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IMPORTANT CASE LAWS

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SUPREME COURT CITATIONS

2010 Crl.L.J. 395

Amrendra Kumar Paul
Vs
Maya Paul and Others

An application for grant of maintenance, therefore, is maintainable, so far as the children are concerned, till they had not attained majority. As a cause of action for grant of maintenance would arise only in the event a person having sufficient means, neglects or refuses to maintain his legitimate or illegitimate minor child unable to maintain itself. Once, therefore, the children attained majority, the said provision would cease to apply to their cases.

Sub-section(3) of Section 125 of the Code provides for a period of limitation, stating:

"(3) if any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuse to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwith-standing such offer, if he is satisfied that there is just ground for so doing.

Explanation-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

A period of limitation is provided for in terms of the aforementioned provision. However, in a case of this nature, Section 15 of the Limitation Act would apply which reads as under:

"15. Exclusion of time in certain other cases.-(1) In computing the period of limitation of any suit or application for the execution of a decree, the institution or execution of which has been stayed by institution or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

Explanation.-In excluding the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be counted.

(3) In computing the period of limitation for any suit or application for execution of a decree by any receiver or interim receiver appointed in proceedings for the adjudication of a person as an insolvent or by any liquidator or provisional liquidator appointed in proceedings for the winding up of a company, the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of appointment of such receiver or liquidator, as the case may be, shall be excluded.

(4) In computing the period of limitation for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

(5) In computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government, shall be excluded."

In fact, the order of stay had been granted by the revisional Court as also by the High Court in the aforementioned proceedings. The limitation for filing application for execution would be computed upon excluding the period during which the order of say was operating.

<u>2010 Crl.L.J. 525</u>

K.M. Ibrahim
Vs
K.P. Mohammed & Anr.

The object of Section 320, Cr.P.C., which would not in the strict sense of the term apply to a proceeding under the Negotiable Instruments Act, 1881, gives the parties to the proceedings an opportunity to compound offences mentioned in the table contained in the said section, with or without the leave of the court, and also vests the court with jurisdiction to allow such compromise. By virtue of sub-section (8), the Legislature has taken one step further in vesting jurisdiction in the Court to also acquit the accused/convict of the offence on the same being allowed to be compounded. Inasmuch as, it is with a similar object in mind that Section 147 has been inserted into the Negotiable Instruments Act, 1881, by amendment, an analogy may be drawn as to the intention of the Legislature as expressed in Section 320(8), Cr.P.C., although, the same has not been expressly mentioned in the amended section to a proceeding under Section 147 of the aforesaid Act.

As far as the non-obstante clause included in Section 147 of the 1881 Act is concerned, the 1881 Act being a special statute, the provisions of Section 147 will have an overriding effect over the provisions of the Code relating to compounding of offences. The various decisions cited by Mr. Rohtagi on this issue does not add to the above position.

It is true that the application under Section 147 of the Negotiable Instruments Act was made by the parties after the proceedings had been concluded before the Appellate Forum. However, Section 147 of the aforesaid Act does not bar the parties from compounding an offence under Section 138 even at the appellate stage of the proceedings. Accordingly, we find no reason to reject the application under Section 147 of the aforesaid Act even in a proceeding under Article 136 of the Constitution.

Since the parties have settled their disputes, in keeping with the spirit of Section 147 of the Act, we allow the parties to compound the offence, set aside the judgment of the courts below and acquit the appellant of the charges against him.

AIR 2010 SC 75

Chairman-cum-Managing Director, Coal India Ltd. & Anr.
Vs
Mukul Kumar Choudhuri & Ors.

(A) Constitution of India, Arts. 226, 311 – Powers of High Court – Departmental enquiry – Delinquent admitting charges – Conclusion arrived at by Inquiry Officer about proof of charges – Absence of any procedural illegality or irregularity in conduct of departmental enquiry – It has to be held that charges against delinquent stood proved and warranted no interference.

(B) Constitution of India, Arts. 311, 226 – Proportionality of punishment – Interference – Powers of High Court – Charge of misconduct – Employee admitting his guilt – However, stated that he did not have any intention to disobey order of higher authority or disobey Company's Rules – Resignation sent by him due to personal reason not accepted by Company – Order of removal cannot be justified in such case – Held that, however, employee would be denied back wages by way of punishment for proved misconduct.

The doctrine of proportionality is well recognized concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review. One of the tests to be applied while dealing with the question of quantum of punishment would be; would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment.

Where the misconduct of the delinquent was unauthorized absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's Rules and Regulations but the reason was purely personal and beyond his control and as a matter of fact, he sent his resignation which was not accepted, the order or removal cannot be held to be justified, since no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment would not be only unduly harsh but grossly in excess to the allegations. It was further held that the demand of justice would be met if the delinquent is denied back wages for the entire period by way of punishment for the proved misconduct of unauthorized absence of six months.

2010 (1) CTC 849

Tameeshwar Vaishnav
Versus
Ramvishal Gupta

Negotiable Instruments Act, 1881 (26 of 1881), Section 138(b) – Notice issued under Clasue (b) received by drawer of cheque – No action taken within prescribed period – Fresh notice in respect of same cheque - Whether proper – Held, no – Cause of action for a Complaint arises only once – Case law discussed.

Facts: A Complaint is filed under Section 138 of the Negotiable Instruments Act based on a fresh notice in respect of a cheque for which earlier a notice had been issued and no action was taken within the time prescribed under the Act. The same was taken on file by the Magistrate and the High Court also confirmed the same.

Held : On careful scrutiny of the decision in S.L. Constructions v. Alapati Srinivasa Rao, 2008 (6) CTC 314 (SC) : 2009 (1) SCC 500, it would appear that the facts on the basis of which the said decision was rendered, were different from a case of mere presentation and dishonor of the cheque after issuance of notice under the Proviso to Section 138 of the Act. While the decision in Sadanandan Bhadran v. Madhavan Sunil Kumar, 1998 (2) CTC 462 (SC): 1998 (6) SCC 514, clearly spells out that a cheque may be presented several times within the period of its validity, the cause of action for a Complaint under Section 138 of the Act arises but once, with the issuance of notice after dishonor of the cheque and the receipt thereof by the drawer. The same view has been reiterated Prem Chand Vijay Kumar v. Yashpal Sing & Anr., 2005 (2) CTC 823 (SC): 2005 (4) SCC 417. The only distinguishing feature of the decision in S.L. Construction's case (supra) is that of the three notice issued, the first two never reached the addressee. It is only after the third notice was received that the cause of action arose for filing the Complaint. In effect, the cause of action for filing the Complaint in the said case did not arise with the issuance of the first two notice since the same were never received by the addressee.

The provisions of Section 138 and clauses (a), (b) and (c) to the Proviso thereof indicate that a cheque has to be presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. Clause (b) indicates that the payee or the holder in due course of the cheque, has to make demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and clause (c) provides that if the drawer of the cheque fails to make the payment of the said amount of money to the payee or to the holder in due course of the cheque within 15 days of receipt of the said notice, the payee or the holder of the cheque may file a Complaint under Section 142 of the Act in the manner prescribed.

In the instant case, it is clear that the first notices were received by the Appellant on 14th June, 2006, whereas the Complaints were filed on 10th July, 2006. It must, therefore, be held that the Complaints were filed beyond the period of limitation and the learned Magistrate erred in taking cognizance on the Complaints filed on the basis of the second notices issued on 7th June, 2006. Similarly, the High Court was also wrong in affirming the order of the learned Magistrate.

<u>2010 (1) CTC 861</u>

Banda Chinna Subbarayudu and others
Versus
Thailam Vishwanantha Rao and another

<u>Limitation Act, 1963 (36 of 1963), Article 127 – Code of Civil Procedure, 1908 (5 of 1908), Order 21, Rule 89</u> – Time, during which Decree which is sought to be executed is stayed by order of Court, is to be excluded while computing period of limitation to file Petition under Order 21, Rule 89 – Fact that judgment – debtor did not get stay but third party obtained stay does not alter position.

Facts : Suit filed for recovery of money decreed and decree holder filed Execution Petition and property was sold in auction on 25.11.2003. A third party filed an Appeal against Decree and obtained stay of Decree on 25.11.2003 before the sale could be conformed. The Appeal filed by third party was dismissed on 02.12.2004 and stay of decree granted earlier was vacated on the same date. The judgment-debtor filed Application on 15.12.2004 under Order 21, Rule 89 and deposited required amount. Period between 25.11.2003 and 02.12.2004 is to be excluded while computing limitation.

Held: The only question we are, therefore, left to answer is whether the appellants would be entitled to the benefit of the said period during which he was prevented by the Execution Proceedings in taking steps to file the Application for setting aside the sale.

HIGH COURT CITATIONS

2010 Crl. L. J. 15

Rajinder alias Lala and etc
Vs
State

The question which needs consideration is whether appellants –Rajinder and Ramesh were unrepresented on the dates 13.10.1998, 13.01.99, 14.01.99 and 19.02.99.

From the facts noted hereinabove, the position which emerges is that on 13.10.1998 appellant-Rajinder was represented by R. D. Dubey and A. Ahmad, Advocates whereas appellant- Ramesh was represented by S.P. Sharma, Advocate. It is most relevant to note on that appellant-Rajinder engaged Kamlesh Sambharwal, Advocate on 10.12.1998 i.e., after raising the objection to the conduct of his defence by R,K. Bahri, Advocate, therefore where was the occasion for the trial court to provide legal aid to said appellant after 13.10.1998. Insofar as appellant-Ramesh is concerned, a perusal of the trial court record shows that S.P. Sharma filed two applications dated 03/07.06, 1998 seeking bail for appellant-Ramesh, which applications was dismissed by the trial court on 04/08.06.1998 after hearing the arguments advanced by the said counsel. Therefore, appellants-Rajinder and Ramesh were represented by a counsel on the dates in question.

It is true that counsel for Rajinder and Ramesh did not appear in court on various dates as noted above but it is equally true that in between said dates counsel for Ramesh filed an application seeking bail. It appears to be a case where the accused were adopting a strategy of contrivance to derail the trial by repeatedly changing counsel.

But the moot question is: whether a prejudice has been caused to Rajinder and Ramesh.

The defence taken by all the appellants was identical. R. K. Bahri, Advocate Cross-examined the witnesses on behalf of appellant Baijinath. He i.e. R.K. Bahri was later on engaged as counsel by Rajinder and Ramesh. Had R.K. Bahri, Advocate felt that any prejudice has been caused to the said appellants on account of denial of opportunity of cross-examination of the witnesses in question, he could have filed an application under Section 311. Cr.PC. for recall of the said witnesses. He did not do so. Rajinder and Ramesh did not instruct him to do so.

In view of above discussion, we find no force in the first submission advanced by the learned counsel for the appellants.

2010 Crl. L. J. 592

Muhammad Rafi
Vs
State of Kerala and Anr.

We have heard learned counsel on either side elaborately and we have gone through the judgment of the Supreme Court in CBI's case paying broad attention to the observation referred to by the learned counsel for the petitioner in paragraph 24 of the judgment. We think it is appropriate to refer to the facts of the case in Central Bureau of Investigation v. State of Rajasthan and others (AIR 1996 SC 2402) :

(1996 Cri LJ 3480), at some length before considering whether the observation referred to by the learned counsel in paragraph 24 of the judgment constitutes a ratio in which case, the submission made by the learned counsel for the accused as regards the necessity to obtain sanction, may require to be accepted.

Central Bureau of Investigation v. State of Rajasthan and others (AIR 1996 SC 2402) : (1996 Cri LJ 3408) dealt with a case where it was alleged that the respondent therein had committed offences under the Foreign Exchange Regulation Act, 1973. An application was filed by the Central Bureau of Investigation before the Chief Judicial Magistrate (Economic Offences), Jaipur, for grant of permission to the Deputy Superintendent of Police to investigate the offence under Section 25(1) read with Section 56 of the Foreign Exchange Regulation Act, 1973. The application was dismissed by the learned Magistrate and this was affirmed by the High Court as well. The principal issue which was considered by the Supreme Court was whether the officers under the Delhi Special Police Establishment Act, can conduct an investigation into an offence under the FERA stated to have been committed outside the country. The Supreme Court held as follows in paragraphs 20 and 21 of the judgment.

"The member of DSPE is a member of police force constituted under DSPE Act by the Central Government. Under DSPE Act a member of DSPE can exercise the power of investigation in the offence or offences as specified in S. 3 of the DSPE Act within Union territory. For exercising power of investigation outside Union territory, even in respect of offences specified under S. 3 of the DSPE Act, a notification extending jurisdiction in the State or States outside Union territory is required to be issued by the Central Government with the consent of such State Government or Governments. Unless such notification under Section 5 of the DSPE Act is issued, a member of DSPE cannot investigate and exercise jurisdiction under DSPE Act in respect of offence or offences specified in S.3 in a State outside the Union territory. It has already been indicated that notifications under Ss.3 and 5 have been issued by the Central Government authorizing members of DSPE to investigate various offenses including offences under FERA in a member of States outside Union territory including the State of Rajasthan.

In our view, such notification under Sections 3 and 5 of DSPE Act are necessary for the purpose of exercising powers by a member of DSPE in respect of offence or offences and in respect of areas outside the Union territory. It may however be noted here that by a general notification, members of DSPE may be authorized to exercise power of investigation in respect of offence or offences under areas as specified in the notification under Sections 3 and 5. As already indicated, although officers of Enforcement Directorate are clothed with the powers and duties to enforce implementation of the provisions of FERA, the Central Government has been authorized to impose on other officers including a police officer, power and authority to discharge such of duties and functions as may be specified by it. It is nobody's case that any notification been issued under FERA authorizing the member of DSPE to discharge duties and functions of an officer of enforcement Directorate. In our view, in the absence of such notification under FERA, a member of DSPE, despite the aforesaid notifications under Sections 3 and 5 or DSPE Act, cannot be held to be an officer under FERA and, therefore, is not competent to investigate into the offences under FERA."

It was further held by the Supreme Court that FERA is a special legislation relating to regulation of foreign exchange and enacted at a later point of time than the Delhi Special Police Establishment Act. It was further held that Section 4 and 5 of the Cr.P.C., will not come in aid of the investigation of offences under FERA by a member of the police force or an officer of the DSPE in accordance with the Criminal Procedure Code. Section 5 of the Cr.P.C. therefore, was not applicable in respect of the offences under the FERA. Finding that a separate notification under the FERA had not been issued in the said case authorizing investigation into offences under the FERA, the Supreme Court specifically held that the member of the DSPE is "not clothed with the authority to investigate offences committed outside India". After having held so, in specific terms, the Court also made an observation that "even under Section 188 of the Cr.P.C., investigation of offences committed outside India can be made only with the permission of the Central Government". It is this observation, that is being projected by the learned counsel for the accused in Cri.M.C. 4666/2008, as one warranting an inference that a Pre-enquiry investigation, in relation to an offence alleged to have been committed outside India will also require the sanction by the Central Government under Section 188 of the Cr.P.C. We are afraid that we are unable to accept the submission. In the case of CBI, Supreme Court was concerned with the authority of the officers in the CBI to investigate into an offence, involving contravention of FERA, stated to have been committed outside India. The Court construed the provisions of the DSPE Act and the FERA and specifically held that the provisions of the Cr.P.C. are not applicable to investigate of the offences under the FERA. Thus, the declaration of law made by the Supreme Court and affirmation of the order impugned before the Supreme Court was rested on the provisions contained in the FERA. In view of the observations made above, reference to Section 188 of the Cr.P.C. cannot be construed as a ratio of the judgment. In fact, the provisions of Section 188 of the Cr.P.C. were not projected for consideration before the Lordships of the Supreme Court, nor was it considered by the Supreme Court. There is a very specific affirmation made by the Supreme Court in paragraph 22 of the Judgment that FERA is a self-contained Code containing comprehensive provisions relating to investigation, inquiry and trial for the offences under the Act and the provisions of Cr.P.C. are not applicable in that regard. Observation that an investigation into an offence committed outside Indian territory may be made only with the permission of the Central Government as contained in paragraph 24 of the judgment, in the context in which the said observation was made, can only be one which was rendered in the context of investigation for offences under the Foreign Exchange Regulation Act.

We are in respectful agreement with the declaration of law made by the Bench of this Court in Muhammed. We, therefore, affirm the view that any investigation of an offence, punishable under the Indian Penal Code and alleged to have been committed outside India by an Indian citizen will not require sanction of the Central Government under Section 188 of the Cr.P.C.

2010 Crl. L. J. 730

Pratibha Pandurang Salvi & Ors.
Vs
State of Maharashtra & Anr.

(A) Criminal P.C. (2 of 1974), Ss. 260, 263, 326 – Summary trial – Procedure – Provisions of S. 326(3) are not applicable – Judge trying case under S. 260 has to complete the case himself – If case is incomplete due to transfer of Judge or for any other reason, his successor Judge has no option but to again record evidence and complete trial – Evidence recorded by one Magistrate and judgment delivered by his successor Magistrate – Is not curable irregularity but is an illegality.

In summary trial it is expected that the Judge who records the evidence should conclude the matter. This spells out justice oriented common sense. The Judge who records the evidence obviously has a first hand and direct opportunity to appreciate and evaluate the evidence. In such cases there is less chance of drawing misleading inference or conclusion. However, Section 326 enables the successor to take over the matter in continuation and he can go on with the matter from the stage where it was left by his predecessor. Chapter XXI is concise chapter of six sections from Sections 260 to 265 of the Criminal Procedure Code. Less serious matters where the offences are not punishable with death or life imprisonment for a term exceeding two years or where the value of the property which was stolen does not exceed Rs.2,000/- and some other offences which are mentioned u/s.260 of the Criminal Procedure Code are to be tried summarily. It is a speedy trial which is to be adopted by dispensing with unnecessary formalities or delay. In the summary trial the Magistrate has to follow the procedure under Section 263 of the Code which is simplified and shortened procedure of the summons case. The procedure can be described as "Bonsai" trial which has all the characteristics and the stages of the summons trial. Yet it is not as lengthy and detail as the summons case. These special powers are to be invoked and used very cautiously by the Magistrate but it is an effective tool to reduce the Court time and Judge hours in the process of justice. If a particular offence is triable summarily under chapter XXI then the Judge who records the evidence should deliver the judgment. Section 326(3) of the Code has not made applicable to the summary trials. Hence the Judge who is trying the case under Section 260; has to complete the case himself or secondly if it is incomplete then the successor has no option but to again record the evidence and complete the trial. Thus, recording of evidence by one Magistrate and passing order or deliver the judgment by the other is not curable irregularity but is an illegality.

(B) Negotiable Instruments Act (26 of 1881), Ss. 138, 143 – Criminal P.C. (2 of 1974), Ss. 263, 326 – Dishonour of cheque – Trial – Procedure – Word "may" used in S. 143 leaves option open for Magistrate to chose whether case is to be tried summarily or as a summons case – Such option is not open for trial of cases under Penal Code which are tried summarily.

Under Seciton 143 of the Negotiable Instruments Act the word used 'may' leaves option open for the Magistrate to chose whether the case is to be tried summarily or as a summons case. However, such option is not open for the matter under the Penal Code which are tried summarily under chapter XXI and in those matters all the provisions under Chapter XXI and Section 326 of the Code are strictly applicable and to be followed.

AIR 2010 MADRAS 13

Thangaraj
Vs
Ameer Hussain & Ors.

Motor Vehicles Act (59 of 1988), S. 50 – Transfer of vehicle – Accident claim – Liability of transferor to pay compensation – Offending vehicles, scooter alleged to have been transferred prior to date of accident – Though delivery note was given by transferee for taking possession of vehicle, transfer of ownership was not entered in registration certificate by Registering Authority – Held, as name of transferor appears in registration certificate as owner, he would be deemed to be owner of vehicle for all purposes – Transferor, and transferee held jointly and severally liable.

Section 50(6) of the Motor Vehicles Act is as follows:

"50. Transfer of ownership – (6) On receipt of a report under sub-section (1) or an application under sub-section (2), the Registering Authority may cause the transfer of ownership to be entered in the certificate of Registration."

A bare reading of Section 50(6) clearly points out that unless the Registering Authority causes the transfer of ownership to be entered in the registration certificate, the person whose name appears in that certificate as such an owner would be deemed to be owner of the vehicle for all purposes.

In view of the ratio laid down by the Hon'ble Supreme Court in Dr.T.V. Jose v. Chocko P.M. (2001 ACJ 2059) : (AIR 2001 SC 3939), followed by this Hon'ble High Court in S.N. Shanmugham v. Shankarlal Jain, 2003-2 LW 126 : (AIR 2003 Mad 183), this Court holds that all the respondents (including 2nd respondent herein) are liable to pay the compensation amount awarded by the Tribunal. Though it was claimed by the learned counsel for the appellant that no compensation amount was awarded under the head of loss of income, the Tribunal has awarded a compensation amount with interest at 12% per annum from the date of petition and as this Court feels that the rate of interest is high, by way of adjustment, this Court is not enhancing the compensation amount awarded by the Tribunal.

As far as the liability is concerned, this Court holds that the respondents 1 to 3 herein are jointly and severally liable to pay the compensation amount as awarded by the Tribunal. In case the compensation amount is either deposited or collected from the second respondent herein, he is entitled to recover that amount from the third respondent herein by filing execution petition in the same proceedings.

AIR 2010 ORISSA 23

Smt. Chandrakanti Das & Ors.
Vs
State of Orissa & Ors.

Legal Services Authorities Act (39 of 1987), S. 21 – Court-fees Act (7 of 1870), S. 13(2) (as amended by Orissa) – Refund of court-fee – Accident claim – Settled in Lok Adalat upon reference by Claims Tribunal – Award passed by Lok Adalat – Is executable as such notwithstanding non-payment of court-fee inasmuch as court-fee is exempted under amended provision to meet the requirements of Legal Services Authority Act – Insistence of Tribunal to pay court-fee before release of cheques deposited hled illegal and unwarranted.

Therefore, the object of the Act, 1987 is to provide free and competent legal service to the weaker sections of the society for the purpose of ensuring that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, meaning thereby that if a person is unable to pay court-fee and his matter has been settled by the Lok Adalat, he may not be required to pay the court-fees. But in Section 21 of the Act, as quoted above, it has been provided that the court-fees paid in the cases referred to Lok Adalat and settled through Lok Adalat shall be refunded in the manner provided under the Court-fees Act, 1870. Therefore, the interpretation of the same is that if a party has already paid the court-fees and his claim has been settled by the Lok Adalat, he is to get refund of the court-fees. Therefore, the plain and natural interpretation of this provision is that court-fee is exempted in the cases where the matter is settled through Lok Adalat.

At this juncture, it is also necessary to notice that under sub-rule (2) of Rule 22 of the Rules, 1960, as quoted above, it is the jurisdiction of the Accident Claims Tribunal to exempt a party from the payment of court-fees at the time of filing of the claim petition with the condition that if the claim of the parties is accepted, the party shall be liable to pay the fees exempted by the Tribunal meaning thereby that if a party has not paid the fees prescribed at the time of filing of the claim petition and the Court did not insist the party to pay the fee, it would be deemed that the Tribunal has exempted the payment of court-fee under sub-rule(2) of Rule 22 of the Rules, 1960.

Therefore, in the above circumstances, if the court-fee was exempted or deemed to be exempted at the time of filing of the claim petition and the case is referred to the Lok Adalat and an award is made by the Lok Adalat, no court-fee should be payable and in such circumstances, the proviso to sub-rule (2) of Rule 22 of the Rules, 1960 would not be applicable as the court-fee is not payable in the matters settled by the Lok Adalats. Sub-section (1) of Section 21 of the Act, 1987 provides regarding refund of the court-fees in case the same is paid by the party. But the question of refund would not arise when no court-fee was paid earlier.

The Act, 1987 does not provide any where that in case where court-fee has not been paid and the matter is settled through Lok Adalat, the party shall be insisted to pay the court-fee first and only then the award would be liable to be executed with a certificate of refund of court-fee. The Act is silent about such a situation. It only provides regarding refund of court-fees. Therefore, this provision would not be applicable where the party has not paid any court-fees at all and his matter has been referred to the Lok Adalat without insisting to pay the court-fees.

Furthermore, there may be another circumstance i.e. if an award is settled in favour of a party through Lok. Adalat and he has no money for payment of court-fees, the award would not be able to be executed meaning thereby that he will not be able to get the amount till he arranges the amount of court-fees though the same is liable to be refunded to him and, therefore, there is no sense to insist a party to arrange the court-fee and then get the award and the court-fees refunded. In such case, it will frustrate the very preamble of the Act, 1987.

2010 (1) CTC 641

Seshamma and 2 others
Vs
N.M. Haneef

Transfer of Property Act, 1882 (4 of 1882), Section 53-A – Part Performance – Plaintiff filed a Suit for permanent injunction against defendant for protecting his possession – Defendant entered into a Sale Agreement with plaintiff for sale of property – Plaintiff performed partial obligations under sale agreement – Plaintiff paid entire sale consideration of property – On part performance of plaintiff put into possession of property – Whether defendant can seek recovery of possession against plaintiff – Protection available under Section 53-A is not a sword but it can be used as a shield against defendant.

Facts: 'Z' filed the Suit for permanent injunction restraining the 'R' from interfering with his peaceful possession and enjoyment of the suit property. 'R' filed a Suit against the 'Z' seeking relief of declaration of title, recovery of possession and mesne profit. Relief of declaration was granted and recovery of possession to 'R' was denied. Suit filed by 'Z' for relief of permanent injunction was dismissed. 'R' filed an Appeal against the refusal of recovery of possession against 'Z'. Appeal filed by the 'R' was allowed. Aggrieved by the order of the Appellate Court, 'Z' filed a Second Appeal on the file of High Court.

Held: That was a case where the appellant, who sought to avail the benefit under Section 53-A of the Transfer of Property Act, 1882, failed to establish that he was ready and willing to perform his part of the contract. Therefore, this Court held in the said case that once the Suit for Specific Performance was dismissed on the ground that the appellants were not ready and willing to perform his part of the contract, the appellants cannot seek protection under Section 53-A of the Transfer of Property Act wherein also the appellant had to establish his readiness and willingness of his part of the contract. But the fact situation in this case is totally different. Here is a case where admittedly, the entire amount due and payable by the respondent Haneef was already paid by Kuppusamy Naidu to the Society. In fact, the Society had already executed a sale deed, Ex.B2 dated 6.4.1992 in favour of Haneef on payment of the entire dues to the Society by Kuppusamy. The facts and circumstances of the instant case would go to show that nothing remains to be performed by Kuppusamy Naidu and his legal heirs inasmuch as they has already performed their part of the contract as per the terms of the contract. Therefore, the observation of this Court in the aforesaid decision would not apply to the facts and circumstances of this case.

This Court in Vasantha and others v. M. Senguttuvan, 1998 (1) CTC 186, has held as follows:

"The other question that arises for consideration is whether the respondent is entitled to recover the property. Admittedly, he is the owner. The Suit for Specific Performance also stands dismissed. The Trial Court entered a finding that the appellant cannot be treated as a trespasser, not as a person in possession without consent of the owner. This finding of the Trial Court was not accepted by the Lower Appellate Court. The Lower Appellate Court held that the construction put up by the appellant was without authority and the owner's consent was not obtained. Once the Suit for Specific Performance is dismissed, the only question that arises for consideration is whether the appellant is entitled to the benefit of Section 53-A of the Transfer of Property Act. Once I hold that the plaintiff was not ready and willing to take the sale deed, even if the appellant claims the benefit of Section 53-A of the said Act, that also will have to be found against him."

This Court in Balusamy (Died) Chinna Ammal and others v. A. Kuppusamy Naicker and others, 2007 (5) CTC 600, has held that once the Suit for Specific Performance was dismissed, the only question that arises for consideration was whether the appellant was entitled to the benefit of Section 53-A of the Transfer of Property Act. It has been further held that the appellant must plea and prove that he was ready and willing to perform his part of the contract so as to enable him to retain his possession of the immovable property held under the agreement for sale. All the ingredients that are essential for specific performance should be proved in a claim under Section 53-A of the Transfer of Property Act, it has been further held.

2010 (1) L.W. 24

The Special Thasildar (LA), SIPCOT Unit, Sriperumbudur
Vs
Prema and others.

The Acquisition Officer, SIPCOT, Irrungattukottai Scheme, Sriperumpudur, is the appellant. The respective respondent/claimants are all the owners of the lands which were acquired at the instance of the appellant.

In this common judgment we cover all the appeals in which three judgments viz., the Judgment in L.A.O.P.No.1323 of 2002 with 208 cases covered by judgment dated 7.10.2005 passed by Fast Track Court IV, Poonamallee; judgment dated 30.10.2006 converning 22 cases commencing with L.A.O.P.No.88 of 2005 passed by the Additional District and Sessions Judge (Fast Track Court V), Chengalpattu; and the Judgment dated 20.12.2007 passed by the Subordinate Judge, Kancheepuram, in L.A.O.P.No.124 of 2007 etc. batch. are under challenge.

As the lands were all contiguous lands and the acquisition proceedings were common in respect of the lands covered by the above three judgments, we propose to pass this common judgment.

i) As far as the judgment dated 7.10.2005 passed in L.A.O.P.No.1323 of 2002 etc. batch, is concerned, while the Acquisition Officer fixed the value at Rs.300/- per cent, the Reference Court enhanced it to Rs.3,500/- percent with 30% solatium.
ii) In the judgment dated 30.10.2006 passed in L.A.O.P.No.88 of 2005 etc. batch, while the Acquisition Officer fixed the value at the same rate viz. Rs.300/- per cent, the Reference Court enhanced it to Rs.4065/- with 30% solatium and other additional benefits.
iii) In the judgment dated 20.12.2007 in L.A.O.P.No.124 of 2007 etc. cases, while the Acquisition Officer fixed the value at Rs.300/- per cent as in other cases, the Reference Court enhanced it to Rs.4900/- per cent with 30% solatium etc.

The following issues arise for consideration:-
1) What is the market value to be fixed for the purpose of working out the compensation?
2) To what relief the claimants are entitled?

In all the three judgments, while rejecting the value of the data land, respective Reference Courts had taken the value of sale deed dated 9.9.1994 in respect of sale of dry land of one acre and 48 cents situated in Survey No.105/50. It is relevant to note that the various lands acquired at Irrungattukottai village are all situated in Survey NOs.99 to 170 and Survey No.105/15 was also one of the lands covered by the acquisition.

As far as development charges are concerned in the first batch of cases decided in L.A.O.P.No.1323 of 2002 etc. on the file of the Additional District and Sessions Judge, Fast Track Court NO.IV, Poonamallee, the Reference Court applied 43% towards development charges and deducted it from the value of the land as per Ex.C.2. After deducting the development charges, the Reference Court fixed the land value at Rs.3,500/- per cent. In the second batch of cases, the Reference Court deducted development charges at 40% of the value of the land under Ex.C.2 dated 9.9.1994. On that basis it worked out the cost of the land at Rs.4,065/- per cent. In the third batch of cases, viz., judgment dated 20.12.2007 passed in L.A.O.P.No.124 of 2007 etc., the Reference Court deducted 20% towards development charges. On that basis it arrived the value of the land at Rs.4,920/- and rounded it to Rs.4,9000/- per cent.

When we consider the submissions of learned Special Government Pleader as well as learned counsel for the respective claimants, we find that the consideration for fixing the value of the land by the Reference Court was restricted to the data land covered by Ex.RB1 dated 6.2.1996 and the claimants document covered by Ex.C.2 dated 9.9.1994. In so far as Ex.RB1 is concerned, the said lands were situated in Survey Nos.122 and 123, and the date of sale was on 6.2.1996. The extent of land sold was 4.11 acres. The total sale consideration was Rs.1,23,300/- which worked out to Rs.300/- per cent. It is no doubt true that the said Ex.RB1 was contemporaneous document which came into existence at the same time when the acquisition came to be made viz. 27.9.1996. As far as Ex.C.2 is concerned, the said sale deed was dated 9.9.1994 and the property was situated in Survey No.105/15 and the extent of land conveyed under the said document is 1 acre and 48 cents. The comparative consideration of the above referred two documents shows that Ex.C.2 is two years prior to the acquisition itself and the extent was not a small area. We have to keep in mind the acquisition was made by invoking emergency provisions of the Land Acquisition Act. We also perused Ex.C.2 and that was a sale by an individual in favour of a Company. In fact, there is no indication in the said document that the sale was as between relations or the vendor and the purchaser were in any way connected with each other. There is also no allegations at the instance of the Land Acquisition Officer as to any clandestine deal in the execution of the said document or the transaction. In such circumstances, there is absolutely, no scope to hold that the said document was not genuine in order to exclude the same from consideration. As far as Ex.RB1 is concerned, even though the said document is of the relevant year 1996 itself, it was larger in extent. If genuine sale deed which came into existence two years prior to the acquisition, reveals the sale value at a sum of Rs.6,150/- per cent, there is no reason to discard the same for the purpose of arriving at the value of the lands which came to be acquired. The only point which was argued against the said document was that the concerned Survey No.105/15 was located just abutting the National Highway and therefore, the value of the land would have been on the higher side. On that score reliance placed upon the said document cannot be rejected. At best while taking the said value and apply the same in respect of acquisition of all other lands in that block is made, the Reference Court should have applied the principle of moderation by making a reasonable percentage of deduction in the value so that there can be no adverse interest either as against the land owners or the Acquisition Body. Such a moderation on the value of the land under Ex.C.2 will be necessitated, in as much as, the total acquisition in that block was 1829 acres. Therefore, when the land covered by Ex.C.2 was abutting the National Highway, the land situated at the far end of the same block which was subject matter of acquisition would not have fetched the very same price. The perusal of the judgment disclosed that as between the land covered by Ex.C.2 and the far end of acquired lands, the distance was ranging from 1 to 4 Kilometres.

Taking note of the above facts into consideration, we are of the considered view that reduction of 15% on the value of the land as per Ex.C.2 would meet the ends of justice.

In the first place, it will have to be stated that on the side of the claimants except stating that the lands were all abutting the National Highways, no other submission was made relating to any other development. Mere reference to certain lay out formed in and around the acquired land by itself, cannot be held to have developed the area fro the purpose of assessing the development charges to be deducted. Admittedly, the acquired lands are 34 kilometres away from the City of Madras. The lands were all barren at the time of acquisition. The evidence let in on the side of the Requisitioning Body disclosed that every other development came to be made after the acquisition, viz., laying of roads, street lights, water supply, drainage facility, power supply, communication system, etc. Therefore, this is not a case where the normal Rule of deduction of 33-1/3% can be applied. Having regard to the factors referred to above, we are convinced that the reduction of 43% as made by the Court below in the first set of cases in the order dated 7.10.2005 in L.A.O.P.No.1323 of 2002 etc. batch by the Additional District and Sessions Judge (Fast Track Court No.IV), Poonamallee, is perfectly justified. Since we have found the said conclusion justified, on the same line of reasoning, development charges fixed in the other set of orders namely, one covered by order dated 30.10.2006 in L.A.O.P.No.88 of 2005 etc. batch by the Additional District Judge, Fast Track Court V, Chengalpattu, and the third set of cases covered by the judgment dated 20.12.2007, by the learned Subordinate Judge, Kancheepuram in L.A.O.P.No.124 of 2007 were all to be uniformly fixed at the rate of 43% by way of development charges. Therefore, when we apply the said percentage namely, 43% by way of development charges on the land value of Rs.5,227.50 it works out to Rs.2,247.80. After deducting the said development charges, the value of the land works out to a sum of Rs.2,979.70 which can be rounded up to sum of Rs.3,000/- per cent.

To sum up in the result, all the appeals are partly allowed as indicated below:-

a) the land value in all appeals are fixed at Rs.3,000/- per cent with 30% solatium.
b) the claimants are entitled to an additional amount of 12% per annum, from the date or notification issued under Section 4(1) of the Land Acquisition Act, till the date of Award of the Referring Officer, or taking possession of the land, whichever is earlier;
c) the claimants are entitled to 9% interest for the first year from the date of taking possession of the land and 15% for every subsequent year, on the amount calculated as market value till the date of deposit;
d) Any excess amount deposited, after satisfying the above award, is permitted to be withdrawn by the appellant in all the appeals.
e) Learned Special Government Pleader (AS) and learned counsel appearing for SIPCOT shall be entitled to separate fees fro each of the Appeals;
f) there shall be no order as to costs.
g) Consequently, connected pending miscellaneous petitions are closed.

<u>2010 (1) L.W. 32</u>

A. Kovilpillai Nadar
Vs
Arulmighu Kailasanathasamy Devasthanam and others.

The first defendant is the appellant. The second appeal is preferred against the judgment and decree dated 08.01.1997 made in A.S.No.109 of 1994 on the file of the learned Subordinate Judge, tuticorin, reversing the judgment and decree, dated 16.02.1984, made in O.S.No.30 of 1993, on the file of the learned Additional District Munsif, Tuticorin.

The suit is filed for a declaration, decalring that the plaint schedule mentioned building is a trust property and fro a mandatory injunction and recovery of possession. The suit is filed by the Executive Officer, 'Arulmighu Kailasanathasamy Devasthanam', Pasuvanthanai Village.

The brief facts of the case are as follows:-

The suit property, the 'Kalmandapam' and 'Nandavanam' of Pasuvanthanai Village is situated on the North Ratham Street. Every year the 3rd day of Tamil month of Chitrai, the second defendant and her husband used to do service to the deity of the plaintiff's temple. On that day, the deity used to be taken to the 'Kalmandapam' and the second defendant and her husband used to conduct 'Abishegam', 'Neivethiam' and 'Deeparadhana' and thereafter, the deity used to be taken to the temple. The second defendant misgrated to Madurai and the first defendant is the resident of Pasuvanthanai Village and he knows that such service is being conducted on the dedication of the suit property. However, the second defendant had executed a sale deed in favour of the first defendant has been trying to demolish the

‘Kalmandapam’ and put up shops in the suit property and therefore, the plaintiff is constrained to file a suit for declaration and for recovery of possession.

The case of the defendant is that the suit property is an Inam property and the possessor viz., the second defendant was given title to the property and she has an alienable right. It is also contended that the ‘Kattalai’ is only a personal service. I disagree with the appellant for the simple reason that the suit property itself is ‘Kalmandapam’ with vacant site. The description in the records would show that the vacant site is a ‘Nandavanam’ Though there are some tax receipts to show that the building thereof was assessed for tax, it is admitted that the ‘Kalmandapam’ was in existence and the deity used to be taken there for ‘Abishegam’ and ‘Aradhana’. Obviously, the expenses for such service is only from the property. In that case, it is an Endowment as defined under Section 6(17) of the HR & CE Act. There is no proof to show that the property is only charged with service and the very purpose of presence of ‘Kalmandapam’ and ‘Nandavanam’ would show that the property is dedicated for service and it is regulated by the provisions of the HR & CE Act. Therefore, it is an endowment, as defined under Section 6(17) of the Act and coming under the provision of Section 41 and therefore, it cannot be alienated. Hence the plaintiff had established that the property is dedicated and burdened with service. Therefore, the property cannot be alienated. The substantial questions of law are answered accordingly.

2010 (1) L.W. 123

A. Srinivasan, S. Rukmani Ammal
Vs
The Tahsildar, Egmore Nungambakkam Taluk, Madras-600 031

The plaintiffs in the suit, in O.S.No.6499 of 1991, are the appellants in the present second appeal. The defendant in the suit is the respondent herein. The plaintiffs had filed the suit, in O.S.No.6499 of 1991, praying to declare that the notice, dated 3.9.1991, issued by the defendant is illegal, arbitrary and non est in law and for a permanent injunction restraining the defendant and others from, in any manner, interfering with the plaintiffs’ enjoyment of the plaint schedule mentioned property and for costs.

The trial Court had found that the defendant in the suit had been examined as D.W.1. In his evidence, the defendant had stated that notice, under Section 6 of the Tamil Nadu Land Encroachment Act, 1905, had not only be issued to be the plaintiffs, but the notices had also been issued to the various persons, who had encroached upon the properties, belonging to the Government. The notices, issued under Section 6 of the Act, had been marked as Exhibits B.1 to B24. Exhibit A.4 is an application submitted by the plaintiffs requesting that the suit property may be given to them on lease and Exhibit B.25, dated 18.9.1991, is the reply sent to the plaintiffs rejecting their request. Exhibit B.26 is the copy of the town survey field register showing that the suit property is a river poramboke.

The Trial Court had further found that the claim of the plaintiffs is that they had purchased the suit property form one Velaythuam, son of Rathnam and his family members, for a valid consideration. Thereafter, they have been in possession and enjoyment of the suit property. However, the plaintiffs had not filed any document to show as to how Rathnam had got the property. No patta had been granted, either to Rathnam or to his son, in respect of the suit property. Further, there is no evidence to show that they had purchased the property from some one else. The plaintiffs had claimed that they had purchased the suit property only because the said property had been in the possession of the plaintiffs’ vendors. However, a document had been marked, as Exhibit B.28, to show that one T.K. Murugesan and others were in occupation of the suit property, having encroached upon the same.

The trial Court had found that even though the plaintiffs had claimed title over the suit property based on the sale deed, marked as Exhibit A.1, the plaintiffs had not shown that a patta in respect of the suit property had been issued to them. Therefore, the sale deed, marked as Exhibit A.1, cannot vest any right or title in respect of the suit property with the plaintiffs. Therefore, the plaintiffs cannot ask for the reliefs, as sought for in the suit, against the government, without having any right or title in respect of the suit property.

The trial Court had further found that the plaintiffs had admitted that the second item of the suit schedule mentioned property belongs to the Government. Therefore, the plaintiffs cannot claim any right in the property without obtaining the patta or any other document granting them certain rights in the said property. In such circumstances, the plaintiffs cannot claim any right in respect of the suit property against its rightful owner, namely, the Government. Even though the plaintiffs had admitted that the suit property belongs to the Government, they had not impleaded the Government as a party in the suit. The suit had been filed only against the Tahsildar, who had issued the notice against them, under the provisions of the Tamil Nadu Land Encroachment Act, 1905. Therefore, the suit is not maintainable due to the reason of non-joinder of the necessary party, namely, the State Government.

The first appellate Court had also noted that it is the case of the plaintiffs, as well as the defendant, that item No.1 in the suit schedule mentioned property has been classified as “Grama Natham”. Since the plaintiffs had encroached upon the Government property, an eviction notice marked as Exhibit A.3 had been issued to them, under the provisions of the Tamil Nadu Land Encroachment Act, 1905. The first appellate Court had also held that the plaintiffs’ second item of the suit schedule mentioned property is a poramboke land. However, Exhibit A3 notice had been issued to the plaintiffs by the defendant for both the two items of the plaint schedule mentioned property. Even though the plaintiffs had claimed that they had purchased the first item of the suit scheduled mentioned property from velayutham and others, who were in possession and enjoyment of the property, having obtained the same from his father, Rathinam, under a settlement deed, marked as Exhibit A.5, they had not shown any other documentary evidence to show that the plaintiffs’ vendor had valid title in respect of the suit property.

By appreciating the evidence on record, the first appellate Court had come to the conclusion that the plaintiffs had admitted that the properties shown in the plaint schedule 1 and 2 are belonging to the Government. However, the plaintiffs, who had claimed that they had purchased the property from their vendors, based on the fact that their vendors had been in possession and enjoyment of the said property, had not proved their title in respect of the suit property, by sufficient evidence. The plaintiffs had stated that they had purchased only the first item of the suit property from their vendors, who had been in possession and enjoyment of the said property and therefore, they are having a valid title in respect of the first item of the suit schedule mentioned property, However, the plaintiffs had clearly admitted that item 2 of the schedule mentioned property is a poramboke land. In such circumstances, the first appellate Court had come to the conclusion that the plaintiffs had not substantiated their claim that they have a valid title in respect of the first item of the suit schedule property. Further, in view of the fact that the plaintiffs had admitted that the second item of the suit schedule mentioned property is a poramboke land, the plaintiffs are not entitled to the reliefs sought for by them in their suit, in O.S.No.6499 of 1991.

The first appellate Court had also found that the plaintiffs had not followed the provisions of Section 79 and Order 27 Rule 5 A of the Civil Procedure Code, by issuing the necessary notice to the defendant before filing of the suit. The First appellate Court had also held that the plaintiffs had not availed the alternative remedy provided under the provisions of the Tamil Nadu Land Encroachment Act, 1905. Further, the Government, which is a necessary party, had not been impleaded in the suit, as a defendant. In such circumstances, the first appellate Court had confirmed the findings of the trial Court, while dismissing the appeal, by its judgment and decree, dated 31.1.1995, made in A.S.No.197 of 1994.

Aggrieved by the judgment and decree of the first appellate Court, the plaintiffs had filed the present second appeal. The second appeal had been admitted by this Court on the following substantial questions of law:

“1. Whether the lower appellate Court has erred in not considering Exs.A.10, A.11 and A.12 and the admission of D.W.1, while considering whether the suit first item which is admittedly Grama Natham, as Government property?

2. Whether the Courts below ought to have followed 1959 II MLJ, 513, which holds that Grama Natham is not Government property?

3. Whether the lower appellate Court factually erred in observing that the plaintiffs admitted that suit item No.1 belongs to Government?

4. Whether to the present case Order 27 Rule 5A C.P.C. would apply?"

From the evidence available on record, it is clear that the plaintiffs had admitted that the suit property belongs to the Government. Therefore, the Courts below had rightly come to the conclusion that the suit filed by the appellants is not maintainable and that the reliefs, as prayed for by the appellants, in the said suit, cannot be granted.

In view of the submissions made by the learned counsels appearing on behalf of the appellants, as well as the respondent and on a perusal of the evidence available on record and in view of the decisions cited by the learned counsel appearing for the appellants, this Court is of the considered view that the Courts below had erred in denying the reliefs prayed for by the appellants, in their suit, in O.S.No.6499 of 1991. In the written statement filed by the defendant, he had admitted that item No.1 of the suit schedule mentioned property is classified as 'Gramanatham'.

Further, from the decisions cited supra, it is clear that 'Gramanatham' cannot be considered, ipso facto, as Government property. Once it is found that item No.1 of the suit schedule mentioned property is classified as 'Gramanatham', it should be held that it does not belong to the Government. Therefore, there can be no doubt that the defendant cannot invoke the provisions of the Tamil Nadu Land Encroachment Act, 1905. As such, the notice issued by the defendant, under Section 7 of the Tamil Nadu Land Encroachment Act, 1905, is invalid in the eye of law. Hence, there is no necessity to implead the Government as a party to the suit, especially, since the appellants had not filed the suit for declaration of their title, in respect of the suit property. Consequently, Section 79 of the Act would not be applicable to the present case. In respect of item No.2 of the suit schedule mentioned property, there is no serious contest from the side of the appellants to show that they have prescribed title, by way of adverse possession, as claimed by them.

The appellants had not shown sufficient evidence to support their claim that they have prescribed title in respect of the said property, by way of adverse possession. Once it has been admitted by the appellants that item No.2 of the suit schedule mentioned property is a poramboke land, the defendant would be entitled to invoke the procedures prescribed, under Section 7 of the Tamil Nadu Land Encroachment Act, 1905.

Accordingly, the judgment and decree of the courts below are set aside, insofar as it related to item No.1 of the schedule mentioned property. As such, the suit, in O.S.No.6499 of 1991, is decreed insofar as it related to item No.1 of the suit schedule mentioned property. However, the notice issued by the appellants, in respect of the item No.2 of suit scheduled mentioned property, cannot be held to be invalid in the eye of law. Hence, the suit is dismissed, insofar as it relates to item NO.2 of the suit schedule mentioned property, by confirming the judgment and decree of the courts below. Accordingly, the second appeal stands partly allowed, as stated above. No costs. However, it is made clear that the declaration of the notice, dated 3.9.1991, issued by the defendant in the suit O.S.No.6499 of 1991 would not, in any way, prevent the concerned authorities to take appropriate action against the plaintiffs in the said suit, in the manner known to law.

2010 (1) L.W. 170

Thirumalai ammal & 2 others
Versus
Mrs. Sakuntala Ammal & 5 others

C.P.C., Section 151, Order 1, Rules 9,13/ Additional grounds/Non-joinder of parties, Effect of, in partition suit.

Respondents 1 and 2 filed the suit for partition and separate possession – A preliminary decree was passed against which Petitioners preferred appeal – They filed an application under Section 151 of CPC praying the Court to permit them to raise additional grounds in the appeal that the plaintiffs filed the suit without impleading the defendant's daughters and that the suit is liable to be dismissed on the ground of non-joinder of parties.

Held: When it is unearthed that some other co-sharers or persons interested in the properties are also available, without whose presence, no final adjudication could be made in a lis, then it is matter fro consideration to bring them to the array of parties – Every co-owner in a joint family property has interest in every infinitesimal particle of the property covered by a partition suit. Petitioners are entitled to raise additional grounds as to non-joinder of parties in the appeal.

The petitioners are defendants 1,3 and 4 in O.S.No.4086 of 1997 on the file of the City Civil Court, Madras. The respondents 1 and 2 and one Gowri filed the said suit for partition and separate possession. A preliminary decree was passed in the suit in favour of the plaintiffs. Hence, the petitioners preferred appeal in A.S.No.232 of 2004 on the file of the V Additional Judge, City Civil Court, Chennai.

2. Pending the hearing of the said appeal, they filed C.M.P.No.2320 of 2005 under Section 151 of CPC praying the Court to permit them to raise additional grounds in the appeal. In the affidavit filed by these petitioners, it is stated as follows:-

2.1. The plaintiffs filed the suit without impleading the defendant's daughters. The petitioner is not all aware of the legal proceedings. she met her Counsel last week to prepare the documents and in the course of the conversation, she mentioned about her daughters. Then only, her Counsel came to know that they were not impleaded in the suit. It is stated that Lalitha, Kalyani and R.Padmavathy are the daughters of the petitioner. In a suit for partition, all the co-sharers must be impleaded and on the ground of non-joinder of parties, the suit is liable to be dismissed. She had not raised plea either in the written statement or in the grounds of appeal. Hence, she may be permitted to raise the plea by way of additional grounds of appeal that the suit is liable to be dismissed on the ground of non-joinder of parties, namely, her daughters above-mentioned.

3. In the counter filed by the respondents / plaintiffs, it is alleged as follows:-

3.1. The partition suit was filed by the legal heirs of one P.C.Shanmuga Achari against the defendants 1 to 4 in respect of the suit properties, which had been jointly purchased and each of them having half share. In respect of half share of the said P.C.Shanmuga Achari, the suit properties were bequeathed in favour of the plaintiffs. Therefore, after notice, on 04.12.1995, to the defendants, the suit was filed for partition. The present allegation that the daughters were also available was not pleaded, on the earlier point of time. It is false to state that the petitioner is not aware of the legal proceedings. The application is intended only to delay the disposal of the appeal and hence, the same may be dismissed.

4. The learned V Additional Judge, City Civil Court, Cheenai, has dismissed the application by observing that the respective claims of the parties have been settled in the preliminary decree passed by the trial Court and none of the questions settled by the preliminary decree will be allowed to be re-agitated on the ground that the persons now sought to be impleaded were not before that Court at the time of passing of preliminary decree. It is not denied that the first plaintiff is the wife of Munusamy Achari and their daughters are Lalitha, Kalyani and R.Padmavathy. It is true that the present plea as to non-joinder of necessary parties was not raised as a defence by these petitioners in the suit proceedings. It is also true that the rights of the parties to the suit have been ascertained by means of preliminary decree. But the fact remains that the three daughters of the first plaintiff, who are very much available in the family were not impleaded in the suit, even though the plaintiffs might have had knowledge. It is not their case that they do not know about the existence of other heirs of Munusamy Achari.

5. The findings of the trial Court that the rights of the parties settled in the preliminary decree may be correct. But when it is unearthed that some other co-sharers or persons interested in the properties are also available, without whose presence, no final adjudication could be made in a lis, then it is the matter for consideration to bring them to array of the parties. It is well settled law that in a partition suit all the parties have to be presumed to be plaintiffs. When one of the parties to the suit, namely, the first defendant, even if she comes forward without the present plea of non-joinder of parties, the Court has to bear in mind that in the absence of other co-sharers in future, there might be multiplicity of proceedings. It cannot be foreseen now, whether the other co-sharers would emerge on a future occasion with a proceedings to agitate their claims in the suit properties so as to disturb the terms of preliminary decree and the effect of final decree which would culminate in the actual division and then physical possession of the properties in favour of the respective parties.

6. It is also cardinal principle of law that every co-owner in a joint family property has interest in every infinitesimal particle of the property covered by a partition suit. It is not denied that the three daughters are not co-sharers. The only objection for this petition projected by the respondents is that the plea of defendants was not raised in the written statement or in any of the earlier proceedings to the preliminary decree. However, it would not be an embargo for the other co-sharers to put forth their claim. It is also not stated by the respondents that the daughters had knowledge about the suit proceedings.

7. In case, if this petition is allowed by the Court, it is for the appellate court to decide the plea of non-joinder of parties as per the merits of the case as well as the contention of the both parties. This Court is of the considered view that presently the petitioners are entitled to raise the additional grounds as to non-joinder of parties in the appeal and the nature of further course of proceedings will be decided by the appellate Court in accordance with law. Hence, the order challenged before this Court call for interference by this Court which is liable to be set aside and accordingly, it is set aside.

In fine, this civil revision petition stands allowed. Consequently, connected M.P. is closed. No costs.

<u>2010 (1) L.W. 172</u>

Maanvizhi (a) Mana Vijie
Vs
Venkatachalam (a) Vingudasalam & 4 others

The appellant claiming herself to be the daughter of respondents 1 and 2 and the sister of respondents 3 to 5, filed the suit for partition to divide the suit properties into five equal shares and for allotment of one such share in her favour.

The suit claim was resisted by the first respondent, contending that the appellant had no right to claim for partition, in as much as the parties to the suit being domiciled at Pondicherry, there was no question of any right in the appellant to claim for partition, that the first respondent/first defendant, who is the legitimate son of his father Kesava Gounder, in whose name the properties originally stood, is alive and therefore there was no scope for considering the claim for partition at the instance of the appellant.

The suit came to be filed in the year 1995. The learned trial Judge framed as many as seven issues.

After hearing learned counsel for the appellant as well as Mr.R. Subramaniam, learned Senior Counsel for respondents, we are of the considered opinion that the conclusions of the trial Court on the issue Nos.2 and 3 would be sufficient to dispose of the appeal. The said issues which arise for consideration even in this first appeal are as under:-

1) Whether the plaintiff and defendants 3 to 5 are the legitimate children of defendants 1 and 2?
2) Whether the defendant No.1 and his father Kesava Gounder constituted a joint family under Mithakshara Hindu Law? If so, whether the suit properties were the joint family properties?

It would be worthwhile to state the legal position relating to the right of a Hindu domiciled in Pondicherry, who claims any right on the basis of devolvement of ancestral property. In the judgment of a Division Bench of this Court in the case of Viswanathan Vs. Savarimouthurayan, reported in 2004 (4) M.L.J. 229 = 2004-2-L.W.259, the legal position has been directly set out in paragraph No.10 which reads as under:

"The learned Judge in the decision in Ramalingam v. Manicka Gounder (1980 (1) M.L.J., 350 = (1981) 94 L.W. 36), has held as follows:

"10. In the event, I think, it would be proper to hold that under the Hindu Law as in vogue in Pondicherry all properties held by a father in a joint family are his absolute properties, whatever might be their origin or their modes of acquisition, and all of them devolve on his death in accordance with the law which governs succession to a male Hindu's absolute estate. This was the law as administered in Pondicherry when the Hindu Succession Act, 1956 came to be extended to that territory in 1963."

When we are clear about the legal position, the only other question to be examined is whether the parties herein are the domicile of Pondicherry. In that context, when we peruse the judgment of the trial Court on Issue No.3, in paragraph No.10, the Birth Certificate of the father of the first respondent viz., Kesava Gounder under Ex.B.1, has been dealt with, which disclosed that the said Kesava Gounder was born in Pondicherry as the son of Mancika Gounder. The very same document also reveals that Kesava Gounder's father Manicka Gounder was the person domiciled in Mangalam village, Villianur Commune, Pondicherry. The said Ex.B.1 came into existence in the year 1909. Though the appellant herein claimed that the first respondent and his ancestors hailed from Pudukuppam, Anumandai, Tamil Nadu, there was absolutely no iota of evidence in support of the said claim. On the other hand, Ex.B.2, the Birth Certificate of the first respondent disclosed that he was also born in Pondicherry. There was another document Ex.B.6 which is the Marriage Invitation of one of the sons of the first respondent, by name, Adhimoolam with Saroja and Ex.B.8 is Voter's Card relating to the year 1995, wherein the anes of the first respondent, second respondent, Andal Ammal mother of the first respondent and the names of the first respondent's sons Adhimoolam, Kulasekaran and Saroja are noted, which all disclose that they were domiciled in Pondicherry. Ex.B.9 is the Voter's list for the year 1976 relating to Odiampet, in which, the name of the first defendant is shown. Death Certificate of Kesava Gounder, viz. Ex.B.28 which again confirms the domicile of the first respondent and his forefathers.

Having regard to such overwhelming evidence placed before the trial Court in support of the stand that the family of the first respondent belongs to Pondicherry and not to the State of Tamil Nadu and applying the law relating to the Hindu woman in the State of Pondicherry, as set out in the legal position, which prevailed as on the date, there can be no two opinion as to the eligibility of the appellant to claim for partition. Consequently, the rejection of the same by the learned trial Judge, cannot be found fault with.

<u>2010 (1) CTC 765</u>

B.S. Adityan and others
Vs.
B.Ramachandra Adityan @ B.R. Adityan and others

Facts: Four persons sought leave under Section 92 of the code of Civil Procedure for filing suit in respect of a trust. Three other persons claiming to be interested in the affairs of the trust sought to implead themselves at the stage of grant of leave. One out of the three persons did not pursue his Application to implead and other two pursued the same. The four persons who sought leave expressed no objections to implead the other two in the Application for the grant of leave. The defendants alone objected to the same. The Division Bench granted leave to the four persons to file the Suit under Section 92, CPC and also allowed the Applications filed by other two persons to implead themselves. Two persons had pleaded that they were vitally interested in the Suit as they apprehended that the original plaintiffs may at a later stage fail to pursue the suit. The order of Division Bench was upheld by the Supreme Court. The four persons alone filed the Suit without adding the other two persons as co plaintiffs. Contention of the original plaintiffs that the other two could always be added as co-plaintiffs was rejected. Plaint was held to be rejected as one not maintainable even at the threshold.

Held: From the above decisions, it would be quite clear that when the sanction is given to number of persons, the Suit must be filed by all since it was a joint authority. In the case on hand, since the Applications filed by the applicants in A.Nos. 215 and 1901/94 seeking impleadment in A. No.33/94 were allowed whereby permission was granted to them to implead themselves in the said proceedings, it would be quite clear that they were all joined in the proceedings seeking for leave. Once the leave was granted in their favour also without adding them as parties or co-plaintiffs, the Suit filed by the other four plaintiffs was only incompetent, and thus the institution of the Suit by the plaintiffs 1 to 4 was not in conformity with the order of the Division Bench to implead the applications in A.Nos.215 and 1901/94 as parties to the proceedings in A.No.33/94. Hence, the institution of the Suit without adding them as parties at that stage itself was defective, incompetent and could not be maintained.

2010 (1) CTC 799

Kokila Kaliamoorthy
Versus
K.Mani and others

Facts: Plaintiff filed a Suit seeking mandatory injunction directing the defendant to demolish the unauthorized construction and also for permanent injunction restraining the defendant from putting up any unauthorized construction. Further direction has also sought against the CMDA not to sanction any plan or approval in the process of the regularization. Trial Court decreed the Suit in favour of plaintiff. Defendant preferred the First Appeal before the First Appellate Court. Appeal allowed in favour of Defendant. Aggrieved the judgment of First Appellate Court unsuccessful plaintiff filed S.A. under Section 100 of CPC on the file of High Court.

Held: Of course, there is a small deviation measuring 4'10" x 8'3" in the rear portion of the superstructure built by the first Defendant as per the report filed by the 6th respondent before the Court. The said report is attacked on the ground that the official, who, in fact, visited the premises, has not subscribed his signature. We cannot expect the Commissioner of Corporation of Chennai to go and visit a small disputed portion and file a report. He has every authority to employ his own subordinate official to discharge such a function to enable him to file a report before the Court. Secondly, it is found that no direction has been issued to the Commissioner of Corporation of Chennai to go over to the disputed premises for personal inspection and file a report. Therefore, the report submitted by the Commissioner of Corporation of Chennai based on the personal inspection done by his subordinate official is proper.

[Para 26]

Of course, the plaintiff has every right to question the construction put up by the first Defendant only when she establishes that her right to enjoy her property was in any way affected by such construction put up by the first Defendant. The First Appellate Court has rightly held that the claim for easementary right for light and air was not established by the plaintiff. Under such circumstances, the plaintiff cannot question the wisdom of sanction of the plan by the Corporation or MMDA or the construction put up by the first Defendant in his premises.

Admittedly, a different shape of construction has now been put up by the plaintiff demolishing the erstwhile construction in her premises. The cause of action to lay a Suit for easementary right of light and air would survive only if the plaintiff establishes that the new construction put up by the plaintiff also does not receive air or light. As already pointed out by this Court, PW has categorically admitted that he construction now in existence in the premises of the first defendant does not affect her right. No evidence has been let in by the plaintiff to establish that the light and air for the newly put up construction was also affected.

<u>Compromise Memo</u> –. Validity of – Validity of Compromise not signed by parties to lis – Held, compromise memo is only a trash which cannot be acted upon by Court of law

Coming to the Compromise Memo now sought to be introduced as additional evidence before this Court, it is found that it was only the first respondent, who had mooted a compromise and having signed the Compromise Memo, circulated the same to the plaintiff. It is to be noted that the said Compromise Memo was not signed by the other respondents who were parties to the Suit. It is also seen that the said Compromise Memo was not signed by the plaintiff. When a Compromise Memo was not signed by both the parties who are concerned with the issue arisen in the lis, the said Compromise Memo is only a trash which cannot be acted upon by the Court of law.

<u>2010 (42) PTC 1 (Del.)</u>

Microsoft Corporation & Anr.
Vs
Dhiren Gopal & Ors.

Copyright Act, 1957

Section 57 – Violation of the copyright – Using pirated/illegally-copied software of the plaintiffs at their offices/work place – Affidavits which are filed in support of their clients on receipt of professional charges should not be given much weight as the affidavit are always in support of their client and may be far from truth – Investigators are not from the field of computer softwares or even computer science – Both seem to have no knowledge of piracy or copying of software – Such affidavits cannot be relied.

Civil Procedure Code, 1908

Order 26 Rule 9 – Appointment of Local Commissioner – Sealing of computers – Once an ex-parte injunction is granted by the Court, getting an ex-parte injunction vacated or a decision on the application on merits by the court becomes a Herculean task for the other party – In those cases (of alleged copyright infringement) where computers are sealed, adopting a blackmailing tactics by the plaintiff and he defendants, in order to restart their business and lessen their losses, start succumbing to the pressure – Appropriate method is a directin for preparation of mirror images of the hard disc and get such mirror images sealed on the spot so that the plaintiffs are not able to use the database of the defendants either for blackmailing the defendants or for any other purpose and the sealed mirror images are produced in the court and inspected in the court by experts of the plaintiffs to find out if there was an infringement or not – One cannot be given liberty to choose a court of his liking because of his money power – court cannot act as an investigating agency for a party – investigative suits are filed by a party on mere suspicion – plaintiff should be asked to deposit costs fro the defendant in the court so that in case, after notice it is found that the plaintiff instituted a false suit, he can be burdened with cost and the defendant can be compensated.

These four suits have been filed by Microsoft Corporation against four different defendants alleging violation of the copyright on the ground of suspicion that the defendants were using pirated/illegally-copied software of the plaintiffs at their offices/work place. The suspicion is based on the investigation done by an alleged independent "investigator" engaged by the plaintiffs, who through telephonic conversation with the employees of the defendants estimated the number of computers that may be installed at the office/work place of the defendants and thereafter matching the number of licenses of the software of the plaintiffs lawfully procured by the defendants. The plaintiffs also visited websites of the defendants to know the nature of work being done by them and the kind of software being used by the defendants and the claims being made by the defendants. On tbe basis of website information and the database maintained by the plaintiffs regarding sale of its licensed software and the assessment made by the investigator of the number of computers installed, the plaintiffs suspected that there was every probability of the defendants using pirated software of the plaintiffs committing infringement of copyright of the plaintiffs. Thus, it is prayed that an ex-parte injunction should be issued restraining defendants, their agents, servants and all other persons acting on their behalf from using pirated/unlicensed software programmes of the plaintiffs in any manner to protect the copyright of the plaintiffs. Coupled with the application for interim injunction under Order 39 Rules 1 and 2 CPC, there is an application under Order 26 Rules 9 and 10 CPC seeking appointment of a Local Commissioner to visit the offices of defendants and to seize the hard discs of the computers, compact discs and other storage/replicating media installed at defendants offices with the help of technical expert of the plaintiff and to prepare an audit report/license summaries and to determine if they contain pirated, counterfeit unlicensed version and to seize and seal the computers' CPU, hard disc, compact disc and other storage/replicating media as found to contain unlicensed, pirated, counterfeit version of any of the plaintiff's softwares, returning them on superdari to defendants with a condition to produce the same before the court and directing the defendants and their employees to provide password and particulars of their computer systems.

A perusal of few Local Commissioner's reports of these cases show that invariably in all cases, Local Commissioners sealed the CPU's computers of the defendants bringing the entire business of the defendants to a standstill. There is no gain saying that once an ex-parte injunction is granted by the Court, getting an ex-parte injunction vacated or a decision on the application on merits by the court becomes a Herculean task fro the other party. Granting of ex-parte injunction along with appointment of Local Commissioner has become a routine process and deciding of applications under Order 39 Rules 1 and 2 CPC on merits after hearing the parties in such cases is a rare phenomenon. All kinds of excuses are used to seek adjournments once a party gets ex-parte injunction. This is one strong reason why the transfer of original jurisdiction from the High Court to the District Courts is strongly opposed by a lobby having vested interest because it is easier to get ex-parte injunctions in High Court and once you get ex-parte injunction, the application on merits is invariably not allowed to be decided in time and the party having ex-parte injunction starts evading arguments on merits on one or the other ground. This results in those cases (of alleged copyright infringement) where computes are sealed, adopting a blackmailing tactics by the plaintiff and the defendants, in order to restart their business and lessen their losses, start succumbing to the pressure. Moreover, when the defendants are not situated in Delhi, to contest litigation coming from Mumbai, Hydrabad, Bangalore itself becomes a source of harassment for the defendants and that seems to be a reason hat in all those cases where ex-parte injunctions are granted, specifically in alleged copyright infringement case, the suits are never contested. The contest takes place only in those cases where infringement of trade mark and design is involved and the parties are normally locally situated and are able to give a meaningful contest to the allegations of violation.

Over the time, it has become a settled law that it is discretion of the plaintiffs to value their suit for purpose of court fee and jurisdiction in cases of trade mark, copyright etc. and court cannot question the valuation done by the plaintiffs and had to entertain the suit. Thus, by paying court fee on amount of Rs.20 lac which comes to around Rs.21,900/-, all suits can be filed in Delhi High Court ignoring the District Court. Today in Delhi, the value of even one room apartment would be more than Rs.20 lac in most of the areas and if there is a suit to be filed in respect of one room apartment then suit must be filed before the High Court. It has become the choice of the advocate of the plaintiff where to file the suit. He shapes the valuation and the reliefs in accordance with the forum of intended trial. If the suit is to be filed before Civil Judge, the suit is valued accordingly and if the suit is to be filed before District Judge, it is valued accordingly and if the suit is to be filed before High Court, it is valued accordingly. Every suit relating to properties in Delhi can be filed on original side of the High Court, if the plaintiff so desires. It only seems that trial time taken in the High Court on the original side and the fees of advocates have deterred many of the plaintiffs from resorting to the High Court (Original side). However, when the jurisdiction of this court was Rs.5 lac and above, all IPR cases used to be filed in High Court by paying court fee on Rs.5 lac. When the jurisdiction was raised to Rs.20 lac, these cases were transferred to District Courts and almost in every case, an application fro amendment of the suit was filed and the jurisdiction para and valuation and court fees para of every IPR suit was amended and the cases forum. If he can pay the Court fee of the High Court, he can value his suit accordingly (wherever there is original jurisdiction with the High Court) and choose the High Court as the court of original jurisdiction and if one cannot afford to pay the court fee as well as the fee of the High Court advocate, he can value the suit accordingly and choose either Civil Judge or a District Judge as the forum.

Given the present interpretation of Section 62(2) of the Copyright Act, a multinational company having its office within the same district where the cause of action arose, defendant resided and where witnesses would be there and it is convenient for the court as well as for the parties to contest the suit, may refuse to file the suit in that State court and choose a distant stand court far away from the office of defendant. Thus, on the strength of its money power it has added advantage of choosing a court of its own liking which is so far away from the defendant so that it becomes problematic and a harassment for the defendant to contest the suit itself. This has been reflected by the Division Bench in its order in **Indian Performing Rights Society Ltd.** Case (supra).

I consider that when the Constitution of India provides equality before law this equality has to be all pervasive and cannot be allowed to be diluted because of money power or lobbying power. One cannot be given liberty to choose a court of his liking because of his money power. There should be one definite court where the suit can be filed by everybody and one cannot hire the services of the court of his choice, i.e., Civil Judge, District Judge or High Court, because he can pay more court fee and advocate fee. I consider that the Legislature and the authorities, who have to act, should seriously consider of removing this anomalous situation by making appropriate amendment in Section 62(2) of the Copyright Act and other similar statutes and it should be seriously considered why the original jurisdiction should not be only with District Courts and the High Courts should be spared to del with not be only with District Courts and the High Courts should be spared to deal with the appeals, writs and related work. Today, the situation is that even the criminal appeals of those who are in jail cannot be heard and disposed of within a reasonable time because enough judges cannot be put for hearing criminal appeals while High Courts have burdened themselves with the original jurisdiction where the jurisdiction should be vested with District Courts. Even if the District Judges are not that liberal in granting ex-parte injunctions, the High Courts are there to hear appeals and can give relief in appeals where appropriate, but it should not be that if you can pay more money, you can hire a more experienced judge (High Court Judges) to decide your cases and if your cannot pay more money, you will have to go to a newly appointed judge (Civil Judge).

Be that as it may, being bound by the judicial discipline, I am bound to entertain the suits despite the fact that the most appropriate forum for filing these suits would have been the places where Microsoft has offices and defendant also has office or place or work and the cause of action of infringement also took place.

I consider that the court cannot act as an investigating agency for a party. If the investigative suits are filed by a party on mere suspicion that there may be an infringement of copyright being committed by the defendant and seeks appointment of a Local commissioner and notice to the defendant, having his office at a far of place so as to deter him from approaching the court at Delhi when the suit could have been filed at the place of defendant itself, the plaintiff should be asked to deposit costs for the defendant in the court so that in case, after notice it is found that the plaintiff instituted a false suit, he can be burdened with cost and the defendant can be compensated accordingly. The costs must commensurate with the expenses which the defendant will have to incur for coming to Delhi, staying here and engaging a counsel in Delhi and paying fee to the counsel. Fees of competent advocates in High Court of Delhi are quite high. I, therefore, consider that the plaintiff should be asked to deposit a sum of Rs.2 lac per case as costs security in the court for the defendant as a pre-condition for entertaining a suit which is investigative in nature and Delhi is deliberately chosen as a forum despite having office at defendant's place where the basis of suit is a suspicion based on a hired investigator's report, who is bound to give affidavit favourable to the plaintiff being a salaried investigator.

2010 (42) PTC 156 (Del.) (DB)

Horlicks Ltd. & Anr.
Vs
Heinz India (Pvt.) Ltd.

Civil Procedure Code, 1908

Section 20 – Specific Relief Act, 1963 – Section 41 – Doctrine of forum non convenience – if legal proceedings are initiated in a particular forum and that forum is of the opinion that there is a more convenient forum where such lis should be tried, it desists from trying the particular lis – Doctrine of anti suit injunction has no place in India regarding another domestic forum in view of the specific bar created by Section 41(b) of the said Act – Principle of forum non convenience does not apply to civil suits in India which are governed by the CPC.

The principle of forum non convenience emerged as a concept primarily applicable to a foreign forum. The important question whether it will apply to domestic forum in India governed by Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code') has given rise to the present appeals since the appellants have been non suited by the learned Single Judge applying the said principle.

The doctrine of forum non convenience which originated in Scotland and thereafter brought to England and United State of America simply put means that if legal proceedings are initiated in a particular forum and that forum is of the opinion that there is a more convenient forum where such lis should be tried, it desists from trying the particular lis. The meaning to be given to "convenience", and as to whether other parameters also come into play, is another aspect which has developed in respect of this doctrine over a period of time making its application more stringent.

The legal position arising from the conspectus of the aforesaid judgments is thus abundantly clear that the principle of anti suit injunction and forum non convenience do apply to the foreign forums/courts once the test laid down for exercise of such jurisdiction is satisfied and this legal position is prevalent in UK, USA, Australia, Canada as also in India.

The legal philosophy behind the impugned judgment is that the power under Section 151 of the said Code permits the Civil Court to apply the principle of forum non convenience, the same being in the nature of a residuary power. The learned Single Judge has thus observed that in exceptional circumstances, the court can exercise the power ex debito justitiae to prevent a proceeding from becoming vexatious or oppressive. The aforesaid line of reasoning is sought to be challenged by learned counsel for the appellants by referring to different provisions of the said Code to advance the plea that Section 151 of the said Code being in the nature of a residuary power, recourse cannot be taken to the said provision where specific provisions are contained in the said Code. The plea is based on the incorporation of the provisions under Section 16 to 20 of the said Code. The said Sections fall under the heading "place of suing". Section 16 of the said Code requires a suit to be instituted where the subject matter is situate while Section 17 refers to suits for immovable property situate within jurisdiction of different courts. Section 18 of the said Code refers to uncertainty about local limits of jurisdiction of Courts while Section 19 deals with suits for compensation for wrongs to person or movables. Section 20 of the said Code provides for other suits to be instituted where defendant resides or cause of action arises. The plea of the learned counsel for the appellants is thus that in respect of instituting a suit of the nature in the present case, the plaintiff can be guided by Section 20 of the said Code.

The crux of the issue in the present case is the applicability of the principles of forum non convenience i.e. whether the court in which the suit is filed and which would otherwise have jurisdiction under the said Code can non suit the plaintiff on the ground that there is a better situated forum to decide the matter in issue and the court where the suit is filed is forum non convenience. The learned Single Judge in the impugned judgment has taken a view that this is permissible. The contention of the respondent that the principle of forum non convenience being the other side of the coin of the doctrine of anti suit injunction and having been applied to domestic forums of the Indian courts, there could be no doubt that the principle of forum non convenience would equally apply. It would thus be appropriate to consider the issue of applicability of the doctrine of anti suit injunction to domestic forums.

Insofar as the aforesaid plea is concerned, our task is made simple in view of the lucid elucidation of the background in which such legislative change took place and the consequent legal position which emerged from the same in the pronouncement of the Supreme Court in Cotton Corporation of **India Limited v. United Industrial Bank Limited and Ors.; (1983) 4 SCC 625.** The controversy which was examined in the said judgment was set out in para 5, which is as under:

"5. A very narrow question which we propose to examine in this appeal is: Whether in view of the provision contained in Section 41(b) of the Specific Relief Act, 1963 ('Act' for short), the court will have jurisdiction to grant an injunction restraining any person from instituting any proceeding in a court not subordinate to that from which the injunction is sought? The contention may be elaborated thus: Can a person be restrained by an injunction of the court from instituting any proceeding which such person is otherwise entitled to institute in a court not subordinate to that from which the injunction is sought? The contention may be elaborated thus: Can a person be restrained by an injunction of the court from instituting any proceeding which such person is otherwise entitled to institute in a court not subordinate to that from which the injunction is sought? In the facts of the present case, the narrow question is whether the Corporation can be restrained by an injunction of the Court from presenting a winding up petition against the Bank? The High Court seems to hold that the court has such powers in view of the provisions contained in Order 39 of the Code of Civil Procedure read with Section 37 of the Specific Relief Act, 1963 or in exercise of the inherent powers of the court under Section 151 of the Code of Civil Procedure. This position is seriously contested by the appellant in this appeal."

After referring to the earlier provision and the subsequent provision, it was observed as under:

"A glance at the two provisions, the existing and the repealed would reveal the legislative response to judicial interpretation. Under Section 56(b) of the repealed Act, the court was precluded by its injunction to grant stay of proceeding in a court not subordinate to that from which the injunction was sought. In other words, the court could stay by its injunction a proceeding in a court subordinate to the court granting injunction. The injunction granting stay of proceeding was directed to the court and the court has to be the court subordinate to the one granting the injunction. This is postulated on the well recognized principle that the superior court can regulate proceedings in a court subordinate to it. It is implicit in this assumption and the language used in Section 56(b) that the could not grant injunction under Section 56(b) of the repealed Act to stay proceeding in a court superior in hierarchy to the court from which injunction is sought. But by judicial interpretation, a consensus was reached that as injunction acts in personam while the court by its injunction cannot stay proceedings in a Court of superior jurisdiction, it could certainly by an injunction restrain a party before it from further prosecuting the proceeding in other courts may be superior or inferior in the hierarchy of courts. To some extent this approach not only effectively circumvented the provision contained in Section 56 of the repealed Act but denuded it of its content. The legislature took notice of this judicial interpretation and materially altered the language of the succeeding provision enacted in Section 41(b) replacing Section 56(b) of the repealed Act while enacting Specific Relief Act of 1963. The legislature manifestly expressed its mind by enacting Section 41(b) in such clear and unambiguous language that an injunction cannot be granted to restrain any person, the language takes care of injunction acting in personam, from instituting or prosecuting any proceeding in a court not subordinate to that from which injunction is sought. Section 41(b) denies to the court the jurisdiction to grant an injunction restraining any person from instituting or prosecuting any proceeding in a court which is not subordinate to the court from which the injunction is sought. In other words, the court can still grant an injunction restraining a person from instituting or prosecuting any proceeding in a court which is subordinate to the court from which the injunction is sought. As a necessary corollary, it would follow that the court is precluded from granting an injunction restraining any person from instituting or prosecuting any proceeding in a Court of coordinate or superior jurisdiction. This change in language deliberately adopted by the legislature after taking note of judicial vacillation has to be given full effect.

It is therefore, necessary to unravel the underlying intendment of the provision contained in Section 41(6). It must at once be conceded that Section 41 deals with perpetual injunction and it may as well be conceded that it has nothing to do with interim or temporary injunction which as provided by Section 37 are dealt with by the Code of Civil Procedure. To begin with, it can be said without fear of contradiction that anyone having a right that is a legally protected interest complains of its infringement and seeks relief through court must have an unhindered, uninterrupted access to law courts. The expression 'court' here is used in its widest amplitude comprehending every forum where relief can be obtained in accordance with law. Access to justice must not be hampered even at the hands of judiciary. Power to grant injunction vests in the court unless the legislature confers specifically such power on some other forum. Now access to court in search of justice according to law is the right of a person who complains of infringement of his legally protected interest and a fortiori therefore, no other court can by its action impede access to justice. This principle is deducible from the Constitution which seeks to set up a society governed by ride of law. As a corollary, it must yield to another principle that the superior court can injunct a person by restraining him from instituting or prosecuting a proceeding before a subordinate court. Save this specific carving out of the area where access to justice may be impeded by an injunction of the court, the legislature desired that the courts ordinarily should not impede access to justice through court. This appears to us to be the equitable principle underlying Section 41(b). Accordingly, it must receive such interpretation as would advance the intendment, and thwart the mischief it was enacted to suppress, and to keep the path of access to justice through court unobstructed.

Viewed from a slightly different angle, it would appear that the legal system in our country envisages obtaining of redressal of wrong or relief against unjust denial thereof by approaching the court set up fro the purpose and invested with power both substantive and procedural to do justice that is to grant relief against invasion or violation of legally protected interest which are jurisprudentially called rights. If a person complaining of invasion or violation of his rights is injuncted from approaching the court set up to grant relief by an action brought by the opposite side against whom he has a claim and which he wanted to enforce through court, he would have first to defend the action establishing that he has a just claim and he cannot be restrained from approaching the court to obtain relief. A person having a legal right and complains of its violation or infringement, can approach the court and seek relief. When such person is injuncted from approaching the court, he has to vindicate the right and then when injunction is vacated, he has to approach the court for relief. In other words, he would have to go through the gamut over again: when defending against a claim of injunction the person vindicates the claim and right to enforce the same. If successful he does not get relief but a door to court which was bolted in his face is opened. Why should he be exposed to multiplicity of proceedings? In order to avoid such a situation the legislature enacted Section 41(b) and statutorily provided hat an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought. Ordinarily a preventive relief by way of prohibitory injunction cannot be granted by a court with a view to restraining any person from instituting or prosecuting any proceeding and this is subject to one exception enacted in larger public interest, namely, a superior court can injunct a person from instituting or prosecuting an action in a subordinate court with a view to regulating the proceeding before the subordinate courts. At any rate the court is precluded by a statutory provision from granting an injunction restraining a person from instituting or prosecuting a proceeding in a Court of coordinate jurisdiction or superior jurisdiction. There is an unresolved controversy whether a court can grant an injunction against a person from instituting or prosecuting a proceeding before itself but that is not relevant in the present circumstances and we do not propose to enlarge the area of controversy."

The innovative plea of the counsel for the respondent that perpetual injunction or interim injunction are regulated by the said Code separately and thus at least temporary injunctions can be granted was rejected by observing that the power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted and thus where final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted. The court thus concluded that court can in appropriate cases grant temporary injunction in exercise of its inherent power in cases not covered by Order 39 of the said Code but while exercising this inherent power, the court should not overlook the statutory provision which clearly indicates that injunction to restrain initiation of proceeding cannot be granted. Section 41(b) of the said Act is one such provision and in that context it was observed that the inherent power of the court cannot be invoked to nullify or stultify a statutory provision. The aforesaid judgment has not even been brought to the notice of the learned Single Judge who has passed the impugned judgment. This judgment cuts at the root of the argument of the respondent that grant of anti suit injunction in domestic forums is a settled proposition of law. If the principle of forum non convenience is the other side of the coin, as contended on behalf of the respondent, then the same would not be available in a domestic forum.

On the conspectus of the aforesaid, we hold as under:

i. The doctrine of anti suit injunction though may be applicable both in foreign forums and domestic forums in different countries has not place in India regarding another domestic forum in view of the specific bar created by Section 41(b) of the said Act as interpreted in **Cotton Corporation of India Limited v. United Industrial Bank Limited and Ors's** case (supra). It would apply only in case of a foreign forum or in a situation where an injunction is sought against a domestic court which is subordinate to the one where such an application is made.
ii. The principle of forum non convenience applies to foreign forums and Indian courts can apply the said principle vis-vis foreign forums or while exercising discretionary jurisdiction under Article 226 of the Constitution of India.
iii. The principle of forum non convenience does not apply to civil suits in India which are governed by the said Code, there being not provision under the Code for the same and recourse to Section 151 CPC is not permissible for application of the principle of forum non convenience to domestic forums especially keeping in mind that it is the other side of the coin of the doctrine of anti suit injunction. An aggrieved party can, however, approach the Supreme Court under Section 25 of the said Code.
iv. The impugned judgment of the learned Single Judge rejecting and returning the plaint cannot be sustained and is thus set aside.
v. In the given facts of the case, even otherwise, if the principle of forum non convenience had been applicable, then there was no reason not to proceed with the suits on merits.
vi. The interlocutory applications for injunction would be required to be heard on merits by the learned Single Judge and decided in accordance with law.