Vol-V **February, 2010**
Part-2

IMPORTANT CASE LAWS

Compiled by

Tamil Nadu State Judicial Academy
Chennai – 28

SUPREME COURT CITATIONS

<u>2010 (1) CTC 121</u>

Shabana Bano
Vs
Imran Khan

<u>Muslim Women (protection of Rights on Divorce) Act, 1986 (25 of 1986), Section 4 –</u> Claim of maintenance by divorced Muslim woman – Whether restricted for iddat period only – Whether Petition under Section 125 of Cr.P.C. maintainable before Family Court – Held: Maintenance to be awarded under Section 125 of Cr.P.C. cannot be restricted for iddat period only – Divorced Muslim woman entitled to claim maintenance from her divorced husband as long as she does not remarry – Divorced Muslim women will be entitled to claim maintenance from her husband under Section 125 of Cr.P.C. after expiry of period of iddat as well.

Facts: The basic and foremost question that arises for consideration is whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her divorced husband under Section 25 of Cr.P.C. and if yes, then through which forum.

The Appellant's petition under section 125 of the Cr.P.C., would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C., cannot be restricted for the iddat period only.

Cumalative reading of the relevant portions of judgments of this Court in Danial Latifi (supra) and Iqbal Bano (supra) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry.This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.

In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C., after the expiry of period of iddat also, as long as she does not remarry.

<u>Family Courts Act, 1984 (66 of 1984), Sections 7 & 20 – Code of Criminal Procedure, 1973 (2 of 1974), Section 125</u> – Family Courts – Suits or proceeding for maintenance – Jurisdiction regarding matters relating to maintenance – Held: Provisions of Family Courts Act shall have overriding effect on all other enactments in force dealing with this issue – Family Court shall exclusively have jurisdiction to adjudicate upon Applications filed under Section 125 of the Cr.P.C., - Family Courts Act has exclusive jurisdiction of matters relating to maintenance, including proceedings under Chapter IX of the Cr.P.C.

Held: The Act , inter alia, seeks to exclusively provide within jurisdiction of the family Courts the matters relating to maintenance, including proceedings under Chapter 9 of the Cr.P.C.

Bare perusal of Section 20 of the Family Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue.

Thus, from the abovementioned provisions it is quite discernible that a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the Applications filed under Section 125 of Cr.P.C.

2010 (1) CTC 355

Khanapuram Gandaiah
Vs
Administrative Officer and others

<u>Right to Information Act,2005 (22 of 2005),Section 2(f) & 6</u>**– Any applicant under Section 6 Of RTI Act can get any information which is already in existence and accessible to public Authority under law – Applicant is entitled to get copy of opinions, advices, circulars, orders – Judge speaks through his judgments or orders passed by him – Person aggrieved by judgment can appeal but cannot seek reasons for passing such judgment under act.**

Under the RTI act "information "is defined under Section 2(f) which provides:

"information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, report, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a Public Authority under any law for the time being in force". This definition shows that an applicant under Section 6 of the RTI Act can get any information which is already in existence and accessible to the Public Authority under law. Of course, under the RTI Act an applicant is entitled to get copy of the opinions, advices, circulars, orders, etc., but he entitled to get copy of the opinions, advices, circulars, orders, etc., but he cannot ask for any information as to why such opinions, advices, circulars, orders, etc. have been passed, especially in matters pertaining to judicial decisions. A Judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order/judgment passed by a Judge, the remedy available to such a party is either to challenge the same by way of Appeal or by Revision or any legally permissible mode. No litigant can be allowed to seek information as to why and for what reasons the judge had come to a particular decision or conclusion. A judge is not bound to explain later on for what reasons he had come to such a conclusion

Moreover, in the instant case, the petitioner submitted his Application under Section 6 of the RTI Act before the Administrative officer – cum – Assistant State Public Information Officer seeking information in respect of the questions raised in his Application. However, the Public Information officer is not supposed to have any material which is not before him; or any information he could have obtained under law. Under Section 6 of the RTI Act, an applicant is entitled to get only such information which can be accessed by the "Public authority" under any other law for the time being in force. The answers sought by the petitioner in the Application could not have been with the Public authority nor could he have had access to this information and Respondent No.4 was not obliged to give any reasons as to why he had taken such a decision in the matter which was before him. A Judge cannot be expected to give reasons other those that have been enumerated in the Judgment or order. The Application filed by the petitioner before the Public Authority is per se illegal and unwarranted. A Judicial Officer is entitled to get protection and the object of the same is not to protect malicious or corrupt Judges, but to protect the public from the dangers to which the administration of justice would be exposed if the concerned Judicial Officers were subject to inquiry as to malice, or to litigation with those whom their decisions might offend. If anything is done contrary to this, it would certainly affect the independence of the judiciary. A Judge should be free to make independent decisions.

2010-1-L.W.254

Bhuwan Singh
Vs
M/s Oriental Insurance Company Ltd. & Anr.

<u>Motor Vehicles Act</u>**(1988), Sections 149(2), Effective licence,** <u>Central Motor Vehicles Rules</u> **(1989), Rules 4,14,Evidence Act, Section 106,** <u>Insurance –</u> **Appeal to Supreme Court was preferred by owner of the Tractor against the award of compensation for hitting against a cycle rider who died – Specific plea was raised by appellant that he was not driving the vehicle and one DS was driving the same – The said fact was within his special knowledge – Burden of proof , therefore, to prove the same was on him; he did not examine D.**

Insurance company, as noticed hereinbefore, has also categorically raised the plea that the appellant was not holding a valid and effective licence – Burden of proof ordinarily would be on insurance company to establish that there has been a breach of conditions of the contract of insurance – In this case, however, the burden in terms of Section 106 of the Evidence act was on the appellant.

Finding of fact has been arrived that appellant had been driving the vehicle - The tribunal as also the High Court arrived at a finding of fact that it was the appellant who had ben driving the vehicle – Question raised before us must be determined having regard to the proved facts as on the date of accident he was not holding any valid and effective licence.

In terms of Section 149 of the Act, the insurance company would be liable to pay the awarded amount to the claimants provided the accident is covered by the terms of the policy, although the burden in respect thereof would be in the insurance company.

Question as to whether the appellant was holding a valid licence or not was within his knowledge – Driver was to show that he held licence in respect of the vehicle for which he had filed an application – Filing of an application and grant thereof are pre-requisite for holding a valid and effective licence – As on 5-01-2001 the appellant was not duly licensed as his learner's licence expired on 22-12-2000 – He filed an application for grant of licence much later – Insurance company, was not bound to reimburse him in terms of the Contract of Insurance – Appeal dismissed.

2010-CIJ 268 SC (1)

Ramesh Kumar
Vs
State of Haryana

(A)Industrial Disputes Act, 1947 (14 of 1947)-Sec.2,25F-Service-Government service-Labour-Casual labour-Termination –Retrenchment-Reinstatement-Appellant was appointed as daily wage labourer and worked in the C.M.residence for about 3 years-Without following the procedure, his services were terminated-Appellant approached Labour for reinstatement- Labour court found that he was in service for more than 240 days continuously and passed an award favouring the appellant- On the writ petition filed by the State, High Court set aside the award- Appellent Challenged the order of High Court parties stood by their stands-Held ,when the labour Court had found on factual aspect of continuity of employment for more than 240 days, the High Court ought not to have interfered in the award-Challenge as to the violation of Constitutional scheme of appointment was not raised before the Labour Court-other similarly placed persons were also regularized-Appeal allowed and the award of the labour Court was upheld.

(B) Constitution of India-Art.14,16-Industrial Disputes Act,1947(14 of 1947)-Sec.2,25F-Sevice-Government service- Labour –Casual labour- Termination-Retrenchment- Compensation –Notice –an appointment on public post cannot be made in contravention of recruitment rules and constitutional scheme of employment-A casual labourer who has completed 240 days of continuous service cannot be terminated without giving notice or compensation in lieu of it in terms of Section 25F of Industrial Disputes Act, 1947.

An appointment on public post cannot be made in contravention of recruitment rules and constitutional scheme of employment. However, in view of the materials placed before the Labour Court and in this Court, we are satisfied that the said principle would not apply in the case on hand . As rightly pointed out, the appellant has not prayed for which he is legally entitled to. It is to be noted in the case of termination of casual employee what is required to be seen is whether a workman has completed 240 days in the preceding 12 months or not. If sufficient materials are shown that workman ha completed 240 days then his service cannot be terminated without giving notice or compensation in lieu of it in terms of Section 25F.

2010 CIJ 150 SC (1)

Mandvi Co-op. Bank Ltd.
Vs.
Nimesh B. Thakore

1. Leave granted

2. In these appeals we are required to consider the special provisions laid down by Section 145 of the Negotiable Instruments Act, 1881 (`the Act', hereinafter) for a dishonoured cheque trial and to consider how far certain assertions made by the accused are in accordance with the provisions contained in the two Sub-sections of that section.

3. The High Court had before it a large number of writ petitions and applications under Section 482 of the Code of Criminal Procedure. Most of those petitions were filed on behalf of the accused but a few were also at the instance of the complainants. On the basis of the grievances made and reliefs prayed for in those petitions the High Court framed the following two questions as arising for its consideration:

(A) Whether Sub-section (2) of Section 145 of the Negotiable Instruments Act, 1881, (for short, "the Act") confers an unfettered right on the complainant and the accused to apply to the court seeking direction to give oral examination-in-chief of a person giving evidence on affidavit, even in respect of the facts stated therein and that if such a right is exercised, whether the court is obliged to examine such a person in spite of the mandate of Section 145(1) of the Act?

(B) Whether the provisions of Section 145 of the Act, as amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002, (for short "the amending Act of 2002") are applicable to the complaints under Section 138 of the Act pending on the date on which the amendment came into force? In other words, do the amended provisions of Section 145(1) and (2) of the Act operate retrospectively?

4. Answering the questions after a detailed and careful consideration of all the relevant provisions and earlier decisions of courts, the High Court held that the person (complainant or his witness) giving evidence on affidavit may be summoned by the court for putting questions as envisaged under Section 165 of the Evidence Act (vide paragraph 24 of the judgment). He would also be summoned on an application made by the accused but the right of the accused is limited to cross-examination of the witness. In terms of Section 145(2) the accused can undoubtedly cross- examine a person whose evidence is given on affidavit but the accused cannot insist that the witness, on coming to court, should first depose in examination-in-chief even in respect of matters which are already stated by him on affidavit (vide paragraph 25 of the judgment). The High Court further explained that for the prosecution the occasion to summon any of its witnesses who have given their evidence on affidavit may arise in two ways. The prosecution may summon a person who has given his evidence on affidavit and has been cross-examined for "re-examination". This right of the prosecution, the High Court observed, was not in dispute before it. The prosecution may also have to summon a witness whose evidence is given on affidavit in case objection is raised by the defence regarding the validity and/or sufficiency of proof of some document(s) submitted along with the affidavit. In that event the witness may be summoned to appear before the court to cure the defect and to have the document(s) properly proved by following the correct legal mode (vide paragraph 26 of the judgment).

5. The High Court then considered the claim of the accused that any evidence in defence, like the complainant's evidence, may also be given on affidavit. It upheld the claim observing as follows:

...Merely because, Section 145(1) does not expressly permit the accused to do so, does not mean that the Magistrate cannot allow the accused to give his evidence on affidavit by applying the same analogy unless there is just and reasonable ground to refuse such permission. There is no express bar on the accused to give evidence on affidavit either in the Act or in the Code.... I find no justified reason to refuse permission to the accused to give his evidence on affidavit subject to the provisions contained in Sections 315 and 316 of the Code.

6. Coming then to the question (B), the High Court had no difficulty in holding that the provisions of Sub-sections (1) and (2) of Section 145 were not substantive but only procedural in nature and, therefore, those provisions would be applicable to the cases pending on the date they came into force.

7. Apart from considering the two questions the High Court also laid down, on the request of the parties, a number of guidelines (vide sub-paragraphs (a) to (r) of paragraph 45 of the judgment) in regard to the procedure that the trial court, the complainant and the accused should follow in a dishonoured cheque trial on a complaint made under Section 138 of the Act. We may have to refer to some of those guidelines later, at an appropriate place in this judgment.

8. The High Court judgment has given rise to these seven appeals, in which the following three issues arise for consideration by this Court:

1. The extent of the right of the accused under Section 145(2) of the Act: whether the right of the accused is limited to cross- examination of any person giving evidence on affidavit or is it open to the accused to insist that notwithstanding the evidence earlier given on affidavit, on coming to the court the complainant or his witness should first give deposition in examination-in-chief before being cross-examined by him? (appeals arising from SLP (Crl.) No. 4760/2006, SLP (Crl.) No. 5689/2006, SLP (Crl.) No. 1106/2007, SLP (Crl.) No. 6442/2007, SLP (Crl.) No. 6443/2007, SLP (Crl.) No. 6703/2007)

2. Whether the provisions of Sub-sections (1) and (2) of Section 145 of the Act would apply to proceedings that were pending on February 6, 2003, the date on which those provisions were inserted in the Act? (appeal arising from SLP (Crl.) No. 4760/2006).

3. Whether the right to give evidence on affidavit as provided to the complainant under Section 145(1) of the Act is also available to the accused? (appeal arising from SLP (Crl.) No. 3915/2006)

9. For a proper appreciation of the issues it would be necessary to examine the relevant legal provisions and to ascertain the object and reasons for which those provisions were brought into existence by making amendments in the Negotiable Instruments Act, 1881. The Negotiable Instruments Act was amended first by the **Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988** and a second time by the **Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002**. The first amendment inserted Chapter XVII in the Act, comprising Sections 138 to 143. Section 138 made, for the first time in the legislative history of the country, the issuance of a cheque by any person in discharge of any debt or liability owed by him to its holder, that was not honoured by the banker because of insufficiency of funds in the account, a penal offence for the drawer that would make him liable to punishment with imprisonment that might extend to one year (now, two years after the second amendment with effect from February 6, 2003) or with fine that might extend to twice the amount of the cheque or both; the four clauses of the proviso then laid down the preconditions to attract the section, as safeguards for the honest drawer. Section 139 created a presumption (rebuttable!) that the cheque was issued by the drawer in discharge of any debt or liability owed by him to its holder. Section 140 provided that it would not be open to the accused in a prosecution under Section 138 to take the plea that when he issued the cheque he had no reason to believe that on presentation, the cheque may be dishonoured for the reasons stated in that section. Section 141 dealt with offences by companies. Section 142 laid down the conditions subject to which alone the court would take cognizance of any offence punishable under Section 138 of the Act.

10. The statement of objects and reasons appended to the bill explaining the provisions of the new chapter stated as follows:

This clause [clause (4) of the Bill] inserts a new Chapter XVII in the Negotiable Instruments Act, 1881. The provisions contained in the new Chapter provide that where any cheque drawn by a person for the discharge of any liability is returned by the bank unpaid for the reason of the insufficiency of the amount of money standing to the credit of the account on which the cheque was drawn or for the reason that it exceeds the arrangements made by the drawer of the cheque with the bankers for that account, the drawer of such cheque shall be deemed to have committed an offence. In that case, the drawer, without prejudice to the other provisions of the said Act, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both.

The provisions have also been made that to constitute the said offence-

(a) such cheque should have been presented to the bank within a period of six months of the date of its drawal or within the period of its validity, whichever is earlier; and

(b) the payee or holder in due course of such cheque should have made a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque within fifteen days of the receipt of the information by him from the bank regarding the return of the cheque unpaid; and

(c) the drawer of such cheque should have failed to make the payment of the said amount of money to the payee or the holder in due course of the cheque within fifteen days of the receipt of the said notice.

It has also been provided that it shall be presumed, unless the contrary is proved, that the holder of such cheque received the cheque in the discharge of a liability. Defences which may or may not be allowed in any prosecution for such offence have also been provided to make the provisions effective. Usual provision relating to offences by companies has also been included in the said new Chapter. In order to ensure that genuine and honest bank customers are not harassed or put to inconvenience, sufficient safeguards have also been provided in the proposed new Chapter. Such safeguards are-

(a) that no court shall take cognizance of such offence except on a complaint, in writing, made by the payee or the holder in due course of the cheque;

(b) that such complaint is made within one month of the date on which the cause of action arises; and

(c) that no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate or a Judicial Magistrate of the first class shall try any such offence.

11. The speech of the Minister of Finance on December 2, 1988 in course of the debate on the Bill in the Lok Sabha tells us that Chapter XVII was inserted in the Act, in light of the Report submitted in the year 1975 by the Committee on Banking Laws headed by Dr. Rajamannar. It appears that in course of the debate some members had expressed the view that the provisions of Chapter XVII sought to be inserted in the Act, contained very abnormal, rather very dangerous provisions, in that a kind of civil liability is supposed to be converted into a kind of criminal act which would have far reaching consequences. Dispelling the apprehensions of those members the Minister pointed out that the proposed amendments were along the same lines as the law prevailing in other countries such as the UK, the USA, Belgium, Portugal, Argentina, etc. Further, in regard to the object of the provisions, the Minister stated as follows:

In fact, *the whole purpose of bringing about this provision is to make the drawing of cheque a regular mode of payment.* Unfortunately, today if a cheque is given to a party, they will not consider it a sufficient means of payment, they will insist that unless the cheque is encashed, they will not take that as a kind of payment made.

(emphasis added)

12. The Minister then elaborated on the safeguards provided in the law to save an honest drawer from coming under the rigours of the section due to any *bona fide* mistake and finally went on to say as follows:

But in spite of time for payment and all other provisions that are made, if the party is not able to make good the amount of money which he owes to a particular party and in spite of the notice also he does not act, the conclusion is inescapable that he will be prosecuted, legal action will have to be taken. It is for the court to take a decision, whether he be imprisoned for one year, or double the amount that would be paid as fine or both things will have to be taken together. Ultimately, it is for the court to take a decision. *But these are the provisions which* *have been provided for so that the parties drawing the cheques are careful enough to see that there are enough resources available in their bank account and if a cheque is drawn, it will not be returned.*

(emphasis added)

13. The provisions of the newly inserted Chapter XVII, on coming into force with effect from April 1, 1989, brought in a veritable deluge of cases in the criminal court system. In the metropolitan cities and the commercial centres of the country, it almost appeared that the main function of the Magistrate's court was to recover monies on behalf of parties on the wrong end of the commercial transactions that had gone sour. Complaints under Section 138 of the Act came to be filed in such large numbers that it became impossible for the courts to handle them within a reasonable time and it also had a highly adverse effect on the court's normal work in ordinary criminal matters. A remedial measure was urgently required and the legislature took action by introducing further amendments in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002. The 2002 amendment inserted in the Act for the first time Sections 143 to 147 besides bringing about a number of changes in the existing provisions of Sections 138 to 142. Section 143 gave to the court the power to try cases summarily; Section 144 provided for the mode of service of summons; Section 145 made it possible for the complainant to give his evidence on affidavit; Section 146 provided that the bank's slip would be *prima facie* evidence of certain facts and Section 147 made the offences under the Act compoundable.

14. The statement of objects and reasons appended to the bill stated as follows:

The Negotiable Instruments Act, 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instruments Act, 1881, namely, Sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, *the procedure prescribed for the courts to deal with such matters has been found to be cumbersome. The courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act.*

2. A large number of cases are reported to be pending under Sections 138 to 142 of the Negotiable Instruments Act in various courts in the country. Keeping in view the large number of complaints under the said Act pending in various courts, a Working Group was constituted to review Section 138 of the Negotiable Instruments Act, 1881 and make recommendations as to what changes were needed to effectively achieve the purpose of that section.

3. The recommendations of the Working Group along with other representations from various institutions and organisations were examined by the Government in consultation with the Reserve Bank of India and other legal experts, and a Bill, namely, the Negotiable Instruments (Amendment) Bill, 2001 was introduced in the Lok Sabha on 24th July, 2001. The Bill was referred to Standing Committee on Finance which made certain recommendations in its report submitted to Lok Sabha in November, 2001.

4. Keeping in view the recommendations of the Standing Committee on Finance and other representations, it has been decided to bring out, inter alia, the following amendments in the Negotiable Instruments Act,1881, namely:

(i) to increase the punishment as prescribed under the Act from one year to two years;

(ii) to increase the period for issue of notice by the payee to the drawer from 15 days to 30 days;

(iii) to provide discretion to the court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act;

(iv) to prescribe procedure for dispensing with preliminary evidence of the complainant;

(v) to prescribe procedure for servicing of summons to the accused or witness by the court through speed post or empanelled private couriers;

(vi) to provide for summary trial of the cases under the Act with a view to speeding up disposal of cases;

(vii) to make the offences under the Act compoundable;

(viii) to exempt those directors from prosecution under Section 141 of the Act who are nominated as directors of a company by virtue of their holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government, or the State Government, as the case may be;

(ix) to provide that the Magistrate trying an offence shall have power to pass sentence of imprisonment for a term exceeding one year and amount of fine exceeding five thousand rupees;

(x) to make the Information Technology Act, 2000 applicable to the Negotiable Instruments Act,1881 in relation to electronic cheques and truncated cheques subject to such modifications and amendments as the Central Government, in consultation with the Reserve Bank of India, considers necessary for carrying out the purposes of the Act, by notification in the Official Gazette; and

(xi) to amend definitions of "bankers' books" and "certified copy" given in the Bankers' Books Evidence Act, 1891.

5. *The proposed amendments in the Act are aimed at early disposal of cases relating to dishonour of cheques*, enhancing punishment for offenders, introducing electronic image of a truncated cheque and a cheque in the electronic form as well as exempting an official nominee director from prosecution under the Negotiable Instruments Act, 1881.

6. The Bill seeks to achieve the above objects.

(emphasis added)

15. Though, in these appeals, we are mainly concerned with the provisions of Section 145, it would be useful here to take a look at all the five sections introduced by the 2002 amendment.

143. Power of court to try cases summarily.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees;

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

144. Mode of service of summons.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), and for the purposes of this Chapter, a Magistrate issuing a summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works; for gain, by speed post or by such courier services as are approved by a Court of Session.

(2) Where an acknowledgment purporting to be signed by the accused or the witness or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refused to take delivery of summons has been received, the court issuing the summons may declare that the summons has been duly served.

145. Evidence on affidavit.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.

146. Bank's slip prima facie evidence of certain facts.

The court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disproved.

147. Offences to be compoundable.

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.

16. It may be noted that the provisions of Sections 143, 144, 145 and 147 expressly depart from and override the provisions of the Code of Criminal Procedure, the main body of adjective law for criminal trials. The provisions of Section 146 similarly depart from the principles of the Indian Evidence Act. Section 143 makes it possible for the complaints under Section 138 of the Act to be tried in the summary manner, except, of course, for the relatively small number of cases where the Magistrate feels that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily. It is, however, significant that the procedure of summary trials is adopted under Section 143 subject to the qualification "as far as possible", thus, leaving sufficient flexibility so as not to affect the quick flow of the trial process. Even while following the procedure of summary trials, the *non-obstante* clause and the expression "as far as possible" used in Section 143 coupled with the *non-obstante* clause in Section 145 allows for the evidence of the complainant to be given on affidavit, that is, in the absence of the accused. This would have been impermissible (even in a summary trial under the Code of Criminal Procedure) in view of Sections 251 and 254 and especially Section 273 of the Code. The accused, however, is fully protected, as under Sub-section (2) of Section 145 he has the absolute and unqualified right to have the complainant and any or all of his witnesses summoned for cross-examination. Sub-section (3) of Section 143 mandates that the trial would proceed, as far as

practicable, on a day-to-day basis and Sub-section (4) of the section requires the Magistrate to make the endeavour to conclude the trial within six months from the date of filing of the complaint. Section 144 makes the process of service of summons simpler and cuts down the long time ordinarily consumed in service of summons in a regular civil suit or a criminal trial. Section 145 with its *non-obstante* clause, as noted above, makes it possible for the evidence of the complainant to be taken in the absence of the accused. But the affidavit of the complainant (or any of his witnesses) may be read in evidence "subject to all just exceptions". In other words, anything inadmissible in evidence, e.g., irrelevant facts or hearsay matters would not be taken in as evidence, even though stated on affidavit. Section 146, making a major departure from the principles of the Evidence Act provides that the bank's slip or memo with the official mark showing that the cheque was dishonoured would by itself give rise to the presumption of dishonour of the cheque, unless and until that fact was disproved. Section 147 makes the offences punishable under the Act, compoundable.

17. It is not difficult to see that Sections 142 to 147 lay down a kind of a special code for the trial of offences under Chapter XVII of the Negotiable Instruments Act and Sections 143 to 147 were inserted in the Act by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all the stages and processes in a regular criminal trial that normally cause inordinate delay in its conclusion and to make the trial procedure as expeditious as possible without in any way compromising on the right of the accused for a fair trial.

18. Here we must take notice of the fact that cases under Section 138 of the Act have been coming in such great multitude that even the introduction of such radical measures to make the trial procedure simplified and speedy has been of little help and cases of dishonoured cheques continue to pile up giving rise to an unbearable burden on the criminal court system. The Law Commission in its report number 213 sent to the Union Minister for Law and Justice on November 24, 2008 advocated the setting up of Fast Track Magisterial courts for dealing with the huge pendency of dishonoured cheque cases. In paragraph 1.5 of the report it was stated as follows:

1.5. Over 38 lac cheque bouncing cases are pending in various courts in the country. There are 7,66,974 cases pending in criminal courts in Delhi at the Magisterial level as on 1st June, 2008. Out of this huge workload, a substantial portion is of cases under Section 138 of the Negotiable Instruments Act which alone count for 5,14,433 cases (cheque bouncing). According to Gujarat High Court sources, there are approximately two lac cheque bouncing cases all over t he State, with the majority of them (84,000 cases) in Ahmedabad, followed by Surat, Vadodara and Rajkot. 73,000 cases were filed under Section 138 of the Negotiable Instruments Act (cheque bouncing) on a single day by a private telecom company before a Bangalore court, informed the Chief Justice of India, K. G. Balakrishnan, urging the Government to appoint more judges to deal with 1.8 crore pending cases in the country. The number of complaints which are pending in Bombay courts On the date of the report, there were 5,91,818 cases pending in sub-ordinate courts of State of Maharashtra, 1,57,191 cases pending in the sub-ordinate courts of State of Karnataka, 1,10,311 cases pending in the sub-ordinate courts of State of Kerala and 5,14,433 cases in the sub-ordinate courts of the State of Delhi under Section 138 of the Negotiable Instrument Act. seriously cast shadow on the credibility of our trade, commerce and business. Immediate steps have to be taken by all concerned to ensure restoration of the credibility of trade, commerce and business.

19. The situation arising from the mounting arrears is so grave that in the `Vision Statement' presented by the Union Minister for Law and Justice to the Chief Justice of India in course of the National Consultation for strengthening the Judiciary towards reducing pendency and delays held on October 24, 2009, cases of dishonoured cheques were cited among one of the major bottlenecks in the criminal justice system. In paragraph 2 under the heading `the Action Plan' it was stated as follows:

2. Identification of Bottlenecks: Clearing the System

1. Studies have shown that cases under certain statutes and area of law are choking dockets of magisterial and specialised courts, and the same need to be identified.

2. Bottlenecks shall be identified as follows:

a) Matrimonial cases.

b) Cases under Section 498A of the Indian Penal Code, 1860.

c) Cases under Section 143 of the Negotiable Instrument Act, 1881.

d) to (i) xxxxxxxxxx

20. Once it is realized that Sections 143 to 147 were designed especially to lay down a much simplified procedure for the trial of dishonoured cheque cases with the sole object that the trial of those cases should follow a course even swifter than a summary trial and once it is seen that even the special procedure failed to effectively and expeditiously handle the vast multitude of cases coming to the court, the claim of the accused that on being summoned under Section 145(2), the complainant or any of his witnesses whose evidence is given on affidavit must be made to depose in examination-in- chief all over again plainly appears to be a demand for meaningless duplication, apparently aimed at delaying the trial.

21. Nevertheless, the submissions made on behalf of the parties must be taken note of and properly dealt with. Mr Ranjit Kumar, learned Senior Advocate, appearing for the appellant in appeal arising from SLP (Crl.) No. 4760/2006 pointed out that Sub-section (2) of Section 145 uses both the words, "may" (with reference to the court) and "shall" (with reference to the prosecution or the accused). It was, therefore, beyond doubt that in the event an application is made by the accused, the court would be obliged to summon the person giving evidence on affidavit in terms of Section 145(1) without having any discretion in the matter. There can be no disagreement with this part of the submission but the question is when the person who has given his evidence on affidavit appears in court, whether it is also open to the accused to insist that before cross-examining him as to the facts stated in the affidavit he must first depose in examination-in-chief and be required to verbally state what is already said in the affidavit. Mr. Ranjit Kumar referred to Section 137 of the Indian Evidence Act, that defines "examination-in- chief", "cross-examination" and "re-examination" and on that basis sought to argue that the word "examine" occurring in Section 145(2) must be construed to mean all the three kinds of examination of a witness. This, according to him, coupled with the use of the word "shall" with reference to the application made by the accused made it quite clear that a person giving his evidence on affidavit, on being summoned under Section 145(2) at the instance of the accused must begin his deposition with examination-in-chief, before he may be cross-examined by the accused. In this regard he submitted that Section 145 did not override the Evidence Act or the Negotiable Instruments Act or any other law except the Code of Criminal Procedure. He further submitted that the plain language of Section 145(2) was clear and unambiguous and was capable of only one meaning and, therefore, the provision must be understood in its literal sense and the High Court was in error in resorting to purposive interpretation of the provision. In support of the submission he relied upon decisions of this Court in *Dental Council of India v. Hari Prakash and Ors.* MANU/SC/0509/2001 : (2001) 8 SCC 61 and *Nathi Devi v. Radha Devi* MANU/SC/1071/2004 : (2005) 2 SCC 271. Mr. Siddharth Bhatnagar, learned Counsel for the appellant in the appeal arising from SLP (Crl.) No. 1106/2007 also joined Mr. Ranjit Kumar in the submission based on literal interpretation. He also submitted that ordinarily the rule of literal construction should not be departed from, particularly when the words of the statute are clear and unambiguous. He relied upon the decision in *Raghunath Rai Bareja v. Punjab National Bank* MANU/SC/5456/2006 : (2007) 2 SCC 230.

22. We are completely unable to appreciate the submission. The plea for a literal interpretation of Section 145(2) is based on the unfounded assumption that the language of the section clearly says that the person giving his evidence on affidavit, on being summoned at the instance of the accused must start his deposition in court with examination-in-chief. We find nothing in Section 145(2) to suggest that. We may also make it clear that Section 137 of the Evidence Act *does not define "examine" to mean and include* the three kinds of examination of a witness; it simply defines "examination-in- chief", "cross-examination" and "re-examination". What Section 145(2) of the Act says is simply this. The court may, at its discretion, call a person giving his evidence on affidavit and examine him as to the facts contained therein. But if an application is made either by the prosecution or by the accused the court must call the person giving his evidence on affidavit, again to be examined as to the facts contained therein. What would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in light of the provision of Section 145(1) and having regard to the object and purpose of the entire scheme of Sections 143 to 146. The scheme of Sections 143 to 146 does not in any way affect the judge's powers under Section 165 of the Evidence Act. As a matter of fact, Section 145(2) expressly provides that the court may, if it thinks fit, summon and examine any person giving evidence on affidavit. But

how would the person giving evidence on affidavit be examined, on being summoned to appear before the court on the application made by the prosecution or the accused? The affidavit of the person so summoned that is already on the record is obviously in the nature of examination-in-chief. Hence, on being summoned on the application made by the accused the deponent of the affidavit (the complainant or any of his witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit. In so far as the prosecution is concerned the occasion to summon any of its witnesses who has given his evidence on affidavit may arise in two ways. The prosecution may summon a person who has given his evidence on affidavit and has been cross-examined for "re-examination". The prosecution may also have to summon a witness whose evidence is given on affidavit in case objection is raised by the defence regarding the validity and/or sufficiency of proof of some document(s) submitted along with the affidavit. In that event the witness may be summoned to appear before the court to cure the defect and to have the document(s) properly proved by following the correct legal mode. This appears to us as the simple answer to the above question and the correct legal position. Any other meaning given to Sub-section (2) of Section 145, as suggested by Mr. Ranjit Kumar would make the provision of Section 145(1) nugatory and would completely defeat the very scheme of trial as designed under Sections 143 to 147.

23. Mr. Ranjit Kumar next submitted that Section 145(2) was identical to Section 296(2) of the Code of Criminal Procedure and this Court, in its decision in *State of Punjab v. Naib Din* MANU/SC/0597/2001 : (2001) 8 SCC 578 dealing with Section 296(2) of the Code made the following observation:

8. ...If any party to a *lis* wishes to examine the deponent of the affidavit it is open to him to make an application before the court that he requires the deponent to be examined or cross- examined in court. This is provided in Sub-section (2) of Section 296 of the Code. When any such application is made it is the duty of the court to call such person to the court for the purpose of being examined.

24. Mr. Siddharth Bhatnagar representing the appellant in the appeal arising from SLP (Crl.) No. 1106/2007 also joined Mr. Ranjit Kumar in the submission based on Section 296(2) of Code. Mr. Bhatnagar submitted that since Section 145(2) is identical to Section 296(2) of the Code, it should be interpreted in light of the legislative history of Section 296(2) and he tried to take us into the details of the legislative history of Section 296 of the Code.

25. In our view the submission is wholly without merit. Neither Section 296(2) of the Code nor the decision in *Naib Din* has any relevance or application to the trial concerning a dishonoured cheque under Sections 143 to 146 of the Act. The decision in *Naib Din* was rendered in a totally different context and the issue before the court was not, whether on being summoned on the application made by the accused, the person giving evidence on affidavit must begin his deposition with examination-in-chief. The appellants are reading into the passage from the decision in *Naib Din* something that was not said by the court. Moreover, the crucial difference between Section 296(2) of the Code and Section 145(2) of the Act is that the former deals with the evidence of a *formal nature* whereas under the latter provision, all evidences including substantive evidence may be given on affidavit. Section 296 is part of the elaborate procedure of a regular trial under the Code while the whole object of Section 145(2) of the Act is to design a much simpler and swifter trial procedure departing from the elaborate and time consuming trial procedure of the Code. Hence, notwithstanding the apparent verbal similarity between Section 145(2) of the Act and Section 296(2) of the Code, it would be completely wrong to interpret the true scope and meaning of the one in the light of the other. Neither the legislative history of 296(2) nor any decision on that section can persuade us to hold that under Section 145(2) of the Act, on being summoned at the instance of the accused the complainant or any of his witnesses should be first made to depose in examination-in-chief before cross-examination.

26. Mr. Ranjit Kumar next submitted that in giving evidence on affidavit, the deponent (the complainant or any of his witnesses) can introduce hearsay or irrelevant facts in evidence to which the accused could have objected if the deposition was made in court as examination-in-chief. Hence, the accused must have the right to call the complainant (or his witness giving evidence on affidavit) into the witness box for examination-in-chief so as to get the inadmissible parts in the affidavit excluded from his evidence. Once again the submission is devoid of merit. It is noted above that the evidence given on affidavit by the complainant is "subject to all just exceptions". This simply means that the evidence given on affidavit must be admissible and it must not include inadmissible materials such as facts not relevant to the issue or any hearsay statements. In case the complainant's affidavits

contain statements that are not admissible in evidence it is always open to the accused to point those out to the court and the court would then surely deal with the objections in accordance with law.

27. Mr. Ranjit Kumar lastly submitted that when the complainant gives his evidence on affidavit, then the documents produced along with the affidavit(s) are not proved automatically and unless the accused admits those documents under Section 294 of the Code of Criminal Procedure the documents must be proved by oral testimony. We find no substance in this submission either and we see no reason why the affidavits should not also contain the formal proof of the enclosed documents. In case, however, the accused raises any objections with regard to the validity or sufficiency of proof of the documents submitted along with the affidavit and if the objections are sustained by the court it is always open to the prosecution to have the concerned witness summoned and get the *lacuna* in the proof of the documents corrected.

28. Mr. Ranjit Kumar also made a feeble attempt to contend that the provisions of Sections 143 to 147 inserted in the Act with effect from February 6, 2003 would operate prospectively and would not apply to cases that were pending on that date. The High Court has considered the issue in great detail and has rightly taken the view that the provisions of Sections 143 to 147 do not take away any substantive rights of the accused. Those provisions are not substantive but procedural in nature and would, therefore, undoubtedly, apply to the cases that were pending on the date the provisions came into force. We are fully in agreement and in order to buttress the view taken by the High Court we will only refer to a decision of this Court.

29. In *Gurbachan Singh v. Satpal Singh and Ors.* MANU/SC/0034/1990 : 1990 (1) SCC 445, the court was called upon to consider whether Section 113A of the Evidence Act that created a presumption as to abetment of a suicide by a married woman would operate retrospectively or prospectively. The court held:

37. The provisions of the said section do not create any new offence and as such it does not create any substantial right but it is *merely a matter of procedure of evidence and as such it is retrospective* and will be applicable to this case. It is profitable to refer in this connection to *Halsbury's Laws of England*, Fourth Edition, Volume 44 page 570 wherein it has been stated that:

The general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implications, it appears that this was the intention of the legislature...

38. It has also been stated in the said volume of *Halsbury's Laws of England* at page 574 that:

The presumption against retrospection does not apply to legislation concerned merely with *matters of procedure or of evidence;* on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.

(emphasis added)

30. Coming now to the last question with regard to the right of the accused to give his evidence, like the complainant, on affidavit, the High Court has held that subject to the provisions of Sections 315 and 316 of the Code of Criminal Procedure the accused can also give his evidence on affidavit. The High Court was fully conscious that Section 145(1) does not provide for the accused to give his evidence, like the complainant, on affidavit. But the High Court argued that there was no express bar in law against the accused giving his evidence on affidavit and more importantly providing a similar right to the accused would be in furtherance of the legislative intent to make the trial process swifter. In paragraph 29 of the judgment, the High Court observed as follows: "It is true that Section 145(1) confers a right on the complainant to give evidence on affidavit. It does not speak of similar right being conferred on the accused. The Legislature in their wisdom may not have thought it proper to incorporate a word `accused' with the word `complainant' in Sub-section (1) of Section 145 in view of the immunity conferred on the accused from being compelled to be a witness against himself under Article 20(3) of the Constitution of India....

30 Then in paragraph 31 of the judgment it observed:

...Merely because, Section 145(1) does not expressly permit the accused to do so, does not mean that the Magistrate cannot allow the accused to give his evidence on affidavit by applying the same analogy unless there is just and reasonable ground to refuse such permission. There is no express bar on the accused to give evidence on affidavit either in the Act or in the Code.... I find no justified reason to refuse permission to the accused to give his evidence on affidavit subject to the provisions contained in Sections 315 and 316 of the Code.

31. On this issue, we are afraid that the High Court overreached itself and took a course that amounts to taking-over the legislative functions.

32. On a bare reading of Section 143 it is clear that the legislature provided for the complainant to give his evidence on affidavit and *did not provide for the accused to similarly do so*. But the High Court thought that not mentioning the accused along with the complainant in Sub-section (1) of Section 145 was merely an omission by the legislature that it could fill up without difficulty. Even though the legislature in their wisdom did not deem it proper to incorporate the word `accused' with the word `complainant' in Section 145(1), it did not mean that the Magistrate could not allow the accused to give his evidence on affidavit by applying the same analogy unless there was a just and reasonable ground to refuse such permission. There are two errors apparent in the reasoning of the High Court. First, if the legislature in their wisdom did not think "it proper to incorporate a word `accused' with the word `complainant' in Section 145(1)....", it was not open to the High Court to fill up the self perceived blank. Secondly, the High Court was in error in drawing an analogy between the evidences of the complainant and the accused in a case of dishonoured cheque. The case of the complainant in a complaint under Section 138 of the Act would be based largely on documentary evidence. The accused, on the other hand, in a large number of cases, may not lead any evidence at all and let the prosecution stand or fall on its own evidence. In case the defence does lead any evidence, the nature of its evidence may not be necessarily documentary; in all likelihood the defence would lead other kinds of evidences to rebut the presumption that the issuance of the cheque was not in the discharge of any debt or liability. This is the basic difference between the nature of the complainant's evidence and the evidence of the accused in a case of dishonoured cheque. It is, therefore, wrong to equate the defence evidence with the complainant's evidence and to extend the same option to the accused as well.

33. Coming back to the fist error in the High Court's reasoning, in the guise of interpretation it is not permissible for the court to make additions in the law and to read into it something that is just not there. In *Union of India and Anr. v. Deoki Nandan Aggarwal* MANU/SC/0013/1992 : 1992 Supp. (1) SCC 323, this Court sounded the note of caution against the court usurping the role of legislator in the guise of interpretation. The court observed:

14. ...it is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught the legislative judgment is subversive of the constitutional harmony and comity of instrumentalities....

34. In *Raghunath Rai Bareja and Anr. v. Punjab National Bank and Ors.* MANU/SC/5456/2006 : (2007) 2 SCC 230 while observing that it is the task of the elected representatives of the people to legislate and not that of the Judge even if it results in hardship or inconvenience, Supreme Court quoted in affirmation, the observation of Justice Frankfurter of the US Supreme Court which is as follows:

41. As stated by Justice Frankfurter of the US Supreme Court (see *"Of Law and Men: Papers and addresses of Felix Frankfurter"*)

Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislator. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished there bretheren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy- making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction.

35. In *Duport Steels Ltd. v. Sirs* [1980] 1 All ER 529, 534, Lord Scarman expounded the legal position in the following words:

But in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law. The judge's duty is to interpret and to apply the law not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing construction are possible. But our law require the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute.

36. In light of the above we have no hesitation in holding that the High Court was in error in taking the view, that on a request made by the accused the magistrate may allow him to tender his evidence on affidavit and consequently, we set aside the direction as contained in sub-paragraph (r) of 34 paragraph 45 of the High Court judgment. The appeal arising from SLP (Crl.) No. 3915/2006 is allowed.

37. All the remaining six appeals are dismissed.

38. There shall be no order as to costs.

HIGH COURT CITATIONS

2010 (1) CTC 139

P.Seshayya and 2 others
Vs
Life Insurance Corporation of India, Chennai

Code of Civil Procedure, 1908 (5 of 1908), Order 6, Rule 14 & Order 29, Rule 1 – Life Insurance Corporation filed Suit for recovery of monies and Plaint was signed and verified by its Manager – No document was filed along with Plaint authorizing Manager to sign – Such Manager deposed on behalf of Corporation and such Manager filed photo copy of proceedings delegating powers to institute Suit – Held, sufficient Compliance of provisions.

Facts: Plaintiff-Corporation laid the Suit for recovery of monies lent to the Defendants on the strength of an equitable mortgage. The Trail Court decreed the Suit after contest. The defence taken by the Defendants was that the disbursement of loan and execution of the memorandum of deposit of title deeds was on the same date and hence it required registration and it was inadmissible in evidence. It was also contended that the manager of the Plaintiff had signed the pleadings without any authority and the Suit was liable to fail on this score also.

Held: The Manager, Legal and HPF Department, Divisional Office-I, of the plaintiff Corporation situated at 102, Anna Salai, Chennai-2, has signed the pleadings. It is true that no document has been filed along with the plaint to show the competency or the authority of the said Manager to represent the plaintiff-Corporation as P.W.1 and she has been cross-examined. During trail, Xerox copy of the proceedings containing delegation of powers under Regulation 41 of the Life Insurance Corporation Regulations, 1959, framed under Section 49 of the Life Insurance Corporation Act, 1956, was given to the defendants. In that proceedings dated 12.06.2002, the Zonal Manager, South Zone, has delegated to 42 Officers individually the power to institute all suits by representing the Corporation and SI.No.9 is Uma Shankari M, who has signed the pleadings in the present case. In the above proceedings, the Zonal Manager has also ratified all the acts done by the Officers mentioned therein hitherto. By virtue of the above, the plaintiff-Corporation has ratified the action of Uma Shankari, M. in signing the pleadings in the present case. Their Lordships of the Supreme Court in the decision, referred to above, have laid down that where Suits are instituted on behalf of a public Corporation, public interest should not be permitted to be defeated on a mere technicality and procedural defects, which do not go to the root of the matter, should not be permitted to defeat a just cause and where pleadings have signed by one of its officers, a Corporation can ratify the said action of its officer in signing the pleadings. The ratio in the above decision applies to the facts of the present case and the plaintiff-Corporation has duly ratified the act of its Officer Uma Shankari, M. in signing the pleadings and hence, the contention of the learned counsel appearing for the appellants is devoid of merit.

Transfer of Property Act,1882 (4 of 1882) – Registration Act, 1908 (16 of 1908) – Evidence Act, 1872 (1 of 1872) – Suit loan disbursed on particular date – On same date Memorandum of deposit of Title Deeds executed by the defendants – " Delivered to and deposited" found in Memorandum refers to a concluded transaction and cannot be termed as simultaneous rendering it inadmissible and requiring registration – Such Memorandum is not operating instrument and does not require registration.

Held: The next contention of the learned counsel appearing for the appellants is that Ex.A4 Memorandum of deposit of title deeds requires stamp duty and registration to create any security over the plaint schedule property as the loan and handing – over the documents are simulataneous and in praesenti and both the transactions took place on 21.02.1994 itself and in the absence of the requirements, no valid equitable mortgage has been created. Per Contra, the learned counsel for the respondent submits that the Acceptance to the Offer was made on 12.01.1994 and on that day itself a concluded contract has come into being and money was advanced on

21.02.1994 and thereafter, the deposit of title deeds was made by the defendants with a view to create an equitable mortgage and the recitals in the Memorandum of deposit of title deeds show the same and in support of his submission, he relies on the judgement of the Supreme Court in Deb Dutt Seal v. Raman Lal Phumra and others, AIR 1970 SC 659.

<u>2010 (1) CTC 192</u>

The Life Insurance Corporation of India, Vellore
Vs
S.Anusuya Bai

<u>Insurance Act, 1938 (4 of 1938), Section 45 – Evide.nce Act, 1872 (1 of 1872), Sections 1 of 1872), Sections 101 to 104</u> – Burden of Proof – Applicability of – Payment of policy note – Deliberate suppression of material information – Ingredients of Section 45 would be attracted if (a) Policy holder suppresses material facts that he was required to disclose or statement made by policy holder is material matter; (b) Such suppression must be fraudulent; (c) Policy holder makes such statement knowing it to be false at time of making it or with knowledge of suppression – LIC being an established corporation, burden is heavy upon it to escape from statutory obligation – LIC failed to discharge its burden and coupled with lack of evidence to show that insured was aware of consequences of making statement of good health in policy – Moreover, misstatement by itself not material for repudiation of policy unless same is material in nature – Evidence disclosed that insured did not know of Hepatitis which caused death at time of taking policy – No proof of deliberate suppression of ailments – held, no deliberate wrong answer on part of insured to have bearing on contract of Insurance - orders of lower Courts directing LIC to pay policy amount along with interest confirmed.

<u>2010 (1) CTC 7</u>

The Revenue Divisional Officer, Tirunelveli and others
Vs
Saroja Victor and others

Land Acquisition Act, 1894 (1 of 1894), Section 4(1) – Notifications under – taking over of possession prior to issue of notification under Section 4(1) – Effect of – Remedy available to person whose land was taken possession of, even before issuance of notification under Section 4(1) – Held : act does not contemplate taking over of possessions prior to issue of notification under Section 4(1) – Notification under section 4(1) is sine qua non for any proceeding under Act – Person, whose land was taken possession of before issue of notification under Section 4(1), would be entitled to fair or damages from date of possession till date of notification.

<u>Land Acquisition Act, 1894 (1 0f 1894), Sections 4(1),18,23(1) &48</u> – Taking of Possession preceding notification under Section 4(1) – Incidents of Acquisition Proceedings either get lapsed or get quashed – Remedy for – Damages for use and occupation – Held: (a) Where possession of land is taken without initiation of any proceedings, it would be open to land owners to approach Civil Court both for recovery of possession and for damages for use and occupation; - (b) If after taking possession, proceedings for acquisition are initiated, it may be open to land owner to continue to prosecute Suit, with regard to relief of damages for use and occupation, from date of taking possession till date of publication of notification – However, prayer for recovery of possession cannot be prosecuted after publication of notification under Section 4(1); - (c) If after taking possession, proceedings for acquisition are initiated, it may be open to the land owner, at time of seeking reference under Section 18, to request Collector to include in terms of reference question relating to damages for use and occupation for period from date of possession till date of notification – Court would then be obliged to adjudicate this issue; - (d) If possession had been taken in pursuance of notification under Section 4(1), but proceedings for acquisition either get elapsed or get quashed, compelling initiation of fresh proceedings Collector himself may determine compensation payable for period from date of possession till date of fresh notification, by invoking power under Section 48(2) – by

virtue of Section 48(3), determination made by Collector under 48(2), could also become subject matter of a reference under Section 18.

Therefore the law on the point can be summarized as follows:
(a) Where possession of the land is taken without the initiation of any proceedings, it would be open to the land owners to approach a Civil Court both for recovery of possession and for damages for use and occupation.

(b) If after taking possession, proceedings for acquisition are initiated, it may open to the land owner to continue to prosecute the suit, with regard to the relief of damages for use and occupation , from the date of taking possession till the date of publication of notification. However, the prayer for recovery of possession and the prayer for damages for use and occupation for the period subsequent to the date of publication of the notification, cannot be prosecuted after the publication of notification. However, prayer for recovery of possession cannot be prosecuted after publication of notification under Section 4(1); - (c) If after taking possession , proceedings for acquisition are initiated, it may be open to the land owner, at time of seeking reference under Section 18, to request Collector to include in terms of reference , question relating to damages for use and occupation for period from date of possession till date of notification – Court would then be obliged to adjudicate this issue;- (d) If possession had been taken in pursuance of notification under Section 4(1), but proceedings for acquisition either get lapsed or get quashed, compelling initiation of fresh proceedings Collector himself may determine compensation payable for period from date of possession till date of fresh notification, by invoking power under section 48(2) .By virtue of section 48(3), determination made by Collector under section 48(2), could also become the subject matter of a reference under Section 18.

<u>2010 (1) CTC 33</u>

The Chairman, Tamil Nadu Electricity Board, Mount Road, Chennai and others
Vs
R.Bakkiavathy and others

<u>Evidence Act, 1872 (1 of 1872), Sections 100 to 104 & 114 –</u> **Duty of Electricity Board to maintain supply system in sound condition – Negligence of Electricity Board in maintaining transmission lines/ supply system in sound condition – Burden of proof of same – Held: Electricity Board being suppliers of electricity are expected to maintain supply system in sound condition – When an accident happens involving electricity line, inference of carelessness can be drawn – Burden of proof is clearly on Board that they have taken all reasonable care in maintaining transmission lines - In event of any untoward incident involving transmission cable , onus is heavy on Electricity Department to absolve themselves from charge of negligence.**

<u>Law of Torts –</u> **Tortious Liability – Death by electrocution – Claim of damages – Quantum – Held: There are no clear guidelines in cases like this to arrive at quantum – Sister enactment like Motor Vehicles Act contains structured formula for payment of compensation – structured formula as under Section 163-A of Motor Vehicles Act followed for purpose of arriving at compensation.**

<u>Code of Civil Procedure, 1908(5 of 1908), Section 34 & Order 41, Rule 33</u> **– Tort – Tortious Liability – Death by electrocution – Claim of damages- awarded of interest – Whether plaintiffs could be awarded interest in First appeal preferred by defendants without Cross-Appeal – Held: As First appeal is continuation of original proceedings, plaintiffs are entitled to claim interest as per section 34, C.P.C**

Since the learned trial Judge has not dealt with the issue regarding payment of interest and as the proceedings pending before this Court is a first appeal, which is nothing but continuation of the original proceedings, I am of the view that the plaintiffs are entitled to claim interest as per Section 34, C.P.C. Accordingly, in exercise of the statutory powers under Order 41, Rule 33, C.P.C., defendants are directed to pay interest @ 9% from date of decree to the date of payment/deposit. The third point is thus answered in favour of the plaintiffs.

2010 (1) CTC 104

The Tamil Nadu State Transport Corporation (Kumbakonam) Ltd., Karaikudi
Vs
Pothumponnu and others

Motor Vehicles Act, 1988 (59 of 1988), Sections 173,166 &168 – appeal –Motor Accident Claims – Practice and Procedure – **Modification of award of Tribunal – Notice to Respondents / claimants – Whether necessary – Only when rights of Respondents are going to be affected by way of reduction or variation of award notice is to be issued – When claimants are going to be benefited and award notice is not necessary – Material irregularity can be remedied suo mottu to do complete justice – Court's approach to be humane and not whittled down by technicalities especially in dealing with beneficial provisions of Motor Vehicles act which are aimed at consoling and compensating victims of an accident.**

2010 (1) CTC 241

Secretary General, Supreme Court of India
Vs
Subhash Chandra Agarwal

Right to Information act,2005 (22 of 2005), Section 2(f) & 2(i) **– Whether resolution passed by Full Court of Supreme Court on specified issue and information regarding declaration of assets by Judges of Supreme Court and High Court is in information under Right to information act and whether they are accessible – First ingredient to invoke act is that what is sought to be accessed is "information" and "information" means any material in any form and would include any information relating to any private body which can be accessed by Public authority under any law for time being in force – Declaration of assets given by Judges would come within purview of definition "information" unless there is any specific exclusion – Second ingredient necessary to invoke provisions of Act is that there must be right to such information – Right to information means right to access information under Act which is held by or under control of any Public Authority – Once these two ingredients are present Public Authority is mandated to furnish information unless it is exempted under Section 8(1) of Act – Information has been created, sought , used or consciously retained by Public Authority will be information held within meaning of Act –**
Exception to such rule would be where such information is sent to or deposited with Public authority which does not hold itself out as willing to receive it and which does not Subsequently use it or where it belongs to employee or officer of Public Authority but which brought by such officer or employee unto Public Authority's premises – Expressions "held by" or "under control of" will include not only information which is otherwise received or used or consciously retained by Public Authority in course of its functions and its official capacity.

Right to Information Act, 2005 (22 of 2005), Sections 8(1) & 10 **– Every citizen is entitled to information held by or under control of Public Authority unless it is exempted by Section 8(1) – Section 10 provides that access may be provided even in respect of protected information in so far as part of which is not protected – Even if certain information comes under purview of Section 8(1) disclosure would be made to citizen if disclosure outweighs harm to protected interest–Resolution of Full Court of Supreme Court treating declaration of assets by Judges as confidential does not make it any less information which citizen is entitled to access.**

Constitution of India, Article 19(1)(a) – Interpretation of Statutes – Right to Information Act,2005 (22 of 2005), Section 2(h) & 2(i) **– Source of right to information does not emanate from Right to information Act – Such right owes its origin to constitutional guarantees under Article 19(1) (a) – Repository of such right is constitution – Such statue should be given wide interpretation and word which are not there will not be read into if such reading results in restriction of rights of citizen for whose benefit statute is enacted.**

Administrative Law – **separation of powers – Judicial independence is hallmark of democracy – Judiciary of undisputed integrity is bedrock of institution essential for upholding democracy and rule of**

law – Independent judiciary which is basic postulate of Constitution is prerequisite for rule of law and it has been recognized in all Human Right conventions – Resolutions passed by Full Court of Supreme Court in 1997 and Judicial conference Resolutions in 1999 are intended to establish standard for ethical conduct of Judges – Such ethical conduct or expression of principles of like nature should be formulated by judiciary itself to maintain independent judiciary and rule of law lest other two wings of government viz, Legislative or Executive would intervene.

Right to Information Act,2005 (22 of 2005), Section 8 (1)(i) – Freedom of information is essentially one where citizen is entitled to access government records – Person could seek information whether public official required to disclose his assets themselves – Such personal information regarding asset disclosure need not be made public unless public interest warrants it.

Constitution of India, Article 21 – Right to Privacy – Right to Information Act,2005 (22 of 2005), Section 8(1)(i) – Right to privacy versus Right to Information – Law of privacy though not enumerated fundamental right is inferred from Article 21 – freedom of information means that every citizen should have right to obtain access to Government records – Such right is made available because (a)right to access will heighten accountability of Government and its agencies to electorate; (b)it will enable interested citizens to contribute more effectively to debate on important questions of public policy; (c) it will conduce fairness in administrative decision making process affecting individuals – Protections of privacy principle believes that individual should have some control over use made by others of information concerning themselves- Logic behind such protection is that person information acquired for one purpose should not be used for another purpose without consent of individual to whom information pertains.

2010 (1) CTC 416

The Special Tahsildar, Adi Dravidar Welfare, Tirupattur
Vs
P.K.Govindasamy Gounder

Land Acquisition Act,1894(1 of 1894), Section 23 – Determination of market value – market value of land depends upon facts and circumstances of each case – consideration mentioned in Sale Deed conveying land similarly situate would be relevant factor if such Sale Deed is nearer to date of Notification under Section 4(1) and it should be a bona fide transaction and land conveyed must be adjacent to land acquired possessing similar advantages – Order by Court enhancing compensation on basis of comparable Sale deed after giving 1/3rd detection on account of difference between extent of land acquired and land covered by comparable Sale Deed held to be correct.

Facts: An extent of 2.92 acres of land was notified to be acquired and person interested in land appealed against Award of Land Acquisition Officer. The Subordinate judge who heard the Appeal relied on 2 Sale Deeds as the Sale Deeds were proximate to the date of notification and situate adjacent to land acquired. The Sub-Judge detected 1/3rd from the consideration shown in the comparable Sale Deeds as it was for a very small extent.

Held: Determination of the market value of the land depends upon facts and circumstances of each case, amongst them would be the price of the land, amount of consideration mentioned in a deed of sale executed in respect of similarly situated land near about the date of issuance of notification under Section 4(1) of the Act. The area of the land, nature thereof advantages and disadvantages accruing therein amongst others would be relevant factors for determining the actual market value of the property. The purpose for which the land is sought to be acquired would also assume significance. It is on the above mentioned factual back drop and legal principles governing, grant of compensation, the market value of acquired lands are required to be determined.

i) When sale is within a reasonable time of the date of notification under Section 4(1); it should be a bona fide transaction;
ii) It should be of the land acquired or of the land adjacent to the land acquired; and it should possess similar advantages.

The above factors are present in Exs. A2 and A3 sale deeds and therefore Court below was right in taking Exs. A2 and A3 as comparable sale. Fixing of market value at Rs 8.50 per sq.ft cannot be said to be on the higher side. It cannot be contended that the Court below erred in fixing the market value per square feet and the substantial questions of law 1 and 2 are answered against the appellant.

Of course, when large tracts are acquired, the transaction are acquired, the transaction in respect of small extent of properties do not offer a proper guideline. It is fairly well settled that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of compensation has to be deducted out of the amount of compensation payable on the acquired lands subject to certain variations depending on its nature, location, extent of expenditure involved for development and the area required for forming roads and other civic amenities to develop the land so as to make plots for residential purposes.

2010 (1) L.W.267

K.Duraisamy
Vs
S.Velmurugan

C.P.C., Section 151, Order 14, R.2, Section 20/Suit on promissory Note, Territorial Jurisdiction, Preliminary issue, as to, Maintainability, Negotiable Instruments Act (1881), Sections 8,9/' Holder', 'Holder in due course'.

Held: Suit filed by the respondent in City Civil Court, Chennai Praying to pass decree directing the petitioner/defendant to pay a sum of money, is maintainable – Considering the fact that the made-over was made in Chennai – Submission of the respondent/plaintiff is that the assignment of made-over of the suit promissory note took place at Chennai within the jurisdiction of the City Civil Court and therefore, the City Civil Court has got jurisdiction to entertain the suit since a part of the cause of action arises in Chennai under Sec.20 (2) C.P.C. – Respondent/ plaintiff is not a holder of the cheque but a holder in due course, as consideration has passed from the respondent /plaintiff – Objections as to the territorial jurisdiction of the Court should be raised at the earliest point of time and atleast before the settlement of issues and not thereafter.

2010 (1) L.W.289

M.Nelson babu
Vs
K.Kamalesh Babu and K.Vijayakumar

C.P.C., Order 7, R.11, Tamil Nadu Court Fees and Suits Valuations Act(1955), Section 25(d),40.

Power Agent of the plaintiff had filed an application to accept the power deed and permit her to represent her principals and the same had been allowed – Petitioner herein filed an IA to review the said order and the same was dismissed by the learned Principal District Munsif, Nagercoil as against which the petitioner has filed CRP No.117.

Petitioner had filed another application to reject the plaint on the ground that the suit in OS.No.99/2008 is filed on identical grounds for the same relief made in OS.No.446/2007 and hence, the same is barred under law – The Court below rejected contention and dismissed the petition, as against which the petitioner has filed CRP.No.153/2009.

Held: As rightly pointed out by the court below the petitioner who is a defendant in the suit has no locus standi to oppose any power accepted by the court and it is a matter between the Principal and the agent and the power agent and the court. The petitioner would not be prejudiced in any manner in the court accepting the power of attorney of the plaintiffs to represent on behalf of them. If there is any doubt in the regard, it is for the respondents/plaintiffs to clarify it at the time of trial on the said ground the order accepting the power of Attorney cannot be reviewed. The court below has rightly dismissed the said petition and it does not warrant interference.

Order 7 Rule 11(d) has limited application. For its applicability, it must be shown that the present suit is barred under law. Such a conclusion must be drawn from the averments made in the plaint. What would be the relevant for invoking order 7 Rule 11(d) of CPC are the averments made in the plaint and for that purpose, there cannot be any addition or subtraction. For the purpose of invoking the said provision, no amount of evidence can be looked into.

The suit in OS.No.446/2007 has been filed by the plaintiff for declaration of pathway with reference to B-Schedule property i.e.Rs.P10-21/3 in Nagercoil Village for free ingress and regress of the plaintiffs, their men, servants without any hindrance and for permanent injunction restraining the defendants 1 to3 their men and servants from encroaching or constructing or installing any new construction within B and A schedule properties and mandatory injunction directing the defendants 1 to 3 to remove TASMAC bar and the construction of the 4th defendant on the face of B-Schedule property within a specified time fixed by the court failing which the permission is sought for to demolish the construction by the plaintiffs themselves. Whereas the present suit in OS.No.99/2008 is filed to declare the document dated 13.02.2007 relating to the suit property in P10-20/2, 20/3 of the Nagercoil Village as non est and unenforceable. Incidentally, it is claimed that it belongs to the plaintiffs. Besides that, the relief of permanent injunction restraining the defendants from encroaching, trespassing or making any construction is sought for.

Though the properties are one and the same in those suits, but the reliefs claimed are totally different and it cannot be said that both the suits are identical and one and the same in relation to the facts and cause of action.

Yet another contention was put forth by the learned counsel for the petitioner that the suit is undervalued and the court fee paid is not correct and the plaint has to be rejected. The suit if filed for declaration that the deed executed by the defendants in relation to the whole properties is nonest, unenforceable and invalid. Admittedly, the plaintiffs are not parties to the said deed and in such case, the relief of declaration would not fall under Section 40 of the Tamil Nadu Court fees and Suits valuation Act. For deciding the value of the court fee payable by the plaintiff has valued the suit for the purpose of Court fee under Section 25(d) of the Tamil Nadu Act 14/55.

It is categorically held by this court that when the plaintiffs are not parties to the main sale deed or any other deed, they need not pay court fees under Section 40(1) of the Tamil Nadu Court Fees and Suits Valuation Act and the payment of court fee under Section 25(d) is proper.

In the light of averments made in the plaint and the petition made thereon, I am of the considered view that the trial court has rightly come to the conclusion that the suit has been rightly valued and the court fee paid is proper. Therefore, I do not find any merit in these Civil Revision Petitions and consequently, they are liable to be dismissed.

2010 (1) L.W.309

G.Ramasubramani
Vs
The District Forest Officer, Forest Office, Madurai and others.

C.P.C., Order 6, Rule 17 Amendment of Pleadings incorporation of subsequent events, Scope.

Petitioner filed for permanent injunction restraining the respondents/defendants from disturbing his peaceful possession and enjoyment – It is stated by the petitioner that the 1st respondent had demolished a portion of the building put up by the petitioner in the suit property and damaged the movables and further detained the petitioner and his family members illegally in their custody on the said date – To put on record the above said subsequent events the petitioner has filed a petition to amend the plaint in order to incorporate the subsequent events in the plaint. The courts below dismissed the petition on the ground that the petitioner has filed a separate suit for damages in the Sub Court and hence, there is no necessity to bring forth the subsequent events by way of an amendment.

It is true that the court at this stage is not concerned with the merits and demerits of the case resulting from allowing an amendment unless the amendment is shown to be barred under some law or is an amendment which is not permissible on the basis of the settled canons of the civil jurisprudence. The amendment should be considered without reference to the ultimate fate of the result of the suit. In the instant case, the petitioner has already filed a suit for permanent injunction and in the said suit prayed for amendment for introduction of the subsequent events said to have occurred on 20.05.2005 during the pendency of the suit, whereby the respondents are said to have demolished the structures put up by the petitioner and therefore, he wishes to bring forth the subsequent events in the suit for better adjudication.

The effect of allowing the amendment in this case will not certainly change the nature of the case or the subject matter. The petitioner is not building up a new case which he has not pleaded at the first instance except the inclusion of subsequent events which had occurred during the pendency of the suit. The learned counsel for the respondents has nowhere showed that the relief claimed by the petitioner is barred or hit by legal provisions or settled principles governing the subject.

In the case of Shikhrchand Jain Vs. Digamber jain Praband karini Sabha and others[AIR – 1974-SC-1178], the Honourable Supreme Court has held thus:-

"Ordinarily a suit is tried in all its stages on the cause of action as it existed on the date of its institution . But it is open to a Court (including a court of appeal) to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances where it is shown that the relief claimed originally has 1)by reason of subsequent change of circumstances become inappropriate; or 2)where it is necessary to take notice of the changed circumstances in order to shorten the litigation or 3) to do complete justice between the parties".

In an another case in Om Prakash Gupta Vs. Ranbir B.Goyal [AIR -2002-SC-665], the Honourable Supreme Court has held that the subsequent events founded on facts and when the party relies on it must seek amendment of the pleadings. It is further held thus:- "the ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and therefore, the decree in a suit and therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: 1)that the relief as claimed originally has by reason of subsequent events become inappropriate or cannot be granted; 2)that taking note of such subsequent events or changed circumstances would shorten litigation and enable complete justice being done to the parties; 3)that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise".

It is clear that the law is well settled that the court may permit the plaintiff to introduce those subsequent events into the pleadings by way of an amendment, as it would be necessary for the purpose of determining the real question and controversy between the parties. The decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has found; and without the amendment of the pleadings, the court would not be entitled to modify or alter the relief.

2010 (1) L.W.312

The Land Acquisition Officer, (Special Tahsildar, Adi Dravidar Welfare), Harur and The District Collector, Dharmapuri
Vs
Radhakrishnan Chetty & others.

Tamil Nadu Court Fee and Suits Valuation Act (1955), Sections 51,3(1)(B), Schedule II.

Held: Acquired lands are admittedly Manavari Punja lands – lands sold as house sites, cannot be taken for comparison with that of the acquired lands – Government has to incur expenditures for

providing roads, drainage,electricity, Water amenity and public space for convenient enjoyment of the property by the people for whom the housing plots are to be allotted.

When the agricultural lands are converted 53% of the land will be lost as per the Building Rules – Taking into Consideration that the valuation has been arrived at on the basis of smaller extent of lands, further deduction is given, the value fixed by the court below would come down from Rs.47/- per sq.ft., to Rs.11.345 per sq.ft.

Tamil Nadu Court Fee and Suits Valuation Act (1955), Sections 51,3(1)(B), Schedule II – Section 51 of the Act imposes a mandatory levy on claimant for payment of court fee – Aggrieved party, has to pay the ad valorem court fee on difference in the compensation amount – A fixed court of Rs.10/- was paid by the claimants which contrary to the provisions of Section 51 of the Act.

Therefore, the abovesaid sale deeds cannot be compared for arriving at the correct value for the acquired lands. Moreover, the acquired lands are admittedly Manavari Punja lands and therefore, Exs. C2 to C4, under which the lands were sold as house sites, cannot be taken for comparision with that of the acquired lands. Above all, the court below has not given necessary deductions. The reasons for not giving any deduction or how the value of Rs.47/- per sq.ft., for the acquired lands has been arrived at has not been mentioned in the impugned judgment of the court below.

In the evidence of the claimants, it is stated that there is a work shop near the acquired lands and that the acquired lands are situated just one kilometer away from the national highway. Merely because there is a highway one kilometer away from the acquired lands, that by itself will not be sufficient to prove that the entire area has been developed. It is common knowledge that when a land is acquired for the purpose of putting up building for accommodating Adi Dravidars, the Government has to necessarily incur huge expenditure for the purpose of leveling of the roads, carving roads, providing drainage facilities, water facilities, electricity amenities etc., especially when the agricultural lands are converted 53% of the land will be lost as per the Building Rules.

Even as per the evidence of the claimants, no development has taken place in the area where the acquired land are situate. Further, taking into consideration that the valuation has been arrived at on the basis of smaller extent of lands, further deduction of 25% can be given. In all, if 78% of deduction is given, the value fixed by the court below would come down from Rs.47/- per sq.ft. to Rs.11.34 per sq.ft rounded off to Rs.11/- per sq.ft., which will be the correct reasonable and proper value for the acquired lands.

2010 (1) L.W.361

B.V.Gururaj
Vs
M.R.Rathindran & another.

The Plaintiffs filed O.S.No.792 of 2004, on the file of the Sub Court, Coimbatore, for specific performance of contract against the defendants on the strength of an agreement for sale executed by the defendants on 21.10.1994. The suit was decreed as prayed for on 17.12.2004 after contest, directing the defendants to execute the sale deed as per the sale agreement, after receiving sale consideration of Rs.24,22,000/- within one month from the date of decree and the defendants 1 to 4 to execute the sale deed pertaining to their undivided $7/8^{th}$ share in the plaint schedule property in favour of the plaintiffs within one month from the date of decree. There was no appeal from the said decree.

C.R.P.No.2494 of 2008: The plaintiffs filed a petition in I.A.No.137 of 2005 under Section 51 CPC seeking two months time and on that petition, the Court extended the time till 16.03.2005. It is alleged by the plaintiffs that since the defendants did not come forward with the Patta Pass Book for the properties, which was required by the Registering Authority, they were constrained to seek further time. On 16.03.2005, another petition was filed by the plaintiffs in I.A.No.270 of 2005 under Section 151 CPC for grant of three weeks further time for having sale deed executed, from 16.03.2005, but, two years requested time from 16.03.2005. The petition had been adjourned from time to time and finally on 18.06.2007, it was dismissed as infructuous under observation that the petitioners have requested time from 16.03.2005, but, two years have elapsed since the filing of the application. Thereafter, the plaintiff filed another petition under Order 9, Rule 9, Section 151 CPC to set aside the order of dismissal on 18.06.2007. The said petition was not numbered, but it was rejected on 27.07.2007 by the Court below by stating that since I.A.No.270 of 2005 was dismissed as infructuous, restoring the said petition does not arise. The said order is challenged before this Court by the plaintiffs in C.R.P. No.2494 of 2008.

C.R.P.No.1195 of 2009; The defendants filed a petition in I.A.No.270 of 2008 under Section 28(1) of Specific relief Act read with Section 151 CPC for rescission of contract and also for a direction to restore the possession in their favour.

After hearing both parties, the learned Fast Track Judge-III, Coimbatore, dismissed the application on 24.11.2008, directing the plaintiffs to deposit the sale price of Rs.24,22,000/- with interest at the rate of 12% from 17.01.2005 till the date of deposit, on or before 01.12.2008. The said order is challenged before this court in C.R.P.No.1195 of 2009 by the defendants.

As far as the facts of the present case are concerned, while the time granted in the decree was about to expire the plaintiffs filed application in I.A.No.137 of 2005 on which two months time was granted and another application in I.A.No.270 of 2005 was filed for further extension of time which came to be dismissed as infructuous. Afterwards, they filed application to restore the said application and the said petition was also rejected. The above said circumstances would indicated that the plaintiffs have not been remaining lethargic in having the sale executed in their favour. They had been pursuing the proceedings.

As far as the dismissal of I.A.No.270 of 2008 is concerned, the main ground for dismissal is on the point of limitation, since the petition has been filed out of time. In this connection, learned counsel appearing for the defendants would submit that the cause of action for filing the petition under the Section 28(1) is, since the petition filed by the plaintiffs for extension of time was dismissed on 18.06.2007 and the unnumbered I.A. suffered rejection on 27.07.2007 I.A.No.210 of 2008 was filed on 22.04.2008 within three years from the accrual of the cause and it is well within time.

This court is not in acceptance with the said contention. The cause of action would not start from the date of the dismissal or rejection of the above said interlocutary applications, but it starts from the date of passing of the decree i.e. from 17.12.2004. Within three years from the date of decree either of the parties, who seeks relief under Section 28(1) of the Act has to file the petition for rescission of contract.

In the considered view of this court, the right to apply for the defendants accrued on the passing of the decree for specific performance of contract. No right could be stated to accrue from the date of rejection or dismissal of the interlocutory applications, which have no bearing on the filing of necessary petition by the defendants under Section 28(1) of the act. In these circumstances, it is held that the petition in I.A.No.270/2008 has not been filed within time and the same is barred by limitation.

When the petition for rescission of contract faces dismissal at the hands of the Trial court, the necessary consequent relief provided for to the plaintiffs is , extension of time, for which the above said illuminating legal pronouncements have to be followed. As per the decision, the power of the Court to extend the time is always existing and the same could be exercised even in the appellate stage by the Court. Since the Court is very much competent to extend the time pursuant to the dismissal of the petition for rescission of contract, directing deposit of the sale consideration along with interest within time frame is lawful.

As per the view in Sardar Mohar's case (supra), direction to pay interest at the rate of 12%, to compensate the defendants for loss of enjoyment of money, is lawful.

In such view of the matter, this Court is of the considered opinion that direction granting time for the decree-holder to deposit amount along with the interest within a fixed time is not infirm, which deserves to be confirmed and it is accordingly confirmed.

In fine, C.R.P.No.1195 of 2009 is dismissed confirming the order passed by the Trial Court in I.A.No.270 of 2008 and C.R.P.No.2494 of 2008 is disposed of in view of the confirmation of order passed in I.A.No.270/2008. Consequently, connected miscellaneous petition is closed.

2009-5 L.W.394

C.Rajamani
Vs.
Rathna Bai

Petition filed under Sections 18 and 22 of the Indian Divorce Act, 1869 and Order XXVII of Original Side Rules prays for a declaration of the marriage solemnized on 22.01.1981 at Roman Catholic Church Thalayavattai Kanniyakumari District as null and void on the ground the same is vitiated by fraud or in the alternative for judicial separation on the grounds of desertion coupled with cruelty and for other relief

Even though the plaintiff has filed this suit under Section 21 of the Indian Divorce Act, 1869 for declaration of marriage between the petitioner and respondent as null and void on the ground the same is vitiated by fraud or in the alternative for judicial separation on the grounds of desertion coupled with cruelty.

It is pertinent to note that it is the duty of the petitioner to plead the fraud and prove the same.

It is pertinent to note that the petitioner has not averred anything about the fraud alleged to be committed by this respondent/wife for obtaining consent from this petitioner. He has merely amended the prayer column. It is pertinent to note that the petition to amend the plaint has been filed which has been dismissed. Against that he has preferred an appeal in that only amendment has been allowed. On that basis the amendment has been carried out. Even for that he has not pleaded. As per Order 6 Rule 4 of CPC fraud is to be pleaded by the person and proved by the person who pleaded. But the petitioner has not pleaded.

In the above said circumstances, the arguments advanced by the learned counsel for the petitioner that the marriage between the petitioner and respondent as null and void on the ground the same is vitiated by fraud is unacceptable one.

While considering the doctor's medical prescription and other report it is shown, the respondent has attained puberty and menstruation cycle is regular. Sometimes it was irregular and sometimes induced by way of medicines. If really she has not attained puberty she will not be fit for marital life. If she is really not attained puberty she will not be treated by the doctors for begotting child. So it is clearly proved that since she has attained puberty and then only the doctors have given treatment in the fertility research center for IVF test. So, considering the same since she has attained puberty poly-cystic ovary is not amount to impotency.

In the above said circumstances, I am of the view that the arguments advanced by the learned counsel for the petitioner that she is impotent and that she has not attained puberty but she has obtained consent concealing the fact does not hold good. Therefore, I am of the opinion that the so far declaration that marriage is null and void is not acceptable. In the above said circumstances, the plaintiff has miserably failed to prove that the respondent – wife has not attained puberty before his marriage and obtained consent from this petitioner for marriage concealing the fact that she has not attained puberty. So, there is no fraud on the side of the respondent for obtaining consent for marriage. So, the marriage is not vitiated as per the provisions of Sections 18 and 19 of Divorce Act. So, the Additional Issue No.1 is answered against this petitioner and in favour of this respondent.

It is true that if the Court wants to rely upon the opinion of the expert, the expert/author of the document to be examined. Because he would be subjected to cross-examination by the other side. Here he has not examined anyone of the doctors to prove the opinion.

The learned counsel would contend that the petitioner has stolen a female baby from the G.G.Hospital stating that as if she has given birth to a child and this fact has been denied by R.W.1. Per contra, R.W.1 in her evidence stated that since her husband wants to adopt a child and a lady staff working at G.G. Hospital is having a female child, wants to hand over the same to her and she brought the child to her home and after seeing the child, the petitioner refused to take the child in adoption since the child was dark and female. Therefore, she denied the averment made by the petitioner. So the story narrated by the petitioner that the respondent has stolen a female baby from the G.G. Hospital is unacceptable one.

It is true that the cruelty includes mental as well as physical cruelty. It depends upon each and every person who met out in a matrimonial matter. The cruelty will be weighed on the facts and circumstances of each case.

Considering the fact that merely giving a police complaint would not amount to mental cruelty, the respondent has driven out from the matrimonial home and since the petitioner had an illegal intimacy with a maid and given birth of three children and now he wants to recognize the status of that maid Selin, he has come forward with this divorce petition. In the above said circumstances, I am of the opinion that the arguments advanced by the learned counsel for the petitioner that the petitioner was subjected to mental cruelty is an unacceptable one and it is not a ground for divorce.

There is no evidence before this Court to show that the respondent has deserted the petitioner with an animus to dissolve the marriage, severe the marital tie, she left the matrimonial home and residing out of the matrimonial home. Per contra, the petitioner has himself driven out his wife from the matrimonial home and not permitted after she returned from her native place. She has not permitted to enter the matrimonial home and he sought for divorce on the ground of desertion. The wrong doer cannot seek remedy for his own wrong.

The relief sought for by the petitioner originally as to whether he is entitled for dissolution of marriage on the ground of desertion and cruelty has been amended by the petitioner to declare the marriage and null and void and alternative relief of judicial separation. So, I am of the opinion that the petitioner is not entitled for judicial separation on the ground of desertion also.

2010-1-L.W.385

G.Ramasami
Vs.
R.Kamala

Benami Transaction (Prohibition)Act (1988), Section 3(2)(a) – Suit by a husband against the wife, claiming Benami transaction is not barred under Section 3(2)(a) of the Act – Burden is on the husband to prove that it is not for the benefit of the wife otherwise the presumption shall apply – Considerations for deciding whether a transaction is benami or not, stated.

As per Section 3(2) of Benami Transaction Act, the purchase of property by any person in the name of his wife or unmarried daughter is permissible and it shall be presumed the purchase is for the benefit of the wife or daughter unless the contrary is proved. Therefore, the suit by a husband against the wife, claiming Benami transaction is not barred under the Benami Transaction Prohibition Act, 1988. However, under Section 3(2)(a), the burden is on the husband to prove that it is not for the benefit of the wife otherwise the presumption shall apply.

The main considerations for deciding whether a transaction is benami or not is now well settled. The considerations are, (a) source of purchase of money (b) manner of enjoyment (c) that the transfer was not intended to be gift in favour of person in whose name transfer is taken (d) custody of title deed (e) motive for transaction (f) relationship between claimant and the alleged benamidhar (g) conduct of parties in dealing with properties after sale.

The Courts below have concurrently found that all the above considerations are in favour of the wife. Ex.P.1 is the Indian Bank Pass Book in the name of the respondent/defendant. Certain amounts has been drawn prior to the execution of the sale deed. The explanation of the husband is that he only deposited the said amounts in the wife's account and the same was drawn and paid for the sale considerations. But, there is no proof. The manner of enjoyment of the property by the wife was also proved by various documents. The crucial factor is whether the husband has proved that the property was not intended for the benefit of the wife but purchased for some other purpose. The defendant has stated that as a doctor, he wanted to construct a hospital in the suit property and it is not purchased for the benefit of his wife. All was not well with the parties. They are separated for more than 25 years. They have almost become senior citizens. The Courts below more particularly the first appellate Court being the last court on facts, categorically came to the conclusion that the plaintiff has not purchased the property for his own benefit in the name of his wife. The Courts below have found that it is not a benami transaction.

It is held in *Sundaram Nadar Vs. Sukumaran* reported in *2000 (III) CTC 473 = 2001 – 2 – L.W. 439,* that the question whether a property is held benami or not is a question of fact and not a question of law.

The Courts below had already dealt with the question of fact finding that the purchase of the property is not a benami transaction and I have no reason to interfere with. The questions of law are answered accordingly. The second appeal is liable to be dismissed.

In the result the Second Appeal is dismissed. No costs.

2010-1-L.W.433

P.Kamalammal
Vs.
V.Sachidanandam

Tamil Nadu City Tenants Protection Act, Section 9 – Landlord-Tenant Relationship, Allotment, Scope, Heritable right, Scope, Suit for mandatory injunction, declaration if necessary – Substantial question of law which has arisen is, whether the right of tenancy is heritable or not?

The plaintiff has filed a suit for mandatory injunction direction the defendant to accept the accumulated arrears of rent and also future monthly rent for the suit premises or in the alternative to direct the mode of payment for the said rents to the credit of the defendant.

The Trial Court after scrutiny of the pleadings, evidence and other materials, dismissed the suit by observing that landlord and tenant relationship does not arise, that without tenancy attorned, and that though the plaintiff is in possession of the suit property as legal heir after death of T.K.Periasamy Mudaliar, she is not entitled to the relief for mandatory injunction, since there was no relief of declaration sought for. The appellant carried the matter in Appeal No.65 of 2007, on the file of the VII Additional Judge, City Civil Court, Chennai and the appellate Court confirmed the judgment and decree of the trial Court. Hence, the appellant is before this Court with this appeal.

There is no specific stipulation in the Tamil Nadu City Tenancy Protection Act that in case of death of the statutory tenant or in case of the property being transferred to any other person, attornment of tenancy has to be made. In the absence of such specific provision in the Act, it has to be held that the tenancy right is heritable which is an estate to be derived by the legal heir of the ancestor, namely., the tenant and the heirs step into the shoes of the tenant, who become the tenants under the landlord. It is conceded that the tenanted premises is a commercial premises and there is no mention in the statute regulating the rights of the heirs of the tenant to inherit the tenancy rights and hence, it is to be held that the legal heir of the tenant would inherit the rights of the deceased tenant.

The High Court is precluded from interfering with the factual concurrent findings recorded by the Court below, but while it is found that a substantial question of law is involved which is sought to be decided by the High Court, then it can do so. As far as the present case is concerned, the substantial question of law which has arisen is, whether the right of tenancy is heritable or not? In such situation, no question of attornment of tenancy in the present suit would arise. The Court below though observed on the decision of this Court as to the fact that the appellant is the legal heir to deceased from T.K.Periasamy Mudaliar, they have not further proceeded to ascertain her legal right as regards her inheritance of the estate of her husband in the tenancy. The substantial question of law is answered that the tenanted premises being commercial one and the right of tenancy has been inherited on the death of the statutory tenant and the appellant had inherited the estate of her husband, the statutory tenant on his death in the tenancy and she has to be termed to be a tenant under the respondent.

In such view of this matter, the appeal deserves to be allowed and the judgment and decree of the Court below have to be set aside and accordingly, they are set aside.

2010-1-L.W.451

Kaja Mohideen
Vs.
Rajendran

C.P.C., Order 7,R.11 Rejection of plaint, Bar of res judicata, Order 21, Rr.97,101.

Held: Res Judicata is a mixed question of law and fact and that cannot be decided in an application under Order 7 and Rule 11 of the C.P.C.- Nevertheless, having regard to the fact that the respondents filed E.A. under Order 21, Rule 97,101 of the Civil Procedure Code, as rightly contended by the learned Counsel for the retended by the learned Counsel for the revision petitioner, the suit cannot be maintained as the respondents herein have invoked the jurisdiction of the Execution Court – When the parties have invoked the provision of Order 21, Rule 97,101 of the CPC, irrespective of the fact that the suit filed by them at earlier point of time , the suit cannot be proceeded with and all the questions relating to right or title all the questions relating to right or title of the parties have to be decided only in the application filed under Order 21,Rule 97.

It is true that the suit in O.S.No.262 of 2006 was filed in earlier point of time and in the application filed under Order 7, Rule 11 of the Civil Procedure Code, the revision petitioner did not state that having regard to the provisions of Order 21, Rule 87 of the Civil Procedure Code, the suit is not maintainable. The revision petitioner has only stated that the suit is barred by res judicata as the revision petitioner has already obtained the order of eviction in R.C.O.P.No.25 of 2004 which is binding on the plaintiffs. It is also not disputed that the respondent in R.C.O.P.No.25 of 2004 is none other than the father of the plaintiffs in O.S.No.262 of 2006. Therefore, it was contended by the revision petitioner that the present suit in O.S.No.262 of 2006 is barred by res judicata.

According to me, as rightly pointed by Mr.G.Sridharan, learned counsel for the respondents, that the question of res judicata is a mixed question of law and fact and that cannot be decided in an application under Order 7 and Rule 11 of the Civil Procedure Code. Nevertheless, having regard to the fact that the respondents herein filed E.A.No.241 of 2006 under order 21, Rules 97, 101 of the Civil Procedure Code, as rightly contended by the learned counsel for the revision petitioner, the suit cannot be maintained as the respondents herein have invoked the jurisdiction of the Execution Court by filing the application under Order 21, Rules 97, 101 of the Civil Procedure Code. As per Order 21, Rule 101 of the Civil Procedure Code, all questions including questions relating to right, title or interest in the property arising between the parties to the proceedings on an application under Order 21, Rule 97 or Rule 99 of the Civil Procedure Code, or the representatives to the adjudication of the application, shall be determined by the Court dealing with an application and not by a separate suit. In this case, the respondents herein are the legal representatives of the tenant in R.C.O.P.No.25 of 2004, against whom; the order of eviction was obtained. They have also filed the application under Order 21, Rule 97 of the Civil Procedure Code. Therefore, when the parties have invoked the provisions of Order 21, Rules 97, 101 of the Civil Procedure Code, irrespective of the fact that the suit filed by them at earlier point of time, the suit cannot be proceeded with and all the questions relating to right or title of the parties have to be decided only in the application filed under Order 21, Rule 97 of the Civil Procedure Code. This position has been made clear in the judgment reported in 1998 – 2 – L.W. 418 in *Shreenath and another Vs. Rajesh and Others.* In the said judgment, the order of the Hon'ble Supreme Court quoting the passage in the judgment reported in 1995 (1) SCC 242, in *Noorduddin Vs. Dr.K.L.Anand,* wherein it is held as follows:

> *"Thus the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the Court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree holder and the person claiming independent right, title or interest in the immovable*

property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code Amendment Act, 1976, right of suit under Order 21, Rule 103 of 1908 code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution."

Therefore, following the judgment, the suit filed by the respondents in O.S.No.262 of 2006 is not maintainable and therefore, it is liable to be rejected. However, it is open to the respondents herein to raise all the pleas that are available to them in the E.A.No.241 of 2006.

Accordingly, the Civil Revision Petition is allowed. No costs.

<u>2010 (1) L.W.471</u>

N.John
Vs
G.Narasaiah and G.Issac

<u>Guardians and Wards Act,</u> Sections 3,7,10,17,29/ Welfare of the minor, <u>Practice and Procedure</u>/ involving either the Police Officers or the Probation Officers wholly unwarranted, <u>C.P.C.,</u> Order 32-A (introduced by the Central Act 104 of 1976),
<u>Hindu Adoptions and Maintenance Act</u> (1956).

Original Petition was filed by the petitioner under sections 3,7,10 and 29 of the Guardian and Wards Act seeking for the custody of minor children.

In matters relating to guardianship, sensitive approach and expeditious disposal is expected and it should not be kept buried in Court dockets – An impression will be created that Courts have no time for such matters and it is busy dealing with the matters relating to property claims of more wealthy and influential persons.

Sending the matter to Mediation Centre is again wholly unwarranted – An exercise should be undertaken by the Trial Court itself – Trial Courts to explain the delay in disposal cannot dump the matters to Mediation Centres and avoid its duty imposed upon them under Order XXXII-A Rule 3 CPC.

Question of involving either the police Officers or the Probation Officers and letting them loose on the parents are wholly unwarranted – Directions passed.

There was also complaint that the Courts are constantly asking the police /Agencies to produce the minor child for every hearing –This is strange practice which is not contemplated under the GAWA.

<u>Constitution of India</u>, Articles 144, 141/ All the Courts shall act in aid of the Supreme Court, Adhering to the time schedule fixed by the Supreme Court, it is also necessary to give appropriate directions regarding the reasons adduced by the District Courts for the cause of delay in disposing of the applications.

2010-CIJ 94 Mad (1)

Balu Pillai @ Balasubramania Pillai and others
Vs
Mahadevan and others

(A) **Tamil Nadu Cultivating Tenants Protection Act, 1955(25 of 1955) – Sec. 2, 6A – Tamil Nadu Agricultural Lands record of tenancy Rights Act,1969 (10 of 1969) Sec.16A- Code of Civil Procedure, 1908 (5 of 1908)- Sec.11,O.41- Agricultural land – Tenant – Cultivating tenant- Sub – Tenant-Government servant – Personal labour – Possession – Recovery of Possession – Res judicata – Plaintiffs purchased an agricultural land under the cultivation of others – he filed suit for recovery of possession and mesne profit – Defendants appealed to High Court – Defendants contended that earlier the proceedings before the Revenue Court was dismissed and it acted as res judicata – They also contended that on the land of sale the lands were under the cultivation of sub-tenants and on knowing the same, the plaintiffs purchased the land – Held, the proceedings dismissed for non-impleading of necessary parties cannot be a res judicata – Government servant cannot become a cultivating tenant – Right to cultivate by a tenant cannot be sub-let-Appeal dismissed.**

(B) **Tamil Nadu Cultivating Tenants Protection Act, 1955(25 of 1955) – Sec. 2, 6A – Agricultural land-Cultivating Tenant – Government servant-Personal labour-A Government servant cannot claim to have contributed his physical labour for the cultivation of an agricultural land when he is actually in service and so cannot be a "cultivating tenant" to avail protection under the Tamil Nadu Cultivating Tenants Protection Act, 1955.**

(C) Tamil Nadu Cultivating Tenants Protection Act, 1955(25 of 1955) – Sec. 2, 6A – Tamil Nadu Agricultural Lands Record of Tenancy Rights Act,1969(10 of 1969).-Sec.16A- tenant-Civil Court-Jurisdiction-Civil Court has jurisdiction to decide whether the person in possession of a land is a cultivating tenant or not and grant relief to the land owner in case it decides that the person in possession is not a cultivating tenant.

(D) Tamil Nadu Cultivating Tenants Protection Act, 1955(25 of 1955) – Sec. 2, 6A – Tamil Nadu Agricultural Lands record of tenancy Rights Act,1969 (10 of 1969) Sec.16A-Agricultural land –Tenant-Cultivating tenant Transfer of lease-Sub-tenant –recorded cultivating tenant has no right to alienate his leasehold right to third party though he has got a right under the Act to sub-let the property to a third party.

(E) Code of Civil Procedure,1908(5 of 1908)-Sec.11-Res Judicata- Dismissal of suit – Necessary party- non-joinder of party- if the former suit is dismissed without any adjudication on the material directly and substantially in issue, on the ground of non-joinder of necessary parties, the decision arrived at in the former suit will not operate as res judicata.

(F) Code of Civil Procedure, 1908(5 of 1908)- O.41-Evidence – Additional evidence - Lacunae- filling uo – Additional evidence cannot be permited to be let in, in an appellate stage to fill up the lacunae or gap in the evidence already let in.

2010-CIJ 63 FBJ

Mr.Panchabhai Popotbhai Butani and others
Vs
State of Mah. and others

(A)Code of Criminal Procedure, 1973(2 of 1974)-Sec.154, 156, 190, 200 – Crime-police-FIR-Registration-Failure-Complaint-Magistrate-format-Pleadings-Prayer-Petitioners lodged private complaint before the Magistrates without first approaching the police-Complaint in some cases did not seek prayer for its

reference to police under Sec.156(3) Cr.P.C.-When the issue came to the High Court, the division bench referred the question as to the necessity of prayer in the complaint before the Magistrate and also the lodging of report with the police before approaching the Magistrate Held, though the complaint to the Magistrate for referring under Sec.156(3) need not incorporate the prayer, it should disclose the commission of an offence-Normally, the person should , at first, Approach the police and in certain special circumstances, he can directly approach the court under sec.156(3) Cr.P.C.-Reference answered.

(B)Administration of Justice-Criminal Justice – Rule of law-Police Judiciary- impartial enforcement of laws requires an independence judiciary and an impartial and incorruptible police force.

Rule of law indicates good governance which requires fair legal framework that enforce law impartially. Impartial enforcement of laws requires an independent judiciary and an impartial and incorruptible police force.

(C)Code of Criminal procedure, 1973(2 of 1974)-Sec.154,156,190,200-Crime –Police –FIR-Registration-Complaint-Magistrate-Option-Complainant-Victim- The victim or the complainant is having an option to choose either the police or the Court for the enforcement of criminal law.

The two accepted methods for enforcing administration of criminal justice system are a direct access and invocation of the Courts system; while the other is adopting the channel through the State agency. The option is available to a complainant or a victim or anybody for the matter and the provisions of the Code provide a detailed statutory scheme for invocation, implementation, trial and punishment of a guilty person under these different methodologies. In the event a person chooses to approach a police station and makes a report of a cognizable offence, the police is under an obligation to register First Information Report (FIR) except in certain exceptional cases where some kind of preliminary inquiry may be necessary in the facts and circumstances of that case before registration of an FIR.

The two distinct and different procedures which can be adopted by an intending complainant or any person who wishes to set into motion the machinery of criminal investigation and trial under the provisions of the Code. Both these prescribed procedural methodologies operate indifferent fields and have no intersecting fields of conflict, rather they could come to the aid of the complainant for better enforcement and implementation for fair and expeditious disposal.

(D)Code of Criminal Procedure,1973(2 of 1974)-Sec.156,190,200-crime-Police-Cognizance- investigation-Complaint-Forwarding – At the stage of taking cognizance of the ofence and also the necessity of summoning the accused or directing police investigation.

Section 190 actually requires a judicious application of mind by the Court with regard to the contents of a complaint and to make up its mind whether the offence alleged appears to have been committed prima facie. It is a stage where the Court should exercise its judicial powers to proceed with the matter further by summoning the accused or by directing investigation on certain issues by the investigation on certain issues by the police agency or even requiring the complainant to lead evidence at pre-summons stage.

(E))Code of Criminal Procedure,1973(2 of 1974)-Sec.156,190-Crime-Cognizance – Trial-Validity- taking cognizance of an offence is sine quanon or condition precedent for holding a valid trial.

Taking cognizance does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance os thus a sine qua non or condition precedent for holding a valid trial.

The law casts an abundant statutory duty upon the police officer in charge of a police station to register the case wherever commission of a cognizable offence is brought to his notice in any form. Normally, it will be default of Section 156(3) of the Code as if the FIR has been registered and the complaint has been investigated in accordance with law. In other words, the code takes complete care of dealing with every situation that may arise in the course of the investigation or inquiry being conducted under the two sources to which anybody has an access under the provisions of the code.

As a normal proposition of law, invocation of the provision of Section 154 in its entirety should be treated as a condition precedent to invocation of the powers of the Court under section 156(3), but there can be exceptions where the facts and circumstances of the case justify directly approaching the court by the complainant. If a person is desirous of invoking the Judicial process at the very first instance, he can always take recourse to section 200 as contained in Chapter XV of the Cod , but if he wishes to invoke the powers of the Court under Section 156(3), normally he may exhaust the remedy available to him as is provided by the Legislature in terms of Section 154 of the Code.

There can be cases where strict compliance to the provisions of Section 154(1) and (3) in their entirety may not be insisted upon by the Court. This will be the case where heinous crime is commit and despite intimation to the police, the police failed to take action forthwith and/or cases where there is likelihood of crucial material evidence being destroyed, damaged and/or tampered with to the prejudice of the complainant. In such cases, the Court may have to entertain an application under section 156(3) without compliance of Section 154(3) but still an averment that the police were approached and have failed to act or why the applicant has chosen to directly approach the Court for issuance of direction under Section 156(3) would be some what necessary, to be mentioned in the complaint.

The word "complaint" has a wide meaning since it include seven oral allegations. It may therefore be assumed that no format is prescribed in which the complainant must be made. There has to be allegation which prima facie discloses commission of a cognizable offence with necessary facts.

"Information" is a wider term than "complaint" and includes any communication relating to the commission of an offence. A complaint is a particular kind of information and is more or less formally made with the definite object that the person to whom the complaint is made will take action under Code of Criminal procedure.

It is not the legislative intent that in the complaint or application/petition under Section 156(3) detailed factual allegations containing in detail the happening of events from beginning to end should be made. It is sufficient for the person to make averment of facts disclosing cognizable offence further stating that the police has filed to take action despite intimation under Section 154 of the Code of criminal procedure. Unnecessary emphasis on the prayer cannot be laid.

No stringent format can be provided or is necessary in relation to a prayer clause. It is for the complainant or the aggrieved person to decide whether he wishes to refer the matter to investigation under Section 156(3) of the Code or whether his application is to be treated as a regular complaint under Section 200 of the Code. We have particular format of the application or petition to magistrate under section 156(3) is provided or is required to be made. Suffice it for the complainant or aggrieved person to bring it to the notice of the Court under Section 156(3) that despite intimation to the police it has failed to act and investigate a cognizable offence in accordance with law or that in the fact situation of the case it was necessary to directly approach the court. But a merely on the ground that it does not contain a proper prayer clause in sofar as it discloses commission of a cognizable offence.

Where a person files a complaint under Section 200 of the Code of Criminal Procedure, he is expected to state the facts giving details and correct versions which would amount to com itting of an offence alleged. It has to satisfy the basic ingredients of such an offence and it is expected of the complainant to make a proper complaint as contemplated under Section 2(d) of the code with appropriate prayers. In contradistinction to this, such strict rule of pleadings cannot be mde applicable to the provisions of Section 15693) of the Code as it is result of a default and even intimation in appropriate format may suffice the purpose in some cases.

It is an option available to an individual whether to invoke powers of the State /investigating Agency under Section 15693) or Section 200 of the Code. It is primary duty of the police to immediately register an FIR and to investigate the matter in accordance with law and not to push any individual to knock the doors of the courts for inquiry, investigation and trial of an offence. Seeking directions from Magistrate to direct police to investigate are the events which should take place as a last measure.

The compliance to Section 154 would be necessary in normal cases which do not fall within the exceptions stated by us. It is being a power of the Court exercisable in default of action being taken by police.

2010 (1) CTC 424

R.Jagadeesan
Vs
N.Ayyasamy and another

Evidence Act,1872 (1 of 1872),Section 45 – Expert Opinion – Age of writing –Duty of Court Age of writing – Duty of Court - Non-availability of scientific method – Sending documents for opinion in respect of age of writing is only futile – Direction not to send documents henceforth unless new methods are invented to find out age of writings was issued.

Constitution of India, Article 21 – Criminal jurisprudence – Fair trial – Right of accused to request for expert opinion – Fair trial is sine qua non of criminal jurisprudence as has been recognized under Article 21 – Accused can very well request Court to forward document for expert opinion – It is for Court to first of all take a decision as to availability of expert.

Evidence Act,1872 (1of 1872),Section 40 – Procedure for appointing expert – Court should first ascertain whether or not particular individual is expert in particular field for particular purpose before seeking opinion of such expert.

Facts: Person accused of an offence under Section 138 of Negotiable Instruments Act filed petitions before the Magistrate requesting him to forward the cheques for examination by Director of Forensic Science to express opinion regarding age of writings as well as signature found in cheque. Forensic Department represented that there is no scientific method available to assess the age of any writing.

Held, that there can be no denial of the fact that the accused needs to be afforded a fair trial to exhaust all his defences available to him. Fair trial is the sine qua non of criminal jurisprudence and the same has been recognized as a fundamental right under Article 21 of the Constitution of India. To prove that the handwriting was not made by him or that the signature was not made by him, the accused can very well request the Court to forward the document for expert opinion. But the question is, in respect of the age of the writings on a document whether there is any expert in terms of Section 45 of the Evidence Act, who shall be competent to examine the same scientifically and to offer his opinion. The term expert denotes, persons specially skilled in the particular field. Under Section 45 of the Evidence expert in the particular field for a particular purpose. In such a way, if it is found that there is an expert who can find out the age of the writings on a document by means of any scientific method, certainly he would fall within the ambit of Section 45 of the Evidence Act to offer such opinion. But the learned counsel for the petitioner would submit that there is no such scientific method available for offering any such opinion.

In view of the above clear and unambiguous statement made by no less a person than the Head of Department of Forensic Science, I am of the view that the whole exercise adopted in various Courts in this State to send the disputed documents for opinion to the Forensic Department in respect of the age of the writings and the documents is only futile. If any document is so sent, certainly the department will say that no opinion could be offered. As a matter of fact, the Assistant Director would inform the Court that already many such documents, which were sent to them by various Courts in the State for such opinion , have been returned by them with the report that no such opinion could be offered.

In view of all the above, in my considered opinion, sending the documents for opinion in respect of the age of the writing on documents should not be resorted to hereafter by the Courts unless, in future, due to scientific advancements, new methods are invented to find out the age of the writings.

2010 (1) CTC 429

Madras Christian Counsil of Social Service, Reg. NGO, rep. by its Exec. Secy, Mr.R.Isabel
Vs
V.Rangarajan and another

Guardians and Wards Act, 1890 (8 of 1890), Sections 3,7, 8,9, 10 & 29 – Appointment of Guardian – NGO in whose custody children were living sought to be appointed as Guardian – NGO also made alternate plea that children could be sent to nay other NGO –petitioner – NGO not having sufficient background for keeping custody of minor children and of recent origin – Institution cannot be substitute for family and female children require emotional security and social identity for their future adult life and family surroundings would have lasing effect in long run – Request of NGO to be appointed as Guardian declined – Maternal aunt could not be considered as case against her brother for murdering mother of minor children was pending and maternal aunt admitted having cordial relationship with her brothers – Disqualification was not permanent and could be revisited – Paternal uncle appointed as children were also friendly with paternal grand parents – Question of material support available with paternal uncle was not lone factor as material welfare alone does not count in appointing guardian but stability, security, loving, understanding care and guidance, warm and compassionate relationship are essential for full development of child's own character, personality and talents.