Vol -VI **May, 2011**
Part-V

IMPORTANT CASE LAWS

Compiled by

Tamil Nadu State Judicial Academy
Chennai – 28

INDEX

TABLE OF CASES WITH CITATION

SUPREME COURT CITATION OF CIVIL CASES

SUPREME COURT CITATION OF CRIMINAL CASES

HIGH COURT CITATION OF CIVIL CASES

HIGH COURT CITATION OF CRIMINAL CASES

SUPREME COURT CITATIONS
CIVIL CASES

2011 (4) SCALE 61

K.K. Velusamy
vs
N. Palanisamy

CIVIL PROCEDURE – C.P.C. – ORDER XVIII RULE 17; SECTION 151 – EVIDENCE ACT, 1872 – SECTION 3 – Reopening/recalling witnesses – Exercise of discretion u/s 151 Order 18 Rule 17 – Inherent power u/s 151 of the Code, can be invoked examination – Respondent filed a suit for specific performance alleging that the appellant had entered into a registered agreement of sale for consideration of ₹ 2,40,000/- but he did not execute the sale deed – Appellant contended that respondent was a money lender and he agreed to advance loan but appellant had to execute sale agreement as security for repayment of loan – On 11.11.2008 when the evidence for purpose of further cross examination of plaintiff (PW.1) and attesting witness (PW.2) – Appellant wanted to cross examine witnesses with reference to admissions made during some conversations, recorded on a compact disc – Trial Court dismissed the said applications holding that as evidence of both parties was concluded and the arguments had also been heard in part, applications were intended only to delay the matter – Revision petition dismissed by the High Court – Neither the trial Court nor the High Court considered the question whether it was a fit case for exercise of discretion u/s 151 or Order 18 Rule 17 of the Code – Whether the courts below were justified in mechanically dismissing the application only on ground that the matter was already at the stage of final arguments – Allowing the appeal in part, Held,

Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (Subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify and issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

There is no specific provision in the Code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re-open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.

2011 (4) SCALE 221

Gurmukh Singh
vs
Jaswant Kaur

STAMP DUTY – INDIAN STAMP ACT, 1899 – Suit for recovery based on pro note – Pro note not duly stamped – Stamps which were affixed on the pro note were removed from another document and affixed on the said pro note – Trial Court rejected plaintiff's claim for recovery of ₹ 2,31,000/- by holding that the said documents were not duly stamped – First appellate court and the High Court agreed with the view of the trial Court – Whether findings of fact recorded by courts below can be interfered with in this appeal – Dismissing the appeal, Held,

The trial court on the basis of evidence found that the pronote and receipt were executed by the defendant in favour of the plaintiff. However, the trial court rejected the plaintiff's claim by holding that the said documents were not duly stamped as required under the provisions of Indian Stamps Act. It was found by the trial court that the stamps which were affixed on the pronote were removed from another document and affixed on the said pronote.

The findings of the courts below are findings of fact and we cannot interfere with the same in this appeal. The finding is that the stamps which have been affixed were removed from other documents, and hence, it has rightly been said that such a pronote cannot be taken into consideration.

The plaintiff-appellant had filed a suit for recovery of ₹2,31,000/-. He claimed that the defendant had executed a pronote and receipt dated 2.5.1994 whereby the defendant had borrowed a sum of ₹1,50,000/- from the plaintiff and agree to repay the same along with interest @ 2% per annum on demand. Since the defendant had nto paid the aforesaid amount, the suit was filed.

The defendant-respondent contested the suit and denied the execution of the pronote and receipt in favour of the plaintiff. She alleged that the aforesaid pronote and receipt were forged and fictitious documents.

The trial court on the basis of evidence found that the pronote and receipt were executed by the defendant in favour of the plaintiff. However, the trial court rejected the plaintiff's claim by holding that the said documents were not dully stamped as required under the provisions of India Stamps Act. It was found by the trial court that the stamps which were affixed on the pronote were removed from another document and affixed on the said pronote.

The first appellate court and the High Court have agreed with the view of the trial court. Thus all the three courts below decided against the appellant.

The findings of the courts below are findings of fact and we cannot interfere with the same in this appeal. The finding is that the stamps which have been affixed were removed from other documents, and hence, it has rightly been said that such a pronote cannot be taken into consideration.

Thus there is no force in this appeal and it is dismissed. No costs.

2011 (4) SCALE 222

U. Sowri Reddy (Dead) by Lrs.
vs
B. Suseelamma & Ors.

CIVIL PROCEDURE – C.P.C. – ORDER XXI RULE 90; SECTION 115 – Revision petition – Scope of powers – Suit for recovery of an amount of ₹26,720/- being the principal amount and interest due on a pro note executed by appellant for ₹24,000/- - Suit decreed ex parte – Plaintiff respondent filed an execution petition for realization of decretal amount by sale of immovable property of appellant – Sale was held in favour of respondents – Appellant

filed an application under Order 21 Rule 90 of the Code to set aside sale of property alleging that the property was worth ₹ 15 lacs but it was sold for ₹ 3,15,000/- to realize the decretal amount of ₹40,364/- - Application dismissed – In revision, High Court gave an opportunity to the judgment debtor to pay the decretal amount – Executing court dismissed the application to set aside sale of the property in question – On challenge, High Court remanded the matter to the trial Court for fresh disposal – Sale was set aside with a direction to the appellant to deposit a sum of ₹18,000/- - High Court set aside this order ignoring deposit of ₹18,000/- by appellant – Whether judgment of the High Court was sustainable – Allowing the appeal, Held,

In our opinion the impugned order of the High Court cannot be sustained. It appears that the High Court ignored the deposit of ₹18,000/- on 06.11.2001 in pursuance of order dated 2.11.2001, and failed to take into account the order dated 11.12.2001 of learned Additional Senior Civil Judge dismissing the Execution Petition No.17 of 1996 and also did not take into consideration the earlier order dated 10.4.1998 in Civil Revision Petition No.3957 of 1998.

In our opinion the High Court was not justified in interfering in a Civil Revision Petition under Section 115 C.P.C. when the amount ₹18,000/- was deposited on 06.11.2001 as per order dated 02.11.2001.

2011 2 – L.W. 481

Gayathri Womens Welfare Association
vs
Gowramma & Anr.

C.P.C., Order 8, Rule 6A/Counter-claim, when can be entertained, Delay in claiming,

C.P.C., Order 6, Rule 17/Amendment of written statement, incorporating counter claim for possession, Scope of, delay/Permissibility.

Question considered whether the High Court was justified in permitting the respondents to raise the counter claim at a stage after the issues had been framed by the trial court?

Held:

Cause of action for the relief of possession arose to the respondents many years ago.

Counter claim not contained in the original written statement may be refused to be taken on record, especially if issues have already been framed – Counter claim is sought to be introduced at the stage of appeal before the High Court.

Dismissal of the counter claim by the trial court was neither illegal nor without jurisdiction.

Prayer in the original counter claim was only for a mandatory injunction to demolish the illegal structures – It was only when the Regular First Appeal was filed for challenging the original decree that the respondents made an application under Order VI Rule 17 for amendment of the original written statement to incorporate the counter claim with a prayer for possession of the land in dispute – Appeal allowed.

The short issue which arises before us is whether the High Court was justified in permitting the respondents to raise the counter claim at a stage after the issues had been framed by the trial court.

Held:

In our opinion, the High Court, while allowing the claims of the respondent to include the prayer for possession in the counter claim, failed to appreciate that the order passed by the trial court did not cause any prejudice to the respondents. The trial court had merely held that the remedy of an independent suit was available to the respondents.

(2011) 3 MLJ 506 (SC)

C.S. Mani (deceased) by LR C.S. Dhanapalan
vs
B. Chinnasamy Naidu (deceased) by LRs.

Code of Civil Procedure (5 of 1908), Order 21 Rule 57 – Execution of money decree – Attachment and sale of property of judgment-debtor – Determination of attachment – Scope and ambit of.

Held:

If the order of the executing Court while closing the execution, was 'attachment to continue', the attachment would have continued in spite of the closing of the execution proceedings. Even if the executing Court had closed the execution, in view of the statutory stay, without any specific order continuing the attachment, the attachment would not have ceased as there was no 'dismissal' of execution under Order 21 Rule 57 of the Code. But, if the order dated 15.2.1975 had stated 'attachment to continue for six months', whether right or wrong, the attachment would have come to an end on the expiry of six months from 15.2.1975, unless it was continued by any subsequent order, or had been modified or set aside by a higher Court.

The attachment dated 29.12.1974 continued till the property was sold by public auction on 6.6.1984 and confirmed on 30.7.1985. Consequently, any sale by the judgment debtor Mokshammal, during the subsistence of the attachment was void insofar as the decree obtained by the appellant. Therefore, it has to be held that neither the purchasers from Mokshammal nor the respondent who is the subsequent transferee, obtained any title in pursuance of the sales, as the sales were void as against the claims enforceable under the attachment.

(2011) 3 Supreme Court Cases 545

Parimal
vs
Veena Alias Bharti

Civil Procedure Code, 1908 – Or. 9 R. 13 and Or. 5 R. 20 – Ex parte decree of divorce – Application for setting aside of – Mandatory requirements and factors to be considered – Sought on grounds of fraud and collusion in obtaining decree, non-service of notice even by substituted service and appellant husband not disclosing fact of grant of divorce during maintenance proceedings – Said application dismissed by trial court but allowed by High Court in absence of "sufficient cause" – Impermissibility – Held, second proviso to Or. 9 R. 13 makes it obligatory for appellate court not to interfere with an ex parte decree unless it meets the statutory requirement – Issue of service of summons or whether there was "sufficient cause" for wife not to appear before court not dealt with, nor findings recorded thereon by trial court set aside – High Court erroneously held that presumption of service of notice stood rebutted by a bald statement made by wife that she was living at different address, with her brother, which was duly supported by him – High Court erred in not appreciating facts in correct perspective as substituted service is mean to be resorted to send notice to the last known address where party had been residing – Also High Court took into consideration conduct of appellant husband subsequent to passing of ex parte decree, which was not permissible – No attempt made to establish that there had been fraud or collusion between appellant husband and postman – It was nobody's case that National Herald daily did not have a wide circulation in Delhi or in the area where respondent wife was residing with her brother – Hence, ex parte divorce decree restored – Further, as appellant had remarried in 1991 and had two major sons, respondent wife awarded ₹ 10 lakhs lump sum amount as maintenance – Hindu Marriage Act, 1955 – Ss. 13 and 25 – Ex parte divorce decree restored by Supreme Court – General Clauses Act, 1897 – S. 27.

Civil Procedure Code, 1908 – Or. 9R. 13 second proviso – Ex parte decree – Setting aside of - Exercise of power as to – Held, second proviso mandatory in nature – It is not permissible for court to allow the application in utter disregard of terms and conditions incorporated therein.

Civil Procedure Code, 1908 – Or. 9 R. 13 – Ex parte decree – Setting aside of – "Sufficient cause" – Meaning and test for – Held, test to be applied is whether defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so – It is such cause for which defendant could not be blamed for his absence – "Sufficient cause" is a question of fact – Words and Phrases – "Sufficient cause", "Good cause".

Held:

The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. In this context, "sufficient cause" means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive".

Evidence Act, 1872 – Ss. 114 Ill. (f), 16 and 101 & 103 – Burden of proof – Provision placing burden on party asserting particular fact – Presumption of service by registered post under S. 114 Ill. (f) – Reiterated, burden to rebut said presumption is on party challenging factum of service – General Clauses Act, 1897, S. 27.

Civil Procedure Code, 19078 – Or. 41 Rr. 31 & 33 and S. 96 – First appeal – Powers of court disposing of such appeal – Proper exercise of – Held, first appellate court should not disturb and interfere with valuable rights of parties which stand crystallized by trial court's judgment, without opening whole case for rehearing, both on question of facts and law.

2011 (4) SCALE 656

Deb Ratan Biswas and Ors
vs
Most. And Moyi Devi & Ors

CIVIL PROCEDURE – C.P.C. – SECTION 115 & 151 – CONTRACT ACT, 1872 – SECTION 207 – Power of attorney – Revocation of – Principal is not bound to consult his attorney before signing a compromise petition – Even after execution of power of attorney the principal can act independently and does not have to take consent of the attorney – Appellants filed a suit for partition against respondents – While partition suit was pending, defendants respondents executed a General Power of Attorney on 31.7.1992 – On 30.7.1196, parties to the suit including defendants respondents filed a compromise petition – Trial Court approved terms of the compromise and directed that a decree be passed in terms of the compromise – Subsequently, a petition purporting to be on behalf of defendants filed through the attorney u/s 151, CPC praying for recalling the order passed in terms of the compromise on allegation that the signatures on the compromise were forged – Trial Court dismissed the petition holding that there was not forgery – Civil consulted their attorney before signing the compromise petition and that attorney's unwillingness should have been mentioned in the compromise petition – Whether the High Court was empowered to interfere with finding of fact recorded by the trial Court – Held, No – Whether principal was bound to consult his attorney before signing a compromise petition – Held, No – Allowing the appeal, Held,

The principal Pushpa Biswas and Apurva Kumar Biswas have signed the compromise for partition of the property, which in our opinion in law amounts to implied revocation of power of attorney in favour of Dr. Sanjeev Kumar Mishra vide illustration of Section 207 of the India Contract Act. Pushpa Biswas and Apurva Kumar Biswas cannot be allowed to say that their own act of signing the compromise petition was collusive and fraudulent.

The learned Subordinate Judge-V, Bhagalpur has gone into the evidence in great detail and recorded findings of fact which could not have been interfered with by the High Court in civil revision. It is well settled that in civil revision the jurisdiction of the High Court is limited, and it can only go into the questions of jurisdiction, but there is no error of jurisdiction in the present case.

2011 (2) CTC 806

Tatipamula Naga Raju
vs
Pattem Padmavathi

Negotiable Instruments Act, 1888 (26 of 1881), Section 20 – Promissory Note – Suit for recovery of money on Promissory Note – Suit filed by Promissory Note – Suit filed by Plaintiff on basis of Promissory Note executed by Defendant for ₹1,25,000/- - Case of Defendant that one Promissory Note for ₹50,000 and three Promissory Note for ₹25,000/- each executed by Defendant and favour of son of Plaintiff – Amount settled between Defendant and Plaintiff's son and money paid back to Plaintiff's son, however one Promissory Note of ₹25,000/- not returned to Defendant as it was said to be misplaced – Case of Defendant that Plaintiff interpolated figure '1' in said misplaced Promissory Note and took undue advantage – Handwriting expert supported case of Defendant and mediators deposed in favour of settlement of dues by Defendant – In such circumstances, held, mere admission of signature of Promissory Note does not make Defendant liable to pay amount in respect of tampered Promissory Note – Civil Appeal allowed – Evidence Act, 1872, Section 45 – Expert Opinion.

Facts:

The Respondent herein had filed Suit for recovery of sum of ₹**1,90,000**/- from the Appellant herein. Suit was dismissed by Trial Court. Upon Appeal filed by the Respondent herein, the Lower Appellate Court allowed the Appeal and decree the Suit with costs. Second Appeal filed by the Appellant was dismissed as no substantial questions of law were raised. Aggrieved by the said dismissals, the present Civil Appeal has been preferred by the original Defendant.

Held:

In our opinion, simply because the Defendant had fairly admitted his signature, the Court should not have come to the conclusion that the amount was payable by the Defendant especially when there was an expert's evidence that figure '1' was added so as to make the figure 1,25,000/- from figure 25,000/- and when the mediators had deposed to the effect that there were transactions between the Defendant and the son of the Plaintiff and in pursuance of the said transaction, Promissory Notes were executed by the Defendant and one of the Promissory Notes was not returned to the Defendant. The explanation given by the Defendant, which was supported by ample evidence, ought to have considered by the Lower Appellate Court and the Lower Appellate Court should not have been guided by a mere fact that the Defendant had admitted execution of the Promissory Note. In our opinion, in such a set of circumstances, the Defendant ought not to have been saddled with a liability to pay the amount in pursuance of the tampered Promissory Note for which no consideration had ever passed from the Plaintiff to the Defendant.

****

(2011) 4 Scale 241

Azeez
vs
State of Kerala

CRIMINAL LAW – I.P.C. – SECTION 304-A, 279 & 337 – Appellant was convicted by the trial Court u/s 304-A, 279 and 337, IPC and was sentenced to undergo simple imprisonment for one year u/s 304-A – Appellant was further sentenced to undergo simple imprisonment for three months u/s 279 and three months u/s 337, IPC – However, the sentences were directed to run concurrently – Appellant has undergone a part of the sentence and has agreed to pay a compensation of ₹ 2,35,000/- to the complainant – It is stated at the Bar that out of this amount, ₹ 35,000/- has already been received by the complainant and a sum of ₹ 2 lakhs has been deposited by the appellant in the Registry of this Court – Court in consideration of the totality of the facts and circumstances of this case, was of the view that ends of justice would be met if the amount of ₹ 2 lakhs, with interest, is directed to be paid to the complainant and the sentence of the appellant is reduced to the period already undergone by him – Court further observes that this case has been decided on its peculiar facts and shall not be treated as a precedent.

Leave granted.

The appellant was convicted by the Trial Court under Section 304-A, 279 and 337 of the Indian Penal Code and was sentenced to undergo simple imprisonment for one year under Section 304-A. He was further sentenced to undergo simple imprisonment for three months under Section 279 and three months under Section 337 of the IPC. However, the sentences were directed to run concurrently.

The appellant filed an appeal before the Additional Sessions Judge, (Fast Track Court) No. 1, Thrissur, which was dismissed. Thereafter, he filed a revision before the High Court which was also dismissed. The appellant is thus before this Court.

We have heard the learned counsel for the parties and perused the impugned judgment.

The appellant has undergone a part of the sentence and has agreed to pay a compensation of ₹ 2,35,000/- to the complainant. It is stated at the Bar that out of this amount, ₹ 35,000/- has already been received by the complainant and a sum of ₹ 2 lakhs has been deposited by the appellant in the Registry of this Court, which is kept in the fixed deposit. The learned counsel for the appellant submits that he has no objection if the amount deposited with the Registry is paid to the complainant. Similarly, the complainant has no objection if the appellant is released on the sentence already undergone by him if the aforementioned amount is paid to her.

On a consideration of the totality of the facts and circumstances of this case, we are of the view that ends of justice would meet if the amount of ₹ 2 lakhs, with interest, is directed to be paid to the complainant (Mrs. Valsala) and the sentence of the appellant is reduced to the period already undergone by him. We order accordingly.

However, we make it clear that this case has been decided on the peculiar facts of this case and shall not be treated as a precedent.

The appeal is disposed of with the aforementioned observations and directions.

(2011) 4 Supreme Court Cases 275

Milind Shripad Chandurkar
vs
Kalim M. Khan and Anr

Negotiable Instrument Act, 1881 – Ss. 142 and 7 to 9 – Cheque payable to sole proprietary concern – Dishonour of – "Payee" – Who is – Locus standi to file complaint – Principles reiterated – Person if sold proprietor – Proof of Appellant having failed to establish that he was proprietor of firm concerned, held, had no locus standi to file complaint under S. 138 – Corporate Laws – Sole proprietorship.

Held:

Where the "payee" is a proprietary concern the complaint can be filed by:

(i) The proprietor of the proprietary concern, describing himself as the sole proprietor of the 'payee';

(ii) The proprietary concern, describing itself as the sole proprietary concern, represented by its sole proprietor; and

(iii) The proprietor or the proprietary concern represented by the attorney-holder under the power of attorney executed by the sole proprietor.

However, it shall not be permissible for an attorney-holder to file the complaint in his own name as if he was the complainant. He can initiate criminal proceedings on behalf of the principal.

In a case of this nature, where the "payee" is a company or a sole proprietary concern, such issue cannot be adjudicated upon taking any guidance from Section 142 of the 1881 Act but the case shall be governed by the general law i.e. the Companies Act, 1956 or by civil law where an individual carries on business in the name or style other than his own name. In such a situation, he can sue in his own name and not in the trading name, though others can sue him in the trading name. So far as Section 142 is concerned, a complaint shall be maintainable in the name of the "payee", proprietary concern itself or in the name of the proprietor of the said concern.

None of the courts below have held that the appellant was the sole proprietor of the said firm.

The appellant miserably failed to prove any nexus or connection that he is the sole proprietor of the concern and being so, he could also be the payee himself and thus, entitled to make the complaint by adducing any evidence, whatsoever, worth the name with the said firm, namely, V. Mere statement in the affidavit in this regard, is not sufficient to meet the requirement of law. The appellant failed to produce any documentary evidence to connect himself with the said firm.

(2011) 3 Supreme Court Cases 351

Mona Panwar
vs
High Court of Judicature of and Ors

Negotiable Instruments Act, 1881 – Ss. 138 and 141 – Dishonour of cheque – Offence by company – Proceedings against Director who had resigned prior to offence allegedly committed by company – Relegating him to face trial – Untenability – Held, an ex-Director cannot be made accountable and fastened with liability for anything done by company after acceptance of his resignation by company – On facts, resignation of appellant as

Director of Company was accepted and notified of Registrar of Companies in prescribed form (Form 32) – On facts, resignation of appellant as Director of Company was accepted and notified to Registrar of Companies in prescribed form (Form 32) – On date when offence was committed by Company, appellant was neither Director of Company nor had anything to do with affairs of Company – Hence, held, if criminal complaints are allowed to proceed against appellant, it would result in gross injustice and tantamount to abuse of process of court – Hence quashed – Corporate Laws – Company Law – Corporate criminal liability – Ex-Director, held, cannot be made liable for acts of company post his resignation – Companies Act, 1956 – S. 291 – Criminal Procedure Code, 1973, S. 482.

Criminal Procedure Code, 1973 – Ss. 482 and 397 – Quashing of proceedings under, by appreciating evidence – When permissible – Consideration of defence at prima facie stage by High Court under revisionary power or under inherent powers is not absolutely barred – In order to prevent injustice or abuse of process or to promote justice, High Court may look into materials which have significant bearing on the matter at prima facie stage – High Court can quash complaint if materials relied upon by accused are beyond suspicion or doubt or which are in the nature of public documents and are uncontroverted – In present case, High Court refused to interfere with complaint (under revisionary power) and allowed trial against Director of company where offence was committed by stand on the face of documents which are beyond suspicion or doubt, it would be travesty of justice if accused is relegated to trial and asked to prove his defence before trial court – Complaints against appellant quashed – Corporate Laws – Corporate criminal liability – Quashment of proceedings – Documents that may be relied on in defence – Companies Act, 1956, S. 291.

Held:

It is not the law that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, 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, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

(2011) 3 Supreme Court Cases 496

Mona Panwar
vs
High Court of Judicature of Allahabad through its Registrar and Ors

Criminal Procedure Code, 1973 – Ss. 156(3), 200 and 482 – Application under S. 156(3), but initiation of proceeding directly under S. 200 – Warrantedness – Scope of interference by High Court – Application filed under S. 156(3) by R-3 (alleged rape victim), before appellant Judicial Magistrate, alleging rape by her father-in-law and praying that appellant direct police to register her complaint and investigate case against accused under S. 156(3) – Appellant, after calling for police report and considering all material filed by R-3 finding case unfit to be referred to police for investigation under S. 156(3), therefore, directed application to be registered as complaint and further order Registry to present file before her for recording statement of R-3 under S.200 – However, High Court, while severely criticizing appellant for such order, set aside the order and directed appellant to decide application of R-3 within ambit of her power under S. 156(3) and also directed her to pass an order for registration of FIR against erring police officers, who had refused to registration of FIR against erring police officers, who had refused to register FIR of R-3 – Sustainability – If on reading of complaint, Magistrate finds that allegations therein disclose cognizable offence and forwarding of complaint to police for investigation under S. 156(3) will not be conducive to justice, held, Magistrate will be justified in adopting the course suggested in S. 200 – Herein, judicial discretion

exercised by appellant was in consonance with scheme postulated by CrPC – There was no material on record to indicate that judicial discretion exercised was either arbitrary or perverse – Hence, there was no occasion for High Court to interfere with discretion exercised judiciously in terms of provisions of CrPC merely because another view was possible – Penal Code, 1860, S. 376.

Criminal Procedure Code, 1973 – Ss. 156(3), 200 and 202 – Complaint before Judicial Magistrate under S. 156(3) – Options available to Magistrate, while dealing with – Held, Magistrate has mainly two options available on such complaint – One, to pass an order as contemplated by S. 156(3) – Or second, to direct examination of complainant upon oath and witnesses present, if any, as mentioned in S. 200 and proceed further with matter as provided under S. 202 (Paras 18 and 23) and proceed further with matter as provided under S. 202.

Criminal Procedure Code, 1973 – Ss. 190, and 156(3) – "Taking cognizance of" – Meaning of, explained.

Held:

The phrase "taking cognizance of" means cognizance of an offence and not of the offender. Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint or on a police report or upon information of a person other than a police officer. Before the Magistrate can be said to have taken cognizance of an offence under Section 190(1)(b) CrPC, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceedings under Section 200 CrPC and the provisions following that section. However, when the Magistrate had applied his mind only for ordering an investigation under Section 156(3) CrPC or issued a warrant for the purposes of investigation, he cannot be said to have taken cognizance of an offence. Taking cognizance is a different thing from initiation of the proceedings.

2011 (3) Scale 574

Kaushalya Devi Massand
vs
Roopkishore Khore

Negotiable Instruments – Negotiable Instruments Act, 1881 – Section 138 – Conviction for offence – Jail sentence not mandatory – Appeal filed by complainant, an old widowed lady, praying for jail sentence for respondent considering the fraud perpetrated by him – Offence was in respect of three cheques dated 01.05.1997, 15.05.1997 and 30.05.1997, for Rs.1 lakhs each – Said cheques were issued in lieu of payment of consideration against the sale of property – On presentation of the cheques to the Bank, the same were dishonoured on ground of insufficient funds – Subsequently, in lieu of the three cheques which had been dishonoured, four cheques were drawn – Said cheques presented to the Bank were again dishonoured due to insufficient funds resulting in filing of the complaint – Respondent was convicted by the Judicial Magistrate for offence u/s 138 of the Act – Respondent having deposited Rs.3,50,000/- as against the cheques amounting to Rs.2 Lakhs, Magistrate held that sentence of fine only would suffice without awarding any jail sentence – Magistrate sentenced the respondent to pay a fine of Rs.4 Lakhs which was to be paid to appellant complainant as compensation – Magistrate directed respondent to pay the balance amounting to Rs.50,000/- to appellant revision filed by respondent challenging order of the Magistrate – While confirming judgment of conviction, Session Judge remanded the matter to the Magistrate for a fresh hearing on question of sentence – On appeal, High Court enhanced liability of respondent to Rs.6 lakhs – Appeal filed by complainant praying for jail sentence for respondent considering unnecessary harassment suffered by an old widowed lady for the last 14 years – Whether on facts of the case, imposition of a fine payable as compensation to appellant was sufficient to meet ends of justice in the instant case – Held, Yes. Court awards a further sum of Rs.2 lakhs – Allowing the appeal in part.

2011 (4) SCALE 614

Rallis India Ltd.,
vs
Poduru Vidya Bhusan & Ors.

NEGOTIABLE INSTRUMENTS – NEGOTIABLE INSTRUMENTS ACT, 1881 – SECTION 138 & 141 – Cr.P.C. – SECTION 482 – Quashing criminal proceedings – Cautionary note with regard to the manner in which High Courts ought to exercise their power to quash criminal proceedings when such proceeding is related to offences committed by companies – High Court could not have discharged respondents of the said liability at the threshold when there were several disputed facts involved – Appellant filed a criminal complaint u/s 138 and 141 of NI Act – Respondents denied their vicarious liability for the offences on ground that they had retired from the partnership firm in 2001/2002, i.e. much prior to the issuance of cheques in question in 2004 – In the complaint, sufficient averments had been made against respondents that they were partners of the firm, at the relevant point of time and were looking after day to day affairs of the partnership firm – Whether High Court was justified in quashing prosecution against respondents in exercise of its jurisdiction u/s 482, Cr.P.C – Allowing the appeal, Held,

The primary responsibility of the complainant is to make specific averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no legal requirement for the complainant to show that the accused partner of the firm was aware about each and every transaction. On the other hand, proviso to Section 141 of the Act clearly lays down that if the accused is able to prove to the satisfaction of the court that the offence was committed without his knowledge or he had exercised due diligence to prevent the commission of such offence, he will not be liable of punishment. Needless to say, final judgment and order would depend on the evidence adduced. Criminal liability is attracted only on those, who at the time of commission of the offence, were in charge of and were responsible for the conduct of the business of the firm. But vicarious criminal liability can be inferred against the partners of a firm when it is specifically averred in the complaint about the status of the partners "qua the firm. This would make them liable to face the prosecution but it does not lead to automatic conviction. Hence, they are not adversely prejudiced – if they are eventually found to be not guilty, as a necessary consequence thereof would be acquitted.

At the threshold, the High Court should not have interfered with the cognizance of the complaints having been taken by the trial court. The High Court could not have discharged the respondents of the said liability at the threshold. Unless parties are given opportunity to lead evidence, it is not possible to come to definite conclusion as to what was the date when the earlier partnership was dissolved and since what date the Respondents ceased to be the partners of the firm.

****

HIGH COURT CITATIONS
CIVIL CASES

2011 -2- L.W. 1

A.N. Kumar
vs
Arulmighu Arunachaleswara Devasthanam Thiruvannamalai and Ors
And
A.N. Kumar
vs
Arulmighu Arunachaleswara Devasthanam Thiruvannamalai

Tamil Nadu Hindu Religious and Charitable Endowments Act (1959), Chapter VII/Sections 78,79, Ejectment suit by temple (Arulmighu Arunachaleswarar Devasathanam Thiruvannamalai) against lessess, whether maintainable; other Suit by lessee was filed for Specific Performance of clause in the lease to exercise option for renewal for further period of 50 years, such clause whether valid, Sections 34, 118,

C.P.C., Section 9/Civil court's jurisdiction, bar as to, Ejectment suit by temple, whether barred,

General Clauses Act (1897), Sections 6,

Specific Performance,

Specific Relief Act (1963), Section 22/Discretionary relief.

Question in these appeals is, whether for ejectment suit filed by the temple, jurisdiction of the Civil Court is expressly barred.

There is no express bar under Sections 78 and 79 for an authority acting on behalf of the temple to approach the Civil Court – Bar of jurisdiction of Civil Court under second provisio to Section 79 is the bar in respect of suits instituted only by a lessee, licensee, or mortgagee of the religious institution or endowment.

When the encroacher has been given a right to approach the Civil Court after an order has been passed by the Deputy Commissioner against him, there cannot be a bar for the temple to file a suit – Suit filed on behalf of the temple is very much maintainable.

As per clause (7) of Ex.A.1, the lessee shall not be entitled to assign, transfer, sell all or any portion of leasehold rights except with the previous consent in writing of the lessors.

Lessee had conveyed the properties without getting the previous consent of the lessor – When there is breach of covenant by the lessee, the lessee forfeited the right to exercise the option for renewal of the lease.

Clause containing option to renewal of lease for fifty years is inconsistent with the provisions of H.R.&C.E.Act.

Passing decree for specific performance directing the Temple Authorities to renew the lease for a further period of fifty years would injuriously affect the interest of the temple.

(2011) 3 MLJ 21

M.V. Jayavelu
vs
E. Umapathy

Code of Civil Procedure (5 of 1908), Order 7 Rule 11 – Rejection of plaint – Suit for specific performance – Plaint does not disclose any cause of action for filing suit for specific performance – Plaint liable to be rejected.

Held:

When the plaint proceeded on the basis that there was an agreement of sale dated 19.4.2000 and the plaintiff is entitled to specific performance of the contract, in the absence of proof of any such agreement of sale dated 19.4.2000, it can be held that the plaint has not disclosed any cause of action.

The plaintiff has not produced any document to prove that there was an agreement of sale between the parties. Further, the alternative prayer is also clearly barred by limitation as admittedly the amount was paid in the year 2000 and in the year 2008, the same cannot be recovered. It may be that the plaintiff is entitled to be in possession of the property till the defendants refund the amount but that is not a ground to maintain the present suit filed by the plaintiff. Therefore, according to the Court, the plaint does not disclose any cause of action for filing a suit for specific performance and the claim for refund of ₹ 2,000/- is also barred by limitation. Hence, the plaint is liable to be rejected.

2011 (3) CTC 31

Aravindharaj Adhithan
vs
R. Perumal

Transfer of Property Act, 1882 (4 of 1882), Section 106 – Termination of Tenancy – Termination Notice issued to vacate premises within 10 days – Suit filed long after statutory period of 15 days – Even if Notice was treated as defective, it got cured by filing of Suit after 15 days statutory period – Concurrent finding as to eviction, upheld.

Facts:

Land issued notice terminating tenancy. Notice was issued granting 10 days for vacating premises. Landlord filed Suit after the statutory period of 15 days. Tenant contended that the notice was defective. Trial Court as well as Appellate Court ordered eviction as against which Tenant preferred Second Appeal. The Hon'ble High Court concurred with the findings and dismissed the Second Appeal with following observation.

Held:

The learned Counsel for the Respondent/Plaintiff, at this juncture, appropriately and appositely, correctly and convincingly would place reliance on the amended Section 106 of the Transfer of Property Act and submit that even though in the termination notice only 10 days' time was granted for the Defendant to vacate the premises, in fact, the Suit was filed long after the statutory period of 15 days, so to say, the notice was admittedly received on 3.2.2006 and the Plaint was presented only on 21.2.2006 and in such a case, only after a lapse of statutory 15 days' time as contemplated under Section 106 of the Transfer of Property Act, the Suit was instituted and even if the notice was treated as a defective one, it got cured by virtue of the Suit itself having been filed after 15 days as contemplated under Section 106 of the T.P. Act.

(2011) 3 MLJ 44

Anser Bi
vs
Sherfunissa Begum Sahiba Mosque Wakf, rep. by its Secretary Fasiuddin and Ors

Transfer of Property Act (4 of 1882), Section 116 – Lease – Renewal of lease – Plea under Section 116 cannot be raised at appellate stage – Plaintiff should be in actual physical possession for claiming rights under Section 116 of Act.

Held:

In the instant case, as contended by the learned counsel for the 1st defendant, absolutely, there was no pleading in respect of the principle of holding over. Therefore, Court is of the opinion that the plaintiff cannot raise the plea under Section 116 at the appellate stage. Had the plea with regard to assent of landlord been taken by the plaintiff before the trial Court, the 1st respondent would have had a change of meeting out the same. Therefore, looking at any angle, the plea under Section 116 is a question of a fact and not a question of law. Under such circumstances, the plaintiff is not entitled to take a plea under Section 116 at this length of time.

The person, who seeks the renewal of lease, should be remaining in possession and should not be in arrears of rent. Though it was alleged that the plaintiff has taken steps to deposit the rent, as could be seen from the dictum laid down from various Court Judgments, it is clear that mere acceptance of rent offered by the lessee would not amount to 'assent'. Court is of the opinion that since the plaintiff is not in actual physical possession and she had not taken a plea with regard to Section 116 of the Transfer of Property Act and notwithstanding the plea under the said Act is a question fact, this Court is not in a position to appreciate the submissions made by the plaintiff. Therefore, Court does not find any infirmity in the finding arrived at by the lower appellate Court and, as such, the substantial questions of law are answered against the plaintiff and the appeal has to be dismissed.

2011 -2- L.W. 53

P. Subramanian (died) & Ors
vs
S. Viswasam

Limitation Act (1963), Section 5, C.P.C., Order 9, Rules 6, 9, Order 5, Rules 17, 18, Practice/Application seeking condonation of delay of 1147 days in seeking to set aside ex parte decree for specific performance preferred after Sale Deed was executed by Court and pending E.A. for possession of property, Revision against order of dismissal of I.A. by lower court, allowed, Specific Performance/ Ex parte decree, setting aside of, Execution.

It is trite that sufficiency of the explanation alone is the relevant criteria and not the number of days – Similarly, there is no presumption of any kind that the delay in approaching the Court is deliberate in nature.

Mere fact that the sale deed was executed in favour of the respondent alone cannot be a reason to reject the application filed by the petitioners to condone the delay – Admittedly, the property is in the possession of the petitioners – It was purely an exparte decree without considering the merits of the matter – There is nothing in the judgment and decree to show that the Court has considered the principles governing the grant of discretionary remedies before decreeing the suit – There were no reasons shown in support of the judgment.

No genuine attempt was made by lower court to consider the question as to whether the petitioners have made out a case for condoning the delay or there was sufficient cause which precluded them from filing the application to set aside the exparte decree within the time permitted by law – Order impugned in this Civil Revision

Petition is liable to be set aside – Matter is remitted to the learned trial Judge for fresh consideration on merits and as per law.

C.P.C., Order 9, Rules 6, 9 –See Limitation Act (1963), Section 5. C.P.C., Order 5, Rules 17, 18 – See Limitation Act (1963), Section 5, C.P.C., Order 9, Rules 6, 9.

Held:

It is a matter of record that the petitioners filed the application only after affixture of notice in E.A. and the learned trial Judge conducted the matter in a highly technical manner.

Though the trial Court has recorded that the summons were affixed, there is nothing on record to show that such a report was made by the process server of the Court. Admittedly, the process server was not examined before the trial Court.

Trial Court record does not contain the affidavit filed by the process server indicating that the notices issued to the petitioners were actually affixed on the outer wall of their residence. The said officer was not examined before ordering substituted service. The record of proceedings gives a clear indication that the process server was not in a position to effect service on the petitioners. The endorsement proceeds as if the defendants were not found. Therefore, it is evident that it was not a case of refusal on the part of the defendants to receive the notice.

There is nothing on record to show that a serious attempt was made by the process server to effect service.

There was no such endorsement made by the process server. Not even a report to that effect is found in the lower Court records. Therefore, it is not clear as to whether summons was really affixed on the outer wall of the residence of P.W.1 and in whose presence such affixture was made.

2011 (3) CTC 58

Sanjay Gupta and Ors
vs
The Corporation of Chennai, represented by its Commissioner, Ripon Buildings

Code of Civil Procedure, 1908 (5 of 1908), Section 92 and Order 39, Rule 1 – Ingredients of – Maintainability of Application in previous schemes Suit filed by person having personal interest in Trust property – Ingredients necessary to file Suit under Section 92 are: (a) There must be allegations of breach of any express or constructive trust created for public purposes of charitable or religious nature or alternatively direction of Court is deemed necessary for administration of trust (b) Person moving Court must have interest in Trust, and (c) Such persons must have obtained leave of Court – Even third parties would be considered to be interested in Trust if they establish that subservience of their private interest would ultimately lead to subservience of interest of Trust – Affidavit filed in support of Application narrates purely private interest in Trust properties and it would not eventually be subservient to interest of Trust – Applications, who could not move Suit under Section 92 could not indirectly achieve their results by filing Application in previous Scheme Suit – Interim injunction refused as no prima facie case made out.

Facts:

A Public Trust was created in 1882 with the main object of constructing a Town Half for holding meetings, concerts, etc. The land over which the hall was constructed was leased by the Corporation of Madras for a period of 99 years. The hall was not put to the use contemplated by Trust after 1963 and substantial portion of the land had been subleased to an individual and/or Companies floated by him. The sub-lease was extended 1973 and the same is due to expire in 2028. In 2009 during the pendency of certain litigations on the renewal of lease the Public Trust resolved that the Trust could be dissolved and the trust and surrendered possession of the lands back to Corporation. The Trust decided to

request the Government to form another trust for the purpose of restoring the original glory of the Town hall. The legal heirs of the individual and the corporate entity created by him filed three Applications in the Scheme Suit filed earlier and where scheme had been framed. Suits were also filed and interim reliefs were sought there also. The Applications in the Suit were for declaring that sub-lease in their favour subsisted and binding on the Corporation and the act of surrendering of the lands by the Trust to the Corporation is null and void and an Application for interim injunction retraining the Corporation and other Respondents from any manner interfering with the right of the Plaintiffs' to peaceful possession and enjoyment of the lands.

Held:

It is needless to point out that to invoke the jurisdiction of this Court under any of the clauses in sub-section (1) of Section 92, CPC, the following conditions are to be satisfied:

2011 -2 - TLNJ 69 (Civil)

K. Ramasundaram
vs
S.P. Thenappan

Civil Procedure Code 1908 as amended, Section 115 – Condone delay – when a suit is reinstated in a Court, notice of hearing to be informed to the parties to the suit by the Court – litigant cannot be expected to visit the Court daily especially when the parties do not know the first date of hearing – for the delay due to plaintiff, he is not entitled for interest on suit claim – CRP Allowed.

2011 -2 - TLNJ 116 (Civil)

A. Meharbhan Ameerkhan
vs
K. Sultan Mohideen

Negotiable Instruments Act 1881, Section 118 – Suit on promissory note – defendant claimed that consideration was paid 3 years prior to suit promissory note and the same was only a renewed document – trial court decreed suit – first appellate court confirmed the findings and dismissed appeal – on further appeal High Court held that as the defendants not rebutted the presumption under section 118 of the act, though different version was given on passing of consideration the defendant not entitled to any relief – Second Appeal dismissed.

2011 -2 - TLNJ 122 (Civil)

Mariyammal and Ors
vs
Mariyappan and Ors

Civil Procedure Code 1908 as amended, Order 22, Rule 3 – Preliminary decree passed in a partition suit – sole plaintiff died – Legal heirs filed application to implead them as parties to the proceedings – trial court dismissed the application and bared by limitation –on revision by the aggrieved legal heirs, the High Court, Madras (Madurai Bench) opined that a petition suit does not abate even legal representatives are nto brought on record – petition to implead legal heirs will not be hit by limitation if not brought on record with the prescribed time stated under order 22 Rule 3 – order of trail court set aside and Civil Revision petition allowed.

2011 -2 - TLNJ 142 (Civil)

A. Govindarajan
vs
V. Alagirisamy Naicker and Ors

Limitation Act 1963, Section 5 – Appeal filed belatedly with a petition to condone delay of 788 days – the appellate court found contradictions in the reasons assigned and non sufficient cause made out in the petition and dismissed the application – on revision High Court, Madras (Madurai Bench) expressed that the term "sufficient cause" is to be looked with lenient and liberal interpretation by Courts and pragmatic common sense approach is to be adopted for condonation of delay – further expressed that when substantial justice and technical consideration are pitted against each other, cause of substantial justice deserves to be preferred and at the same time decree passed not to be set aside in a cavalier fashion as a matter of routine – Civil Revision Petition dismissed.

2011 -2 - TLNJ 147 (Civil)

Govindarajalu Naidu
vs
Vaduganathan (Deceased) Ramesh (died) Ors

Tamil Nadu Building (Lease & Rent Control) Act 1960, Section 10(3) (a) (iii) – Petition filed seeking eviction on the ground of willful default and owners occupation – rent controller ordered and appellate authority confirmed the finding –on revision under section 25 of the act, to the High Court, Madras it was held that exercising jurisdiction under section 25 of the act, it cannot make further rowing enquiry and act as a second court of appeal – further rejected the contention that on account of death of landlord pending revision the eviction on the ground of owners occupation can not be granted and expressed that subsequent events are not matters of automatic cognizance of court – Civil Revision Petition dismissed.

2011 -2 - TLNJ 160 (Civil)

Muthuvel
vs
V. Ponnusamy and Ors

Civil Procedure Code 1908 as amended, Order 6, Rule 17 – Suit filed by plaintiff for declaration of title and for permanent injunction against the defendants from interfering with his peaceful possession and enjoyment suit property – evidence over – suit posted for argument in the written statement filed in the year 2007 – defendants contended that they are in possession of the property – plaintiff who was aware that the defendants are claiming possession had not though it fit to file an application for amendment immediately, after filing the written statement or before the commencement of the trial – the plaintiff not entitled to file an application for amendment by incorporating the prayer for possession at the belated stage – CRP dismissed.

2011 (2) TLNJ 198 (Civil)

S. Krishnkumar
vs
V. Arumugham

Specific Relief Act: Section 16(c) Suit for specific performance of agreement of sale – suit dismissed – on appeal it was held the plaintiff in a suit for specific performance has to comply with section 16(c) of specific Relief Act is the mandate of the statute – ready and willingness to be determined from conduct of parties – time is not the essence of contract when one of the parties evade his part of performance –appeal allowed.

2011 -2- L.W. 226

K. Pattammal (deceased) & Ors
vs
Ganga Harinarayanan & Ors

Specific Performance, Specific Relief Act (1963), Sections 16, 21/Two agreements for sale, Starting of limitation, Computing of, Consensus ad idem between the parties relating to enforcement of the agreement, Novation of contract.

Limitation Act (1963), Article 54/Limitation for filing of suit,

Contract/Novation,

Maxims/Ex turpi causa non oritur action – (Out of a base (illegal or immoral) consideration, an action does (can) not arise; Exdolo malo non aritur action – (Out of fraud no action arises; fraud never gives a right of action; No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act; In Pari delicto potior est condition possidentis (defendentis) – In a case of equal or mutual fault (between two parties) the condition of the party in possession (or defending) is the better one; Suppressio very suggestion falsi – Suppression of the truth is equivalent to the suggestion of what is false; Suppressio very expression falsi – Suppression of the truth is equivalent to the expression of what is false.

Before the lower court virtually, both sides agreed that such an agreement (Ex.A1) emerged between the parties concerned – Period of performance was specified as three months, which means on or before 03.04.1987, the parties should have performed their respective parts of the contract – But, in this case, it did not the contract – But, in this case, it did not happen – Second agreement emerged on 22.01.1987 between the same parties and for the same property.

Three months' period expired by 03.04.1987 and three years limitation period as per Article 54 of the Limitation period as per Article 54 of the Limitation Act expired by 03.04.1990 – Plaint was presented before the court only on 24.04.1990 long after the expiry of the limitation period.

There was no consensus ad idem between the parties relating to enforcement of the agreement to sell Ex.A1 in toto.

Ex.A1 agreement to sell was sought to be manipulated by entering into the second agreement to sell – It cannot be contended that the terms and conditions in Ex.A1 and the subsequent agreement were verbatim the same and there was no novation.

Plaintiff wanted to get enforced the second agreement to sell – But, plaintiff filed the suit for enforcement of the first agreement.

In the absence of a prayer for such return of the advance amount and for awarding compensation, the same could not be ordered.

Held:

Unarguably and unassailably, indubitably and indisputably, Ex-A1 is the agreement to sell dated 03.01.1987. Before the lower court virtually, both sides agreed that such an agreement emerged between the parties concerned.

(2011) 3 MLJ 251

K.P. Rajendran and Anr
vs
N.R. Nachmuthu and Ors

Specific Relief Act (47 of 1963), Section 15 and 19 – Specific performance of contract – Party sought to be impleaded in suit not claiming any independent title but claiming title through one of parties – He is necessary party and liable to be impleaded as party to suit.

Held: A combined reading of Sections 15 and 19 of the said Act, makes it clear that the parties to the contract and their representatives in interest can claim enforcement of the contract and the contract can be enforced against either party or any other person claiming under him by a title arising subsequently to the contract.

In this case, it is admitted that after filing of the suit, the fourth respondent purchased the property from the other defendants and therefore, she is coming under Section 19(b) of the said Act. Further, under Section 19(b) of the said Act, if the subsequent purchaser is able to prove that he is transferee for value, who paid the money in good faith and without notice of the original contract, the specific performance of contract cannot be enforced against him and therefore, the subsequent purchaser is entitled to get the suit dismissed filed by the prospective purchaser under the agreement of sale, if he is able to prove that he is bona fide purchaser for value and he purchased the property without notice of the original contract. Therefore, the subsequent purchaser, who purchased the subject matter of the suit from one of the parties is a necessary party to have a binding decree against other parties.

In the event of any decree being passed in favour of the revision petitioner, the fourth respondent has to execute sale deed along with the respondents 1 to 3 and therefore, in order to bind the fourth respondent, he is a necessary party. Without appreciating the same, the Lower Court relied upon the judgments in S.G. Kannappan v. S. Murugesan and Another (2001) 4 CTC 730: (2002) 1 MLJ 90, and Anil Kumar Singh v. Shivnath Mishra (1995) 3 SCC 147 and dismissed the application.

2011 -2- L.W. 270

S.R. Jayaraman and Ors
vs
C. Jothirlingam and Ors

C.P.C., Order 33, Rule 1, Order 7, Rule 11, Practice and Procedure, Challenge to order of lower court granting permission of the Court to recognize the Power Agent to continue the suit – As per Order 33, Rule 1 of C.P.C., when an application filed is rejected by the Court, refusing to grant permission to the plaintiff to sue as indigent person, sufficient time has to be given to the plaintiff - Even after the dismissal of the application filed under Order 33, Rule 1 of C.P.C., the Court has to give further time to the plaintiffs to pay the Court fee in this case, that situation has not arisen.

In this case, though the time was fixed by this Court respondents filed application under Order 33, Rule 1 of C.P.C., seeking permission of the Court to continue the proceedings as informa pauperis – In that application before passing any order, the Stamp duty and the Court fee was paid – It cannot be stated that there is non compliance of Order 7, Rule 11 of C.P.C., which warrants dismissal or the rejection of the plaint.

As per the residuary power given by the principal, the Agent is entitled to file the suit in respect of the permission given in the Power – No infirmity in the order of the Court below.

It is admitted that this Court vide order 08.01.2008, passed in C.R.P(NPD) No. 1399 of 2006, directed the respondents to pay the Court fee under Section 40 of the said Act and granted two months time to pay the same. It is seen from the endorsement of the Court below that the plaint was returned to the respondents on 08.01.2008, with a direction to

pay the Court fee within a period of two months. Thereafter, on 29.02.2008, the respondents/plaintiffs filed an application under Order 33, Rule 1 of C.P.C., seeking permission of the Court below to pay the Court fee. That petition was returned for compliance of certain defects and by order dated 20.03.2009, excepts the minor plaintiffs, all other plaintiffs were directed to be present before the Court for recording sworn statement. Thereafter, the petition was re-presented and finally the respondents/plaintiffs made an endorsement agreeing to pay the Court fee and sought permission of the Court to permit the respondents/plaintiffs to pay the Court fee and that was accepted and the plaint numbered.

2011 -2- L.W. 289

K. Muthusamy and Ors
vs
K.V. K. Subramanian

Specific Performance/Plea of defendant that alleged sale agreement was executed only for the security purpose and so there was no question of readiness and willingness to perform his part of contract – It was submitted that the respondent/plaintiff herein has obtained the signature of the first appellant in blank papers when he lend money and that it has become a matter of routing practice to obtain such agreement by force by taking advantage of the dire need of the borrower – Appeal was preferred by defendants from decree of lower court granting specific performance.

Evidence Act (1872), Section 92,

Registration Act (1908), Section 17, (Amendment Act 48 of 2001),

Specific Relief Act (1963),

As laid down in 2007-5-ML 222, mere registration of sale agreement, will not prove its veracity – Ex.A3 came into existence on 16.02.1999, but the amendment came into effect by 48 of 2001. So before 2001, there was no necessity for registering the sale agreement – In such circumstances, no reason has been assigned by the respondent/plaintiff as to why possession was handed over to him by part performance and the same also had not been mentioned in Ex.A1.

It is proved that at the time of borrowing ₹.5,00,000/-, the respondent/plaintiff got the sale agreement to be executed and registered and obtained signatures from the first appellant/first defendant in a blank paper and executed power of attorney.

The learned counsel appearing for the petitioners/appellants submitted that the respondent/plaintiff herein has obtained the signature of the first petitioner/first appellant in blank papers when he lend money of ₹5,00,000/- and got the registered sale agreement with an intention that the document was executed for the security for the amount of ₹5,00,000/-. The respondent/plaintiff also obtained signatures from his son, who is the second petitioner/second appellant and fabricated the blank papers by executing power of attorney in favour of his benami, one Kalimuthu and the said Kalimuthu executed a lease deed in favour of one Shanmugasundaram, who is also the benami of respondent/plaintiff.

2011 -2- L.W. 308

Elumalai
vs
Subbramani

Evidence Act (1872), Section 45/Age of ink in disputed document, finding of, methods,

C.P.C., Section 151.

Petitioner filed an application under Section 151 of CPC praying the Court to send the suit pro-note to the expert to ascertain the difference between the inks which were utilized for signing his signatures in the suit pro-note and other signatures contained in the printed form which is a filled up pro-note.

It is not impossible to discover age of the ink.

Disputed document to examination in order to provide an opportunity when a good material is available, to rebut the presumption as per law, by non-destructive method in this regard.

If the expert concerned considers that such examination would destruct a part of the document or the document itself, they may report the fact before the Court and the Court thereafter shall pass further orders for the proof of the facts on the basis of pleadings and other evidence.

Disputed document has to be referred to the expert for ascertaining the age of the ink and practical hardships, if any, sustained by the expert shall be brought to the notice of the Court and the Court shall thereafter act according to the settled principles.

The petitioner is defendant in O.S.No.220 of 2008 on the file of the First Additional District Munsif Court, Thirukoilur. The respondent has filed the suit on a pro-note against this petitioner for recovery of a sum of ₹ 40,000/- along with interest and costs. The suit was taken for trial and when it is in part-heard stage, the petitioner filed an application under Section 151 of CPC praying the Court to send the suit pro-note to the expert to ascertain the difference between the inks which were utilized for signing his signatures in the suit pro-note and other signatures contained in the printed form which is a filled up pro-note.

Held:

The aforenoted opinions of the reputed authors on this subject as narrated above would make it abundantly clear that it is not impossible to discover age of the ink. Hence, the plea that the procedures have not evolved so far in this country is no longer available and it cannot be acceded to. Going by the above clippings in the authorities, it transpires that it is not at all difficult task to step into the experiments under the guidelines of illustrious experts in this filed. The authorities and the officials concerned have to take initiatives to evolve procedures for experiments with latest technology for achieving improvement on the subject.

2011 -2- L.W. 341

M.K. Swaminathan
vs
V. Thangam

Tamil Nadu Buildings (Lease and Rent Control) Act, Section 10(2)(i)/Wilful default, Adjustment of Advance; Conduct of tenant; Section 10(3) (a)/Bona fide requirement of non-residential premises, Considerations.

High Court has consistently held that in the absence of any request by the tenant to adjust the rent from advance, it is not open to the tenant to contend that he has not committed willful default and the landlord ought to have adjusted the rent from the advance amount.

Unless the tenant called upon the landlord to adjust the advance against the arrears, he cannot escape the consequences of willful default – In this case, the conduct of the tenant should also prove that the default is nothing but willful – Without sending pay order along with Ex.R5, the tenant has claimed that rent for 3 months representing Avani, Puratasi to Ayppasi 2001 was paid – Further, even after the relationship was strained, he claimed to have paid the rent in person without getting receipt – This conduct on the part of the tenant would lead only to the conclusion that he has committed willful default, even though the landlord had the advance with him.

No explanation was given by the landlord for not occupying those buildings – Bona-fide of the landlord has to be doubted and that only leads to the presumption that the requirement of the landlord is not bona-fide and the tenant is not liable to be evicted on that ground – Therefore, the landlord is not entitled to evict the tenant on the ground of owners' occupation – However, having regard to the finding that the tenant has committed willful default in the payment of rent, the fair and decreetal order of the Rent Control Appellate Authority is set aside and the order of the Rent Controller is restored and this Civil Revision Petition allowed.

(2011) 3 MLJ 410

Bairappan @ Mani
vs
S. Mangammal

Code of Civil Procedure (5 of 1908), Order 6 Rule 17 – Amendment of pleadings – Amendment of date of suit pronote – Typographical error – Affidavit for amendment – Competency of advocate to file affidavit – Protection of interest of client – Advocate on record not barred from filing affidavit.

FACTS IN BRIEF:

Civil Revision Petition has been filed under Article 227 of the Constitution of India against the order passed by the lower Court whereby an application filed under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the date of Suit Pronote was allowed. The competency of Advocate on record to file such affidavit for amendment on behalf of the plaintiff is challenged by the revision petitioner.

QUERY:

Whether an advocate on record is legally entitled to file an affidavit on behalf of his client?

Held:

In the cause of action portion, the date of the suit pronote has been mentioned as 30.12.2005 and that the Suit Pronote also bares the date of 30.12.2005. When the mistake is committed by the learned counsel on record, the same can be corrected by his sworn affidavit.

(2011) 3 MLJ 423

Rayathal (died) and Ors
vs
Periya Kannu and Ors

Code of Civil Procedure (5 of 1908), Order 6 Rule 16 – Tamil Nadu Patta Pass Book Act (40 of 1986), Section 14 – Rejection of plaint – Bar provided under Section 14 of Act – It cannot be stated that Section 14 is bar for seeking declaration that order of revenue authorities granting patta in other's name cannot be maintained in civil Court.

Held:

Court is unable to agree with the contention of the learned counsel for the petitioners and in Court's opinion, the second relief prayed for in the suit cannot be brought under Rule 16(a). Though Mr. Raghavachari vehemently argued that it will come under Rule 16 of Order 6 stating that it is a clear case of abuse of process of Court citing various judgments of Honourable Supreme Court and our High Court, in Court's opinion, it cannot be stated that it is an abuse of process of Court when a person prays for a declaration that the orders passed by the authorities are null and void.

2011 -2- L.W. 432

Sebasthian and Ors
vs
Shakul Hameed Ors

Specific Relief Act (1963), Section 22/Courts power to grant relief for possession, partition, refund of earnest money, etc., Specific Performance, Possession in a case where property is in occupation of tenants, Relief, when can be granted/Execution Application, filing of, Maintainability, Transfer of Property Act (1882), Section 55/Duty upon the seller to hand over possession of the property which involved in a particular sale as its nature admits, Scope, Fraud, details of the same must be specifically pleaded.

Held:

Except the bald averments with regard to fraud and coercion, no details are found place in the written statement filed on the side of the defendants in Original Suit No.66 of -2000-Therefore, it is easily discernible that the fraud alleged on the side of the appellants/defendants in Original Suit No.66 of 2000 is not in consonance with legal requirements.

It was contended that the relief of possession has not been sought for and the appellant-defendants are not in possession of the suit properties and therefore, E.A.Nos. are not legally maintainable, but the trial Court has erroneously allowed the same.

2011 -2- L.W. 445

S.R. Jayaraman and Ors
vs
C. Jothirlingam and Ors

C.P.C., Order 33, Rule 1, Order 7, Rule 11, Tamil Nadu Court Fees and Suits Valuation Act (1955), Section 25(d), 40, Practice and Procedure – Revision against order of lower court dismissing petition to reject the plaint, for non-payment of the Court fee within the time granted by the Court in CRP (NPD) No. 1399 of 2006 – In this case, though the time famed was fixed by this Court in C.R.P(NPD)No.1399 of 2006, the respondents filed application under Order 33, Rule 1 of C.P.C., seeking permission of the Court to continue the proceedings as informa pauperis and in that application before passing any order, the Stamp duty and the Court fee was paid – Hence, it cannot be stated that there is non compliance of Order 7, Rule 11 of C.P.C., which warrants dismissal or the rejection of the plaint – CRP (NPD) NO.1399 of 2006 dismissed.

C.R.P.No.3862 of 2009: was filed against the order passed in Unnumbered Interlocutory Application filed by the respondents/plaintiffs, seeking permission of the Court to sue as indigent persons – Along with the application filed under Order 33, Rule 1 of C.P.C., the respondents/plaintiffs also filed application seeking permission of the Court to recognize the Power Agent to continue the suit and that was granted, and that order is challenged in this revision petition.

Held:

Power Agent has filed an application to continue the application filed under Order 33, Rule 1, which is only a formal application – Further, in the Power given by the Principals to the Power Agent, it was stated that Power is given to act on behalf of the Principal in respect of any matter, which had not been stated in the Power, and such residuary power was given to the Agent to act on behalf of the Principal – Therefore, as per the residuary power given by the principal, the Agent is entitled to file the suit in respect of the permission given in the Power, and therefore, that cannot be challenged by the revision petitioner.

C.P.C., Order 7, Rule 11 – See C.P.C., Order 33, Rule 1.

Tamil Nadu Court Fees and Suits Valuation Act (1955), Section 25(d), 40 – See C.P.C., Order 33, Rule 1, Order 7, Rule 11.

Practice and Procedure – See C.P.C., Order 33, Rule 1, Order 7, Rule 11, Tamil Nadu Court Fees and Suits Valuation Act (1955), Section 25(d), 40.

(2011) 3 MLJ 452

M.K.M. Mohammed Nazar and Ors
vs
R.A. Venugopal (Died) and Ors

Code of Civil Procedure (5 of 1908), Order 1, Rule 10 – Impleadment of a party – Necessary or proper party – Not a question of initial jurisdiction of the Court – But of judicial discretion – To be exercise in view of all facts and circumstances of a particular case.

Facts in Brief:

The present civil revision petition is directed against the order passed by the learned Additional District Munsif Court, Naguneri in I.A. No. 615 of 2004 om O.S> No. 939 of 1996, dated 31.12.2004 whereby the prayer for impleading the defendants 4 and 5 in the said suit was allowed and that order is under challenge.

Query:

Whether the Court can entertain the impleading application after the completion of "Trial"?

Held:

The question of impleadment of a party has to be decided on the touchstone of Order 1, Rule 10, which provides only a necessary or a proper party may be added. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The addition of parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case.

2011 2 – L.W. 516

M/s. Sundaram Dynacast Pvt. Ltd
vs
M/s. Raas Controls, and Ors

C.P.C., Order 7, R.14(3), Order 18, C.P.C. Amendment Act 104 of 1976, Act 46 of 1999,

Practice and Procedure/Recall of Witness (PW1) and marking of documents, Permissibility.

I.A. was filed by the plaintiff to recall PW1 for marking further exhibits on his side and to receive the documents mentioned in the petition – Those applications came to be dismissed by the Court against which revisions are directed.

Suit was originally filed by Company, represented by its Vice-President(Operations) – Company authorized the said Vice-President by its resolution to institute legal proceedings on behalf of the company, but however the same was omitted to be filed by mistake – Held: to avoid multiplicity of proceedings, the petitioner could be permitted to file the said resolution.

Order 18 Rule 17 CPC cannot be invoked to fill up the omissions in the evidence of witnesses – Order 18 Rule 17-A was omitted by Amendment Act 46 of 1999 with effect from 01.07.2002 – Insertion of Rule 14(3) under Order 7 will amply establish that the plaintiff, with the leave of the Court, can file the document with or annexed with the plaint.

Order of the Court below rejecting the request of the petitioner to recall PW1 and to file the document referred to above is totally untenable and unjustified.

(2011) 3 MLJ 533

Sandrayan and Ors
vs
S.S. Mariappan and Anr

Code of Civil Procedure (5 of 1908), Section 100 – Second Appeal – Suit for specific performance – Agreement to sell – Burden of proof is only on plaintiff – Courts below misapplied concept of burden of proof as though burden of proof was on defendants – Second appeal allowed.

FACTS IN BRIEF:

A suit was filed for specific performance of an agreement to sell and the trial Court decreed the suit. Being aggrieved by the same, the defendants preferred an appeal which got dismissed by the appellate Court confirming the decree of the trial Court. Challenging the same, a second appeal has been filed by the defendants.

QUERIES:

1. Whether the Courts below were justified in proceeding on the footing as though the burden of proof is on defendants to prove the falsity of Exhibit A-1 – the Agreement to sell?

2. Despite the scribe having not signed in the agreement to sell, whether the Courts below were justified in not adverting to the said fact and in upholding the validity of Exhibit A-1?

3. Whether the Courts below were justified in giving weightage to the non – examination of the mother of the plaintiff as a fact against the genuineness of the case of the defendants?

4. Whether the judgments of the Courts below are fraught with perversity?

Held:

It is clear that interference of this Court is warranted, as the judgments of the Courts below are fraught with perversity. Accordingly, the substantial questions of law are decided as under:

Substantial question of law (i) is decided to the effect that the Courts below misunderstood the concept 'burden of proof' and misapplied it as though the burden of proof was on the defendants.

Substantial question of law (ii) is decided to the effect that despite the scribe having not signed in the agreement to sell, the Courts below were not justified in not signed in the agreement to sell, the Courts below were not adverting to the said fact while discussing the facts involved in this case and in upholding the validity of Exhibit A-1.

(2011) 3 MLJ 553

V.L. Dhandapani
vs
Revathy Ramachandran, Kumar, Village Administrative Officer, Vedanenmeli, Perur Post

Code of Civil Procedure (5 of 1908), Order 22 Rule 10 – Assignment of interest during pendency of suit – Suit – Suit for permanent injunction – Bona fide purchaser of suit property – Impleading of transferee pendent lite as party in suit – Scope of.

FACTS IN BRIEF:

Civil Revision Petition has been filed under Article 227 of the Constitution against the order passed by the lower Court whereby the application filed by the petitioner who is a bona fide purchaser of the property during the pendency of the suit to implead him as a second plaintiff in the suit was dismissed by observing that previous cause of action cannot be the cause of action for the petitioner against the defendants and that the remedy for the petitioner is to file a fresh suit with new cause of action.

QUERY:

Whether the transferee pendent lite is entitled to be impleaded as a party in the suit?

Held:

In one line of decisions by the Supreme Court, it has been held that the transferee pendent lite has got substantial interest in the subject matter of the case and hence, his presence is necessary and so he has to be impleaded as a party. In another set of decisions by the Apex Court cited on behalf of the 6th respondent, it has been held that the transferee pendent lite need not be included as a party to the suit in the absence of leave of the Court for transfer of the property during its pendency and that such purchaser can neither be termed as a necessary party nor proper party. In view of the above said position, the Court deems it fit to refer the matter to a larger bench for deciding the legal issue to be followed by Courts.

2011 (2) CTC 635

Muniappan
vs
Ponni

Constitution of India, Article 21 – Right to Privacy – Evidence Act, 1872 (1 of 1872), Section 112 – Husband suspecting paternity of child filed an Application to direct Blood Test upon him – Trial Court dismissed Application – Revision filed – Record show that Husband had made out a prima facie case – He alleged that he had not visited his wife for a considerable period – There would be no impediment in ordering DNA Test – Order of Trial Court set aside – Civil Revision Petition allowed – Case law discussed.

Facts:

Husband filed an Application for dissolution of marriage. During enquiry husband filed Application to direct the Blood Test upon the second son, whose paternity he suspected. He alleged that he had no access to his wife for a considerable period and therefore, the child was not born to him. The Trial Court dismissed the Application on the ground that the marriage is proved and would intervene into her fundamental rights. Husband preferred Revision. The High Court considering the citation in Sharda v. Dharmapal as well as other decisions reversed the findings of the Trial Court observing that directing Blood test would not be violative of fundamental rights.

Held:

The Full Bench of the Appex Court in Sharda v. Dharmpal, 2003(2) CTC 760, differs from the Goutam Kuntu's case as far as the direction No.5 above that no one can be compelled to give sample of blood for analysis. In Sharda's case it has been held by the Apex Court that directing medical examination of a party to a matrimonial litigation cannot be held to be violative of one's right to privacy, so also is not in violation of right of personal liberty under Article 21 of the Constitution. In both the decisions of the Honourable Supreme Court, it has been consistently held that the party who seeks direction for conducting D.N.A. Test shall not be ordered as a matter of course. The Supreme Court has not put complete prohibition on the power of the Court to order for D.N.A. Test. It is the view of the Supreme Court that as a routine practice, in all the cases such direction shall not be granted.

As far as the facts of the present case are concerned, the Petitioner has made out a prima faice case. He has alleged that between 12.04.2001 and 25.5.2002 he had been away at Banagalore and he has not visited the Respondents house. Hence, there is no impediment to pass an order for D.N.A. Test in this case. In such a view of this matter, this Court has to interfere with the order passed by the Court below, which is liable to be set aside and it is accordingly set aside. The Revision deserves to be allowed.

2011 (2) CTC 642

C.G. Jayaraman and Ors
vs
C. Gangadharan

Code of Civil Procedure, 1908(5 of 1908), Section 100 & Order 41, Rule 31 – When concurring judgment is given, absence of elaborate discussion by Lower Appellate Court might not be fatal – But if a reversal finding is given, then Lower Appellate Court should given reasons on each and every findings of fact.

Evidence Act, 1872 (1 of 1872), Section 63 – Secondary Evidence – Un-authenticated photocopy of a document cannot be produced as document to get it marked as secondary evidence – Approach of Lower Appellate Court relying on an inadmissible document, held, not justified.

Legal Maxims – "Principiis obsta" – Withstand beginnings; Oppose a thing in its early stages, if you would do so with success.

Legal Maxims – "Qui non negat fatetur" –He who does not deny, admits.

Legal Maxims – "Jusdicis est judicare secundum allegata et probate" – It is duty of a Judge to decide according to facts alleged and prove

Facts:

Plaintiff obtained Jewel loan from the Bank. The Bank auctioned the jewels for non-payment of dues. Plaintiff claimed that he was ready to pay the money and the act of the Bank was excessive and therefore, filed a Suit claiming ₹ 90,000/- as damages. The Trial Court dismissed his Suit. The Appellate Court reversed the finding as against which the Second Appeal was preferred. The High Court observed that the Lower Appellate Court had decided the case on the basis of an inadmissible document and had not substantiated reasoning for differing with the views of the Trial Court. High Court consequently dismissed the Suit.

Held:

Trite the proposition of law is that in a Civil Court, a mere unauthenticated photocopy of a document cannot be produced as evidence. I am at a loss to understand, as to how the Trial Court simply entertained it and gave a marking to it as Ex.A1. No doubt, it is found mentioned in the relevant chief examination Affidavit itself that the original of Ex.A1 was filed

in the connected Criminal case and if that be so, it was the bounden duty of the Plaintiff to apply for a certified copy of the same and produce it before the Civil Court and get it marked and that will be treated as a secondary evidence. But, in this case, that was not done so. However, the Plaintiff would place heavy reliance on such Ex.A1 and the First Appellate Court's judgment itself is based on such Ex.A1, which is ex facie and prima facie and inadmissible piece of evidence.

2011 (2) CTC 727

Navaneethakrishnan and Ors
vs
S.A. Subramania Raja

Specific Relief Act, 1963 (47 of 1963), Section 12(3) – Specific Performance Suit – Decreed by Trial Court and confirmed in Appeal – Contention that suit property is ancestral – Appellants -1 & 2 alone executed Sale Agreement – In agreement, no purpose has been stated for which property was agreed to be sold – Property was not sold for any family necessity – Co-owners are not parties to Agreement of Sale – Plaintiff is not entitled to decree for Specific Performance in respect of whole of suit property – Plaintiff is entitled to claim Specific Performance of 1/3 share of suit property regarding which Appellants-1 & 2 had executed Sale Agreement – Second Appeal partly allowed.

Facts:

Suit for Specific Performance was decreed by the Trial Court and confirmed in Appeal. However, the High Court allowed the Second Appeal filed by the Defendants in part by holding that the Plaintiff will be entitled to claim Specific Performance of only 1/3 share of the suit property in view of the provisions of Section 13(3) of the Specific Relief Act, 1963, since the Sale Agreement will bind only the share of Appellants 1 & 2.

Held: According to me, the share owned by Appellants 2 and 3 and their mother Avudaithayammal viz., 1/3 share in total in the suit property forms a considerable part of the whole and therefore, the Respondent in entitled to obtain decree of specific performance by paying the agreed price reduced by the consideration for the part which is left unperformed. In other words, if the Respondent is prepared to pay 1/3 of the sale consideration, he is entitled to get the relief of specific performance in respect of 1/3 share in the suit property. As a matter of fact, in the judgment reported in 1993 (1) LW 599 cited supra, the same principle has been upheld and the decree was modified. The Honourable Supreme Court in the judgment. A. Abdul Rashid Khan (Dead) and Others v. P.A.K.A. Shahul Hamid and Others, 2000(10) SCC 636, and in the judgment Manzoor Ahmed Magray v. Ghulam Hassan Aram and Others, 1999(7) SCC 703, held that where any property is held jointly and once and party to the contract has agreed to sell such joint property, the agreement, then, even if the other co-sharer has not joined, at lest to the extent of his share, the party of the contract is bound to execute the Sale Deed. The same principle was reiterated in Kammana Sambamurthy v. Kalipatnapu Atchutamma, 2011 (1) MWN (Civil) 99 (SC) : 2011 (1) MLJ 404(SC). The other judgments relied upon by the learned Counsel for the Appellants are in respect of a contract where the remaining part which left unperformed forms part of a considerable portion and the parties can execute sale in respect of only a fraction of share and in such circumstances, it was held that the Agreement of Sale is not entitled to the specific performance.

2011 (2) CTC 763

Nagarajuna Oil Corporation Ltd., Cuddalore
vs
R. Revathi W/o. Ravikumar

Code of Civil Procedure, 1908 (5 of 1908), Order 14, Rule 2 – Preliminary issue – Issue of valuation and jurisdiction is a mixed question of fact and law – When an Application is filed after evidence was recorded, it can be construed only as Application under Order 14, Rule 2 – Courts should not resort to try issue as preliminary issue – It has to be tried along with other issues – Civil Revision Petition dismissed.

Facts:

Plaintiff filed a Suit for declaration of her 1/3rd share and for delivery of possession. In the alternative, she also claimed a relief of partition. During trial, PW-1 was examined in chief. In the mean time the 4th Defendant filed an Application under Order 14, Rule 2, C.P.C. to try the issue of Court-fee and jurisdiction as preliminary issue. The Trial Court rejected the Application, as against which the 4th Defendant preferred a Revision. The High Court while dismissing the Revision Petition observed that the issue with respect to Court-fee and jurisdiction is a mixed question of law and fact and the Application had to be treated as one under Order 14 Rule 2, C.P.C. and the preliminary issue has to be tried along with other issues. The details of the order as a follows:

Held:

According to me, that question can be decided by the Court below by permitting the party to lead the evidence. The reason is that the Court fee is a mixed question of fact and law and it cannot be decided as a preliminary issue. Nevertheless, under Section 12(2) of the Tamil Nadu Court Fees and Suits Valuation Act, any Defendant may, by his Written Statement filed before the first hearing of the Suit or before evidence is recorded on the merits of the claim but, subject to the next succeeding sub-section, not later, plead that the subject matter of the Suit has not been properly valued or that the fee paid is not sufficient. When such questions are raised, the same shall be decided before the evidence is recorded. In this case, it is admitted that the Revision Petitioner has not raised this issue in the Written Statement nor filed Application before recording the evidence. Admittedly, PW1 has filed proof and when the case was posted for cross – examination, this Application was filed by the Revision Petitioner. Therefore, the Petition filed by the Revision Petitioner cannot be brought under the scope of Section 12(2) of the Tamil Nadu Court Fees and Suits Valuation Act. In my judgment rendered in Regila Prem v. Chellappan and others, 2010 (3) MWN (Civil) 722 : 2010 (5) LW 344, I relied upon the Division Bench of this Honourable Court reported n V.R. Gopala Krishnan v. Andiammal, 2002 (2) CTC 513, wherein the difference between Order 14, Rule 2, and Section 12(2) of the Tamil Nadu Court Fees and Suits Valuation Act.

(2011) 3 MLJ 819

Tirupurasundari (died) and Ors
vs
C. Nagarajan and Ors

Code of Civil Procedure (5 of 1908), Order 23, Rule 3 –Compromise of suit – Compromise memo signed by counsels of both parties – Absence of signature of parties in memo – Allegation of fraud in obtaining compromise – Counsel of party possess implied authority to enter into compromise on behalf of party – Compromise memo valid in absence of signature of parties unless there is any written prohibition or limitation to curtail authority of counsel – Party not entitled to challenge act of entry into compromise by counsel unless any adverse interest attributed to him – Compromise memo held, valid.

FACTS IN BRIEF:

Compromise decree was challenged after more than 30 years on the ground that the memo of compromise was signed by advocates of parties alone and not by the parties and that the compromise was obtained by way of fraud.

QUERIES:

1. **Whether a compromise memo containing signatures of advocates of parties alone is valid in the absence of signature of parties?**
2. **Whether challenge to compromise decree after 30 years is barred by limitation?**

Held:

The provision in force, earlier to the amended Act No. 104 of 1976 dated 1.2.1977, did not contain the terms "in writing and signed by the parties". Hence, it was not the statutory requirement anterior to the advent of amended Act, that the compromise should receive the signatures of the parties. The authority was given to the counsel appearing for the party to enter into a compromise. Unless any adverse interest attributed to the counsel on record, the party on a later point of time could not challenge the act of the counsel who has entered into compromise ignoring the authority or power already given to him.

2011 (2) CTC 846

M.Shyamsundar
vs
M.Rangaprakash

Indian Succession Act, 1925 (39 of 1925), Section 68 – Evidence Act, 1872 (1 of 1872), Section 63 – Proving of will – Suspicious circumstances – Testatrix gave sufficient reasons for excluding one of her sons while bequeathing properties to other children and foster daughter – Attesting witness proved execution and attestation – Evidence adduced established that Testator though suffering from cancer was in conscious and sound and disposing state of mind – Held, will proved.

Facts:

Will was executed by ailing mother excluding one of her sons from inheritance as he had left the family fold and dragged the mother to a litigation and mother's stand was vindicated. Attesting witness proved the execution of the will. Will held to be proved.

Held:

The testatrix, in the present case has expressed in detail the reasons for exclusion of the second Respondent. She has recited that the second Respondent picked up quarrel with her and left the house causing her much pain and suffering. Besides, he also filed a case against her for partition and got preliminary decree for 1/4th share in the movable and immovable properties excepting suit 'A' Schedule property. He also picked up quarrel with her and hurt her feelings when he left the house and caused her many troubled dragging her to the Court and hence she did not want to give him anything from her property and she was firm in this regard, she has further added. As mentioned above, execution and attestation of the will have been proved. The contents of the will would clearly portray the dislike which the testatrix had against the second Respondent. By furnishing good reasons, she has kept out the second respondent from inheriting her property. However, she has mentioned in the will that she has given some jewels to the children of the second respondent.

2011 (2) CTC 861

V. Uma
vs
V. Balaji

Contempt of courts Act, 1971 (70 of 1971) – Code of civil procedure, 1908, (5 of 1908), order 39, Rule 2-A – Contempt Petition – Maintainability of – Contention that Respondent had put up a compound wall in violation of order of injunction – Rule 2-A of Order 39 takes care of situations in case a party against whom order of injunction was issued, violated said order – It provides for attachment and sale of property belonging to contemner – Order 39, Rule 2-A is intended for enforcing order or decree of injunction – It is an adequate remedy – Provision also

enables contemner to produce materials to show that he had not committed any act of contempt as alleged – Contempt is essentially a matter between Court and contemner – Trial Court should make an attempt to take up such violation Applications, before disposal of Suit - Main objection of Rule 2-A is to uphold majesty of judicial orders, as otherwise it would erode faith of litigants appealable – Since alternative remedy is available to Petitioner, it is not appropriate to permit Petitioner to invoke jurisdiction under Contempt of Courts Act – Opportunity given to Petitioner to approach Trial Court – Objection raised by Registry sustained – Contempt Petition dismissed.

Facts :

Petitioner sought to initiate Contempt proceedings against the Respondent for violating the order of injunction passed by the Trial Court. High Court held that there is an adequate remedy for the Petitioner under Order 39, Rule 2-A of the Code of Civil Procedure, for violation of decree for injunction and the Code of Civil Procedure contains an inbuilt provision to safeguard the interest of the parties. The Contempt jurisdiction was distinguished as one essentially between the Court and the contemner and in view of the alternative remedy available to the Petitioner, the High Court held that the Petitioner cannot invoke jurisdiction under the Contempt of Courts Act. By giving liberty to the Petitioner to approach the Trial Court with an appropriate Application, the objection raised by the registry was sustained and Contempt Petition was dismissed.

Held :

The Civil Procedure Code contains provisions grant of decrees and orders as also its enforcement. Order 39, Rule 1 provides for granting temporary injunctions and interlocutory orders. Order 39, 2-A of the Civil Procedure Code indicates the consequences of disobedience or breach of order of injunction. The provision reads thus:

(1) In the case of disobedience of any injunction granted or other order made under Rule 1 of Rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Suit or proceeding is transferred, may order the property of the person guilty of disobedience or breach to be attached, and may also order such person to be detained in the Civil prison for a term not exceeding three months, unless in the meantime the court directs his release.

(2) No attachment made under this Rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, the party entitled thereto.

****

HIGH COURT CITATIONS
CRIMINAL CASES

(2011) 2 MLJ (Crl) 5

K. Narayanasamy
vs
State, by Inspector of Police, CBCID Metro Wing

Code of Criminal Procedure, 1973 (2 of 1974), Section 173(8) – Discharge petition – Charges and allegations connected with earlier case of electricity theft – Offences to be construed only as connected offence relating to earlier case –Any information received by investigating agency, only remedy available is to seek for relief of further investigation by invoking Section 173(8) Cr.P.C.

Held:

In this case the present allegation of substitution of original forensic report by a bogus report in respect of allegation of tampering of electricity meter is mainly pursuant to the investigation and filing of the final report in the earlier case for the offences under Sections 39(1) and 44(1)(e) of the Indian Electricity Act read with Section 379 IPC, in which the revision petitioner has been arrayed as A1 in the said case. Therefore, it is crystal clear that any further information or material collected by the investigating agency discloses commission of any further offence, the only remedy available to the investigating agency is to seek for the relief of further investigation by invoking the provisions of 173(2) Cr.P.C with the leave of the Court and thereafter to forward the further evidence if any collected and file a further report under Section 173(8) Cr.P.C. but in the instant case, the Investigating agency has failed to do the same and instead resorted to register a separate case and thereafter filed the final report in the instant case.

(2011) 2 MLJ (Crl) 14

R. Lakshmikanthan
vs
K. Senthilkumar

Indian Evidence Act (1 of 1872), Section 45 – Hand writing expert opinion – Cheque bouncing – Signature in cheque disputed – Drawer entitled to examination of cheque by expert – Denial amounts to infringement of right to fair trial.

FACTS IN BRIEF:

Criminal Original Petition has been filed against the order of the lower appellate court dismissing the application filed by the accused in the proceedings under Section 138 of the Negotiable Instruments Act to send the cheque for examination by hand writing expert on a defence of forged signature, on the ground that it has been filed for delaying the matter.

QUERY:

Whether an accused in a proceeding under Section 138 of the Negotiable Instruments Act has a right to expert opinion if the signature in cheque is disputed?

Held:

Whenever an accused disputes his signature in the alleged cheque and takes such defence and if he has come forward with the petition for sending the same for expends opinion under Section 45 of the Evidence Act, the learned Magistrate shall send the disputed cheque for comparing the same with the admitted signature of the accused unless he considers that such Applications should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing. The accused is entitled to rebut the case of the Complainant and the denial of such right amounts of denial of fair trial.

(2011) 2 MLJ (Crl) 24

Nachimuthu
vs
State by the Inspector of Police, Velagoundampatty Police Station

Indian Penal Code (45 of 1860), Section 304-A – Office under – Order of conviction - No evidence to prove rash and negligent driving on part of accused – Mere driving of vehicle at high speed not enough to bring offence under Section 304-A IPC – Order of conviction cannot be sustained.

Held:

The evidence of P.W.9 is sufficient enough to shatter the case of the prosecution as if the but driver is solely responsible for the accident. As rightly pointed out by the learned counsel for the petitioner, the bus was coming straight in the main road and the normal focus of the driver will be only on the main road. Whereas the TVS 50 moped riders coming from branch road ought to have, before entering the main order at the junction, verified the traffic on the main road and only after confirming the same can enter and cross the main road. None of the P.Ws deposed that one such attempt was made by the TVS 50 moped rider before entering the main road. On the contrary, P.W.11 has stated that the bus driver attempted to divert the bus to opposite direction to avoid accident. If that is so, the accused cannot be said to be acted without due care and caution, so as to construe his act, as rashness opposed to deliberate act. It is to be observed that all the witnesses did only speak about the driving of the vehicle at high speed which alone would not render the driving to be rash and negligent as observed by the Supreme Court in the judgment in B.C. Ramachandra S/o Chikkashetty v. State of Karnataka by Channarayapatna Town Police, rep. by S.P.P. of High Court of Karnataka (supra) and Mahadeohariokrs v. State of Maharashtra (supra). The Supreme Court is, under similar circumstances where serious attempts were made on the part of the driver of the vehicle to divert the direction to avoid accident, pleased to hold that the circumstances did not bespeak, negligence or dereliction of duty to exercise due care and control on the part of the accused. The Supreme Court has also observed that when an explanation is sought to be given by the accused about the circumstances under which the accident is caused due to negligent act of the deceased, then the burden shifts to the prosecution to show that the explanation so offered by the accused could not be believed and when no such reason is made out, the case of the prosecution ought to be rejected as no proof is made out and the conviction recorded against the accused is hence not sustainable. The Apex Court has, in the cases above referred to, not appreciated the approach adopted by Courts below, resulting in manifestly illegal order leading to failure of justice. The Courts below by simply accepting the prosecution case, without analyzing as to what amounts to rash and negligent act committed serious error in finding the accused is guilty and convicted him and such order of conviction cannot be allowed to sustain.

2011 (2) CTC 617

Dilip S. Dhanukar, Chairman and Managing Direcotr, Indo Biotech Foods Limited.,
vs
India Equipment Leasing Ltd.,

Negotiable Instruments Act, 1881 (26 of 1881), Section 138(b) – Effect of – Absence of individual Statutory notice – Notice sent to Company will not amount to individual notice to Director or Managing Director of Company – Proceedings quashed as against Chairman/Managing Director on whom no notice was served.

Facts:

The Chairman of the First Accused-Company came forward with the Petition to quash the Section 138 proceedings for want of service of statutory notice on him.

Held:

At the outset it has to be pointed out that in the Complaints, it has not been stated that the statutory notice was sent to the Petitioner. Therefore, the question of his complying with the demand within 15 days from the date of receipt of the summons from the Court does not arise. The contention that notice to the Company will amount to notice to the Petitioner, who happens to be the Chairman-cum-Managing Director of the Company, cannot be countenanced for the following reasons:

(i) In Y. Banumoorthy v. R. Janakiraman, 2006 (1) MWN (Crl.) 78 (DCC) : 2006 (2) MLJ (Crl.) 134, a learned Single Judge of this Court has held that no prosecution under Section 138 of the Act, can be launched without issuance of the statutory notice.

(ii) Another learned Single Judge of this Court in the judgment dated 07.07.1999 rendered in Crl.O.P.No.9530 of 1998 has held that in the absence of statutory notice to the Petitioner, who was a Managing Director of the Company, which is mandatory under the provisions of the Negotiable Instruments Act, a Complaint could be quashed.

(iii) The aforesaid judgment, dated 07.07.1999, has been followed by Mr. Justice D. Murugesan, in Harish C. Chadda v. XS Financial Service Limited, 2001 MLJ (Crl.) 519. The decision reported in 2001 MLJ (Crl.) 519 (referred to supra) of Mr. Justice D. Murugesan, has been affirmed by a Division Bench of this Court in B. Raman v. Shasun Chemicals and Drugs Ltd., 2006(2) MLJ(Crl.) 990.

****