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IMPORTANT CASE LAWS & LECTURES

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SUPREME COURT CITATIONS
CIVIL CASES

(2010) 8 MLJ 726 (SC)

Sanjeeta Das
vs
Tapan Kumar Mohanty

Hindu – Marriage Act (25 of 1955), Section 13 – Dissolution of marriage – Filing of affidavit by husband offering life term maintenance – Grant of divorce only on any of the grounds under Section 13 – Consent of the parties irrelevant.

FACTS IN BRIEF:

Aggrieved by the order of the High Court in granting a decree of dissolution of marriage, accepting the affidavit filed by the husband offering maintenance to the wife and expenses to the marriage of their daughter in consideration of a decree of divorce, appeal was filed by the wife.

QUERY:

Whether a decree of divorce can be granted under Section 13 of the Hindu Marriage Act on the basis of consent of the parties?

Held:

The marriage between the respondent and the appellant was admittedly solemnized in accordance with the Hindu religious rites. A Hindu marriage can be dissolved only on any of the grounds plainly and clearly enumerated under Section 13 of the Hindu Marriage Act. The law does not permit the purchase of a decree of divorce for consideration, with or without the consent of the other side.

The affidavit referred to in the order is the one filed by the respondent and consideration of submission of counsel for the parties does not indicate that the appellant had given her consent for dissolution of her marriage with the respondent on payment of ₹.10,00,000.00 (Rupees ten lakhs only). Secondly, and more importantly, the consent of the parties is of no relevance in the matter. No Court can assume jurisdiction to dissolve a Hindu marriage simply on the basis of the consent of the parties de hors the grounds enumerated under Section 13 of the Act, unless of course the consenting parties proceed under Section 13-B of the Act.

(2010) 8 MLJ 802 (SC)

Eshwarappa @ Maheswarappa and Another
vs
C.S. Gurushanthappa and Another

Motor Vehicles Act (59 of 1988), Section 140 – Accident claim – 'No fault compensation' – Scope of.

FACTS IN BRIEF:

Aggrieved by the order denying to the appellant, the compensation in terms of Section 140 of the Motor Vehicles Act, 1988, an appeal has been filed.

QUERY:

Whether the claimant is entitled to no fault compensation under Section 140 of the Motor Vehicles Act though the claim was not made at the initial stage of the proceedings?

Held:

The Court is completely unable to appreciate the reasons assigned for denying the appellants the 'no fault compensation' as provided under Section 140 of the Act. The Tribunal was gravely in error in taking the view that a claim for compensation under Section 140 of the Act can succeed only in case it is raised at the initial stage of the proceedings and further that the claim must fail if the accident had taken place by using the car without the consent or knowledge of its owner.

On plain reading of the provisions it is evident that all that is required to attract the liability under Section 140 is an accident arising out of the use of a motor vehicle(s) leading to the death or permanent disablement of any person.

The provision of Sections 146 and 147 are meant to create the large pool of money for making payments of no fault compensation. Thus, the liability arising from Section 140 would almost invariably be passed on to the insures to be paid off from the vast fund created by virtue of Sections 146 and 147 of the Act unless the owner of the vehicle causing accident is guilty of some flagrant violation of the law.

The provisions of chapter X together with Sections 146 and 147 would appear to be in furtherance of the public policy that in case of death or permanent disablement of any person resulting from a motor accident, a minimum amount must be paid to the injured or the heirs of the deceased, as the case may be, without any questions being asked and independently of the compensation on the principle of fault.

(2010) 8 MLJ 1067 (SC)

Bimlesh and Others
vs
New India Assurance Co.Ltd.

Motor Vehicles Act (59 of 1988), Section 163-A – Additional premium – Owner as driver – Maintainability.

FACTS IN BRIEF:

The appeal arose out of an order dismissing a claim petition under Section 163-A of the M.V. Act 1988.

QUERY:

Whether the Tribunal could decide the maintainability of the claim petition and dismiss the claim on the basis without considering other issues?

Held:

The Code of Civil procedure, 1908 is not applicable to the proceedings before the Claims Tribunal except to the extent provided in Sub-section (2) of Section 169 and the rules. The whole object of summary procedure is to ensure that claim application is heard and decided by the Claims Tribunal expeditiously. The inquiry under Section 168 and the summary procedure that the Claim Tribunal has to follow do not contemplate the controversy arising out of claim application being decided in piecemeal. The objection raised by the Insurance Company about maintainability of claim petition is intricately connected with its liability which in the facts and circumstances of the case is dependent on determination of the effect of the additional premium paid by the insured to cover the risk of the driver and other terms of the policy including terms of the policy contained in para 5. Since all issues (points for determination) are required to be considered by the Claims Tribunal together in light of the evidence that may be let in by the parties and not in piecemeal, Court does not think it proper to consider the rival contentions on merits at this stage. Suffice it to say that matter needs to be sent back to the Claim Tribunal.

(2010) 8 MLJ 1098 (SC)

Ittianam and Others
vs
Cherichi alias Padmini

Indian Succession Act (39 of 1925), Section 90 – Will – Description of property – Will to speak from the date of death of testator – Presumption against intestacy in absence of a contrary intention – Interpretation to be in favour of testacy – Appeal allowed.

FACTS IN BRIEF:

Aggrieved by the judgment and order of the Division Bench of the High Court declining to grant letters of administration in respect of properties namely items 4 to 7 in the Will bequeathed by the testator, on the ground

that the testator's title to half of the property was not perfected on the date of execution of the Will, appeal was filed by the appellants.

QUERIES:

1. Whether a Will has to be construed as if it has been executed just before the death of the testator?
2. Whether a testator before death, acquired full title in respect of the property for which sale deed was executed before the Execution of Will?

Held:

Section 90 of the Act uses the legal fiction "deemed" and that is used with the specific purpose of raising a presumption against intestacy. Therefore, on an analysis of the provisions of Section 90, it is clear that the property described in the Will shall be deemed to refer to and comprise the property answering that description at the death of the testator.

Registration Act (16 of 1908), Section 47 – Acquisition of title by retrospective effect – Title of sale deed effective from the date of its execution – Not from date of registration – Testator acquires title before death.

Held:

In this case, assuming but not admitting that the testator had not acquired title in respect of half of the property, namely, items 4 to 7 of the property bequeathed by him in the Will on 8.5.1967, but the sale deed having been registered on 8.5.1967, the title reverts back to the date of execution of the sale deed on 2.5.1967 under Section 47 of the Registration Act. And the testator died on 20.7.1971. Therefore, much before his death, the testator acquired full title over items 4 to 7 of the property.

(2010) 10 Supreme Court Cases 512

MAN KAUR (DEAD) BY LRS.
vs
HARTAR SINGH SANGHA

Contract and Specific Relief – Specific performance of contract – Readiness and willingness to perform – Manner of proof – Person(s) with personal knowledge of details of transaction – Necessity of examination of – Power-of-attorney holder (PoA) – When may depose by entering witness box – Principles summarised – Multiple PoAs of plaintiff buyer responsible for sale transaction in present case – PoA concerned examined to prove readiness and willingness of plaintiff, was unaware of transaction and only authorised to file suit – Held, power-of-attorney holder who has no personal knowledge cannot be examined in place of plaintiff – Hence decree for specific performance set aside – Evidence Act, 1872 – Ss. 106, 60, 118 and 120 – Specific Relief Act, 1963 – S. 16(c) – Civil Procedure Code, 1908 – Or. 3 Rr: 1 & 2 – Powers of Attorney Act, 1882, S. 1-A.

Evidence Act, 1872 – Ss. 101, 106, 145 and 114 Ill. (g) – Adverse presumption – Reiterated, where a party to the suit does not appear in witness box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that case set up by him is not correct – Specific Relief Act, 1963, Ss. 15 and 16(c).

The plaintiff purchaser of property was a non-resident India. Agreement of sale entered into between parties through power of attorney-holders. Agreement on behalf of the plaintiff signed by different attorney-holder and suit filed by another attorney-holder. Earlier attorney-holder who executed agreement on behalf of the purchaser was not examined. Other attorney-holder who had filed suit was examined but stated unawareness of transaction before the issuing of suit notice. The plaintiff could not arrange for balance amount on the day fixed. The defendant vendor contended that the plaintiff was not ready and willing to perform the contract and that the suit was not filed by a competent person. Agreement provided for payment of double amount of earnest money in case of breach by vendor. It did not provide for specific performance of contract. The High Court affirmed the concurrent findings of the court's below decreeing the suit. Hence the appeal.

Allowing the appeal, the Supreme Court.

Held:

The legal position as to who should give evidence in regard to matters involving personal knowledge can be summarized as follows:

An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those act or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those act and transactions have to be prove.

The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney-holders or person residing abroad managing their affairs through their attorney-holders.

Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.

Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.

Where the law requires or contemplated the plaintiff or other part to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a

son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

Contract and Specific Relief – Specific performance of contract – Readiness and willingness to perform – Burden of proof – Reiterated, plaintiff should not only plead and prove the terms of the agreement, but should also plead and prove his readiness and willingness to perform his obligations under the contract in terms of the contract – Evidence Act, 1872 – S. 101 – Specific Relief Act, 1963, S. 16(c).

2010 (13) SCALE 281

RAJ KISHORE (DEAD) BY LRS.
vs
PREM SINGH & ORS.

TRANSFER OF PROPERTY – TRANSFER OF PROPERTY ACT, 1882 – SECTION 58(c) – Mortgage by conditional sale – For a transaction to constitute mortgage by conditional sale it is necessary that the condition is embodied in the document that purports to effect the sale – Condition regarding payment of the mortgage money as a condition for transfer of the property to the seller must be embodies in the sale deed itself.

A. A Plain regarding of the above would show that for a transaction to constitute an English mortgage the following essential conditions must be satisfied: (1) The Mortgagor must bind himself to re-pay the mortgage money on a certain date. (2) The property mortgaged should be transferred absolutely to the Mortgage. (3) Such absolute transfer should be made subject to proviso that the Mortgagee shall re-convey the property to the Mortgagor upon payment by him of the mortgage money on the date the Mortgagor binds himself to pay the same.

SPECIFIC RELIEF – SPECIFIC RELIEF ACT, 1963 – SECTION 16(c) – Suit for specific performance – Contracts relating to re-conveyance of property – Time is always the essence of the contract – In absence of an averment as to the readiness and willingness of the plaintiff to perform his part of the contract, amendment of the plaint to incorporate a prayer for specific performance of the agreement for re-conveyance would not have advanced case of plaintiff – Late 'R', predecessor-in-interest of plaintiffs appellants, owned jointly with his brother, defendant 2, agricultural land – In terms of sale deed executed and registered by 'R' an extent of 14 bighas of land was transferred to defendant-respondent 1 for a sum of ₹.6,000/-only – Allegations that contrary to the agreement between the parties defendant 1 got a mutation regarding the land in question attested in his favour - Plaintiff prayed for a decree of declaration to the effect that the sale deed executed by him in favour of defendant 1 was void and ineffective –Trial Court dismissed the suit – During appeal, plaintiff filed application for permission to amend the plaint to add relief for decree for specific performance – First Appellate Court dismissed the suit holding that the prayer for amendment of the plaint was time barred - On second appeal, High Court held that whenever a sale deed was accompanied by a document for re-conveyance of the property sold the transaction between the parties would amount to a mortgage - Whether the plaintiff could rely upon the agreement for re-conveyance and pray for a decree for specific performance thereof – Dismissing the appeal, Held

B. the High Court has, while dealing with the substantial question of law framed by it for determination, held that whenever conveyance of any property is accompanied by a document for re-conveyance of the same to the seller the transaction would amount to a mortgage. That proposition of law is not in our opinion correctly

staged. Although the High Court has not elaborated as to what kind of mortgage an agreement for re-conveyance would bring about, it is obvious that the High Court meant to say that the transaction would constitute a mortgage by conditional sale.

C. A bare reading of the above would show that for a transaction to constitute mortgage by conditional sale it is necessary that the condition is embodied in the document that purports to effect the sale. That requirement is stipulated by the proviso which admits of no exceptions.

D. The High Court it is manifest from the judgment under appeal overlooked the proviso according to which the condition regarding payment of the mortgage money as a condition for transfer of the property to the seller must be embodied in the sale-deed itself. That is not so in the instant case. The sale-deed executed by the plaintiff in the instant case does not embody any condition like the one referred to in clause (c) of Section 58 extracted above. The broad statement of law made by the High Court to the effect that every sale accompanied by an agreement for re-conveyance of the property will constitute a mortgage by conditional sale is not, therefore, correct.

E. As a matter of fact, the sale-deed does not even remotely suggest that the transaction is in the nature of a mortgages or that there is any understanding or agreement between the parties where under the property sold has to be re-transferred to the seller. The only other document which could possible contain such a stipulation binding the mortgagor to return the mortgage money is the agreement for re-conveyance. Significantly, this document is signed only by prem Singh the purchaser and not by the seller. The document signed by Prem Singh is described as an agreement for re-conveyance. There is no doubt a stipulation that Prem Singh has agreed to re-transfer the property to the seller in case the plaintiff Raj Kishore returns the sum of **₹.6,000/-** by 6th July, 1981 yet here is nothing in the document to suggest that the seller had bound himself to abide by that stipulation. What is important in terms of the requirement of Section 58 (e) is not that the purchaser has agreed or bound himself to transfer the property by a particular date but that seller has bound himself to pay the amount by a certain date. Since the seller is not a signatory to the agreement of re-conveyance it is difficult to see how he can be said to have bound himself to re-pay the mortgage money by the 6th July, 1981. We have, therefore, no difficulty in rejecting the contention urged on behalf of the appellants that the transaction was in the nature of an English Mortgage and the suit was in essence a suit for redemption of such a mortgage. We have also in that view no difficulty in repelling the contention urged by Mr. Jain that the stipulation of a date for payment of money as a condition for re-conveyance of the property is a clog on equity of redemption. We cannot overlook the fact that the suit filed by the appellants did not proceed on the basis that the transaction between the parties tantamounted to a mortgage nor did the plaintiff pray for a decree for redemption from the Court. The suit was, as noticed earlier, one for declaration to the effect that the sale-deed executed by him was void and the plaintiffs continued to be owner and in occupation. The contention that the transaction between the parties was in reality one in the nature of a mortgage or that the suit was in substance one for redemption has not, therefore, impressed us and is accordingly rejected.

2010 (13) SCALE 524

ANJANI MOLU DESSAI
vs
STATE OF GOA & ANR.

LAND ACQUISTION – LAND ACQUISTION ACT, 1894 – SECTION 4 & 23 – compensation claim – Valuation of acquired lands – Comparable sales – Where there are several exemplars with reference to similar lands, usually the highest of the exemplars, which is a bona fide transaction, will be considered –

Averaging of the prices under the two sale deeds held, not justified – An area of 3, 65, 375 sq.m. of land was acquired for laying the New Broad Gauge line for Railway in pursuance of preliminary notification dated 27.6.1991 and final declaration dated 4.11.1991 – Land Acquisition Collector, by his award dated 7.12.1993, awarded compensation @ ₹.12/- per sq.m. for bharad (orchard) lands and ₹.6/- per sq.m. for irrigated (paddy) lands – Reference Court and the High Court affirmed the said valuation by rejecting the reference and appeal by the appellant –Acquired lands were not undeveloped rural land, but could be reckoned as urbanisable land situated near a developed semi urban village with access to all infrastructure facilities – Land Acquisition Collector relied upon two sale transactions, first was the sale deed dated 30.8.1989 relating to sale of 2055 sq.m. of orchard land situated at a distance of 200 m. from the acquired lands which was sold @ ₹.43.80 per sq.m. – Land Acquisition Collector deducted 45% from the sale price ₹.43.80 per sq.m. towards 'development cost' – As there was a gap of 23 months between the date of the said sale and the date of preliminary notification, Collector provided a cumulative increase at the rate of 14.5% per annum to arrive at the market value as on 30.7.1991 as ₹.32.24 per sq.m. – Second sale deed was @ ₹.3 per sq.m. – Whether Collector was justified in averaging the said two rates derived from the sale prices under the two sale deeds to arrive at the market value of the acquired land – Held, No – Whether Land Acquisition Collector was justified in making 45% deduction from the price disclosed by the sale deed dated 30.8.1989 – Held, No – Allowing the appeal in part, Held,

The sale deed dated 30.8.1989 relates to sale of similar bharad land in Sy. No.83 of Balli Village. The extent of the land sold was about half an acre. The distance between the acquired lands and the land in Sy.No.83 sold under the deed dated 30.8.1989, was hardly 200 meters. The said sale therefore relates to a comparable land and furnishes a reasonable basis for assessing the market value of the acquired land, by providing appropriate increase to cover the appreciation in prices during the gap of about two years between 30.8.1989 (date of sale deed) and 30.7.1991 (date of publication of the preliminary notification).

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SUPREME COURT CITATIONS
CRIMINAL CASES

2010 (1) SCALE 1

GANGULA MOHAN REDDY
vs
STATE OF ANDHRA PRADESH

CRIMINAL LAW – I.P.C. – SECTION 306 & 107 - Abetment of suicide – There has to be a clear mens rea to commit the offence – It also requires an active or direct act which led the deceased to commit suicide – Prosecution case that appellant, an agriculturist, harassed his agriculture labour by leveling the allegation that he had committed theft of some gold ornaments two days prior to his death – Allegations that appellant demanded ₹.7,000/- from deceased which was given in advance to him at the time when he was kept in employment – Prosecution case that deceased labour unable to bear the harassment meted out to him committed suicide by consuming pesticides – On basis of statements of parents of deceased, trial Court convicted appellant u/s 306, I.P.C. - Whether High Court was justified in affirming conviction of appellant – Allowing the appeal, Held,

Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

The intention of the Legislature and the ratio of the cases decided by this court is clear that in order to convict a person under section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide.

In the light of the provision of law and the settled legal positions crystallized by a series of judgments of this Court, the conviction of the appellant cannot be sustained. Consequently, the appeal filed by the appellant is allowed and disposed of.

2010 (1) SCALE 46

HARINARAYAN G. BAJAJ
vs
STATE OF MAHARASHTRA & ORS.

CRIMINAL LAW – Cr.P.C. – SECTION 319(4), 244 & 245 – I.P.C. – SECTION 406 r/w 114 – Newly joined accused – De novo inquiry – Right to cross examine witnesses who were examined prior to framing of charge – A complaint was filed against three accused persons, being respondent No. 2, 3 and 4 for offence u/s 406 r/w 114, I.P.C. – Charges framed against respondent No. 2, 3 and 4 – Complainant – appellant filed an application u/s 319, Cr.P.C. to array respondent No. 5 as a co-accused in the said proceedings – Application allowed and summons issued to 5th respondent – 5th respondent filed an

application to commence proceedings against him from the stage of Section 244, Cr.P.C. and to allow cross-examination of witnesses of prosecution at the stage of evidence before charge – Whether trial Court was justified in ordering de novo proceedings as against respondent No. 5 from the stage of inquiry – Dismissing the appeal, Held.

Even a glance at this Section suggests that there is no escape from commencing the proceedings afresh and also that the witnesses have to be re-heard. Clause (a) is the basic provision and the use of the words 'proceedings' and the term 'commence afresh' has its own significance. If we accept the contention of Shri Naphade that the newly joined accused has no right of cross-examination, it would mean that on being joined under Section 319 (1), Cr.P.C., the only step that would be required would be framing of charge against him. In that, there would be a complete denial to such accused of an important right of cross-examination of the witnesses before the framing of the charge. It would only then mean that such accused would remain a mute spectator till the framing of the charge.

We would also give a meaningful interpretation to the word 'proceedings' which has been deliberately used by the Legislature. The Legislature does not use the word 'trial' which essentially begins after framing of the charge. If the Legislature had intended that the newly joined accused should not get the right of cross-examining the witnesses examined before framing of the charge, it might have used the word 'trial'. The deliberate use of the word 'proceedings' would then include not only the trial but also the inquiry which commences with Section 244, Cr.P.C. and ends with the framing of the charge under Section 246, Cr.P.C. The terminology 'commence afresh' has also its own force. It indicates that the whole inquiry which commences from Section 244 Cr.P.C. must begin afresh. The interpretation that we give to the words 'proceedings' is buttressed by the language of 319 (b), Cr.P.C. The plain language takes back the whole proceedings to the stage of taking cognizance. If we accept the contention of the appellant herein, the sub-clause (b) would be rendered otiose. We have, therefore, no doubt that the language of Section 319, Cr.P.C. itself pushes the proceedings back to the stage of inquiry, once the order under Section 319 (1) Cr.P.C. is passed by the Court and new accused is joined therein.

There is one more angle and that is the angle of mischief. If the interpretation given by the appellant is to be accepted then a complainant, wherein it is a case of multiple accused, may mischievously join only few of them and after getting the charge framed, make an application under Section 319, Cr.P.C. to join some other accused persons who would then have no right of cross-examination of the witnesses and who would be required to be the mute spectators to the charge being framed against which they could have successfully resisted by cross-examining the witnesses.

There is one more aspect that before summoning the accused under Section 319 (1), Cr.P.C. there is no requirement of allowing such accused person to cross-examine the witnesses. That stage comes only after an accused is summoned under sub-Section (1). Therefore, it would be a case where the newly added accused who has not had the advantage of hearing the evidence would be put to prejudice because firstly, he has not heard the evidence and secondly, he cannot even cross-examine those witnesses in the warrant trial based on a private complaint.

This Court has already held that right to cross-examine the witnesses who are examined before framing of the charge is a very precious right because it is only by cross-examination that the accused can show to the Court that there is no need of a trial against him. It is to be seen that before framing of the charge under Section 246, the Magistrate has to form an opinion about there being ground for presuming that the accused had committed offence triable under the chapter. If it is held that there is no right of cross-examination under Section 244, then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope for framing a charge against him.

Therefore, the situation is clear that under Section 244, Cr.P.C. the accused has a right to cross-examine the witnesses and in the matter to Section 319, Cr.P.C. when a new accused is summoned, he would have similar right to cross-examine the witness examined during the inquiry afresh. Again, the witnesses would have to be re-heard and then there would be such a right. Merely presenting such witnesses for cross-examination would be of no consequence.

(2010) 10 Supreme Court Cases 439

PRAMJEET SINGH
vs
STATE OF UTTARAKHAND

Criminal Trial – Proof – Generally – Standard of proof required for establishing guilt of accused – Duty of court – Nature of offence – Relevance – Held, court has to judge evidence by yardstick of probabilities, its intrinsic worth and animus of witnesses – In trial involving serious offence of brutal nature, court should be wary of fact that it is human instinct to react adversely to commission of offence and make effort to see that such an instinctive reaction does not prejudice accused in any way – Law does not permit court to punish accused on basis of moral conviction or suspicion alone – Where offence alleged to have been committed is a serious one, prosecution must provide greater assurance that its case has been proved beyond reasonable doubt – More serious the offence, stricter the degree of proof required, since a higher degree of assurance is required for conviction.

Held:

A criminal trial is not a fairy tale wherein one is free to give flight to one's imagination and fantasy. Crime is an event in real life and is the product of an interplay between different human emotions. In arriving at a conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case, in the final analysis, would have to depend upon its own facts. The court must bear in mind that human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions. Though an offence may be gruesome and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjecture. The law does not permit the court to punish the accused on the basis of a moral conviction or suspicion alone. The burden of proof in a criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence. In fact, it is a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof required, since a higher degree of assurance is required to convict the accused. The fact that the offence was committed in a very cruel and revolting manner may in itself be a reason for scrutinising the evidence more closely, lest the shocking nature of the crime induces an instinctive reaction against dispassionate judicial scrutiny of the facts and law.

(2010) 10 Supreme Court Cases 582

SUDHAKARAN
vs
STATE OF KERALA

Penal Code, 1860 – Ss. 84 and 302 – Defence of insanity – Proof required for claiming benefit of, not found – Murder trial – Existence of necessary mens rea for committing murder, established – Conviction confirmed – Held, for claiming benefit of said defence, accused would have to prove that his cognitive faculties were so impaired, at the time when crime was committed, as not to know nature of act – Herein plea taken by crime was committed, as not to know nature of act – Herein plea taken by appellant-accused for murdering his wife was that he was suffering from paranoid schizophrenia at time of commission of murder –

However, entire medical evidence produced was not sufficient to show that at time of commission of murder, appellant was medically insane and incapable of understanding nature of consequences of act performed by him – Whilst appellant had brutally and callously committed murder of his wife, he did not cause any hurt or discomfort to his child – Rather, he made up his mind to ensure that child be put into proper care and custody after the murder – Conduct of appellant before and after incident, sufficient to negate any notion that he was mentally insane so as not to be possessed of necessary mens rea for committing murder of his wife – Thus, his defence under S. 84, held, not proved – Defence – Mental disorder.

Penal Code, 1860 – S. 84 – Plea of insanity – Standard and burden of proof required to be discharged by accused for getting benefit under S. 84 – Principles restated – Evidence Act, 1872, Ss. 3, 4, 101 and 105.

Penal Code, 1860 – S. 84 – Act of a person of unsound mind – Crucial point of time for ascertaining existence of circumstances bringing case within purview of S. 84 – Held, is the time when the offence is committed.

Penal Code, 1860 – S. 84 – Defence of insanity - Position of law in English legal system, considered – Held. S. 84 clearly gives statutory recognition to defence of insanity, as developed by common law of England, rendered in M' Nagcase, (1843) 8 ER 718 (HL)

Penal Code, 1860 – S. 302 – Murder trial – Appreciation of evidence – Conviction confirmed – Appellant-accused murdered his wife, by assaulting her with a chopper on her neck, in bedroom of his house, for allegedly cheating on him – All circumstances chillingly point towards guilt of appellant – Both courts below correctly concluded that circumstances lead to the only conclusion that appellant committed murder of his wife – Therefore, appellant's conviction, confirmed.

(2010) 10 Supreme Court Cases 611

SUNDER SINGH
vs
STATE OF UTTARANCHAL

Penal Code, 1860 – S. 302 – Murder trial – Sentence – Death sentence – Imposition of – Rarest of rare cases – Principles reiterated – Held, instant case is one of the rarest of rare cases since entire family was wiped out – Five persons had lost their lives while sole surviving lady has to lead life with 70% burn injuries – Murder was committed in a cruel, grotesque and diabolical manner; and closing of door was the most foul act, by which accused actually intended to burn all persons inside the room and precisely that had happened – Deceased B who managed to come out was almost beheaded – Accused had gone to pleace of occurrence well prepared Carrying jerry cans containing petrol, sword and also a pistol with two bullets which showed his premeditation and cold-blooded mind – There was no immediate provocation and incident occurred because of enmity in respect of family lands – Accused remained absconding for 12 years and was arrested only accidentally – There is no mitigating circumstance in instant case, and even the fact that accused remained under shadow of death since 2004 cannot mitigate his horrible crime – Criminal Trial – Sentence – Death sentence.

Penal Code, 1860 – Ss. 302, 307 and 406 – Multiple murders – Appreciation of evidence – Conviction confirmed – Accused alleged to have poured petrol from jerry cans in room where victims were taking dinner and after setting fire by torch, shutting door of the room; deceased B who managed to come out of the room was given a sword-below to neck resulting in his death; thus five persons roasted alive in the occurrence and only PW 1 surviving with 70% burn injuries – Testimony of PW 1 found reliable – She identifying jerry cans,

sword and pistol – Contradictions found in her evidence not substantial enough so as to affect credibility of her evidence - Furthermore, her so-called dying declaration found credible and properly recorded, corroborating her oral evidence and correctly depicting events – Seizure panchnama proving that three jerry cans in semi-burnt condition smelling of petrol were immediately seized on the spot – Appellant named in FIR which was lodged immediately after occurrence – Medical evidence corroborating prosecution version – PW 1 had stated that appellant-accused assaulted here husband on neck only once and that besides accused, she did not see anyone else on the spot – Therefore, fact that accused was alone and further that B (deceased), after opening door ran out and was thereafter immediately found cut, leads to only inference that it was accused alone who assaulted B – Hence, held, guilt accused proved beyond reasonable doubt – Criminal Trial – Appreciation of evidence – Credibility of witness.

Criminal Trial – Identification – Identification of accused – Proof – Accused real brother of deceased p – Hence held, there was no scope for mistaken identity – Besides, house was set on fire and there was ample light available for identifying accused.

Criminal Trial – Appreciation of evidence – Contradictions, inconsistencies, exaggerations or embellishments – Opportunity of explaining contradictions – Purpose and necessity – Held, very purpose of putting contradiction to witness is to give opportunity to him/her to explain a contradictory statement, if any – Unless contradiction is proved by putting it to person who records original statement, such contradiction is of no consequence – PW 1 not specifically questioned about her previous statement nor was she given an opportunity to explain as to why she had stated that there were three jerry cans as her dying declaration stated that there was one jerry can – Hence, such contradiction cannot be taken note of – Moreover, three burnt jerry cans were actually found by PW 13 immediately on the spot in a semi-burnt condition, and thus, so-called contradiction loses all its rigour – Evidence Act, 1872, S. 137.

(2010) 8 MLJ 1028(SC)

Raghbinder Singh
vs
Bant Kaur and Others

Civil proceedings for damages for offence of murder – Criminal Proceedings pending before High Court – Order of payment of compensation – Filing of civil suit before adjudgment of culpability in criminal trial – Plea of non-maintainability of suit on ground of being premature – Scope of.

FACTS IN BRIEF:

Aggrieved by the judgment and order of the High Court ordering compensation to the plaintiffs/respondents for the loss of dependency and mental agony suffered by them caused by the murder committed by the appellant, appeal has been filed by the appellant.

QUERY:

Whether a claim for damages can be decreed when the suit is premature?

Held:

A suit of a civil nature even if filed before the date on which the plaintiff became actually entitled to sue and claim the damages based on a cause of action of such suit, need not be dismissed for that reason. The Court possess jurisdiction to entertain such suit and to pass a decree which is of discretionary in nature.

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HIGH COURT CITATIONS
CIVIL CASES

2010- 2- L.W.(Crl.) 1467

R. SEKAR
VS
K. KASINATHAN

Negotiable Instruments Act, Sections, 138, 142, Revision against judgment of appellate court affirming the conviction by trial court – Question raised was whether Ex.P4 amounts to second notice or it is to be taken as first notice, and if Ex.D1 is accepted as a notice, demanding the cheque amount, whether the complaint filed by P.W.1 is barred by limitation – Held: In view of the ratio laid down by the Hon'ble Supreme Court, Ex.D1 letter in which P.W.1 had demanded payment of the amount of cheque by the accused, and also had stated that legal action would be taken against the accused should be treated as notice within the contemplation of clause (c) of the Proviso to Section 138, and if Ex.D1 is treated as a notice, the complaint filed by the complainant is only after the expiry of the time limit of 30 days prescribed by clause (b) of Section 142 and therefore, conviction is not legal – Conviction and sentence imposed on the petitioner set aside – Criminal Revision Petition allowed.

2010 (4) TLNJ 557 (CIVIL)

M. DOSS AND OTHER
VS
A. SANKAR

Tamil Nadu Buildings (Lease and Rent Control Act 1960, Section 8, 10(2)(i) – Eviction petition filed on the ground of wilful default and different user – Rent Control ordered eviction on the ground of wilful default – appeal by tenant to the appellate authority dismissed – On Revision under Section 25 of the act, High Court opined that mere refusal of the land lord to receive rent cannot justify tenant to invoke Section 8(5) without following procedures stated in the sub-sections – such deposit will not also protect tenant against actions on the ground of wilful default – Civil Revision Petition dismissed.

2010 (4) TLNJ 573 (CIVIL)

NALLATHAMBI, S/O. (LATE) KALVARAYAN AND OTHERS
VS
ADIMOOLAM S/O. SEVI GOUNDER AND OTHERS

Limitation Act 1963, Section 137 – Final decree application filed after several years – objected as time bared – allowed by trial court – on revision High Court opined that in a suit for partition courts have to pass preliminary decree in the first instance and thereafter filing of application for final decree has to be passed and the final decree application is not an application in execution of the decree but is only an application in pending suit – further held that the suit is to be considered as pending till final orders as re-passed and the final decree is passed - Civil Revision petition dismissed.

2010 (4) TLNJ 614 (CIVIL)

THE COMMISSIONER, H.R. & C.E. ADMN. DEPARTMENT,
NUNGAMBAKKAM HIGH ROAD, MADRAS- 34 AND OTHER
VS
SRI AYYAPPA BAKTHA SABHA REPRESENTED BY ITS
SECRETARY K.V. THANGAPPAN NAIR

Hindu Religious and Charitable Endowments Act(22 of 1959), Section 6(18), 63-A – Assistant Commissioner attempted to seal bundies of Iyalppan Temple, maintained by a Sabha at Ch-34 – on petition Deputy Commissioner passed order holding that Temple situated is a Public Religious Institution – Commissioner suo moto revised the proceedings, and held the Temple is Public Religious Institution – suit filed declaration decreed – on appeal High Court held that mear fact that any body can become member is Sabha and Worship Temple will not changed its character - further held suit Temple is a Private Temple, Tamil Nadu Act 22 of 1959 shall not and authority cannot have any control on the Temple – Appeal Suit dismissed.

Appeal suit filed under Section 70(2) of the Tamil Nadu Hindu Religious and Charitable Endowments Act 22 of 1959 against the judgment and decree of the learned V Assistant Judge, City Civil Court, Madras made in O.S.No.4229/89 dated 9.9.93.

2010 (4) TLNJ 632 (CIVIL)

A. ANBUKKARASU
VS
K. SANTHANAM

Contract Act 1872, Section 14, 16 – Suit for recovery of money consideration denied – suit decreed – on appeal the High Court held that there was no undue influence or fraud in obtaining promissory note – presumption under Section 118 of Negotiable Instruments 1881 to be taken note as consideration passed – Appeal Suit dismissed.

Negotiable Instruments 1881, Section 118 – See Contract Act 1872, Section 14, 16.

Appeal Suit filed under section 96 of CPC against the Judgment and decree dated 28.04.2009 passed in Original Suit No.177 of 2007 by the Additional District and Sessions Court/Fast Track Court No.III, Madurai.

2010 (6) CTC 711

T. THIYAGARAJAN
VS
K.R. VENUGOPALAN AND 4 OTHERS

Negotiable Instruments Act, 1881 (26 of 1881), Section 20 –Inchoate Stamped Instrument – Suit for Recovery of money based on Promissory Note – Plaintiff filed Interim Application to include his name in Promissory Note – Trial Court allowed Application preferred by Plaintiff – Whether Section 20 is applicable to case on hand, if so at what stage Plaintiff could be permitted to make insertion – Revision

Petitioner contended by placing reliance upon decision of Sesharal Bajana that Suit filed with blanks in Promissory Note is not maintainable and retention of blanks in Promissory Note by Plaintiff who was a professional money-lender should not be permitted – Allowing plaintiff to fill up blanks in Promissory Note would amount to material alternation and no decree can be passed on such instrument – Held, law laid down in Sesharal Bajna case has been impliedly overruled by judgment reported in Malar Finance – Mere filling up of name would not in any manner affect Defendant's rights to raise contention that Promissory Note is inadmissible – There is difference between English Law and Indian Law with regard to inchoate stamped instrument – English Law required that blanks must be filled up within reasonable time – Section 20 does not stipulate any time limit for filling upon blanks in promissory note – Civil Revision Petition dismissed.

Facts:

Second Defendant in the Suit is the Revision Petitioner. Plaintiff filed an Interim Application to permit his name to be included in promissory note. Court below allowed the Application filed by the Plaintiff. Aggrieved by the order passed by the Court below the Defendant has filed this C.R.P. invoking jurisdiction of High Court under Article 227 of the Constitution of India.

Held:

The Judgment in Sesharal Bajna came up for consideration before this Court in Malar Finance Corporation v. Rathinam, 2001 (3) MLJ 753. The learned Judged, after discussing the entire gamut of case law on the subject and taking note of the order passed by this Court in the case of M.P.RM Irulandi Mudaliar v. Syed Ibrahim, AIR 1962 Mad. 326, reffered supra as well as other subsequent Judgments, elaborately discussed the ambit of Section 20 of the Act and held that in view of the earlier decisions, the decision in Sesharal Bajna stands impliedly overruled.

2010 (6) CTC 716

S. RAMACHANDRA REDDY AND OTHER
VS
NATARAJAN AND OTHER

Code of Civil Procedure, 1908 (5 of 1908), Order 18, Rule 3-A – Party to appear before other witnesses – Defendants examined their Power Agent as DW1 and thereafter filed Application for appointment of Advocate Commissioner to examine First Defendant as DW2 – Trial Court dismissed Application – Revision against – Held, where party wishes to examine any witnesses before examining himself, he should obtain permission of Court – Permission can be sought, even after examination of witness – What is necessary is to file Application for permission and it is not necessary that such Application should be filed before commencement of examination of witness – Law laid down in Chennimalai v. Alagulakshmi, 2008 (4) CTC 490 applied and followed.

Facts:

Revision petitioner is the Defendant in the suit property. Petitioner filed an Interim Application for appointment of Advocate Commissioner to examine the First Defendant as DW2 and that Petition was dismissed, against which C.R.P. has been filed.

Held:

A reading of Order 18, Rule 3-A of C.P.C. would make it clear that where a party wishes to examine any witness before examining himself he has to obtain the permission of the Court. Such permission can be sought for even after examining the witnesses as held by the Division Bench of this Court in the judgment reported in the matter of Ravi & another v. Ramar, 2008 (1) LW 1055; and in the judgment reported in the matter of Chennimalai v. Alagulakshmi, 2008 (4) CTC 490, also the same position has been reiterated. But without filing an Application, it is not open to the party to examine himself after the examination of witnesses. Though in this case no such Application was filed, Court below dismissed the Application for appointment of Commissioner on the ground that a permission ought to have been obtained before the commencement of the examination of other witnesses on behalf of the party for seeking permission. As stated supra, as per the Division Bench of this Court in the judgment reported in 2008 (1) LW 1055, this Court has held as follows:

"As observed in the various decisions and more particularly in the decisions of the Division Benches of Punjab & Haryana, Jammu & Kashmir, Patna and Orissa High Courts, what is necessary is that before giving such permission, the Court is required to give reasons and obviously the reasons must be relevant. However, to lay down as an inexorable rule that in no case such an Application can be filed after the examination of any other witness may result in injustice."

Therefore, what is necessary is to file an Application for permission and it is not necessary that such Application should be filed before the commencement of examination of the witnesses.

2010 (6) CTC 739

NEW INDIA ASSURANCE CO. LTD., THIRUCHIRAPALLI
VS
KAVITHA AND OTHERS

Motor Vehicles Act, 1988 (59 of 1988), Section 166 – Motor accident – Claim for compensation – Award passed by Tribunal – Liability fastened upon the Insurance Company – Appeal by Insurance Company – Contention the driver of offending vehicle did not possess a valid licence to drive School Bus, without an endorsement by Licensing Authority – Motor Vehicles Act is a piece of beneficial legislation – Aim and purpose of Act cannot be defeated by Insurance Company, on a technical ground – Even in case of violation of policy conditions, victim being an innocent person, should not be made to suffer – Injured or relatives of deceased, should not go with mind that decree is merely a paper decree – Concept of pay and recover can be applied to grant relief to claimants – Decision reported in Branch Manager, United India Insurance Co. Ltd. v. Nagammal, 2009 (1) CTC 1 (FB), followed – Insurance Company directed to pay compensation and thereafter to proceed against owner of vehicle for reimbursement - Civil miscellaneous Appeals disposed of.

Facts:

In claims for compensation arising out of a motor accident, the Insurance Company challenged the award on the ground that there was violation of Policy condition, since the driver of the vehicle did not have a valid driving licence. High Court held that the Motor Vehicles Act, 1988 is a beneficial legislation and that the claimants should have the benefit of the said provisions and directed the Insurance Company to pay the compensation and recover the same from the owner of the offending vehicle.

Held:

As already pointed out, the only question raised herein is the breach of policy conditions. As far as the registration is concerned, that learned Counsel appearing for the Respondents pointed out that considering the decision of this Court in B.M., New India Assurance Co, Ltd. V. Muralikrishnan, 2010 (3) MLJ 271, which followed the decision of the Apex Court in and National Insurance Co. Ltd. V. Swaran Singh, 2004 (1) TNMAC 104(SC) : AIR 2004 SC 1531, the concept of pay and recover still holds good and no exception could be taken to the decision of the Tribunal holding that the Insurance Company is responsible to make payment. That even in the case of policy violation, this Court in the decision reported in The Manager, United India Insurance Company Ltd. V. Tmt. P. Muthamani, 2010 (1) TN MAC 486, referring to the decision of the Apex Court in Swarna Singh's case (cited supra), pointed out that the mere absence of an endorsement, per se would be dilute the liability of the Insurance Company. In the circumstances, the compensation has to be made by the Insurance Company at the first instance and has to be made by the Insurance Company at the first instance and thereafter, they have to recover the same from the owner of the vehicle. The said line of reason envisages the fact that in the Motor Vehicles Act, being a beneficial provision, the aim and purpose of the same cannot be defeated by the Insurance Company by raising a technical plea. Even in the case of violation to the policy condition, the victim of the accident being an innocent person, it is necessary to see that the innocent persons do not suffer an injury or a loss by reason of mere policy violation. The injured person or the relatives of the person killed in the accident should not be allowed to go with the mind that the decree obtained by them is merely a paper decree and that on a technical plea, the owner or the Insurance Company would not escape from the liability.

2010 (6) CTC 895

P. ASHOKAN
VS
K. RAMACHANDRAN AND OTHER

Code of Civil procedure, 1908 (5 of 1908), Order 21, Rule 15 – Application for execution by joint decree holders – Execution – Requirement thereof – Decree was passed in favour of petitioner directing Respondent to remove illegal construction and to hand over possession – Petitioner filed Execution Petition to execute decree – Court below dismissed Application on ground that decree could not be executed till rival claims between decree holders are settled – Hence Revision – Contention of judgment-debtor that one of decree holders has received sum of ₹.15,000 and relinquished his right over suit property, therefore, Execution Petition is not maintainable – Held, terminology "decree holder" employed in Order 21, Rule 15 would mean in plural as decree holders and payment out of Court for satisfaction of decree has to be made to all decree holders and one of several joint holders cannot give a valid discharge of entire decree – When joint decree provides for distinct and separable share to each of judgment-creditor, even if certain properties in decree were alienated, judgment-creditor is always at liberty to execute decree against judgment-debtor – Order of Court below is liable to be set aside – Matter remitted back for fresh consideration – Civil Revision Petition disposed of.

Facts:

Petitioner is the Second Plaintiff is the Suit which was filed against Respondent and a decree was passed in favour of Petitioner directing Respondent to remove illegal construction and hand over the suit property, Petitioner filed Execution Petition for execution of decree. Execution Court dismissed the Application on ground that till rival claims between the decree holders are settled, Execution Petition is not maintainable.

Held:

From the above said decisions, the following points originate-

The term employed in Order 21, Rule 1 (b) of C.P.C. would convey the meaning as "decree-holders" also. In satisfaction of a decree, the payment out of Court shall be made by the judgment-debtor to all the decree-holders and one among the several decree-holders in a joint decree is not competent to discharge the entire decree without authorization of other decree-holders.

If payment out of Court is made by the judgment-debtor to one among the decree holders in a joint decree, the judgment-debtor has to be establish that it was paid to the whole body of the decree holders.

A joint decree could be made divisible and executable, to the extent of the intending judgment-creditor who prefers Execution Petition, by act of parties. In such circumstances, a partial satisfaction or extinguishment of a decree may take place.

When a joint decree provides for distinct and separable shares to each of the judgment-creditors, then even if certain properties in the decree were alienated, the judgment-creditor is always at liberty to execute the decree against the judgment-debtor.

2010 (6) CTC 901

J.P. BUILDERS & ANOTHER
VS
A. RAMADAS RAO & ANOTHER

Specific Relief Act, 1963 (47 of 1963) – Words and Phrases – "Readiness" and "Willingness" – Former refers to financial capacity and later to conduct of Plaintiff wanting Specific Performance - "Readiness" generally is backed by " willingness".

Facts:

Specific Performance which was decreed partly by the High Court is under challenge before the Apex Court on various grounds.

Transfer of Property Act, 1882 (4 of 1882), Section 56 – Doctrine of Marshalling – Deals with right of subsequent purchaser – Should be contrasted from Section 81 which relates to marshalling by a subsequent mortgagee – Principle underlying Section 56 is that a creditor, who has means of satisfying debt out of several funds, shall not, by exercising his right, prejudice another creditor whose security comprises only one of funds.

Held:

In order to understand the claim of the Plaintiff and the stand taken by the Defendant Nos. 1 and 2, it is useful to refer Section 56 of the T.P. Act:

" 56. Marshalling by subsequent purchaser – If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to

the contrary, entitled to have the mortgaged-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

2010 (6) CTC 561

SARAYU, W/O. S. BABU SHANKAR AND OTHERS
VS
SURENDRA VITHAL NAZARE AND OTHERS

Motor Vehicles Act, 1988 (59 of 1988), Sections 166 & 173 – Code of Civil Procedure, 1908 (5 of 1908), Section 2(11) – Claim for Compensation – Question as to who is a Legal Representative, entitled to claim compensation – Tribunal holding that father of deceased was continuing as a partner in a business concern and not dependant on income of deceased – It further held that mother of deceased was also not dependant on income of deceased – Wife of deceased was deprived of compensation, on ground that she remarried after death of her husband – Held, parents of deceased are Legal Representatives entitled to claim compensation as dependents – Wife of deceased, who remarried her husband's brother after her husband's death, is also entitled to claim compensation as a Legal Representative – Compensation enhanced in Appeal – Civil Miscellaneous Appeal allowed.

Facts:

The Tribunal, dealing with a claim for compensation arising out of a motor accident, held that the parents and wife of the deceased, who had remarried her brother-in-law, were not entitled to claim compensation. In Appeal before the High Court, it was held that, as per Section 2 (11) of the Code of Civil Procedure and Section 166 of the Motor Vehicles Act, the parents and wife of the deceased, despite the fact that she had remarried after the death of her husband, were Legal Representatives.

Held:

The word "Legal Representative" as defined in Section 2(11) of the C.P.C. means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

We are, therefore, of the considered opinion that the Tribunal has committed grave error of law in holding that the parents of the deceased are not the Legal Representatives of the deceased to claim compensation amount as Dependants. The Tribunal further committed serious illegality in holding that the First Appellant who was the wife of the deceased is also not entitled to any compensation for the reason that after the death of the deceased she remarried her husband's brother. In our view all the claimants/Appellants are entitled to compensation on account of death of the deceased in a car accident.

2010 (6) CTC 580

P. KRISHNA KUMARI
VS
A. KANDASAMY

Code of Civil Procedure, 1908(5 of 1908), Order 5, Rules 17 & 19 and Order 9, Rule 13 – Application filed by wife to set aside decree for divorce, was dismissed – Civil Miscellaneous Appeal against said order – Notice sent to wife was returned with an endorsement "not claimed" – Family Court concluded that service was sufficient and passed ex parte decree – Order 5, Rule 17 deals with procedure when Defendant refuses to accept service or cannot be found – Service by affixture by process server, even in absence of witnesses can be deemed to be good and sufficient – When party denies service of notice through process server, onus shifts to Plaintiff to prove essential ingredients of Order 5, Rule 17 –Family Court erred in raising presumption of service of notice – No proof was adduced to show that any attempt was made to serve personally – Wife had filed Petition to set aside ex parte decree within 30 days from date of knowledge – No application to condone delay is necessary in present case – Impugned order set aside – O.P. Restored – C.M.A. allowed.

Facts:

Wife sought to set aside the ex parte decree for divorce. Though the Application was dismissed by the Family Court, on the ground that the there was no Application to condone the delay, High Court held that the wife had filed the Application to set aside the ex parte decree within 30 days from the date of her knowledge and allowed the Civil Miscellaneous Appeal, so that the wife will have an opportunity to refute the serious allegations raised against her.

Held:

Order 5, Rule 17, C.P.C. deals with procedure when Defendant refuses to accept service, or cannot be found and service of notice by affixture. Service of summons by affixation would be valid if one or the other of the following conditions are satisfied, namely (1) if the Defendant or his agent or such other person as is mentioned in Rules 13 to 15 refuses to sign the acknowledgment, or (2) if the serving officer after using all due and reasonable diligence cannot find the Defendants and there is no agent or other person on whom service can be made. In case of return under Rule 17, the Court shall record a distinct declaration of service or order further service. The Process Server must use the due and reasonable diligence in finding the Defendant/Respondent and make efforts to find out as and when the Respondent would be available next time. The process Server should also mention in his report as to whom he contacted and by whom the house was identified.

2010 (6) CTC 589

M.R. RAMAMURTHY (DECEASED) AND 8 OTHERS
VS
RADHA (DECEASED) AND 9 OTHERS

Indian Succession Act, 1925 (39 of 1925), Section 63(c) – Evidence Act, 1872 (1 of 1872), Sections 68, 69 & 90 – Will – Proof execution – In respect of Will, provisions of Section 90 of Evidence Act are not applicable, even if Will is produced from proper custody – If a Will is challenged as surrounded by suspicious circumstances, all legitimate doubts have to be removed by cogent and satisfactory evidence

to dispel suspicion – Even as per Section 90, words used are "Court may presume" and not "Court shall presume" – Will has to be proved by examination of witnesses – No evidence to show that Will was produced from proper custody – There are suspicious circumstances surrounding its execution – Will not proved.

Facts:

In Probate proceedings, it was held that the presumption under Section 90 of the Evidence Act, 1872, cannot be extended to a Will, since the same has to be proved in accordance with Section 68 of the Evidence Act by examining the witnesses. It was also held that the provisions of the Benami Transactions (Prohibition) Act, 1988 does not have retrospective effect. Ultimately the Testamentary Original Suit was dismissed and the Partition Suit was decreed.

Held:

Section 68 of the Evidence Act prescribes the mode of proof of execution of a document required by law to be attested. A will, is no doubt, a document required by law to be proved in attested. The Section mandates that such a document shall not be used as evidence until at least one Attesting Witness has been called for the purpose of proving its execution, if there be an Attesting Witness alive, subject to the process of the Court and capable of giving evidence. There is no evidence to show that none of the Attestors is alive subject to the process of Court and capable of giving evidence. The Proviso to Section 68 of the Evidence Act is not attracted because of the specific exclusion of Will from the Proviso. The exclusion of Will from the Proviso is deliberate sine a Will comes into effect and the proof of Will arises only after the death of the Testator. Absence of evidence on the side of the Plaintiffs to show that none of the Attestors of the Will is alive, shall pave the way for holding that the suit Will (Ex.P2) has not been proved in the manner prescribed under Section 68 of the Evidence Act, 1872. At the cost of repetition, it is further pointed out that not even the signatures of the Testator and that of the Attestors found in Ex.P2-Will have been proved by the identification of the same by persons who were familiar with the same.

2010 (6) CTC 612

SUNDARAJAN @ PICHAIKARAN
VS
AANJI

Code of Civil Procedure, 1908 (5 of 1908), Order 51, Rule 23-A – Order of remand by First Appellate Court – Challenged in Appeal - No finding recorded by First Appellate Court, as to why Trial Court Judgment was reversed – First Appellate Court has ample powers to decide all issues, including appointment of Advocate Commissioner, amendment of pleadings, etc. – Order of remand should not be passed as a matter of course – First Appellate Court had not properly assessed evidence available on record – Civil Miscellaneous Appeal allowed.

Facts:

An order of remand was challenged by the Plaintiff in a Suit for declaration, recovery of possession, permanent injunction and mandatory injunction. His Suit was decreed by the Trial Court. On Appeal by the Defendant, the matter was remanded to the Trial Court. High Court set aside the order of remand and directed the First Appellate Court to decide the matter by holding that that order of remand should cannot be passed as a matter of course without giving a finding as to how the decree and judgment of the Trial Court are perverse,

illegal, especially, after amendment to Order 41, Rule 23-A of Code Civil Procedure and that the First Appellate Court remanded the matter back to the Trial Court for fresh consideration summarily on the only ground that the documents sought to be produced by the plaintiff has to be entertained by letting in evidence before the Trial Court.

Held:

A reading of the order of remand passed by the First Appellate Court would indicate that no finding was recorded as to why the order passed by the Trial Court has to be reversed. In this connection, I am fortified by the decision rendered by the Honourable Supreme Court reported in P. Purushottam Reddy and another v. Pratap Steels Ltd., 2002 (2) SCC 686 wherein in para-10 and 11, it was stated thus:

"10. The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23-A in Order 41 of the Code of Civil Procedure by the CPC Amendment Act, 1976, there were only two provisions contemplating remand by a Court of Appeal in Order 41, C.P.C. Rule 23 applies when the Trial Court disposes of the entire Suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in Appeal. Rule 25 applies when the Appellate Court notices an omission on the part of the Trial Court to frame or try any issue or to determine any question of fact which in the opinion of the Appellate Court was essential to the right decision of the Suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand inasmuch as the Subordinate Court can try only such issues as are referred to it for trial and having done so, the evidence recorded, together with findings and reasons therefore of the Trial Court, are required to be returned to the Appellate Court. However, still it was a settled position of law before the 1976 Amendment that the Court, in an appropriate case could exercise its inherent jurisdiction under Section 151, C.P.C. to order a remand if such a remand was considered preminently necessary ex debito justitiae, though not covered by any specific provision of Order 41, C.P.C. In cases where additional evidence is required to be taken in the event of any one of the clauses of sub-rule (1) of Rule 27 being attracted, such additional evidence, oral or documentary, is allowed to be produced either before the Appellate Court itself or by directing and Court Subordinate to the Appellate Court to receive such evidence and send it to the Appellate Court. In 1976, Rule 23-A has been inserted in Order 41 which provides for a remand by an Appellate Court hearing an Appeal against a decree if (i) the Trial Court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in Appeal and a retrial is considered necessary. On twin conditions being satisfied, the Appellate Court can exercise the same power of remand under Rule 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rule 23 and 23-A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent powers to make a remand because, at held in Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati (AIR at p. 399), it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the Court may now exercise the power of remand dehors Rules 23 and 23-A. To wit, the superior Court, if it finds that the judgment under Appeal has not disposed of the case satisfactorily in the manner required by Order 20, Rule 3 or Order 41, Rule 31, C.P.C. and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An Appellate Court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or 23-A or Rule 25, C.P.C. An unwarranted order of remand gives the litigation an underserved lease of life and, therefore, must be avoided.

In the case at hand, the Trial Court did not dispose of the Suit upon a preliminary point. The Suit was decided by recording findings on all the issues. By its Appellate judgment under Appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the Trial Court. It is not a case where a retrial is considered necessary. Neither Rule 23 nor Rule 23-A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify

production of additional evidence by either party under that Rule. The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the Suit for failure of the Plaint to satisfy the requirement of Forms 47 and 48 of Appendix A, C.P.C. is concerned, the High Court has itself found that there was no specific plea taken in the Written Statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the Defendants purely as a question of law which, in their submission, strikes at the very root of the right of the Plaintiff to maintain the Suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to clause (c) of Section 16 of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise inasmuch as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a libierty. It is true that a specific issue was not framed by the Trial Court. Nevertheless, the parties and the Trial Court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the Trial Court was sustainable or not – in law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the Court of First Appeal, all the question of fact and law arising in the case were open before it for consideration and decision."

2010 -5- L.W. 967

**STATE BANK OF INDIA, REP BY ITS BRANCH MANAGER,
KODAIKANAL BRANCH, KODAIKANAL, DINDIGUL DISTRICT
VS
KUTTALINGAM, S/O IYAMPERUMAL, MANJALAR DAM,
DEVADANAPATTI, THENI DISTRICT**

Recovery of Debts due to Banks and Financial Institutions Act 1993 (Amendment Act 2000), Sections 17, 18, 30/Alternative remedy, Civil Court's jurisdiction to set aside order of Recovery Officer if available, Declaration suit invoking civil Court's Jurisdiction, bar as to – CRP under Article 227 allowed,

Constitution of India, Article 227/Abuse of powers,

C.P.C., Order 7, Rule 11/Plaint to be struck off, Abuse of process, Suit for Declaration to set aside order of Recovery Officer not maintainable.

In this case, as per Section 31(A), the decree holder is entitled to apply to the Tribunal to pass an order for recovery of amount on the basis of the decree passed by the Civil Court – When an application is filed before the Tribunal which has jurisdiction to issue a Recovery Certificate and on receipt of the Certificate, the Recovery Officer shall proceed as if it is a Certificate in respect of debt recoverable under the Act – Bar of jurisdiction as per Section 18 of the Act comes into operation as soon as an application is filed by the bank seeking for issuance of a recovery certificate to recover the amount.

In this case, an application was filed before the Debt Recovery Tribunal, Chennai to issue the Recovery Certificate on the basis of the final decree, and the Recovery Certificate was issued by the Debt Recover Tribunal.

Invoking of jurisdiction of the Civil Court to set aside the order passed by the Recovery Officer passed under the provisions of the Act is not maintainable, having regard to the alternative remedy

provided under Section 30 of the Act the civil suit is not maintainable – It is a clear case of abuse of process of Court – CRP under Article 227 allowed.

2010 -5- L.W. 978

THE DIVISIONAL MANAGER, THE UNITED INDIA INSURANCE CO. LTD.,
VS
SUDHA AND OTHER

Motor Vehicles Act (1988), Section 147/Compensation, Insurance, Third party risk, Gratutious passenger, pay and recover, Principle.

Issue is whether the Tribunal was justified in directing the payment of compensation to the injured persons by the Insurance Company without granting them liberty to recover from the owner of the vehicle – When the Insurance Company have raised a plea that they are not liable to compensate the persons who were gratuitous passengers traveling in a goods vehicle – It was contended that the good vehicle – It was contended that the vehicle is a good carriage vehicle and as per the policy conditions, the Insurance Company is not liable to honour the compensation claim in respect of the passengers who are carried in goods vehicle – When the Tribunal passed the award, the decision of the Hon'ble Supreme Court in Satpal Singh held the field – Hon'ble Supreme Court in the case of Asha Rani supra overruled the decision in Satpal Singh's case.

Finding of the tribunal holding that the insurer is liable requires interference.

Liberty granted to recover the compensation amount from the owner of the vehicle, the 2nd respondent – CRPs allowed.

(2010) 8 MLJ 703

P.S. RAJESH
VS
KEN H. RAJA

Pecuniary jurisdiction – Suit papers returned for certain defects – It is not open to plaintiff to add or delete some prayer in plaint on his own to bring suit within pecuniary jurisdiction of Court.

Held:

It was the plaintiff who himself added another prayer in the prayer portion seeking damages for a sum of ₹.3 lakhs and re-presented the papers along with the additional Court fee of ₹.3,000/-. This was done by the plaintiff on his own, because by that time the City Civil Court Act was amended and the pecuniary jurisdiction of the Court was raised to ₹.25 lakes. That is why, the plaintiff on his own raised the suit value to another ₹.3 lakhs to bring the suit within the pecuniary jurisdiction, of this Court.

If the plaintiff wants to add one more prayer, seeking a sum of ₹.3 lakhs towards damages, then a proper way is to file an amendment petition to amend the plaint to raise the value of the plaint. Similarly, if the plaintiff wants to add one more paragraph the leave of the Court should be obtained to do so, after the original plaint was returned for certain other compliances. The plaintiff cannot make additions, deletions, alterations, interpolations,

etc., in a plaint on his own after the papers are returned for some other compliances. Further, when these things are allowed, it may lead to unnecessary consequences as at a later point of time, it would not be known as to what was the original suit claim and when and how the same was changed.

(2010) 8 MLJ 709

RUDRA FINANCIAL SERVICES, REP. BY ITS MANAGER, CHENNAI
VS
KOTA NADAMUNI, EDAPALAYAM, CHENNAI -3

Indian Stamp Act (2 of 1899), Sections 2(5)(b), 33, 35 – Suit to declare redemption of mortgage deed and for permanent injunction restraining sale of property in public auction – Agreement not duly stamped – Application to impound agreement and not to act on it, till payment of stamp duty – Document is a bond in nature – 'Bond' – Definition of-Even after marking of document, Court to direct party to pay necessary stamp duty – Agreement to be a bond – Needs payment of stamp duty and penalty.

FACTS IN BRIEF:

Aggrieved by the order of the lower Court directing impounding of Exhibit B-1 agreement and directing payment of stamp duty with penalty, holding that the said document is a bond, the respondent/defendant has filed revision petition.

QUERY:

Whether the validity of an instrument once marked in evidence can be questioned on the ground that it has not been duly stamped?

Held:

As held by the Hon'ble Apex Court held in Hindustan Steel Ltd. v. Dilip Constructions Co. AIR 1969 SC 1238 : (1969) 1 SCC 579, the Indian Stamp Act is a fiscal measure. Even after marking the document, the Court can ask the party, who marked the document to pay necessary stamp duty.

In the instant case, on the petition filed by the respondent/plaintiff, after hearing both sides, the Court below directed to pay stamp duty, holding that Exhibit B-1 is a bond, which needs stamp duty and penalty. Though the copy Exhibit B-1 was not produced by either side, from the impugned order and the averments made by both the parties, by was of typed set, Court is of the view that there is no error in the impugned order passed by the Court below, holding the said document is a bond, in the light of the various decisions of the Hon'ble Apex Court and the Allahabad High Court and therefore, this civil revision petition is liable to be dismissed.

(2010) 8 MLJ 887

RENGARAJAN
VS
RAJESH AND OTHERS

Code of Civil Procedure (5 of 1908), Sections 47, 100 – Objections to executability.

FACTS IN BRIEF:

The appeal and revision are against an order declaring that the decree is passed without jurisdiction and hence inexecutable.

QUERY:

Whether the question of want of jurisdiction by the Court passing a decree can be taken in a subsequent suit without raising it in the earlier suit?

Held:

The question of nullity on the ground without jurisdiction cannot be taken in the subsequent suit for the simple reason that the same plea was not taken before the Court which passed the decree.

Objecting the decree on the ground that the decree is not executable cannot be raised under Section 47 of Code of Civil Procedure before the executing Court. Executing Court cannot go beyond the decree and the executing Court cannot entertain that the decree was passed without jurisdiction. A plea which ought to have been taken before passing that decree cannot be allowed to be raised during execution proceedings.

(2010) 8 MLJ 912

P. SIVAKUMAR
VS
PONNUSAMY AND ANOTHER

Legal Services Authorities Act (39 of 1987), Section 22-E – Execution of sale deed – Award of Lok Adalat not complied with – Lack of description of suit property in award – Execution petition returned by executing Court for amendment – Verification with Lok Adalat authorities to be done for execution of decree – Execution petition not to be returned by Court – Award of Lok Adalat final – To be treated as a decree of Civil Court – Revision petition allowed.

FACTS IN BRIEF:

Aggrieved by the refusal on the part of the Executing Court to entertain the Execution petition filed by the plaintiff/petitioner on the ground that the description of suit property was not contained in the award of Lok Adalat, revision petition was filed by the plaintiff.

QUERY:

Whether Executing Court can return an Execution petition on the ground that there was no description of suit property in the Lok Adalat award which is to be executed?

Held:

Normally, the order or award passed by the Lok Adalat cannot be appealed against and it would become final. Therefore, by returning the execution petition, the very object of settling the dispute between the parties, before the Lok Adalat, has been thwarted by the executing Court. Merely because the award passed by the Lok Adalat do not contain the description of the property, it will not disentitle the revision petitioner to file the Execution Petition to execute the award passed by the Lok Adalat which can be treated as a decree passed by the Civil Court. Therefore, the Court below ought not to have returned the Execution Petition for amendment or modification or rectification of the award passed by the Lok Adalat, instead of numbering the Execution Petition.

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HIGH COURT CITATIONS
CRIMINAL CASES

2010- 2- L.W.(Crl.) 1444

SHANMUGAM S/O MURUGAN
VS
STATE REP. BY INSPECTOR OF POLICE, KANCHI
TALUK POLICE STATION.

I.P.C., Section 302/Extra Judicial Confession made before village administrative Officer (PW 13), nine days after the occurrence – Appeal was preferred against conviction of appellant under Section 302 for causing death of his wife (accused was acquitted of the charge under Section 498-A) – Credibility of the confessional statement, Scope.

Immediately on production of the accused before the police, P.W.13 was asked to go away and the police did not examine him in connection with the case – This aspect also creates grave doubt in the mind of this Court as to the credibility and reliability of the extra-judicial confession given by the accused to P.W.13-Hence, Court is of the view, the extra-judicial confession cannot be relied upon as a piece of evidence to bring home the guilt on the part of the accused.

Further, the FIR under Ex.P13 which came to be registered at 18.00 hours on 2.4.2007 reached the jurisdictional Magistrate Court at about 10.00 a.m. on 3.4.2007 and the statements of material witnesses viz., P.W.6 and 26 had reached the Court much belatedly.

Delay in despatch of FIR as well as certain documents of material witnesses to the Court belatedly, is fatal to the case of the prosecution and no explanation whatsoever has been offered by P.W.27 Investigating Officer with regard to the said delay.

Prosecution has failed to prove the guilt on the part of the accused beyond any reasonable doubt and consequently, the benefit of doubt shall enure in favour of the appellant/accused – Appeal allowed, conviction set aside.

Criminal Trial/Extra Judicial Confession, F.I.R., Delay – See I.P.C., Section 302/Extra Judicial Confession made before Village Administrative Officer (PW 13), nine days after the occurrence.

2010- 2- L.W.(Crl.) 1452

Micheal @ Nai Micheal
vs
State rep. by Inspector of Police, Bhoothapandy Police Station.

I.P.C., Section 302, 304 Part II, Single stab, Absence of pre- meditation, Considerations before court as to nature of offence,

Evidence/Dog Squad, Corroboration requirement, Scope,

Criminal P.C., Section 164(e), Delay in despatch of statement of witnesses by Investigation Officer to Court, When vitiates investigation, No guidelines prescribed in the Code,

Criminal Trial/FIR, Delay, Motive.

Mere delay in lodging the FIR with the police is not necessarily, as a matter of law, fatal to the prosecution – Even if there were delay for the FIR in reaching the Judicial Magistrate, if it is shown that immediately after lodging of First Information Report, the investigation started and proceeded, then there is no ground to lay suspicion over the prosecution case – Hence, even if there was a delay of there hours, in the view of this Court, it does not make the prosecution case vulnerable.

Available materials would show in the present case on hand that even though the accused was identified, in order to know about his whereabouts, the services of dog squad were availed – Contention that since the accused was unknown the dog squad was called for cannot be countenanced – This court does not place any reliance upon the outcome of sniffer dog tracking report, since it could not constitute basis for conviction as per law.

Though Criminal procedure Code does not prescribe any guideline, it is declared by this Court, that the documents, which are coming within the meaning of special importance should reach the judicial authority in time – Even though certain statements recorded by the police under Section 161(3) Cr.P.C. reached the Court at a later point of time, it would not vitiate the investigation since it has been already observed that the investigation had started immediately after lodging of the First Information Report.

Only one injury was received by the deceased which was fatal – Evidence on record does not lead the Court to discern that there was a premeditation nor predetermination in the mind of the accused to do away with the deceased – Conviction altered from Section 302 to Section 304, Part II.

2010- 2- L.W.(Crl.) 1461

Papannan
vs
State rep. by Forest Range Officer, Tirupattur, Vellore District (in Crime No.60/96)

Criminal P.C., Section 29(2), as amended regarding Powers of Judicial Magistrate, Scope, Enhancement of the Fining power of Judicial Magistrate from ₹ 5000/- to ₹ 10,000/- Sections 325, 482,

Criminal P.C., Sections 325, 482/Powers of C.J.M. to impose Fine, enhancement of the power from ₹ .5000 to Rs.10,000, Scope – See Crl.P.C., Sections 29(2).

Tamil Nadu Forest Act, Section 2(d) (e) (f), 36-E-See – Criminal P.C., Sections 29(2), 325, 482.

Question considered was whether the Chief Judicial Magistrate, to whom a case has been referred under Section 325 Cr.P.C, can retransfer the same to the very same Judicial Magistrate or assign it to any other Judicial Magistrate? – Held: Section 325 makes it clear that the CJM to whom a case is referred by a

Magistrate under Section 325(1) of Cr.P.C, cannot transfer or assign the case to any other Magistrate and it is incumbent upon him to decide the matter.

When the Judicial Magistrate or the CJM is of the view that one of the offences is triable exclusively by a Court of Session, then such a Magistrate or the Chief Judicial Magistrate had to pass an order committing the case for trial to the Sessions Court – Once a judgment is pronounced, there is no power to commit the case to the Sessions Court either for trial or for imposition of punishment.

When the Magistrate records an opinion of conviction and transmits the case to the CJM under Section 325(1), one cannot expect an unbiased approach by the very same Magistrate or the Courts of the same cadre to approach the problem without being influenced by the opinion recorded – Order set aside – Crl. O.P. allowed.

Held:

As per the amended Section 36-E of Tamil Nadu Forest Act, an offence of contravention of contravention of Section 36-E of the Act is made punishable with imprisonment, which may extend to five years and with fine, which may extend to ₹.20,000/-. However, a proviso has also been appended prescribing minimum sentence of imprisonment and minimum fine to be imposed in such cases. As per proviso (a), minimum sentence of imprisonment is two years and the minimum fine is ₹.7,500/-for the first offence. As per Clause (b), for a second or subsequent offence, minimum imprisonment is for three years and the minimum fine that has to be imposed is ₹.15,000/-. Therefore, the amendment brought to Section 29(2) has empowered the Sepcial Judicial Magistrate, Tirupattur to impose the minimum sentence of imprisonment and fine referred to in Clause A of the proviso to Section 36-E of the Tamil Nadu Forest Act.

2010 (6) CTC 719

Sundar @ Sundarrajan
vs
State by Inspector of Police, Kammapuram P.S.,
Cuddalore District

Indian Penal Code, 1860 (45 of 1860), Sections 302 & 364-A – Death penalty – Child of 7 years kidnapped for ransom and when it was not met child being murdered – Such acts shok conscience of society and are inhuman, gruesome and merciless – Though life sentence is rule and death penalty is an exception, held case falls under rarest of rare cases and death sentence awarded, confirmed holding that mercy or leniency in such cases would amount to mocking at Criminal system and also amount to misplaced mercy on accused – Case law discussed.

Facts:

The crime was about a small boy aged 7 years being kidnapped for ransom. When the ransom was not met the accused brutally murdered the child. The Session Court after trial found the accused guilty of all charges. In Appeal, it was contended that the Session Court ought not have relied on the evidence of a minor witness and also the identification parade and in any event ought not have sentenced the accused with death penalty.

Held:

Insofar as the death penalty imposed by the Trial Judge, this Court, for the following reasons, has to affirm the same. In the case on hand, a child of 7 years old was kidnapped by A-1 from the place for a demand of ₹.5 lakhs ransom, and when it was not met, he has mercilessly and brutally murdered the child. It is not only gruesome, but also merciless act. Ordinarily, it would shock the conscience of the society. In a case like this, when an illegal demand of ransom is made, and if not met, whether a young child could be murdered. Here is a case where the act of A-1 would not be compatible to the human behaviour, and it is, no doubt, inhuman. It can even be commented that like a beast, he has acted so and that too mercilessly. It remains to be stated that from the evidence of P.W.1, it is quite clear that she has got three daughters, but only one son namely the deceased young child. This Court is conscious of the fact that the life sentence is the rule, and the death sentence is an exception. This Court is also mindful of the caution made by the Apex Court that the death sentence could be imposed in rarest of rare cases. The case on hand would fall under "rarest of rare cases".

2010 (6) CTC 631

R. Lakshmikanthan
vs
K. Senthilkumar

Code of Criminal Procedure, 1973 (2 of 1974), Section 243 – Evidence Act, 1872 (1 of 1872), Section 45 – Negotiable Instruments Act, 1881 (26 of 1881), Section 138 – Accused entitled to rebut case of Complainant – Denial of such right would amount to denial of fair trial - Even though defence of forgery was not taken in reply to statutory notice, during trial accused sought for sending disputed instrument for comparison of signature – Magistrate shall entertain such request unless it is considered o be for purpose of vexation or delay or defeat ends of justice by recording reasons in writing.

Facts:

In a case pertaining to dishonor of cheque, the accused filed an Application under Section 45 of the Evidence Act to send the cheque for handwriting expert opinion. The Magistrate dismissed the same on the ground that the accused had not taken defence of forgery at the earliest point of time. The Appeal against the same was also dismissed.

Held:

Therefore, whenever an accused disputes his signature in the alleged cheque and takes such defence and if he had come forward with the Petition for sending the same for experts' 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 Application should be refused on the ground that it is made for ht e 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.

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Lecture delivered on Refresher Course for Civil Judges (Junior Division) – I Batch at Tamil Nadu State Judicial Academy on 12.02.2011

Rights of Transgender People – Sensitising Officers to Provide Access to Justice

by

Hon'ble Thiru. Justice P.Sathasivam, Judge, Supreme Court of India

DEFINITION

The term 'transgender' has been derived from the Latin word 'trans' and the English word 'gender'. Different sorts of individuals come under this category. No particular form of sexual orientation is meant through the term transgender. The way they behave and act differs from the 'normative' gender role of men and women. Leading a life as a transgender is far from easy because such people can be neither categorized as male nor female and this deviation is "unacceptable" to society's vast majority. Trying to eke out a dignified living is even worse.

HIJRAS: THE THIRD GENDERED PEOPLE

In India, the hijra community has existed for more than four thousand years and is currently believed to number half a million. The word "hijra" designates an alter-native gender to the male-female binary; the term translates as eunuch or hermaphrodite. The hijras' base their group's third gender identity on an episode in the Ramayana where Rama is banished. In the story, Rama tells a tearful group of men and women, lamenting his banishment, to leave and return to the city. A group of people "who were not men and not women" did not know what to do and remained with him. Rama rewarded the hijras for their loyalty by giving them the power to bless auspicious occasions such as marriage and childbirth through customary singing and dancing.

Irregular male sex organs are central to the group's definition. The hijras include both ceremonially emasculated males and intersexed people whose genitals are "ambiguously male-like at birth." All hijras have a female gender identity. There are no ambiguous females who identify as males in the group. Instead, all hijras dress and act as women even though they are not biological women.

RIGHTS OF TRANSGENDER PEOPLE

Preamble to the Constitution mandates Justice - social, economic, and political equality of status.

Thus the first and foremost right that they are deserving of is the right to equality under Article 14. Article 15 speaks about the prohibition of discrimination on the ground of religion, race, caste, sex or place of birth.

Article 21 ensures right to privacy and personal dignity to all the citizens.

Article 23 prohibits trafficking In human beings as beggars and other similar forms of forced labor and any contravention of these provisions shall be an offence punishable in accordance with law.

The Constitution provides for the fundamental right to equality, and tolerates no discrimination on the grounds of sex, caste, creed or religion. The Constitution also guarantees political rights and other benefits to every citizen. But the third community (transgenders) continues to be ostracized. The Constitution affirms equality in all spheres but the moot question is whether it is being applied.

This phenomenon can be observed at the international level also, principally in the form of practice related to the United Nations-sponsored human rights treaties, as well as under the European Convention on Human Rights. The development of this sexual orientation and gender identity-related human rights legal doctrine can be categorized as follows:

a) Non-discrimination
b) Protection of Privacy rights and
c) the ensuring of other general human rights protection to all, regardless of sexual orientation of gender identity

In the light of the Constitutional guarantees provided, there is no reason why Transgender Community should not get their basic rights, which include Right to Personal Liberty, Dignity, Freedom of Expression, Right to Education and Empowerment, Right against Violence, Discrimination and exploitation.

The Constitution endures persons in every generation and every generation can invoke its principles in their own search for greater freedom, therefore, it is the duty of judiciary to interpret the provisions of the Constitution in such a way so as to ensure a life of dignity for them.

As per the Constitution most of the protections under the Fundamental Rights Chapter are available to all persons with some rights being restricted to only citizens. Beyond this categorization the Constitution makes no further distinction among rights holders. Official identity papers provide civil personhood. Among the instruments by which the Indian state defines civil personhood, sexual (gender) identity is a crucial and unavoidable category. Identification on the basis of sex within male and female is a crucial component of civil identity as required by-the Indian state.

The Indian. state's policy of recognizing only two sexes and refusing to recognize hijras as women, or as a third sex (if a hijra wants it), has deprived them at a stroke of several rights that Indian citizens take for granted. These rights include the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on. Such deprivation secludes hijras from the very fabric of Indian civil society.

The main problems that are being faced by the transgender community are of discrimination, unemployment, lack of educational facilities, homelessness, lack of medical facilities like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, penectomy and problems related to marriage and adoption.

In 1994, transgender persons got the voting right but the task of issuing them voter identity cards got caught up in the male or female question. Several of them were denied cards with sexual category of their choice.

The other fields where this community feels neglected are inheritance of property or adoption of a child. They are often pushed to the periphery as a social outcaste and many may end up begging and dancing. This is by all means human trafficking. They even engage themselves as sex workers for survival.

ACCESS TO JUSTICE

One to four percent of the world population is intersexed, not fully male or female. After independence however they were denotified in 1952, though the century old stigma continues. This stigma reduces the transgender to individuals who are no considered human, thus devoid of' all human rights. They suffer a whole lot

of mental, physical and sexual oppression In the society. The health and well-being of transgender people suffers great harm by attitudes of intolerance and hatred toward diverse gender expression.

The laws that, in today's date, terrorize the transgender community are Section 377 of the Indian Penal Code, 1870 and the Immoral Traffic Prevention Act, 1986.

***Immoral Traffic Prevention Act of* 1956** (amended in 1986) is the chief instrument of the Indian state's regulation of prostitution which mandates to prevent the traffic of women and children into prostitution. With the 1986 amendment, the title was modified to "Immoral Traffic Prevention Act," and it became gender neutral. The ambit of the Act now applied to both male and female sex workers and possibly also to those whose gender identity was indeterminate. It is with the 1986 amendment that both male and hijra sex workers became criminal subjects of the ITPA. This provided the legal basis for arrest and intimidation of the transgender sex workers population.

See* 377 *of the 1860 Code was drafted by Lord Macaulay. It comes under the Section titled 'Offences Affecting the Human Body' and provision provides the sanction for the prosecution of certain kinds of sexual acts deemed to be unnatural. It is important to note that regardless of consent these sexual acts are liable for prosecution provided they are seen as carnal intercourse against the order of nature, with man, woman, or animal and, thus satisfy the requirement of penetration. And **to be a homosexual or a hijra is to draw the presumption that the hijra or the homosexual is engaging in "carnal intercourse against the order of nature.**

Section 377 has been extensively used by the law enforcers to harass and exploit homosexuals and transgender persons. Various such incidents have come to light in the recent past. In *Jayalakshmi* v. *State of Tamil Nadu,* Pandian, a transgender, was arrested by the police on charges of theft. He was sexually abused in the police station which ultimately led him to immolate himself in the premises of the police station.

Similarly, policemen arrested Narayana, a transgender, In Bangalore on suspicion of theft without informing him of the grounds of arrest or extending any opportunity to him to defend himself. His diary was confiscated by the police and he was threatened with dire consequences if he did not assist in indentifying other transgenders he was acquainted with.

Homosexuals have also been at the aggrieved end of financial extortion by the police in exchange for not revealing their identities to society.

Similarly, the Indian Council for Medical Research (ICMR) and Indian Medical Association (IMA) have not prescribed any guidelines for Sex Reassignment Surgery (SRS). This reticence on the part of the medical sphere has led many transgenders to approach quacks, putting themselves at grave risk.

From the numerous instances of abuse and violence against homosexuals and transgenders, it is evident that Section 377 has been grossly misused. It is equally obvious that a judicial move to address this concern was exigent in the face of a law enforcement framework so hostile that exploitation at the hands of the alleged protectors became a quotidian affair for sexual minorities in India.

With the advent of the contemporary epoch, the movement against the repressive and oppressive nature of Section 377 grew exponentially and it was finally on July 2, 2009 that for the first time any court in India pronounced that the oppression meted out to the transgender community and the homosexuals in the country is violative of Right to Equality under Article 14, Right against Discrimination under Article 15, and Right to Privacy and Personal Dignity under Article 21of the Indian Constitution.

These rights are not only constitutionally guaranteed but are also implicit in the Universal Declaration of Human Rights and should therefore; enjoy a superior position to other rights. The judgment of the Delhi High Court reflects a sense of conscience and empathy towards the sexual minorities, emotions that were hitherto unknown. Section 377, in its criminalization of homosexual activity, was a repressive measure on the fundamental rights of the transgender community.

And when a transgender is treated like an unequal or is humiliated by the ordinary people, there are not a lot of redressal mechanisms that are available to him. Thus to put an end to all the inhuman behavior towards the transgender community it is very important that reforms are made in the existing laws, the law officers are sensitized to adapt to a complete humanitarian approach while dealing with a person of transgender community and also the society should get rid of the century old bias and realize that transgender behavior is a normal and natural as their own feeling towards their sexual orientation.

All the laws of the land should be applied to them like any other person. They should be treated equally, respectfully and without any discrimination. They should not be discriminated against in exercising their right to apply for a job, access to a public place, right to property or their right to access to justice.

Thus it is very vital that the judicial officers and the police officers do not become the means to institutionalize or to enforce such discrimination. Rather, they should spread awareness in the societal area they work in and enlighten the laymen that the transgender are as human as them and deserve to be treated in the same manner. There should be a group of activists to whom any matter involving transgender rights as soon as it reaches the court can be referred to. This panel of activists should involve social workers dedicated to the cause of upliftment of the transgender community and also lawyers through with the law on the subject.

Shelter homes should also be made available for such transgenders who are facing violence and are in further risk of going through the same during the proceedings. The officials dealing with issues relating to transgenders should observe complete transparency during such events. One should always remember that being in the legal profession it is our first and foremost duty to fight for the rights of the people who can't fight for themselves. Thus establishment of a division under the local legal services authority in order to provide legal aid to the transgenders, will adequately serve the purpose.

While reforms are needed and suggested in the existing laws for the realization of equal rights for the transgender community, the target can not be achieved, if not fully but partially, if reforms take place in the implementation of such laws. And the State of Tamil Nadu has set an example of the above statement to the entire world. While it is the first State to constitute a Welfare Board for the transgender community, known as aravanis, with the official working staff along being the members of the transgender community; it has also taken affirmative action to achieve equality by reserving seats for third-gender students in government-owned art and science colleges and providing ration cards (identity documents) to third-gender people with the appropriate gender category. The state government was also giving subsidy to all those transgenders who wish to undergo surgical treatment for change of their sex.

India's transsexuals are also listed as 'others', distinct from males and females, on electoral rolls and voter identity cards since 2009. This identity of a third gender was a major step ahead in their struggle for political rights.

Another area of law which has to be seen with the glasses of welfare of transgenders is the juvenile justice system. Welfare and protective measures have to be implemented in the procedures and working of the Juvenile Justice system. The Juvenile Justice Act is more of a welfare legislation that penalizing one because it

aims at proper upbringing of the delinquents by making the environment child friendly and informal. It is usually children with humiliating experiences in familial, economic or school life are found to be in conflict with law. Another factor that can be added to the list these humiliating experiences are the ones relating to the child's sexual orientation, which the Juvenile Justice System does not contemplate upon.

Adolescence is a confusing time during which the children learn the skills required to become healthy adults. They experience significant intellectual, emotional, and physical developments during this bridge to adulthood. This is equally true of the transgender adolescent, but they have the added disadvantage of coming of age in a society in which their identities are stigmatized and their families and schools often harass and victimize them. These children are often rejected, neglected, or abused by their guardians and choose a life on the streets rather than remain in hostile environments.

The members of the Juvenile Justice Board should be particularly compassionate towards a transgender juvenile and have a deeper understanding of his problems that led him into a delinquent act.

If the purpose of the juvenile justice system is to intervene in a troubled youth's life and guide them towards becoming contributing members of society, then the juvenile justice system must support transgenders in their youth in the exploration and expression of their sexual orientation and gender identity.

To bring about a change in the societal aspect it is necessary that we implement the seeds of equal treatment for transgenders in the minds of the new generation. A comprehensive gender and sexuality education should be provided to all children and youth, within and outside formal education systems, which includes discussions on sexual and gender diversity and sexual rights. This will not only ensure a better future outlook for the transgenders but also they will be able to earn self esteem and self respect which they deserve for the mere fact of being a human being.

To get any reform in any law that would affect the transgender community it is proposed that a few members of the transgender community be made a part of such commission so that the law does not remain a toothless piece of legislation and serves the purpose it was enacted or amended for.

It is of utmost importance that the transgender community is made free from violence and discrimination at all levels of the society. It is due to the discrimination they face since school that they never have enough confidence to continue studying and become eligible for all the white collar jobs. This mindset has to change if India truly wants to be the champion of human rights in the world. The surgery of sex reassignment should be given a legal status so that the transgenders do not risk their lives going through it in a secret unlawful manner. This record will also be helpful in accurately determining their census. There should also be a separate column in the sex determinant portion in all government and non-government forms.

There is need for their social acceptance. They should be provided separate wards in all government hospitals. The authorities do not admit them in women's ward because women do not feel comfortable or free in their presence and in men's ward they face sexual abuse. Besides, there are no separate toilet facilities for them.

Some progressive measures are:

a) To sensitize the society with regard to their identity.
b) Support of civil society organization to advocate for their cause and efforts. For example, advocate for land/ shelter, creation of separate public toilets, hospital wards, recognition of their right to vote as citizens, reservation seats in election, etc.

c) Support of Media - both print and electronic, to highlight their status and plight rather than portraying them in poor light.
d) Extend financial support for community based organizations run by transgender communities.
e) To generate awareness, so that the transgender is viewed and understood as a culture, community and a movement.

RECOMMENDATIONS AND SUGGESTIONS

Discrimination against hijras and kothis is embedded in both state and civil society. The violence that this community faces is not only due to the state but also has deep societal roots. Wider change is premised on changing existing social relations. Apart from shifts in class relations, change would also crucially hinge upon overturning the existing regime of both gender and sexuality that enforces its own hierarchies, (e.g. heterosexuality over homosexuality), exclusions (e.g, hijras as the excluded category) and oppressions. While keeping in mind this wider context, a human rights approach has to deal with the various institutional contexts and think through ways in which change can be brought about.

Legal Measures

1. Every person must have the right to decide their gender expression and identity, including transsexuals, transgenders, transvestites and hijras. They should also have the right to freely express their gender identity. This includes the demand for hijras to be considered female as well as a third sex.
2. Comprehensive civil rights legislation should be enacted to offer hijras and kothis the same protection and rights now guaranteed to others on the basis of sex, caste, creed and colour. The Constitution should be amended to include sexual orientation/gender identity as a ground of non-discrimination.
3. There should be a special legal protection against this form of discrimination inflicted by both state and civil society which is very akin to the offence of practicing untouchability.
4. The Immoral Trafficking Prevention Act, 1956, as has been pointed out earlier, is used less for preventing trafficking than for intimidating those who are the most vulnerable i.e., the individual sex worker as opposed to brothel keepers or pimps. This law needs to be reformed with a clear understanding of how the state is to deal with those engaged in sex work.
5. Section 375 of the IPC should be amended to punish all kinds of sexual violence, including sexual abuse of children. A comprehensive sexual assault law should be enacted applying to all persons irrespective of their sexual orientation and marital status.
6. Civil rights under law such as the right to get a passport, ration card, make a will, inherit property and adopt children must be available to all regardless of change in gender / sex identities.

Police Reforms

1. The police administration should appoint a standing committee comprising Station House Officers and human rights and social activists to promptly investigate reports of gross abuses by the police against kothis and hijras in public areas and police stations, and the guilty policeman be immediately punished.
2. The police administration should adopt transparency in their dealings with hijras and kothis; make available all information relating to procedures and penalties used in detaining kothis and hijras in public places.
3. Protection and safety should be ensured for hijras and kothis to prevent rape in police custody and in jail. Hijras should not be sent into male cells with other men in order to prevent harassment, abuse and rape.
4. The police at all levels should undergo sensitization workshops by human rights groups/queer groups in order to break down their social prejudices and to train them to accord hijras and kothis the same courteous and humane treatment as they should towards the general public.

Other Measures

1. A comprehensive sex-education program should be included as part of the school curricula that alters the heterosexist bias in education and provides judgement-free information and fosters a liberal outlook with regard to matters of sexuality, including orientation, identity and behaviour of all sexualities. Vocational training centers should be established for giving the transgender new occupational opportunities.
2. The Press Council of India and other watchdog institutions of various popular media (including film, video and TV) should issue guidelines to ensure sensitive and respectful treatment of these issues.
3. Several NGO's are working in almost every field but ironically there are very few NGOs for transgender.

Reforming the Medical Establishment

1. Initiate a debate on whether being transgender should be classified as a gender identity disorder or whether it should be seen as a choice.
2. The Medical Council of India should issue guidelines to ensure that discrimination in medical treatment of hijras and kothis, which would include refusal to treat a person on the basis of their gender identity, is treated as professional misconduct.
3. Reform medical curricula in medical colleges that moves beyond seeing transgenderism as a disease and a deviance.

Hopes for the Future

- The right to be treated fairly with compassion & free from unjust treatment, cruelty, discrimination, & exploitation in all private & government institutions & other entities.
- The right to be recognized as a marginalized group thus appropriate representation be afforded to us in all government instrumentalities & all other groups & organizations whether local or international.
- The right to be given equal Opportunities in employment as Transgenders.
- The right to participate in all socia-Economic, political & cultural activities, programs & services that directly concern and affect us.
- The right to build a family and home without prejudices and biases.
- The right to form and organize groups to freely redress our grievances against the government and other institutions without fear of being imprisoned or killed.
- The right to adequate access to health care and support, appropriate information and attain the highest standard of sexual and reproductive health.
- The right to bodily autonomy and to decide freely the matters concerning our health and reproduction that is free of discrimination, coercion, violence and deceit.

TAMIL NADU SHOWS THE WAY TO TRANSGENDERS IN INDIA

There is a population of approximately 30,000 transgenders in the State of Tamil Nadu. They meet in ***Koovagam,*** a village in the Ulundurpet taluk in ***Villupuram*** district, Tamil Nadu in the Tamil month of Chitrai (April /May) for an annual festival which takes place for fifteen days.

In Tamil Nadu, Hijras are known as Aravanis. Most of them do not finish high school because they are constantly teased by their peers. They dress in saris, give themselves feminine names, and refer to each other in female kinship terms. After becoming Aravanis, most of them leave their natal homes, and join the Aravani community. They are shunned by family members, especially their male kin, and offer material as well as

emotional support to each other. Aravanis are more than cross-dressers. Many go through a sex change operation or take hormones to become a "perfect" female, and many also become sex workers to serve non-Aravani men. At times they maintain a monogamous relationship with a man they call a husband.

Tamil Nadu government took bold steps to recognize transgenders as a separate gender for the first time in the country.

In Tamil Nadu, a remarkable group of aravani activists have, through legal and advocacy measures, been able to get the Tamil Nadu government to constitute an Aravani Welfare Board, meant especially to look after the welfare of the aravani community. The Board has ten aravani representatives who act in an unofficial advisory capacity. The welfare board is empowered to look into the various problems, difficulties and inconveniences faced by the transgenders and based on these inputs, formulate and execute welfare schemes for their betterment.

The government also announced to create a special database of transgenders that would help deal with their problems and demands. The database would be created by a non-governmental organization and would map the population of transgender in the state and find out their detailed demands such as ration cards, voter identity cards and health facilities etc.

It is the responsibility of the Government to ensure wide publicity through the print and visual media, of the fact that aravanis are entitled to get registered in electoral rolls and that transgender individuals could choose either 'male' or 'female' as their gender when applying for official identity documents. The state's education department issued a G.O. creating a "third gender category" for admission In educational institutions.: As per this order, educational institutions have to issue application form for undergraduate courses that will include transgender as a separate category. This will permit transgender students to join any college of their choice, whether co-educational, men's or women's colleges. Further, the government has issued guidelines for schools to provide for counseling of transgender students, counseling for families of transgender students to ensure they don't disown them, and ensuring disciplinary action against schools and colleges who refused to admit aravanis.

Transgenders are in need of equality and security. They are being shunned by the society, suffer offences and crimes and are deprived of basic housing facilities. The sorry state of transgender is not an age old phenomena. In ancient and medieval times they had some respect in the society. Recorded history says that transgenders were used as palace guards. They were entrusted with the responsibility to look after the security of the female chamber of the Royal Palace.

However, with the advent of Victorian sense of morality imposed by the British rule the transgender fell out of the mainstream in India. The Indian society now sees them as evil and immoral.

It is very heartening that very laudable efforts are being taken by the Government of Tamil Nadu, mainly after the conference was organized In Chennai, to rehabilitate the transgender and to achieve equality for them in the community.

I am happy to inform you that the Government of Tamil Nadu have taken the pioneer effort to reach out to the transgenders and the Government on the Floor of the Assembly announced to constitute Welfare Board for the Transgenders in the State and allocated an amount of Rs.l00 Crores. The Welfare Board comprise of 9 Transgender members, who have been empowered to look into the various problems, difficulties and inconvenience faced by the community and based on the inputs received, the Government have formulated and executed various welfare schemes. I would like to highlight some of the welfare schemes so formulated by the Government of Tamil Nadu:-

1) The Government has created a database on Transgender that would help to deal with their problems and demands such as housing, ration card, voter identity, patta, health facility etc.
2) The Government has also issued a Government order for admission of Transgenders. in Government Schools and Colleges.

After the Judicial Colloquium, definite progress has been made and awareness on the part of public and philanthropists enabled for creating new job opportunities and programmes for Transgenders.

Life Insurance Corporation of India, In response to the Seminar arranged for employment mela has given appointments to Transgenders as Agent In the Corporation. Nearly 100 Transgenders participated and 14 of them were selected for appointment as agent. Further, 50 transgenders have given willingness to work as agents in the Life Insurance Corporation of India.

So far 8 meetings of the Welfare Board have been held and progress has been made and in the Welfare Meetings the Transgenders expressed their grievances.

The Transgender persons have been provided with education assistance of Rs.15,300/-

A proposal has been sent for making a documentary film on Transgenders incurring an amount of *Rs.1,05,000/-*, which has been approved by the Government.

Likewise, Rs.13,380/- has been approved for starting a tailoring training by a NGO for the transgenders in Chennai.

Rs.2.25 Lakhs has been distributed to the District Social Welfare Officer, Chennai for starting Beautician course for the transgenders.

It is proposed to start self-employment of manufacturing Agarbathis in Tuticorin District and in this regard the Government has been addressed for approval of Rs.1.60 Lakhs.

An amount of Rs. 100 Crores has been sanctioned by the Government for group houses for 182 Transgenders in 10 districts.

An amount of Rs. 1,06,813/- has been sanctioned towards staff salary and maintenance of the short stay home for the Transgenders, which is being run in Chennai by the Government.

In Chennai, efforts are being made to get houses for 163 Transgender persons through the Tamil Nadu Slum Clearance Board and proposal to this effect has been sent to the Slum Clearance Board.

Transgender persons, who have enrolled themselves with the Welfare Board, action plan has been drawn for rehabilitation through awareness progammes and providing employment opportunities.

It is high time the Central Government and the State Governments come forward, like the State of Tamil Nadu and take all possible steps for bringing the Transgender Community into the mainstream. The progress made in fostering public health systems and affirmative action policies for transgenders in Tamil Nadu should be replicated at the national level.

To put in a nutshell the following solutions are needed:

- The transgender persons must be properly documented in census.
- They need to be considered for statutory reservation in educational institutions and job opportunities in public and private sectors.
- They need to be empowered with high degree of educational and vocational trainings to upgrade their earning and status in the society.
- Since they are prone to heath setbacks, they need proper medical facilities including insurance in the health sector.

There has to be togetherness. They should be brought under one umbrella, where people from mainstream society enjoy certain rights and benefits. They could be accorded security and further benefits through social, political and legislative intervention. Separate law is needed to ameliorate the condition of eunuchs, and ensure that they enjoy the rights granted to every citizen.

UNDP Country Director Caitlin Wiesen pointed out the progress made in neighbouring Pakistan and Nepal to give due recognition to the transgender community. She particularly highlighted the Pakistani Supreme Court's landmark judgment affirming their right of access to all government schemes and programmes.

In western countries, the transgenders are very much part of the society, then why not in India they will be given recognition and respect like others. We need to take a look either into their past or into the future to stop vast discrimination against such a large portion of the population and to help them to divert their way from sex workers to good Citizens.

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JUDICIAL ACCOUNTABILITY IN REFERENCE TO JUDGMENTS CONDUCT AND ETHICS

by

The Hon'ble Thiru. Justice P. Shanmugam, Former Madras High Court, Judge

1.Introduction

The judges are accountable to their judgments, their conduct and judicial ethics. The extent and the content of the responsibility is our subject.

2. Meaning

Accountable means justification of decisions and actions. Interestingly the word 'account' comes from French language meaning 'to count'. The decisions and the conduct of the judges should be within the legal framework and norms. All must be clearly or explicitly understandable with no secret or hidden reasons.

3. Judge

A "judge" is defined under Sec. 19 I.P.C. as an officer empowered to give a judgment. A judge is to act judicially according to Sec 20 I.P.C. Every judge is a 'Public Servant' as per Sec.21 I.P.C. A judge is 'Public Officer' according to Sec 2(17) C.P.C.

3. What is a judgment?

"Judgment" means a considered decision or conclusion of a court of law. It is humorously put as a misfortune given as a divine punishment. (Oxford Dictionary) Order 20 Rule 4(2) C.P.C. says that Judgments of courts shall contain statement of the case, the points for determination, finding and the decision with reasons thereof.

4. Conduct

Conduct is the way a person behaves. The conduct required of a Judge may depend on the requirement or the work expected of him. The Government of Tamil Nadu has framed code of conduct for its officers under Art.309 of the Constitution of India. The same rules besides other principles apply to the judges.

The Tamil Nadu Government Servants Conduct Rules 1973.

The gist of some of the important conduct rules are as follows:

1) Maintain absolute integrity and unquestionable honesty at all times.
2) Devotion to duty and sincerity to work at all times.
3) Independence and impartiality in discharge of duty
4) Responsible standard of conduct in private life
5) Maintenance of political neutrality
6) To avoid indebtedness

7) Inform Legal proceeding initiated against the officer to the higher authorities.
8) Courtesy to Members of Parliament & Legislatures
9) Not to practice untouchability
10) Not to accept hospitality or borrow money from any person or entity having official dealings with likely pecuniary obligation
11) No sexual harassment in work place
12) Do not employ children below 14 years
13) Recusal from cases in which impartiality might be questioned (Sec 479 Cr.P.C)
14) Avoid becoming members of Club or Public Trust with possibility to become associated with public/litigant in the court
15) Apply and follow the rules of law in private and in office

5. Miconduct

Violation of anyone of the Code of conduct and norms expected of a judge may be construed as 'misconduct'. It means conduct unbecoming of a judge.

6. Judicial Ethics:

Ethics are principles of right, acceptable good conduct expected from a judge. The difference between code of conduct and ethics is that the code is laid down written rules whereas the judicial ethics are unwritten rules of judicial conduct acknowledged as principles to be followed. There is a distinction between social ethics followed in social life and judicial ethics. There are sanctions for immoral conduct in a society. Similarly judges bear the good or bad consequences for their following and not following judicial ethics.

Some of the Do's and Don'ts of judicial ethics for a judge are as follows:

A) Do's

1) Hear the parties patiently as if every case is important'
2) Develop a reputation for fairness and impartiality
3) Render justice unmindful of consequences
4) Act according to conscience
5) Maintain punctuality in all matters
6) Maintain confidentiality
7) Maintain honesty
8) Courteous to litigants, advocates and subordinates
9) Address all persons with respect
10) Require all staff to observe the requirements
11) Maintain decorum and quiet atmosphere in court halls
12) Give instructions clearly
13) Give priority to judicial work and importance to administrative works, keep track of cases regularly
14) Follow the precedents and directions of Higher courts
15) Appreciate the difficulties of ignorant poor and villagers
16) Provide written instructions to be followed in court like, no cell phone, keep silence etc,.
17) Pass speaking order whenever required.

B) Don'ts

1) Subject the victims of crime unjust scrutiny
2) Comment on physical appearance in public

3) Make personal exchanges with advocates and witnesses
4) Make inappropriate jokes
5) Make disrespectful observations like" you are wasting courts time", "You have not studied law proper/y"
6) Compel the parties to settle the matters
7) Put questions or make comments showing bias
8) Show religious or caste affiliation or prejudice
9) Enter into unauthorized communication
10) Handle money matters personally
11) Show or seek personal favours
12) Make comments on the functioning of administrators or colleagues or superiors
13) pre sign or pre date of orders
14) delegate judicial work to others or staff
15) assure a particular order on plea bargaining
16) interfere with advocate-client relationship
17) judicial robe for while not conducting official work
18) retaliatory orders for non complying with the suggestion of the court

7. These principles are not exhaustive. The application of judicial ethical principles depends on facts circumstances and context. A good judge follows these principles as a rule.

8. ACCOUNTABILITY

With this background we shall go into the real question namely the extent of accountability of judge in reference to judgments, conduct and ethics.

Any proven misconduct will invite action contemplated under. TNCS (CCA) Rules departmentally. A judge's duty is to decide according to law. Any bonafide error in the judgment can be corrected by Review, Revision or Appeal. To err is human. But if the error is deliberate it will be a different story. In this context Sec. 8 of the Evidence Act dealing with motive and conduct will be relevant.

If an officer in discharge of his duty does an act or renders a decision pursuant to a corrupt motive to oblige someone, it will amount to misconduct for the purpose of taking disciplinary action under TNCS(CCA) Rules as well as prosecution under Prevention of Corruption Act after obtaining sanction under Sec 197 Cr.P.C. In a strict sense committing of offence can never be part of official's duty. It must be seen whether the officer had committed the misconduct in abuse of his official status.

For instance an officer while dictating a judgment in his chambers outrages a modesty of a woman or steals from her purse, no sanction would be required for criminal prosecution. The officer can also proceeded with for "misconduct". By the very nature of offences like 'bribery' 'cheating' 'assault' 'wrongful confinement' 'embezzlement' and 'misappropriation' they cannot be supposed to be part of one's official duty or connected with it.

A High Court or Supreme Court judge is liable to be removed on the ground of proved misbehavior or incapacity under Art. 124 (4) or 217 of the Constitution of India

9. A judgment may be bad for the following among other reasons;

a) If the judgment is based on conjectures, on surmises, unsupported by reason, or on personal knowledge of the judge.

b) If the language is unbalanced, and biased.
c) Finding given without pleading and on matters unnecessary for disposal of the matter.
d) If the judgment is bald, vague and unintelligible.
e) On colourable pretence of considering evidence without considering the argument.
f) If the fundamental basic principles of law is disregarded.

A judgment however bad, by itself may not be sufficient to invite disciplinary proceedings. Even if a judgment is good in every aspect but rendered on corrupt motive appropriate action can be initiated.

Every officer is responsible for his judgments. He can not disown it at any time. Though ordinarily a judgment speaks for itself and no explanation or evidence is permissible in support of it, and the hierarchy of forums are there to take care of mistakes and miscarriage of justice, the responsibility of the officer can be fixed for a motivated or reckless omission.

The supreme court in Union of India v R.K.Desai 1993 SCC (L&S) 318 held that while exercising judicial/quasi judicial function if the officer takes the decision pursuant to corrupt or improper motive disciplinary action would lie.

In H.H.B. Gill v R AIR 1948 PC 128 it was held that a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act.

The Supreme Court in Union of India v K.K.Dhawan (1993) 24 ATC 1, held that an officer who exercised judicial or quasi judicial powers act negligently or recklessly or in order to confer undue favour on a person is not acting as a judge. The Supreme Court was not concerned with the correctness or legality of the decision, but on the conduct of the officer in discharge of his duties as an officer. The court concluded that disciplinary action can be taken in the following cases:

i) "Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;
ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;
iii) if he had acted in a manner which is unbecoming of a Government servant;
iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;
v) if he had acted in order to unduly favour a party;
vi) if he had been actuated by corrupt motive, however small the bribe may be because Lord Coke said long ago" though the bribe may be small, yet the fault is great."

The Supreme court observed a word of caution holding that each case will depend upon the facts and no absolute rule can be postulated.

The Supreme Court in H.C. of Judicature at Bombay v Shashikant 2000 SCC (L&S) 144 held as follows

"Dishonesty is the stark antithesis of judicial probity. Any instance 'of a High Court condoning or compromising with a dishonest deed of one of its officers would only be contributing to erosion of the judicial foundation. The judiciary has to be reminded itself every hour that it floats only over the confidence of the people in its probity. Such confidence is the foundation on which the pillars of the judiciary are built.

The judges, at whatever level they may be, represent the State and its authority, unlike the bureaucracy or the members of other service. Judicial service is not merely an employment nor the judges mere employees.

They exercise sovereign judicial power. They are holders of public officers of great trust and responsibility. If a judicial officer "tips the scales of justice its rippling effect be disastrous and deleterious" A dishonest judicial personage is an oxymoron".

The Supreme Court in Ramesh Chand v High Court of Allahabad 2007 4 MLJ 1055 (SC) held that D.P can be initiated only on stronger grounds of suspicion of bonafides and orders passed on malice, bias or illegality. There must be prima facie material to show recklessness or misconduct or undue favour to a party. It was held" Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate officers and subjecting them to severe disciplinary proceeding would ultimately harm the judicial system at the grassroots level"

In V.C.Rajamanickkam V State Tamil Nadu 2007 5 MLJ 1181 (DB) the High Court upheld the charge of us disparaging language and un parliamentary comments about the judges of High Court and thereby failed to maintain the dignity and decorum of the court and thereby committed acts insubordination and conduct unbecoming of a judicial officer.

In K.Veerasamy v Union of India (1991) 3 SCC 655

Justice Veerasamy was approved as a judge in the Madras High Court in the year1960. He became the Chief Justice in 1969. An FIR under See. 5 of the Prevention of Corruption Act was filed in Feb 1976 in one of the courts in Delhi and on coming to know he proceeded on leave from Mar 1976 and retired on superannuation in April 1976. The charge against him was that he was in possession of pecuniary resources and property disproportionate to the known source of income. The contention that a High Court judge is immune from prosecution under PC Act and that the charge sheet did not contain the particulars of enquiry by the investigating officer was rejected and directed the case to be proceeded. Though on merits after trial he succeeded he had suffer in the process. No body can claim exemption from legal process.

10. A judge will have to face the consequences of bad judgment or conduct. The consequences may vary from mere advise or warning to dismissal. A judge has to reap the consequences, A good judgment and good behaviour will get appreciation and satisfaction and happiness. An adverse action will bring disrepute to the person and office. A good judgment comes from sincere and devoted work and so also a good conduct and judicial ethics can be cultivated and imbibed. Everything depends on the will of the officer. If one wants to be known as a good and fine judge he must work hard to earn it. Nothing comes easily or ready made. The reputation of a judge will be known quickly to everybody. Ultimately one must be honest to one's conscience.

We can aptly refer to a Thirukural in this context

"செயற்பாலது ஒரும் அறனே ஒருவற்கு
உயற்பாலது ஒரும் பழி " திருக்குறள் - 40

"That which should be done is virtue;
That which should be avoided is vice" - Thirukural No. 40

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