191 to 193 and 196 to 200 – Restitution – Desgorgement of gains of wrongdoer – Unjust enrichment from abuse of process – Imposition of exemplary costs to disgorge.

Civil Procedure Code, 1908 – Or. 14 R. 2, Or. 7 Rr. 11(b) & (c) and Or. 20 R. 5 – Preliminary issue – When may an issue be treated as a preliminary issue and be disposed of as such – Stage to which suit had advanced – Relevance of – Issue relating to proper valuation of suit for purpose of court fees and jurisdiction – If could be treated as a preliminary issue – Said issue, held, was only an averment made in the plaint and it neither related to jurisdiction of court to entertain suit nor to bar created by any law as provided in Or. 14 R. 2(2) – Suit had reached stage of final arguments after entire evidence had been led – Treating the issue as a preliminary issue would be against spirit of Or. 14 R. 2 and Or. 20 R. 5.

2011 (11) SCALE 266

State of Haryana
Vs
Mukesh Kumar & Ors.

ADVERSE POSSESSION – LIMITATION ACT, 1963 – ARTICLE 65 – Need for abolition of law of adverse possession – Parliament may consider abolishing the law of adverse possession or at least amending and making substantial changes in law in larger public interest – State of Haryana filed a civil suit through the Superintendent of Police, seeking a relief of declaration to the effect that it has acquired rights of ownership by way of adverse possession over land – It was also prayed that defendants be perpetually restrained from interfering with the peaceful possession of plaintiff over the suit land – Trial Court held that the plaintiff had failed to prove possession over the disputed property and revenue records showed that the defendants were the owners in possession of disputed property – Trial Court observed that possession of State, as claimed in the plaint for a continuous period of 55 years, stood falsified by the documents issued by officials of the State – On appeal, High Court held that action of the plaintiff in trying to grab the land/property of defendants under the garb of plea of adverse possession was deplorable and disgraceful – Whether the State can be permitted to grab the land and property of its own citizens under the banner of plea of adverse possession – Held, No. Court dismisses the petition with costs of ₹ 50,000/- - Held.

(2011) 7 MLJ 402

Vimaleshwar Nagappa Shet
Vs
Noor Ahmed Sheriff and Ors

Specific Performance – Suit property dwelling house – Defendant No. 3 has right to purchase to exclude outsider who holds equitable right of purchase of shares of other defendants – Defendant No. 3 not party to agreement and not bound by agreement executed by other defendants to extent of his share – High Court taking into account of submission by counsel for appellants and respondents, fixed market value of property – Defendant no. 3 proposes to purchase 9/11th share by paying value to plaintiff – Counsel for plaintiff on instruction from plaintiff agreed to said proposal on condition that defendant No. 3 would pay said amount within specified time – High Court recorded in impugned judgment that counsel agreed with instructions from plaintiff – It is consent order – Appeals dismissed.

RATIO DECIDENDI: A concession made by a counsel on a question of fact is binding on the client.

2011 (11) SCALE 438

Suraj Lamp & Industries Pvt. Ltd.
Vs
State of Haryana & Anr.

TRANSFER OF PROPERTY – TRANSFER OF PROPERTY ACT, 1882 – SECTION 5, 53A & 54 – INDIAN STAMP ACT, 1899 – SECTION 27, ARTICLE 23 – REGISTRATION ACT, 1908 – SECTION 17 & 49 – General Power of Attorney Sales or Sale Agreement/General Power of Attorney/Will Transfers (SA/GPA/WILL transfers) – III- effects of – Advantages of registration – Scope of an agreement of sale – Scope of Power of Attorney – Scope of Will – An agreement of sale is not a conveyance – An immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance – Transactions of the nature of ‘GPA sales’ or ‘SA/GPA/WILL transfers’ do

not convey title and do not amount to transfer – However, if the documents relating to ‘SA/GPA/WILL transactions’ have been accepted and acted upon by DDA or other developmental authorities to effect mutation, they need not be disturbed – Observations made in this decision are not intended to apply to bona fide/genuine transactions – Disposing the matter, Held.

2011 (11) SCALE 467

Ganduri Koteswaramma & Anr.

Vs

Chakiri Yanadi & Anr.

HINDU LAW – HINDU SUCCESSION ACT, 1956 [AS AMENDED BY (AMENDMENT) ACT, 2005] – SECTION 6 – C.P.C. – SECTION 97 – Coparcenary property – On and from 9.9.2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son – New Section 6 shall not apply to the partition which has been effected before 20.12.2004 – Respondent 1 filed a suit for partition impleading his father, his brother and his two sisters – Father of plaintiff respondent 1 died in 1993 during pendency of the suit – Trial Court vide its judgment and preliminary decree dated 19.3.1999 declared that plaintiff was entitled to 1/3rd share in schedule ‘A’, ‘C’ and ‘D’ properties and further entitled to 1/4th share in 1/3rd share left by 1st defendant (father) – Preliminary decree was amended on 27.9.2003 declaring that plaintiff was entitled to equal share along with 2nd, 3rd and 4th defendant in 1/5th share left by 1st defendant in schedule property ‘B’ – Plaintiff made applications for passing the final decree – However, before passing of the final decree, Hindu Succession (Amendment) Act, 2005 came into force on 9.9.2005 – Appellants (defendants 3 and 4), two sisters of plaintiff made application for partition of schedule properties ‘A’, ‘C’ and ‘D’ into four equal shares – Trial Court held that appellants (3rd and 4th defendant) were entitled to 1/4th share each – On appeal, Single Judge of the High Court set aside order of the trial Court – Whether preliminary decree passed by the trial Court on 19.3.1999 and amended on 27.9.2003 deprived appellants of benefit of 2005 Amendment Act although final decree for partition had not yet been passed – Allowing the appeal, Held.

SUPREME COURT CITATIONS CRIMINAL CASES

2011 (10) SCALE 55

Mrinal Das & Ors.
Vs
The State of Tripura

CRIMINAL LAW – I.P.C. – SECTION 302/34 – EVIDENCE ACT, 1872 – SECTION 133, 114, ILLUSTRATION (b) – Cr.P.C. – SECTION 306 & 307 – Appeal against acquittal – Approver/accomplice – Evidentiary value – Pardon can be tendered at any time after commitment of a case but before the judgment is pronounced – Deceased was a leader of Durgapur Local Committee of Democratic Youth Federation of India – Prosecution case that a meeting was convened by the Committee and after the meeting was over, deceased accompanied by PW.1, PW.2, PW.3, PW.10, PW.11 and PW.12 reached Ferry Ghat to cross the river on way to home, on the other side of the river – At about 6.30 p.m., when deceased and his companions disembarked from the boat, A-12 allegedly dragged him down and when he fell on the ground, A-5 and A-11 shot at him causing severe bullet injuries – Victim died on the way to hospital – FIR lodged for offences u/s 148, 149, 326, 302 and 307, IPC and prosecution launched against 13 persons – During recording of evidence, about four years after the incident, A-12 filed an application praying for grant of ‘pardon’ and to treat him as an approver which was granted by the trial Court – Trial Court acquitted A-1, A-2, A-3, A-4, A-6, A-7, A-8, A-9, A-10 and A-13 and convicted A-5 and A-11 and set aside acquittal of four persons A-4, A-9, A-7 and A-1 and convicted them u/s 302/34, IPC – Whether High Court was justified in convicting these accused by setting aside their acquittal – Held, Yes – Whether evidence of approver was rightly accepted by the High Court – Held, Yes – Dismissing the appeal, Held.

(2011) 3 MLJ (Crl) 63 (SC)

Vishnu Agarwal
Vs
State of U.P. and Anr

Code of Criminal Procedure, 1973 (2 of 1974), Section 362 – Recalling of order – Absence of Counsel for revision petitioner on posted date – Appearance on side of respondents – Passing of judgment – Filing of application for recall of order – Challenge against direction to recall order – Non-appearance of Counsel due to failure to note case in cause list – Human mistake – Application only to recall order, not review – Recall petition and Review petition – Distinguished – Order of court can be altered to correct a clerical error or arithmetical error under Section 362 – Interpretation of Section 362 in rigid and technical manner results in defeat of ends of justice – Order for recalling of order upheld.

RATIO DECIDENDI: An order passed by the Court for recalling an order of the Court which is passed ex parte due to the non-appearance of the party on account of not taking note of posting of case in the cause list can be sustainable under Section 362 of the Code of Criminal Procedure giving a liberal interpretation to the aforesaid Section.

(2011) 8 Supreme Court Cases 80

State of Uttar Pradesh
Vs
Mohd. Iqram and Anr

Criminal Trial – Medical Jurisprudence / Evidence – Post-mortem examination / report – Admissibility and probative value of, distinguished and explained – In present case, though post-mortem report had been proved by doctor who prepared it, he made no mention of sexual assault on deceased in his chief examination, and nor was this issue put to him in cross-examination – Nor was it put to accused under S. 313 CrPC – Held, in such

circumstances those part of post-mortem report indicating assault and rape prior to murder of deceased, could not be relied upon – Penal Code, 1860 – Ss. 376 and 302 – Rape – Medical evidence – Criminal Procedure Code, 1973, 313.

Evidence Act, 1872 – Ss. 61 and 63 – Proof of contents of documents – Maker of document, and who had proved the same neither mentioning certain contents thereof in chief examination nor cross-examined on its contents – Contents not put to persons adversely affected thereby either – Effect.

Penal Code, 1860 – S. 302 r/w S. 34 – Murder trial – Conviction restored – Appreciation of evidence – Death caused by strangulation – Police party saw three persons scaling down wall towards room of deceased – Two respondents were apprehended near place of occurrence while the third person escaped – Trial court convicted respondents – High Court ordered acquittal on basis that no weapon had been recovered and probably S (ex-husband of deceased) who had been acquitted by trial court, had committed murder after committing rape on his ex-wife, he being the third person who had escaped that night – Respondents were caught at scene of crime in the dead of night – They were not likely to be present there as they were not residents of the area – No suggestions as to what could have brought them to spot in the dead of night – They had led police party inside sehan of said house – Deceased woman was seen lying unconscious in the room – She was declared dead in hospital – Held, circumstantial evidence is so strong that it points unmistakably to guilt of respondents and is incapable of supporting any other hypothesis other than of their guilt – Findings of fact recorded by High Court are perverse, being based on irrelevant considerations and inadmissible material.

Criminal Trial – Circumstantial Evidence – Failure to explain incriminating circumstances – Presence of accused at scene of crime proved in the dead of night – Onus stood shifted to defence to explain what could have brought them to spot in the dead of night – Evidence Act, 1872 – Ss. 101 to 103 – Proof – Presumptions – Presumption of innocence – When dispelled.

Criminal Procedure Code, 1973 – Ss. 378 and 386 – Appeal against acquittal – Interference in – Principles reiterated – Interference in a routine manner should be avoided – Judgment of acquittal by High Court being perverse however, set aside.

Criminal Procedure Code, 1973 – S. 313 – Statement of accused – Facts not put to accused – Effect of – Duty of court to examine accused and seek his explanation on incriminating material against him, no matter how weak or scanty prosecution evidence is in regard to certain incriminating material – Issue of rape of deceased by S, her ex-husband prior to her murder – Post-mortem report contained such observations – However doctor who conducted post-mortem did not make any such reference in his deposition – Nor had this aspect ever been put to either of three accused under S. 313 CrPC – Trial court recorded findings of fact on this aspect in the negative – Trial court did not even frame any charge under S. 376 IPC – Held, court cannot place reliance on incriminating material against accused, unless it is put to him during his examination under S. 313 CrPC – High Court committed an error by taking into consideration inadmissible evidence and holding S guilty, who had already been acquitted by trial court and there was no appeal filed by State thereagainst – Thus, it was not permissible for High Court to castigate S with such observations holding him guilty of committing rape and subsequent murder of his ex-wife – Penal Code, 1860 – Ss. 376 and 302 – Charge – Criminal Trial – Appeal – Absence of appeal by State.

Criminal Trial – Medical Jurisprudence / Evidence – Asphyxia / Throttling / Strangulation / Hanging – Death by strangulation – Non-recovery of weapon – Effect – Injuries could be caused by strangulation by hands – Nature of injuries itself reveals that for causing such injuries, no weapon was required – Non-use of weapon cannot be illogical – Held, acquittal on ground of non-recovery of any weapon by High Court, is totally unwarranted and uncalled for – Conviction restored – Penal Code, 1860 – S. 302 r/w S. 34 – Murder trial.

Criminal Trial – Identification – Identification of accused at night / darkness – Source of light – Identification of accused – There were minimum three torches flashed simultaneously on persons who were scaling down wall and were being chased by witnesses – Failure of electricity supply does not become fatal – Witnesses identified respondents being persons who were scaling down wall and had been apprehended upon an immediate chase – Held, High Court erred in recording finding that identification was doubtful.

(2011) 4 MLJ (Crl) 88 (SC)

**A.Subhas Babu
Vs
State of A.P. and Anr**

Indian Penal Code (45 of 1860), Sections 494, 495, 417 and 420 – Cheating by making false and fraudulent representation – Act of second marriage by accused with complainant when first wife is alive – Concealment of fact of former marriage to complainant - Second marriage void – Section 494 does not restrict right of filing of complaint to first wife alone – Held, woman with whom second marriage performed entitled to maintain a complaint against husband under Sections 494 and 495.

Indian Penal Code (45 of 1860), Section 498-A – Cruelty and dowry harassment – Act of second marriage by accused with complainant when first wife alive – Demand of dowry and harassment – High Court quashed proceedings against accused under Section 498-A on ground that complainant not a wife within meaning of Section – Accused cannot be allowed to take shelter on ground of absence of a valid marriage – High Court not justified in quashing proceedings under Section 498-A – Absentee of appeal by State or complainant not to prevent Apex Court from doing justice – Held, order for quashing of complaint under Section 498-A set aside and complaint stand restored.

RATIO DECIDENDI: Section 494 of the Indian Penal Code does not restrict right of filing of complaint to first wife alone and a woman with whom accused performs second marriage is entitled to maintain a complaint against husband under Sections 494 and 495.

(2011) 3 MLJ (Crl) 90 (SC)

**Lakhan
Vs
State of M.P.**

Indian Penal Code (45 of 1860), Section 302 – Indian Evidence Act (1 of 1872), Section 32 – Dying declaration – Deceased wife succumbed to burn injuries – Accused husband convicted – Sentence of Life Imprisonment – Deceased making two conflicting dying declarations – 2nd dying declaration corroborated by medical evidence and oral dying declaration made to her parents, reliable – No interference.

RATIONES DECIDENDI

- I. If the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at the time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring / duress / prompting, it can be the sole basis for recording conviction and no corroboration is required.
- II. In case where there are multiple, inconsistent dying declarations, generally the dying declaration recorded by a higher officer like the Magistrate, can be relied upon, provided there are no circumstances giving rise to any suspicion about its truthfulness.
- III. The deceased must be in a fit state of mind to make the declaration and must identify the assailants.
- IV. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration.
- V. When a dying declaration is made under suspicious circumstances, it should not be relied upon without any corroborative evidence.

(2011) 9 Supreme Court Cases 115

**State of Rajasthan
Vs
Arjun Singh and Ors**

Penal Code, 1860 – S. 34 or S. 149 (r/w Ss. 302 and 307) – Clear evidence against three main assailants only – No clear evidence implicating other accused – Acquittal of six accused and alternation of conviction of three accused who were main assailants from Ss. 302/307 r/w S. 149 to Ss. 302/307 r/w S. 34, confirmed.

Previous enmity and litigation, resulting in all accused allegedly gathering on roof of house of accused K, from where accused A fired at H from a gun, thereby seriously injuring him – On hearing H's cries, his brothers R and Ra (PW 2) came there and took injured H inside their house and after leaving him there, when both of them were going to police outpost to lodge complaint, at that time, Bh, G (both absconding), B, K and S fired gunshots on them, resulting in injuries to both of them – Other accused Bd, L, Sw, Gy and Bg, also present on roof of K, allegedly tried to kill other family members of H, with deadly weapons – Accused persons also attempted to take life of D (PW 3), another brother of H – Injured persons H, R, Ra and D were taken to hospital where R died the same day and H died after 35 days.

Held, gunshot injuries tallied with medical evidence and both deceased persons died due to same reasons – Minor discrepancies in evidence of eyewitnesses, immaterial – However, presence of eyewitnesses PWs 3, 4 and 6 (brothers and father of deceased, respectively) at place of incident, highly doubtful – Therefore, only eyewitness available to support prosecution case was PW 2 – In his evidence, PW 2 categorically asserted that he saw five to seven persons standing on roof of house of K - He specifically mentioned names of those persons as Bd, S, B, Sw, Gy, Bg, G and K – Inasmuch as in parchabayan, only name of A and as per statements recorded by Judicial Magistrate (PW 18), names of A and B were mentioned, who were present on roof at relevant time, therefore, as rightly observed by High Court, claim of PW 2, that all accused persons were standing on roof, is not believable, however, his assertion that two persons, A and B were on roof, cannot be denied – Even if certain portion from evidence of PW 2 is eschewed, his assertion and statement regarding involvement of A, S and B cannot be disputed – In categorical terms, he explained role played by these persons – It is clear from his evidence, that he received gunshot injuries, which is also supported by medical evidence – In view of same, his presence at the time of occurrence cannot be disputed and is found to be proved – This is also strengthened from his statement in parchabayan and statement given to Judicial Magistrate – A perusal of parchabayan makes it clear that it was A who first fired gunshot at H and subsequently Bh, G (both absconding), B and S also fired at R and Ra, causing injuries to them – It also clearly shows that there are specific allegations of causing gunshot injuries against S, A and B – In the same manner, verification of statement given to Judicial Magistrate, shows that A and B fired at deceased H and, thereafter, Bh and S fired at brothers of H, when they were going to inform police – Hence, materials placed by prosecution clearly prove guilt of accused A, B and S, who were armed with guns, and with their common intention, they fired gunshots, resulting in death of R and H, as well as causing injuries to Ra (PW 2) – In such circumstances, their conviction, as altered by High court, confirmed – Further, High Court rightly acquitted rest of six accused, after detailed analysis of evidence relating to their role.

Criminal Trial – Proof – Recovery of crime incriminating material / other articles – Non-recovery of – When not fatal – Direct evidence – Effect of – Absence of evidence regarding recovery – Inference – Held, mere non-recovery of pistol or cartridge does not detract from case of prosecution where clinching and direct evidence is acceptable – Absence of evidence regarding recovery of used pellets, bloodstained clothes etc. cannot be taken or construed to conclude that no crime had taken place – Evidence Act, 1872, S. 27.

Criminal Trial – Motive – Proof of – Generally difficult – Reiterated, motive for doing a criminal act is generally a difficult area for prosecution to prove since one cannot normally see into mind of another – Motive is emotion which impels a man to do a particular act – In instant case, where two persons were killed and one sustained injuries due to firearms, even in absence of specific evidence as to motive case of prosecution cannot be thrown out on this ground – Penal Code, 1860, Ss. 302/34 and 307/34.

Criminal Trial – Witnesses – Related witness – Testimony of – Admissibility – Murder trial – Reiterated, testimony of witnesses should not be rejected merely because witnesses are related to deceased – However, their testimonies have to be carefully analysed because of their relationship and if the same are cogent and if there is no discrepancy, same are acceptable – Penal Code, 1860, Ss. 302/34 and 307/34.

Penal Code, 1860 – S. 302 or S. 304 (S. 300 Thirdly) – In instant case, accused persons contending that inasmuch as H died after 35 days due to septicaemia, courts below were not justified in convicting them for offence under S. 302 for his death – Tenability – Held, considering medical evidence that H sustained 7 gunshot injuries, which were sufficient to cause death in ordinary course, death of H undoubtedly falls within ambit of S. 302 – Hence, conviction under S. 302 justified.

2011 (11) SCALE 128

M/S. Thermax Ltd. & Ors.
Vs
K.M. Johny & Ors.

CRIMINAL LAW – Cr.P.C. – SECTION 156(3) & 482 - I.P.C. – SECTION 405, 406 & 420 r/w 34 – Quashing of complaint – Inordinate delay and laches in filing complaint for offences u/s 405, 406, 420 r/w 34, IPC – Complaint inherently improbable containing flavour of civil nature – Appellant-company engaged in the field of energy and environment management placed three purchase orders on respondent 1, proprietor of two small scale industries undertaking fabrication job work for appellant-company for the past several years – On 6.5.2000, respondent 1 filed a complaint with the Crime Branch alleging that they had carried out several fabrication job works for appellant-company and huge amount of ₹ 91,95,054/- was outstanding till date – Judicial Magistrate issued a direction u/s 156(3), Cr.P.C. and referred the same to Crime Branch for investigation – Proceedings initiated against appellant-company for offences u/s 405, 406, 420 r/w 34, IPC – Appellant filed petition for quashing the order passed by the Judicial Magistrate – Whether High Court ought to have quashed criminal proceedings against appellant-company – Held, Yes – Whether Judicial Magistrate committed error in calling for a report u/s 156(3) of the Code – Held, Yes – Allowing the appeal, Held.

(2011) 8 Supreme Court Cases 130

Rajinder Singh
Vs
State of Haryana

Narcotic Drugs and Psychotropic Substances Act, 1985 – Ss. 42(1) and (2) – Entry, search and seizure – Requirement of writing down and conveying information to immediate official superior – Total non-compliance with – Impermissibility of – Delayed compliance with a satisfactory explanation – Permissibility of – Dispatch of wireless message – Whether amounts to compliance – Held, total non-compliance with Ss. 42(1) and (2) is impermissible but delayed compliance with a satisfactory explanation for delay can, however, be countenanced – But dispatch of a wireless message does not amount to compliance with S. 42(2).

Narcotic Drugs and Psychotropic Substances Act, 1985 – Ss. 42 and 18 – Complete non-compliance with requirements of S. 42(2) – Conviction reversed – PW 6 (Inspector) sent ruqa to police station, that he had received secret information that appellant-accused was an opium addict and also dealing in its sale, and that he had kept some opium in shed used for storing fodder in his farmhouse, and if raid was organized, opium could be recovered – A wireless message regarding the same was also sent by him to PW 5 (DSP) to reach the spot – Search allegedly led to recovery of opium, ultimately leading to appellant's conviction – Held, PW 6 clearly admitted in his cross-examination that he had not prepared any record in writing about secret information received by him, and had not sent any such information to higher authorities – Likewise, PW 5 did not utter a single word about receipt of any written information from his junior officer, PW 6 – It is therefore clear that there was complete non-compliance with

provisions of S. 42(2), which vitiates conviction – Also, dispatch of wireless message to PW 5 does not amount to compliance with S. 42(2) – Hence, appellant’s conviction, reversed.

(2011) 4 MLJ (Crl) 142 (SC)

Bhola Singh
Vs
State of Punjab

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 35 – Presumption of culpable mental state – It was only after evidence proved beyond reasonable doubt that accused had knowledge, presumption under Section 35 of Act would arise – Absence of any evidence with regard to mental state of accused – No presumption under Section 35 of Act can be drawn.

RATIO DECIDENDI: The initial burden to prove that the accused had the knowledge that the vehicle he owned was being used for transporting narcotics would be on the prosecution and it is only after the prosecution has discharged the initial burden to prove the foundational facts, the presumption under Section 35 of the Narcotic Drugs and Psychotropic Substances Act would arise.

(2011) 4 MLJ (Crl) 171 (SC)

Harshendra Kumar D.
Vs
Rebatilata Koley Etc.

Negotiable Instruments Act (26 of 1881), Section 138 read with Section 141 – 18 cheques bouncing – Criminal revision applications by appellant seeking to quash complaint cases against him, dismissed by High Court – Held, in criminal appeal, appellant already resigned from Director’s post, hence, not in charges of affairs of company nor responsible to it for the conduct of its business at relevant time – Complaints as against appellant quashed.

RATIONES DECIDENDI:

- I. A director, whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies cannot be made accountable and fastened with liability for anything done by the company after the acceptable of his resignation.
- II. In an appropriate case, if on the face of the documents, which are beyond suspicion or doubt, placed by the accused, the accusations against him cannot stand, for promotion of justice or to prevent injustice or abuse of process of Court, the High Court may look into the materials which have significant bearing on the matter at the prima facie stage.

HIGH COURT CITATIONS CIVIL CASES

2011 - 3 –TLNJ 30 (Civil)

Gladys Devavaram, W/o. Rev, E.G. Devaram
Vs
S. Subbiah S/o. Sivappa and Anr

Specific Relief Act 1963, Section 15, Clause (b) – Suit for Specific Performance by nominee against the original vendor and agreement holder – trial court dismissed the suit – on appeal High Court held that as the original purchaser failed to perform his part of contract within the stipulated time, has lost his right on the suit property, and therefore not entitled to assign the sale agreement in favour of another person – AS allowed.

2011 - 3 –TLNJ 47 (Civil)

C. Ravikumar
Vs
S. Narmadha

Hindu Marriage Act 1955, Section 13(1) (i a) – Husband sought divorce and wife sought conjugal rights – Husband's petition was dismissed – on appeal High Court bench expressed that the non inclination of the husband and his mother to see the child cause mental cruelty to the wife – further when no endeavour is made by husband for re union, he cannot be allowed to allege desertion – further held that the conduct of husband in filing divorce petition soon after the wife leaving for her parents house for delivery of child expose the intention of husband – Civil Miscellaneous Appeal dismissed.

(2011) 7 MLJ 71

R. Srinivasan and Ors
Vs

Special Commissioner and Commissioner for Land Reforms, Chepauk, Chennai – 600005 and Anr

Tamil Nadu Urban Land (Ceiling and Regulation) Act (31 of 1978), Sections 9(5), 10(1), 11(5) 7(1) 7(2) – Notices, under – Section 11(3) – Excess land vesting with Government – Tamil Nadu Urban Land (Ceiling and Regulation) Rules, 1978, Rule 8 – Mandatory requirement, under – Repealing Act (20 of 1999) – Property in dispute allegedly subjected to land ceiling proceedings and authorities allegedly taken symbolic possession of said property – Notices served only by affixture, not sent by Registered Post, acknowledge due – Held, notices under Act not served on land owners in accordance with law – Mandatory requirement under Rule 8 of Rules 1978, not met – No evidence to show possession taken by authorities respondents from petitioners – Entire proceedings initiated under Act, 1978, vitiated for non-compliance with mandatory requirement under Rule 8, Rules 1978.

RATIONES DECIDENDI:

- I. Rule 8 of the Tamil Nadu Urban Land (Ceiling and Regulation) Rules, 1978, makes it mandatory for the department to issue a notice to the land owner by registered post with acknowledgement due.
- II. When all the notices have been served only by affixture, the possession said to have been taken by the authorities from the petitioner was invalid.
- III. As per the Tamil Nadu Urban (Ceiling and Regulation) Repealing Act, 1999, if possession is not taken by the authorities concerned, all the prior proceedings shall stand abated.

2011-4-TLNJ 97 (Civil)

Ramamurthi (Appellant No.1 declared Major & guardian discharged vide Order dated 18.09.2009 made in M.P.(MD) No.3 of 2008 in S.A.No.1152/1995 by GMAJ) and Anr
Vs
Ayinar Chettiar and Anr

Adverse Possession – (Adverse possession has to be pleaded and proved) – Suit for declaration and possession of one item of property and partition of another item of property – Suit dismissed by trial court and confirmed by first appellate court on the ground that suit not filed within 12 years of assertion of title made by defendants – on further appeal to High Court held that in order to establish adverse possession, a specific plea to be made supported by concrete evidence and onus is on the party who pleads adverse possession – SA allowed.

2011 - 4 –TLNJ 102 (Civil)

Muthuraman
Vs
Anuradha

Civil Procedure Code 1908 as amended, Order 3, Rule 1 and 2 – See Hindu Marriage Act 1955, Section 13.

Hindu Marriage Act 1955, Section 13 – (Cases cannot be filed by Power of attorney in Family Court) – Husband working in abroad filed petition seeking dissolution of marriage through his father as power agent – trial court returned petition as not maintainable – on revision High Court opined that the case being purely family dispute due to differences in view between husband and wife and possibilities for change in their views are possible on their appearance before in Court their presence is necessary before the court – CRP dismissed.

2011 - 4 –TLNJ 104 (Civil)

National Insurance Company Ltd, No. 12-A, Sub-Collector, Office Road, Y.M.R. Patti, Dindigul
Vs
Mrs. Sundari and Ors

Motor Vehicles Act 1988, Section 166 – Deceased age at 34 years and working as a bank clerk – While travelling in the bus accident cost and died – Wife and minor son filed claim petition – trial court awarded Rs.12,40000/- - on appeal by the insurance company the High Court expressed that for determining compensation it is necessary to ascertain net income of deceased to support himself and dependant – the figure cannot be accurately ascertained – involves element of estimate or a conjecture – may be by using method of multiplier – Proper multiplier is held as 16 in circumstances of the case – the award of trial court modified as 11, 68000/- - CMA disposed with modification.

2011-4-TLNJ 128 (Civil)

Subbarayulu
Vs
Lakshmanan

Negotiable Instruments Act, 1881, 118(a) – Suit for recovery of money – on appeal findings of the trial court confirmed and the presumption is that it was executed for consideration until contrary is proved – further held that the court is competent to fix the rate of interest – Appeal Suit disposed with direction.

2011-4-TLNJ 157 (Civil)

K. Muthulakshmi
Vs
Tmt. K. Lakshmiammal and Ors

Registration of Births and Deaths Act 1969, Section 13(3) – Suit for mandatory injunction – Plaintiff working as medical officers in Army Headquarters, alleged that her date of birth was wrongly entered and obtained order from Sub Divisional Magistrate to register a different date as her date of birth – Subsequently wanted her employer to accept the changed birth certificate and produced the extract issued by authority – rejected and hence the suit – trial court and first appellate court dismissed her suit – on second appeal the High Court expressed that under section 13(3) is only summary enquiry – not required to adjudicate upon correctness of date of birth – further held Magistrate only to verify whether birth or death had taken place and the date of such occurrence – the extract can be only used as a piece of evidence and burden is on the person claiming as his date of birth to prove that he was born on that date – Second appeal dismissed.

(2011) 7 MLJ 160

**Chandramohan
Vs
Pushpa**

Code of Civil Procedure (5 of 1908), Order 37 – Negotiable Instruments Act (24 of 1881), Section 118 – Presumption, under – Indian Evidence Act (1 of 1872), Section 73 – Suit for recovery of money based on pro-note – Dispute as to signatures on suit pro-note – 1st Appellate Court comparing disputed signatures with admitted post litem signatures of defendant – Held, impugned decision based on subjective satisfaction of 1st Appellate Court relying based on subjective satisfaction of 1st Appellate Court relying on post litem motem signatures of defendant and not on his admitted ante litem motem signature – Since defendant denying purported signatures in the pro-note, hand writing expert’s opinion required – Matter remitted.

FACTS IN BRIEFF: The plaintiff filed the suit for recovery of money based on a pro-note, as against the defendant, who resisted the suit, denying, in his written statement the signature in the paid promissory note. The trial Court dismissed the suit, but in appeal, the 1st Appellate Court decreed the suit. The defendant has filed the present second appeal challenging the above said judgment and decree passed by the 1st Appellate Court.

QUERIES:

1. Whether the 1st Appellate Court was justified in comparing the disputed signatures with the admitted signatures of the defendant in the vakalat and deposition?
2. Whether the 1st Appellate Court was justified in reversing the judgment and decree of dismissal passed by the trial Court, based on its own interpretation of the evidence and on its own composition of the signatures?
3. Whether the 1st Appellate Court was justified in comparing the disputed signature with the admitted post litem motem signatures of the defendant without applying the principles embodied in the handwriting science?

Held: The 1st Appellate Court has not even chosen to place reliance on any contemporaneous admitted signature of the defendant or admitted anti litem motem signature of the defendant, but only on the post litem motem signatures of the defendant in the vakalat and deposition and that itself is ex facie and prima facie untenable.

In view of the fact that the defendant is insisting upon the plea of denial of the purported signatures in the pro-note and that the 1st Appellate Court has committed an error in simply arriving at subjective satisfaction relating to the disputed signatures, this Court is of the view that for the purpose of deciding the lis on a better footing, obtention of expert opinion is very much required. However, both parties should bear the cost of getting such expert opinion.

The matter is remitted back to the 1st Appellate Court to send the disputed signature to the handwriting expert for getting the opinion. The defendant is enjoined to furnish before the 1st Appellate Court his contemporaneous signature or his anti litem motem signature found in an authenticated manner in some document.

RATIONES DECIDENDI:

- I. The 1st appellate Court was not justified in rendering the judgment based only on its subjective satisfaction that the disputed signature in the pro note tally with the post litem motem admitted signatures.

- II. When the defendant denied his signature on the promissory note, it is necessary to obtain a handwriting expert's opinion.

2011-5-L.W. 174

N. Rajendran
Vs

Shriram Chits Tamil Nadu Pvt. Ltd. Rep. by its Branch Manager/Foreman, No.23/3, Nethaji Road, Tiruvarur

C.P.C., Order 21, Rr. 104, 105, 106 /Execution Proceedings, Ex parte order of attachment pursuant to a Money decree, Setting aside of, Delay in applying for setting aside Exparte order, Condonation, Scope.

C.P.C. (1908), Sections 121, 122, Powers of High Court to make Rules, Scope,

C.P.C. Amendment Act (104 of 1976) (Act 45 of 1999) Section 97, (Act 22 of 2002), Order 21, Rules 105, 106, Historical tracing of Amending Acts,

Limitation Act (1963), Section 5 ,whether applicable.

Question is whether the Proviso under Sub-rule (3) of Rule 105 stood repealed in terms of Section 97(1) of Amendment Act 104 of 1976 or not – Held: A Court in Tamil Nadu need not, nay cannot, invoke Section 5 of the Limitation Act, 1963, by taking recourse to Rule 105(4) as Sub-rule (4) was deleted way back in 1972 – It is enough if the Proviso to Sub-rule (3) of Rule 105 is invoked.

Consequences of the above Madras High Court Amendment made with effect from 01.11.1972 – The first was to delete Sub-rule (4) of Rule 105 and the second was to insert a proviso under Rule (3) of Rule 105.

Section 97 of the Amendment Act 104 of 1976 made it clear that an amendment made by a State Legislature or High Court, to the principal Act, would also stand repealed by the Amendment Act, if any such amendment was inconsistent with the provisions of the principal Act that were expressly repealed by the Amendment Act 104 of 1976 – Section 97 (1) of Amendment Act 104 of 1976 merely contained an omnibus provision to repeal by one stroke, all State and High Court Amendments that became inconsistent with the provisions of the amended Code.

There is nothing on record to show that the proviso to Sub-rule (3) of Rule 105, which would now become the proviso to Sub-rule (3) of Rule 106 of Order XXI, is, in any way, inconsistent with the amendments introduced either in 1976 or in 1999 or even in 2002 – So long as the proviso under Sub-rule (3) is not shown to be inconsistent with any of the amendments, it cannot be stated to have been repealed under the Central Amendment Acts.

Order of the Court below, refusing to entertain the application on the ground that it was filed beyond 30 days and that there was no power to entertain the same, is not in accordance with law – CRP allowed on terms.

2011-4-TLNJ 223 (Civil)

Latha Sridharan
Vs
Rajkumar and Anr

Limitation Act 1963 – Petition to condone delay of 525 days in filing petition to set aside exparte decree allowed on costs by trial court - on revision High Court expressed that ordinarily a litigant does not stand to the benefit by filing section 5 application belatedly and litigant runs a serious risk – further held that the breadth and length of delay is not a material factor in respect of sec. 5 application under Limitation act – CRP disposed with directions.

2011-5- L.W. 225

A. Dharmaraj
Vs
Kasturi and Anr

Tamil Nadu Buildings (Lease and Rent Control) Act (1960), Section 10(3)(a)(iii), (c).

Revision (CRP) arising out of Petitions (RCOP) seeking eviction from non-residential buildings (shops), on the ground that Landlord-Revision Petitioner required the premises for own use and occupation – Revision Petitions (CRPs) were accompanied only by the certified copies of the fair and decretal orders of the Appellate Authority and not the fair and decretal orders of the Rent Controller, Whether maintainable, Relative hardship, Considerations,

Tamil Nadu Buildings (Lease and Rent Control) Act (1960), Section 25.

Madras High Court Appellate Side, Rules, Order 4, Rule 21 / To say that a presentation which is not in accordance with the requirements of Order IV, Rule 21, is no presentation in the eye of law at all, lies at one extreme in the spectrum of consequences that would flow out of the non-fulfilment of the requirements of the rule – Unless such a consequence is spelt out clearly by the rule itself, it cannot be presumed to be inbuilt in the rule.

Held: In as much as there was substantial compliance with the requirements of Order IV, Rule 21, the presentation of the revision was only an irregular presentation, capable of being cured by re-presentation within the time stipulated by the Registry – Question as to whether the presentation of an appeal or revision, is a valid presentation or irregular presentation or invalid presentation or no presentation at all would depend more upon what was filed than upon what was not filed.

Relative hardship, as the very expression suggests is relative – When the admitted case of both parties was that there were only 4 shops, the finding recorded by both the authorities as though there were 5 shop portions, on the basis of the report of the Commissioner, was nothing but perverse.

In so far as the relative hardship is concerned, the respondents / tenants did not even go to the witness box – While the respondent in one civil revision petition examined her son, the respondent in the other civil revision petition examined his brother – Therefore, the finding on the question of relative hardship cannot be sustained – Petitioner has made out a case for the grant of an order of eviction of the respondents from the petition – premises for own use and occupation.

2011-4-TLNJ 227 (Civil)

Nattan Ambalam
Vs
Dhanalakshmi

Civil Procedure Code 1908 as amended, Section 151 – Petition filed to restore the EP dismissed for default – allowed by executing court – on revision High Court held that executing court can exercise judicial discretion under section 151 CPC and order restoration in the circumstances of the case – CRP dismissed.

(2011) 7 MLJ 227

S. Revathy
Vs
S. Vadevalli

Tamil Nadu Buildings Lease and Rent Control Act (18 of 1960), Section 10(2) (i) and 11(4) – Eviction – Revision against order of Rent Control Appellate Authority – Willful default in payment of rent – Non-compliance of conditional order of Appellate Authority passed under Section 11(4) – Though order passed as a consequential order,

matter specifically ordered to be posted on a subsequent date after a month, for passing further orders – Order passed by Court below prior to date fixed by Court below, unreasonable and improper – Order held, unsustainable.

RATIONES DECIDENDI:

- I. When any order is passed under Section 11(4) of the Tamil Nadu Buildings Lease and Rent Control Act, for the non-compliance of the order, within stipulated time in depositing the amount of arrears of rent, the tenant cannot agitate the same subsequently.
- II. An order though consequential, passed prior to a date fixed by a Court, when the matter is specifically ordered to be posted on a subsequent date for passing further orders is unreasonable and tainted with material irregularity and therefore unsustainable.

2011-5- L.W. 246

K. S. Rajendhiran

Vs

Dr. M.R. Muralikrishnan and Anr

Limitation Act (1963), Section 5,

C.P.C., Order 9, Rule 13 - Application for setting aside ex parte decree, Limitation, Knowledge, Considerations,

C.P.C., Order 5, Rule 2, Vakalat filed on receipt of summons, Plea that copy of plaint was not enclosed, Tenability of plea,

Practice/Contention that vakalat was filed only for purpose of Interlocutory Application, whether sustainable.

When a person signs a vakalath authorizing his advocate to prosecute or defend a proceedings, particularly in a suit, it can be taken as a Vakalath for prosecuting or contesting the main suit and it cannot be restricted to only the interlocutory application or applications – It cannot be said that the Vakalath was filed only in respect of the interlocutory application or applications – It cannot be said that the Vakalath was filed only in respect of the interlocutory application and not for contesting the suit.

If a vakalath is filed on receipt of summons received without enclosing the plaint copy by the other side in compliance with Order V Rule 2 of CPC, it is the usual practice for the advocate who files vakalath on behalf of his client to get the plaint copy and other documents either from the Registry or from the other side – Appellant had knowledge about the pendency of the suit and he was also duly served in the interlocutory stage – Appellant also filed vakalath through his advocate, sought time to file counter, but without filing counter, the advocate engaged by the appellant reported no instructions – Under those circumstances, it cannot be said that the service made by means of paper publication is not an effective or due service – Substituted service was in addition to the actual earlier service and after the appellant appeared through an advocate – Merely because service was made by means of paper publication, it cannot be construed that service in the normal mode was not proper or correct.

2011 (5) CTC 252

Girdharilal Chandak and Bros. (HUF), represented by its Kartha, Mr. Girdharilal Chandak (died) and Anr

Vs

S. Mehdi Ispahania and Ors

Code of Civil Procedure, 1908 (5 of 1908), Order 41, Rule 5 – Scope of – Provisions contained in Order 41, Rule 5 embodies general Principles of law and is applicable to proceedings under Rent Control Act too – Appeal by itself shall not operate as stay of proceedings under decree or order appealed from except so far Appellate Authority may order – Hence, in absence of stay of such proceedings decree or order appealed from can be executed.

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (T.N. Act 18 of 1960), Section 4 – Fixation of Fair Rent – When fair rent is fixed, person who suffers fair rent has only one remedy viz. of filing an Appeal – Person in whose favour order is passed has multiple remedies like (a) seek recovery of money by filing Suit (b) seek eviction on ground of willful default.

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (T.N. Act 18 of 1960), Sections 23 & 25 – Tamil Nadu Buildings (Lease and Rent Control) Rules, 1974, Rule 12(3) – Section 23 empowers Appellate Authority to grant stay of order of Lower Court – Section 25 does not contain any such clause – Section 23(4) renders decision of Appellate Authority final and same cannot be questioned in any Court of law except in Revision filed under Section 25 – If High Court does not grant stay of order of Appellate Court, such order becomes final until modified or set aside by High Court – Rule 12(3) contains cases where there would be automatic stay.

(2011) 7 MLJ 264

K. Mani

Vs

M.D. Jayavel and Ors

Transfer of Property Act (4 of 1882), Section 53-A – Registration Act (16 of 1908), Section 17(1-A) – Specific Relief Act (47 of 1963), Section 16(c) – Second Appeals – Concurrent findings – Suit for eviction and Suit for specific performance of agreement of sale – Appellant/Tenant entering into sale agreement with land lord with regard to demised premises – Agreement of sale being not registered, tenant not entitled to benefit of Section 53-A of T.P. Act in view of Section 17(1-A) of Registration Act – Agreement to sell unenforceable – No evidence on record to show that land lords agreed that appellant / tenant's possession should get itself converted into one that of an agreement holder since date of agreement to sell – Mere agreement of sale will not terminate land lord – tenant relationship unless there is specification to that effect in agreement itself – Tenant acquired no right in property – Termination of tenancy, valid – Tenant liable to be evicted – Second appeals dismissed.

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960) – Code of Civil Procedure (5 of 1908), Section 100 – Second Appeal – Suit for eviction based on tenancy – Suit decreed – Concurrent findings – Appellant / Tenant entering into sale agreement with land lord with regard to demised premises – Claims possession in pursuance of agreement – No evidence on record to show that land lords agreed that appellant / tenant's possession should get itself converted into one that of an agreement holder since date of agreement to sell – Mere agreement of sale will not terminate land lord-tenant relationship unless there is specification to that effect in agreement itself – Tenant acquired no right in property – Termination of tenancy, valid – Tenant liable to be evicted – Tamil Nadu Buildings (Lease and Rent Control) Act not applicable to village panchayat areas and hence do not apply to present suit – Second appeal dismissed.

RATIONES DECIDENDI:

- I. Unless an agreement of sale is registered, Section 53-A of the Transfer of Property Act in view of Section 17(1-A) of Registration Act cannot be invoked.
- II. Mere agreement of sale with regard to demised premises entered into between land lord and tenant will not terminate land lord-tenant relationship and will not automatically convert tenant's possession into one that of an agreement holder unless there are specific recitals to the contrary in such agreement.

2011 (5) CTC 287

N. Govindarajan
Vs
N. Leelavathy and Ors

Will – Indian Succession Act, 1925 (39 of 1925), Section 63 – Attestor is a classmate of beneficiary, but stranger to Testator - Evidence of Attestor to be viewed with caution – Record shows that evidence of Attestor not convincing to conscience of Court – Will, held, invalid.

Indian Evidence Act, 1872 (1 of 1872), Sections 101 & 68 - Burden of Proof – Will – Burden on Propounder to prove that Testator had put his signature after understanding contents of document – No convincing evidence found to show that Testator had understood recitals in Will – Will, held, not proved.

Will – Indian Succession Act, 1925 (39 of 1925), Section 63 – Animo attestandi – Attestation of Will is not an empty formality – Attestor should know the document he is attesting – In instant case, Attestor did not know what document he is signing – His evidence goes to show that he came to know only through beneficiary that he has signed in Will – Will, held, not proved.

Will – Indian Succession Act, 1925 (39 of 1925), Section 63 – Suspicious circumstances – Tampering of Will – Traces of cutting bottom portion of second page of Will, visibly seen – In seal of Advocate and Notary Public “CHENNAI” has been erased and in that place “CHAMBERS MADRAS” has been substituted – Will of year 1995 – Seal of Advocate contains word “CHENNAI” – Name of city was changed from Madras only in year 1996 – No satisfactory explanation forthcoming from Propounder – Totality of circumstances disturbs genuineness of Will – Held, Propounder failed to dispel suspicion – Will fails.

2011 (5) CTC 308

P.R. Ramasami Gounder, Memorial Trust rep. by Trustees and Ors
Vs
Kasturi Travels, Proprietor, Neena Sha and Ors

Code of Civil Procedure 1908 (5 of 1908), Order 5, Rule 20 – Substituted Service – Pre-requisites to be followed – Suit for recovery of possession and damages decree ex parte – Execution Petition filed by Decree Holder allowed ex parte – Decree Holder subsequently filed Application to break open and delivery of possession – Judgment-debtor filed an Application for redelivery of possession taken by Amin – Contention of Respondent that Executing Court had failed to adhere to mandatory procedure adumbrated under Order 5, Rule 20 of Code of Civil Procedure and summons were not duly served – Execution Application filed by judgment-debtor was allowed – Held, Suit summons was served by affixture and notice sent through Post was returned with an endorsement “door locked intimation delivered” – Court ought to have ordered fresh notice to judgment-debtor – Court should record finding that Defendant is keeping himself away to avoid service of summons while ordering substituted service – Executing Court failed to adhere mandatory procedure provided under Order 5, Rule 20 of Code of Civil Procedure – Civil Revision Petition dismissed.

Code of Civil Procedure, 1908 (5 of 1908), Order 5, Rule 20 – Substituted Service – Essential conditions – Duty of Court – Procedure to be followed – When power under Order 5, Rule 20 can be exercised – (a) Defendant is keeping himself away to avoid service of summons, (b) summons cannot be served in ordinary way – Court should record finding that “there is reason to believe that Defendant is keeping away for purpose of evading service or summons cannot be served in ordinary way” – Failure to record reasons for satisfaction of ordering substituted service would vitiate order passed by Court below.

(2011) 7 MLJ 339

Lakshmi and Ors
Vs
Prasanna Mani and Anr

Code of Civil Procedure (5 of 1908), Section 11 and Order 7 Rule 1 – Striking out plaint – Suit for partition and separate possession / by 1st respondent / plaintiff claiming to be filed, legally wedded wife of late Tirumalaisami – Sale of share by 1st respondent to third parties claiming to be wife of Tirumalaisami – Claim of 1st respondent already settled in an earlier suit filed by sister of Tirumalaisami – Impleading application filed by 1st respondent along with her purchasers in former suit got dismissed on her failure to establish her status as legal representative of Tirumalaisami – Dismissal confirmed by Apex Court – Claim of 1st respondent settled in previous proceedings – Re-litigation of concluded matter amounts to abuse of process of Court – Suit filed by 1st respondent vexatious and amounts to clear abuse of process of Court – Civil revision petition allowed.

RATIO DECIDENDI: Re-litigation of same issue tried and concluded in an earlier suit amounts to abuse of process of Court and such subsequent suit is clearly frivolous and vexatious which has been initiated to circumvent the binding decree passed in former suit.

(2011) 7 MLJ 356

Silampayee
Vs
Principal Accountant General (A & E), Office of the Accountant General (A & E), Chennai - 18 and Ors

Pension Act (26 of 1871), Section 12 – Tamil Nadu Pension Rules (1978), Rule 49 – Payment of family pension – Petitioner, legally wedded third wife of deceased Government servant – First two wives dead – Petitioner taking care of children of first wives – Consent letter / no objection given by legal heirs of deceased amounts to an agreement or assignment as contemplated under statute – Petitioner entitled for payment of family pension in entirety.

RATIO DECIDENDI: Payment of family pension can be disbursed in entirety to the legally wedded wife of a deceased Government servant despite him having children born through other deceased wives, when consent / no objection is given by such legal heirs.

(2011) 7 MLJ 413

T. Sivasubramaniam
Vs
Muniammal and Ors

Code of Civil Procedure (5 of 1908), Section 11 and Order 23 – Withdrawal and adjustment of suits – Second Appeal – Suit filed for declaration of title, injunction and mandatory injunction to remove structures – Withdrawal of earlier suit by plaintiff in appeal stage due to some change in cause of action pendente lite – Use of words in Appellate Court order as if giving permission to withdraw appeal with liberty to file a fresh appeal on same cause of action – Fresh suit filed by plaintiff dismissed by trial Court on ground of res judicata misinterpreting Appellate Court order – Order 23 do not contemplate withdrawal of appeal with liberty to file a fresh appeal – Mere typographical error in Court order cannot be taken advantage of by defendants – Dismissal of fresh suit by trial Court on ground of bar of res judicata, not justified – Suit not barred by res judicata – Matter remitted back to lower Court to be decided on merits.

RATIO DECIDENDI: Order 23 of the Code of Civil Procedure do not contemplate that an appeal could be withdrawn with liberty to file a fresh appeal.

HIGH COURT CITATIONS CRIMINAL CASES

2011-5- L.W. 1

T. Sivakumar
Vs

The Inspector of Police, Thiruvallur Town Police Station, Thiruvallur District and Ors

Hindu Marriage Act (1955), Sections 5, 11, 12, 18 / Marriage of a girl below 18 years, H.C.P. preferred by her father, Praying for custody of the girl, Distinction between Valid Marriage, Void Marriage, Voidable Marriage, Scheme of the Act.

Constitution of India, Article 226 / Habeas Corpus, Prayer for custody of minor daughter alleged to have been married illegally and in contravention of H.M. Act, sought by her father,

Guardians and Wards Act (1890) Sections 17, 19 (a) Principles, whether can be imported to a case arising out of the alleged marriage of a minor girl, admittedly in contravention of the provisions of the Hindu Marriage Act?, Custody of girl.

Juvenile Justice (Care and Protection of Children) Act (2000), Tamil Nadu Juvenile Justice (Care and Protection of Children) Rules (2001),

Whether a minor girl, who claims to have solemnized her marriage with another person would not be a juvenile in conflict with law.

Court dealing with a Writ of Habeas Corpus, whether has to power to entrust the custody of the minor girl to a person, who contracted the marriage with the minor girl and thereby committed an offence punishable under Section 18 of the H.M. Act and Section 9 of the Prohibition of Child Marriage Act, 2006,

Prohibition of Child Marriage Act, Section 9, Punishment up to two years, Offence is cognizable and non-bailable, Undoubtedly, Section 3 of the Prohibition of Child Marriage Act will have overriding effect over the Hindu Marriage Act.

Since a child marriage as defined in the Prohibition of Child Marriage Act itself is an offence and the same is cognizable, it does not require any complaint to the police to register a case and to investigate.

Steps for adequate publicity recommended.

Majority Act (1875) (9 of 1875), Section 2 (f), Definition of "Minor", Anomaly pointed out.

Hindu Minority and Guardianship Act (1956), Section 6(c), stands impliedly repealed by the Prohibition of Child Marriage Act – Therefore, it is to be concluded that an adult male who marries a female child in violation of section 3 of the Prohibition of Child Marriage Act shall not become the natural guardian of the female child.

Expressions 'husband' and 'wife' have not been defined anywhere in H.M. Act – Reliefs under sections 9 and 13 of the Act are available only to parties to a valid marriage.

A male who contracts a child marriage of a female child cannot attain the full status of a husband like a husband of a full fledged valid marriage – By the said marriage, though he burdens himself with legal liabilities arising there from, he acquires only limited rights.

Simply because an individual happens to be a natural guardian or guardian of any other category, he does not have indefeasible right to have the custody of the minor – Court should decide as to how the interests of the minor and his welfare could be well protected.

In our considered opinion, sub section (3) of section 3 shall be read that in the case of a male, a petition for annulment of child marriage shall be filed before he completes two years of attaining twenty-one years of age – We are hopeful that the Parliament will take note of the above anomaly and make necessary amendment to sub section (3) to avoid any more complication.

(2011) 3 MLJ (Crl) 5

Anbu @ Sivalingam
Vs

State represented by Inspector of Police, CBCID, Vellore, Tirupattur Town Police Station

Code of Criminal Procedure, 1973 (2 of 1974) Section 207 – Furnishing of copies – Accused not entitled to be furnished with copies of charge sheet translated in Tamil – Duty of Court – Translation not duty of Court and furnishing of copies alone is prime duty of the Court.

QUERY: Whether the Accused is entitled to copies required to be furnished under Section 207 of Cr.P.C. in a language known to him?

Held: A plain reading of Section 207 of Cr.P.C. would show that translation is not the duty of the Court and furnishing of the copies alone is the prime duty of the Court.

RATIO DECIDENDI: Furnishing of translated copies cannot be equivalent to the furnishing of copies as required under Section 207 of Cr.P.C.

(2011) 3 MLJ (Crl) 8

Madasamy Devar
Vs

State rep. by Sub-Inspector of Police, Sambavar Vadakarai Police Station,
Tirunelveli, Tirunelveli District and Anr

Code of Criminal Procedure, 1973 (2 of 1974), Section 173 – Protest Petition – Application requesting Court to order for further investigation by some other police Station – Application dismissed – Revision – Notice not issued from Court concerned to de facto complainant before taking cognizance of offence against accused – Hence all other subsequent proceedings have been vitiated – Absence of notice to de facto complainant/petitioner is not mentioned in protest petition – Same cannot be bar for him to raise it before revisional Court.

RATIO DECIDENDI: When no notice has been issued from the Court concerned to de facto complainant before taking cognizance of offence against the accused, it would vitiate the entire subsequent proceedings and even though the absence of notice to defacto complainant is not mentioned in the protest petition, it cannot be a bar for him to raise it before the revisional Court.

(2011) 4 MLJ (Crl) 34

M. Subramani
Vs

State represented by Inspector of Police, SPE / CBI / ACB / Chennai

Prevention of Corruption Act (49 of 1988), Sections 7 and 20(1) – Demand and receipt of illegal gratification – Appeal against conviction and sentence – Conduct of trap proceedings – Prosecution failed to prove demand of illegal gratification – Presumption under Section 20(1) cannot be raised in absence of proof of demand – Conviction set aside.

RATIO DECIDENDI: In absence of a proof of demand, presumption contemplated under Section 20(1) of the Prevention of Corruption Act, 1988, cannot be raised against accused.

(2011) 4 MLJ (Crl) 53

R. Srinath

Vs

State by Inspector of Police, SPE/CBI/BS & FC/Bangalore

Indian Penal Code (45 of 1860), Sections 120-B read with 409 and 420 – Prevention of Corruption Act (49 of 1988) – Indian Evidence Act (1 of 1872), Section 154 – Permission for cross examination of witnesses by party calling him – Criminal conspiracy and cheating – Abuse of position – Violation of clearing rules – Cause of wrongful loss to bank and wrongful gain to accused – Permission for cross-examination in terms of Section 154 – Scope and ambit of – Court having discretionary powers under Section 154 empowered to permit a party to cross-examination of his witness – Discretion to be exercised judiciously in interest of justice – Court in its discretion, entitled to permit a person who calls a witness to put any questions to him which might be put in cross-examination by adverse party – Permission cannot be granted at mere asking of party calling witness – Discretion to be exercised on being satisfied that witness really bears a hostile animus to party calling him – Trial Court failed in exercising its discretionary powers judiciously – Order of trial Court, set aside – Criminal original petition allowed.

RATIONES DECIDENDI :

- I. Section 154 of the Indian Evidence Act confers a judicial discretion on the Court to permit a party to cross-examine his own witness which might be put in cross-examination by adverse party and such discretion has to be exercised by the Court judiciously on being satisfied that the witness really bears a hostile animus to party calling him.
- II. Permission for cross-examination as per Section 154 of the Evidence Act cannot be granted by the Court at the mere asking of the party calling the witness and the discretion available under the said Section must be judiciously and properly exercised in the interests of justice.

(2011) 4 MLJ (Crl) 234

J. Duraimunusamy and Ors

Vs

State by Additional Superintendent of Police, CBI : SPE : ACB, Chennai – 600 006

Code of Criminal Procedure, 1973 (2 of 1974), Sections 227 and 482 – Indian Penal Code (45 of 1860), Sections 120-B read with 420 – Prevention of Corruption Act (49 of 1988), Sections 13(2) read with 13(1)(d) – Recruitment of police constables – Leakage of question paper for written test twice – Dismissal of discharge petitions filed by accused under Section 227 by trial Court, confirmed by High Court – SLP's filed by accused against same dismissed by Apex Court – Maintainability of original petitions under Section 482 – Scope of – Dismissal of SLP cannot be a bar to entertain original petitions on ground of non-assignment of reasons – Appropriate charges not framed against accused correlating to materials – High Court entitled to interfere with proceedings in exercise of its jurisdiction under Section 482 of Cr.P.C. – Charges liable to be quashed on ground of misjoinder of charges and accused – Criminal Original Petitions allowed.

Code of Criminal Procedure, 1973 (2 of 1974), Section 218 – Separate charges for distinct offences – Accused contends misjoinder of charges and misjoinder of accused – Charges in respect of two different occurrences – Two different and distinct offences committed on two different occasions – Framing of charges and trial in respect of distinct offences committed in regard to leak of question papers of two different exams held on different dates, requires to be done separately – Joinder of all accused commonly under charge of conspiracy in respect of two different occurrences and charging and trying them jointly, held illegal – Allowing of trial proceedings on erroneous charges and having a joint trial results in failure of justice – Held, Charges liable to be quashed – Matter remitted back to trial Court.
