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IMPORTANT CASE LAWS

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SUPREME COURT CITATIONS

2010 (2) SCALE 427

Economic Transport Organization
Vs.
Charan Spinning Mills (P) Ltd. and Anr.

Factual Background:

The first respondent (also referred to as the 'Assured' or the 'consignor') is a manufacturer of the cotton yarn. It took a policy of insurance from the second respondent (National Insurance Co. Ltd, referred to as the 'Insurer'), covering transit risks between the period 11.5.1995 and 10.5.1996 in respect of cotton yarn sent by it to various consignees through rail or road against theft, pilferage, non-delivery and/or damage. The first respondent entrusted a consignment of hosiery cotton yarn of the value of Rs. 7,70,948/- to the appellant (also referred to as the 'carrier') on 6.10.1995 for transportation and delivery to a consignee at Calcutta. The goods vehicle carrying the said consignment met with an accident and the consignment was completely damaged. On the basis of a surveyor's certificate issued after assessment of the damage, the second respondent settled the claim of the first respondent for Rs. 447,436/- on 9.2.1996. On receiving the payment, the first respondent executed a Letter of Subrogation-cum-Special Power of Attorney in favour of the second respondent on 15.2.1996. Thereafter, respondents 1 and 2 filed a complaint under the Consumer Protection Act, 1986 ('Act' for short) against the appellant before the District Consumer Disputes Redressal Commission, Dindigul, claiming compensation of Rs. 447,436/- with interest at 12% per annum, for deficiency in service, as the damage to the consignment was due to the negligence on the part of the appellant and its servants. It was averred that the insurer as subrogee was the co-complainant in view of the statutory subrogation in its favour on settlement of the claim and the letter of subrogation-cum-special power of attorney executed by the Assured.

The District Forum by its order dated 8.11.1996 allowed the complaint and directed the appellant to pay Rs. 447,436/- with interest at the rate of 12% per annum from the date of accident (8.10.1995) till date of payment to the Insurer, on the basis of the subrogation. The District Forum held that the failure to deliver the consignment in sound condition was a deficiency in service, in view of the unrebutted presumption of negligence arising under Sections 8 and 9 of the Carriers Act, 1865. The appeal filed by the appellant before the State Consumer Disputes Redressal Commission, Madras, challenging the said order was dismissed on 2.4.1998. The appellant thereafter filed a revision before the National Consumer Disputes Redressal Commission in the year 1999. The National Commission dismissed the appellant's revision petition by a short non-speaking order dated 19.7.1999 which reads thus: "We do not find any illegality or jurisdictional error in the order passed by the State Commission." The said order is challenged in this appeal by special leave.

The assured entrusted the consignment for transportation to the carrier. The consignment was insured by the assured with the insurer. When the goods were damaged in an accident, the assured, as the consignor-consumer, could certainly maintain a complaint under the Act, seeking compensation for the loss, alleging negligence and deficiency in service. The fact that in pursuance of a contract of insurance, the assured had received from the insurer, the value of the goods lost, either fully or in part, does not erase or reduce the liability of the wrongdoer responsible for the loss. Therefore, the assured as a consumer, could file a complaint under the Act, even after the insurer had settled its claim in regard to the loss.

A contract of insurance is a contract of indemnity. The loss/damage to the goods covered by a policy of insurance, may be caused either due to an act for which the owner (assured) may not have a remedy against any third party (as for example when the loss is on account of an act of God) or due to a wrongful act of a third party, for which he may have a remedy against such third party (as for example where the loss is on account of negligence of the third party). In both cases, the assured can obtain reimbursement of the loss, from the insurer. In the first case, neither the assured, nor the insurer can make any claim against any third party. But where the damage is on account of negligence of a third party, the assured will have the right to sue the wrongdoer for damages; and where the assured has obtained the value of the goods lost from the insurer in pursuance of the contract of insurance, the law of insurance recognizes as an equitable corollary of the principle of indemnity that the rights and remedies of the assured against the wrong-doer stand transferred to and vested in the insurer. The equitable assignment of the rights and remedies of the assured in favour of the insurer, implied in a contract of indemnity, known as 'subrogation', is based on two basic principles of equity: (a) *No tort-feasor should escape liability for his wrong; (b) No unjust enrichment for the injured, by recovery of compensation for the same loss, from more than one source.* The doctrine of subrogation will thus enable the insurer, to step into the shoes of the assured, and enforce the rights and remedies available to the assured.

Subrogation, as an equitable assignment, is inherent, incidental and collateral to a contract of indemnity, which occurs automatically, when the insurer settles the claim under the policy, by reimbursing the entire loss suffered by the assured. It need not be evidenced by any writing. But where the insurer does not settle the claim of the assured fully, by reimbursing the entire loss, there will be no equitable assignment of the claim enabling the insurer to stand in the shoes of the assured, but only a right to recover from the assured, any amount remaining out of the compensation recovered by the assured from the wrongdoer, after the assured fully recovers his loss. To avoid any dispute with the assured as to the right of subrogation and extent of its rights, the insurers usually reduce the terms of subrogation into writing in the form of a Letter of Subrogation which enables and authorizes the insurer to recover the amount settled and paid by the insurer, from the third party wrong-doer as a Subrogee-cum-Attorney. When the insurer obtains an instrument from the assured on settlement of the claim, whether it will be a deed of subrogation, or subrogation-cum-assignment, would depend upon the intention of parties as evidenced by the wording of the document. The title or caption of the document, by itself, may not be conclusive. It is possible that the document may be styled as 'subrogation' but may contain in addition an assignment in regard to the balance of the claim, in which event it will be a deed of subrogation-cum-assignment. It may be a pure and simple subrogation but may inadvertently or by way of excessive caution use words more appropriate to an assignment. If the terms clearly show that the intention was to have only a subrogation, use of the words "assign, transfer and abandon in favour of" would in the context be construed as referring to subrogation and nothing more.

We may, therefore, classify subrogations under three broad categories:

(i) subrogation by equitable assignment;
(ii) subrogation by contract; and
(iii) subrogation-cum-assignment.

In the first category, the subrogation is not evidenced by any document, but is based on the insurance policy and the receipt issued by the assured acknowledging the full settlement of the claim relating to the loss. Where the insurer has reimbursed the entire loss incurred by the assured, it can sue in the name of the assured for the amount paid by it to the assured. But where the insurer has reimbursed only a part of the loss, in settling the insurance claim, the insurer has to wait for the assured to sue and recover compensation from the wrongdoer; and when the assured recovers compensation, the assured is entitled to first appropriate the same towards the balance of his loss (which was not received from the insurer) so that he gets full reimbursement of his loss and the cost, if any, incurred by him for such recovery. The insurer will be entitled only to whatever balance remaining, for reimbursement of what it paid to the assured.

In the second category, the subrogation is evidenced by an instrument. To avoid any dispute about the right to claim reimbursement, or to settle the priority of inter-se claims or to confirm the quantum of reimbursement in pursuance of the subrogation, and to ensure co-operation by the assured in suing the wrongdoer, the insurer usually obtains a letter of subrogation in writing, specifying its rights vis-à-vis the assured. The letter of subrogation is a contractual arrangement which crystallizes the rights of the insurer vis-à-vis the assignee. On execution of a letter of subrogation, the insurer becomes entitled to recover in terms of it, a sum not exceeding what was paid by it under the contract of insurance by suing in the name of the assured. Even where the insurer had settled only a part of the loss incurred by the assured, on recovery of the claim from the wrongdoer, the insurer may, if the letter of subrogation so authorizes, first appropriate what it had paid to the assured and pay only the balance, if any, to the assured.

The third category is where the assured executes a letter of subrogation-cum-assignment enabling the insurer retain the entire amount recovered (even if it is more than what was paid to the assured) and giving an option to sue in the name of the assured or to sue in its own name. In all three types of subrogation, the insurer can sue the wrongdoer in the name of the assured. This means that the insurer requests the assured to file the suit/complaint and has the option of joining as co-plaintiff. Alternatively the insurer can obtain a special power of Attorney from the assured and then to sue the wrongdoer in the name of the assured as his attorney.

The assured has no right to deny the equitable right of subrogation of the insurer in accordance with law, even whether there is no writing to support it. But the assured whose claim is settled by the insurer, only in respect of a part of the loss may insist that when compensation is recovered from the wrongdoer he will first appropriate the same, to recover the balance of his loss. The assured can also refuse to execute a subrogation-cum-assignment which has the effect of taking away his right to receive the balance of the loss. But once a subrogation is reduced to writing, the rights inter-se between the assured and insurer will be regulated by the terms agreed, which is a matter of negotiation between the assured and insurer.

If a letter of subrogation containing terms of assignment is to be treated only as an assignment by ignoring the subrogation, there may be the danger of document itself becoming invalid and unenforceable, having regard to the bar contained in Section 6 of the Transfer of Property Act, 1882 ('TP Act' for short). Section 6 of Transfer of Property Act, 1882, provides that property of any kind may be transferred except as otherwise provided by that Act or by any other law for the time being in force. Clause (e) of the said section provides that mere right to sue cannot be transferred. Section 130 provides the manner of transfer of actionable claims. Section 3 defines an 'actionable claim' as : (i) any debt (other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property) or (ii) any beneficial interest is movable property not in the possession, either actual or constructive of the claimant, which the civil courts recognizes as affording grounds for relief. A 'debt' refers to an ascertained sum due from one person to another, as contrasted from unliquidated damages and claims for compensation which requires ascertainment/assessment by a Court or Tribunal before it becomes due and payable. A transfer or assignment of a mere right to sue for compensation will be invalid having regard to Section 6(e) of the TP Act. But when a letter of subrogation-cum-assignment is executed, the assignment is interlinked with subrogation, and not being an assignment of a mere right to sue, will be valid and enforceable.

The principles relating to subrogation can therefore be summarized thus:

i) Equitable right of subrogation arises when the insurer settles the claim of the assured, for the entire loss. When there is an equitable subrogation in favour of the insurer, the insurer is allowed to stand in the shoes of the assured and enforce the rights of the assured against the wrongdoer.

ii) Subrogation does not terminate nor puts an end to the right of the assured to sue the wrong-doer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation.

iii) Where the assured executes a Letter of Subrogation, reducing the terms of subrogation, the rights of the insurer *vis-à-vis* the assured will be governed by the terms of the Letter of Subrogation.

iv) A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or petition for recovery of compensation can be filed in the name of the assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants.

v) Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrongdoer on its own account and for its own benefit. But as the instrument is a subrogation-cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insured becomes entitled to the entire amount recovered from the wrongdoer, that is, not only the amount that the insured had paid to the assured, but also any amount received in excess of what was paid by it to the assured, if the instrument so provides.

Whether the document executed by the assured in favour of the insurer is a subrogation simpliciter, or a subrogation-cum-assignment is relevant only in a dispute between the assured and the insurer. It may not be relevant for deciding the maintainability of a complaint under the Act. If the complaint is filed by the assured (who is the consumer), or by the assured represented by the insurer as its attorney holder, or by the assured and the insurer jointly as complainants, the complaint will be maintainable, if the presence of insurer is explained as being a subrogee. Whether the amount claimed is the total loss or only the amount for which the claim was settled would make no difference for the maintainability of the complaint, so long as the consumer is the complainant (either personally or represented by its attorney holder) or is a co-complainant along with his subrogee. On the other hand, if the assured (who is the consumer) is not the complainant, and the insurer alone files the complaint in its own name, the complaint will not be maintainable, as the insurer is not a 'consumer', nor a person who answers the definition of 'complainant' under the Act. The fact that it seeks to recover from the wrongdoer (service provider) only the amount paid to the assured and not any amount in excess of what was paid to the assured will also not make any difference, if the assured - consignor is not the complainant or co-complainant. The complaint will not be maintainable unless the requirements of the Act are fulfilled. The remedy under the Act being summary in nature, once the consumer is the complainant or is a co-complainant, it will not be necessary for the Consumer Forum to probe the exact nature of relationship between the consumer (assured) and the insurer, in a complaint against the service provider.

We therefore answer the questions raised as follows:

a) The insurer, as subrogee, can file a complaint under the Act either in the name of the assured (as his attorney holder) or in the joint names of the assured and the insurer for recovery of the amount due from the service provider. The insurer may also request the assured to sue the wrong doer (service provider).

b) Even if the letter of subrogation executed by the assured in favour of the insurer contains in addition to the words of subrogation, any words of assignment, the complaint would be maintainable so long as the complaint is in the name of the assured and insurer figures in the complaint only as an attorney holder or subrogee of the assured.

c) The insurer cannot in its own name maintain a complaint before a consumer forum under the Act, even if its right is traced to the terms of a Letter of subrogation-cum-assignment executed by the assured.

d) *Oberai* is not good law insofar as it construes a Letter of subrogation-cum-assignment, as a pure and simple assignment. But to the extent it holds that an insurer alone cannot file a complaint under the Act, the decision is correct.

We may also notice that Section 2(d) of Act was amended by Amendment Act 62 of 2002 with effect from 15.3.2003, by adding the words "but does not include a person who avails of such services for any commercial purpose" in the definition of 'consumer'. After the said amendment, if the service of the carrier had been availed for any commercial purpose, then the person availing the service will not be a 'consumer' and consequently, complaints will not be maintainable in such cases. But the said amendment will not apply to complaints filed before the amendment.

2010 (2) SCALE 503

Haridwar Development Authority
Vs
Raghubir Singh

The question whether the acquired lands have to be valued uniformly at the same rate, or whether different areas in the acquired lands have to be valued at different rates, depends upon the extent of the land acquired, the location, proximity to an access road/Main Road/Highway or to a City/Town/Village, and other relevant circumstances. We may illustrate:

A. When a small and compact extent of land is acquired and the entire area is similarly situated, it will be appropriate to value the acquired land at a single uniform rate.

B. If a large tract of land is acquired with some lands facing a main road or a national highway and other lands being in the interior, the normal procedure is to value the lands adjacent to the main road at a higher rate and the interior lands which do not have road access, at a lesser rate.

C. Where a very large tract of land on the outskirts of a town is acquired, one end of the acquired lands adjoining the town boundary, the other end being two to three kilometres away, obviously, the rate that is adopted for the land nearest to the town cannot be adopted for the land which is farther away from the town. In such a situation, what is known as a belting method is adopted and the belt or strip adjacent to the town boundary will be given the highest price, the remotest belt will be awarded the lowest rate, the belts/strips of lands falling in between, will be awarded gradually reducing rates from the highest to the lowest.

D. Where a very large tract of land with a radius of one to two kilometres is acquired, but the entire land acquired is far away from any town or city limits, without any special Main road access, then it is logical to award the entire land, one uniform rate. The fact that the distance between one point to another point in the acquired lands, may be as much as two to three kilometres may not make any difference.

The claimants do not dispute the appropriateness of the said sale transaction taken as the basis for determination of compensation. Their grievance is that no deduction or cut should have been effected in the price disclosed by the sale deed, for arriving at the market value, in view of the following factors: (i) that the acquired lands were near to the main Bye-pass Road and had road access on two sides; (ii) that many residential houses had already come up in the surrounding areas, and the entire area was already fast developing; and (iii) that the acquired land had the potential to be used an urban residential area. When the value of a large extent of agricultural land has to be determined with reference to the price fetched by sale of a small residential plot, it is necessary to make an appropriate deduction towards the development cost, to arrive at the value of the large tract of land. The deduction towards development cost may vary from 20% to 75% depending upon various factors see : *Lal Chand v. Union of India* 2009 (15) SCC 769. Even if the acquired lands have situational advantages, the minimum deduction from the market value of a small presidential plot, to arrive at the market value of a larger agricultural land, is in the usual course, will be in the range of 20% to 25%. In this case, the Collector has himself adopted a 25% deduction which has been affirmed by the Reference Court and High Court. We therefore do not propose to alter it.

Only one grievance of the claimants remains to be addressed. The claimants pointed out that the relied upon sale transaction is dated 19.12.1990, whereas the notification under Section 4(1) of the Act in this case was of 7.12.1991; and as there is a gap of nearly one year, an appropriate increase in the market value should have been provided keeping in view the steady increase in prices. It is well settled that an increase in market value by about 10% to 12% per year can be provided, in regard to lands situated near urban areas having potential for non-agricultural development. See : *Sardar Jogendra Singh v. State of U.P.* 2008 (17) SCC 133.

We are therefore of the view that the value arrived at by the Collector, and accepted by the Reference Court and the High Court requires to be increased by 12% in view of the fact that the preliminary notification was one year after the relied upon sale transaction. Accordingly by increasing the value of Rs. 26/25 by 12%, we arrive at the market value as on 7.12.1991 as Rs.29/40, rounded off to Rs. 29/50 per sq.ft.

2010 (2) SCALE 530

Sadashiv Shyama Sawant [D] through L.Rs. and Ors.
Vs.
Anita Anant Sawant

The main question for consideration in this appeal by special leave is: where a tenant in exclusive possession is dispossessed forcibly by a person other than landlord, can landlord maintain suit under Section 6 of Specific Relief Act, 1963 against such person for immediate possession. The incidental question is, whether tenant is a necessary party in such suit.

Section 6 of the Act reads as under:

> "*6. - Suit by person dispossessed of immovable property.*- (1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.
>
> (2) No suit under this section shall be brought –
>
> (a) after the expiry of six months from the date of dispossession; or
>
> (b) against the Government.
>
> (3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.
>
> (4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

A landlord by letting out the property to a tenant does not lose possession as he continues to retain the legal possession although actual possession, user and control of that property is with the tenant. By retaining legal possession or in any case constructive possession, the landlord also retains all his legal remedies. As a matter of law, the dispossession of tenant by a third party is dispossession of the landlord. The word "dispossessed" in Section 6(1) must be read in this context and not in light of the actual possession alone. If a tenant is thrown out forcibly from the tenanted premises by a trespasser, the landlord has implied right of entry in order to recover possession (for himself and his tenant). Similarly, the expression "any person claiming through him" would bring within its fold the landlord as he continues in legal possession over the tenanted property through his tenant. As a matter of fact, on plain reading of Section 6(1), it is clear that besides the person who has been dispossessed, any person claiming through him can also file a suit seeking recovery of possession. Obviously, a landlord who holds the possession through his tenant is competent to maintain suit under Section 6 and recover possession from a trespasser who has forcibly dispossessed his tenant. A landlord when he lets out his property to the tenant is not deprived of his possession in the property in law. What is altered is mode in which the landlord held his possession in the property inasmuch as the tenant comes into physical possession while the landlord retains possession through his tenant. The view of Calcutta High Court that where the tenant was forcibly ejected from the land by the third party, it may reasonably be held that landlord has also been dispossessed is the correct view. We find ourselves in agreement with the view of Bombay, Patna, Pepsu and Rajasthan High Courts and hold, as it must be, that there is nothing in Section 6 of the Act to bar a landlord from suing a trespasser in possession even when, at the date of dispossession, the property is in actual occupation of a tenant entitled to possession. The views expressed by Madras High Court in Veeraswami Mudali and (Kanneganti) Ramamanemma and by Nagpur Judicial Commissioner in the case of Ramchandra, AIR 1928 Nagpur 313 do not lay down the correct law.

Now we advert to the incidental question whether in such a suit, tenant is a necessary party. Section 6 of the Act provides that suit to recover possession under the said provision could be filed by the person who is dispossessed or any person claiming through him. The tenant having lost the possession though without his consent to a third party, may not be interested in recovery of possession. He may not be available. He may not like to involve himself in litigation. In such circumstances, if a landlord brings the suit to recover possession against trespasser under Section 6, it cannot be laid down as an absolute proposition that tenant must necessarily be impleaded as party to such suit. The view of Bombay High Court in Ratanlal Ghelabhai AIR 1929 Bom 467 that landlord can sue in his own name where there is an injury to the reversion exposits the correct position of law. It may be desirable that a landlord in a suit under Section 6 of the Act against a trespasser for immediate possession when, at the date of dispossession, the house was in occupation of a tenant, impleads the tenant, but his non-impleadment is not fatal to the maintainability of such suit. The view of Madras High Court in (Kanneganti) Ramamanemma5 and of other High Courts following that view do not appear to us as laying down correct law.

CDJ 2010 SC 364

General Insurance Council & Others
Vs
State of Andhra Pradesh & Others

Constitution of India - Articles 14 ,19 & 32 - Code of Criminal Procedure, 1973 - Sections 451 and 457 - Insurance Act, 1938 - Section 64 – disposal of the seized vehicles –

When vehicles are seized and kept in various police stations, not only they occupy substantial space of the police stations but upon being kept in open, is also prone to fast natural decay on account of weather conditions. Even a good maintained vehicle loses its road worthiness if it is kept stationary in the police station for more than fifteen days. Apart from the above, it is also a matter of common knowledge that several valuable and costly parts of the said vehicles are either stolen or are cannibalised so that the vehicles become unworthy of being driven on road. To avoid all this, SC direct that all the State Governments/ Union Territories/Director Generals of Police shall ensure macro implementation of the statutory provisions and further direct that the activities of each and every police stations, especially with regard to disposal of the seized vehicles be taken care of by the Inspector General of Police of the concerned Division/Commissioner of Police of the concerned cities/Superintendent of Police of the concerned district - In case any non-compliance is reported either by the Petitioners or by any of the aggrieved party, then needless to say, SC would be constrained to take a serious view of the matter against an erring officer who would be dealt with iron hands - With the aforesaid directions, this writ petition stands finally disposed of.

CDJ 2010 SC 366

State of A.P.
Vs
Hyderabad Potteries Pvt. Ltd & Another

Constitution of India - Article 226 - Civil Procedure code - Section 11 - A.P. Survey and Boundaries Act, 1923 - Section 14 - Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 - Section 7, 8 & 10 - State of A.P had filed an application before the Special Court, against the Respondents seeking a declaration that they be declared land grabbers in respect of schedule property and consequently to evict them and deliver vacant possession and to further award compensation to the State - The case of the Appellant before the Special Court was that in the town survey conducted, it was found that certain extent of area existing between two villages was left un-surveyed and was not accounted for. Consequently, it remained as a gap area. Gap area means un-surveyed land and would be deemed to be Government land - For purposes of construction of multi-storeyed complex, Respondents applied for permission. The said permission was refused stating that the land is a Government land - Respondents were, therefore, constrained to challenge the same by filing in the High Court of Andhra Pradesh, which came to be allowed directing the Municipality to grant permission for construction of such multi-storeyed complex – In appeal, The Division Bench held that the Appellant had miserably failed to prove that Respondents are land grabbers as contemplated under the provisions of the Act and, therefore, it put its seal of approval on the majority view of the Special Court and dismissed the Appellant's writ petition - Feeling aggrieved there from, this appeal is preferred –

SC held, Looking to the matter in totality and from all angles it can safely be construed that prima facie Appellant-State failed to establish that Respondents are land grabbers of its land or the title of the land vested with the State - Apart from the revenue record and issuance of gazette notification, no other material document was filed by the Appellant-state to show that the said land belonged only to Government. It is trite that entry in the revenue record alone may not be sufficient as conclusive proof of title nor can be relied on for proof of establishing the title as such on account of various sale deeds, mutation of their names in the T.S.L.R., Payment of Taxes and other documents, it was fully established that Respondents are the exclusive owner thereof -On the other hand, on account of various sale deeds, mutation of their names in the T.S.L.R., Payment of Taxes and other documents, it was fully established that Respondents are the exclusive owner thereof. Thus, the burden which lay on the Respondents as contemplated under Section 10 of the Act has fully been discharged - Thus, in court considered opinion, no fault can be found either in the judgment and decree of the Special Court or in the judgment and order passed by Division Bench of the High Court, in Appellant's writ petition – Hence, the appeal is dismissed.

CDJ 2010 SC 363

Vishnu & Others
Vs
Jaya

The present SLP arises from the proceedings for the custody of their two children (Kumar Gaurao and Kumar Kunal aged 11 years and 9 years respectively) instituted on the basis of an application filed by the respondent under sections 7 and 9 of the Guardian and Wards Act and registered as Misc. Civil Application No.158 of 2008 in the court of the District Judge- 2, Jalgaon. The District Judge by his order dated March 25, 2009 rejected the respondent's petition and left the two children in the custody of their father, the present petitioner. In appeal by the respondent, the High Court of Bombay, Aurangabad Bench by its judgment and order dated February 3, 2010 passed in FA No.887 of 2009 with Civil Appeal No.5044 of 2009 reversed the order of the District Judge and directed that the custody of the two children be given to the respondent wife within 15 days of the date of the order. The petitioner, the father of the two children has now brought the matter to this court.

Both the children were very clear and firm that they want to live with their father and they do not want to go with their mother. The elder son was not even able to recall the name of the mother. In the aforesaid facts and circumstances, we are of the view that if the children are forcibly taken away from their father and handed over to the mother, it will only traumatize them and it will not do any good to anybody. In the present situation, the better course would be that the mother should first be allowed to make the initial contact with the children, build up her relationship with them and slowly and gradually restore her position as their mother. The High Court of course did not have the advantage of meeting all concerned in this case but we after meeting both the children and the petitioner and the respondent and after speaking to them for quite sometime are clearly of the view that the course indicated above needs to be adopted. We can even say that at the end of the meeting, the mother seemed to agree that for the present at least, she should accept and be satisfied with her right to access and visitation rights to her two children. We, accordingly, stay the operation of the order of the High Court and make the following interim arrangement in its place:

Every alternate Saturday, it will be open to the respondent wife to come to Bhusawal or Kalyan or wherever the children may be living with their father and to take them out, if she so desires, for an overnight stay with her. She will take the two children from their father's house at 10 in the morning of the Saturday. She may bring the children back to their house on the same day in the evening or if she so desires, she may keep them overnight with her and reach them back at 10 in the morning of the following Sunday. Having regard to the distance from Bhopal, it may not be possible for her to visit the children every alternate Saturday. In that event, she will inform about her programme to come to their place on a particular Saturday, either telephonically or by post, for mutual convenience.

During the three long vacations, namely the summer vacation, Diwali vacation and Christmas vacation the two children will spend half their vacations with the respondent mother at her house, in Bhopal or wherever she might be living. Before taking away the children she will duly notify the petitioner about her whereabouts and her residential address. After the period of the children's stay with her is over, she will duly reach the children to their father's house and hand them over to the petitioner father. The direction comes into immediate effect and the respondent will be free to take the children for half the period of their current vacation.

2010 CIJ 462 SC (1)

Thakur Kuldeep Singh (D) thr. L.R. and Ors.
Vs.
Union of India (UOI) and Ors.

Sections 23 and 24 of the Act speak about the matters to be considered and to be neglected in determining compensation. Let us consider whether the appellants are entitled to higher compensation than that of the one fixed by the High Court or Union of India is justified in seeking reduction of the market value/compensation for the acquired land. While fixing compensation, it is the duty of the Land Acquisition Collector as well as the Court to take into consideration the nature of the land, its suitability, nature of the use to which the lands are sought to be acquired on the date of notification, income derived or derivable from or any other special distinctive feature which the land is possessed of, the sale transactions in respect of land covered by the same notification are all relevant factors to be taken into consideration in determining the market value. It is equally to consider the suitability of neighbourhood lands as are possessed of similar potentiality or any advantageous features or any special characteristics available. The Land Acquisition Collector as well as the Court should always keep in their mind that the object of assessment is to arrive at a reasonable and adequate market value of the land. While doing so, imagination should be eschewed and mechanical assessment of evidence should be avoided. More attention should be on the bona fide and genuine sale transactions as guiding star in evaluating the evidence. The relevant factor would be that of the hypothetical willing vendor would offer for the land and what a willing purchaser of normal human conduct would be willing to buy as a prudent man in normal market conditions prevailing in the open market in the locality in which the acquired lands are situated as on the date of notification under Section 4(1) of the Act. In other words, the Judge who sits in the armchair of the willing buyer and seek an answer to the question whether in the given set of circumstances as a prudent buyer he would offer the same market value which the court proposed to fix for the acquired lands in the available market conditions. The market value so determined should be just, adequate and reasonable.

In ***DDA's case*** (supra), this Court in view of the market value fixed in the case of **Karan Singh & Ors** v. **Union of India,** (1997) 8 SCC 186 and taking note of the fact that acquisition of land under the same notification without adverting `Government schedule of rates' fixed the market value as determined in ***Karan Singh's*** case (supra). In ***Pramod Gupta's*** case (supra), this Court did not approve the method of fixing market value based on certain notifications issued by the Union of

India in the year 1965 which were meant for the residential plots. In ***Ranvir Singh's*** case (supra), the circle rates were not followed in determining the market value.

We accept that in view of the purpose for which the `circle rates' have been notified by the Ministry of Urban Affairs and Employment, market value of a plot cannot be determined solely on the basis of the circle rates. On the other hand, it cannot be ignored in toto. If other materials are available, Government rates can also be considered as corroborative evidence. The nature of the land plays an important role. Likewise, market conditions prevailing as on the date of notification are also relevant. Sale price in respect of small piece of land cannot be the basis for determination of market value of large stretch of land.

It is also useful to refer the recent decision of this Court in ***Lal Chand*** v. ***Union of India and Anr.***, JT 2009 (11) SC 490. A two-Judge Bench has held that the circle rates relate to urban/city areas in Delhi and are wholly irrelevant when the court has to decide the market value in regard to land situated in a village on the outskirts of Delhi. Based on this, learned Counsel for the appellants submitted that this Court has not completely ignored the rates notified by the Government though it cannot be applied to the area other than urban/city.

It is clear from the above decisions and discussion that merely on the basis of `circle rate', market value for acquired lands cannot be fixed but, at the same time, as observed earlier, the locality and the prevailing circumstances are relevant for determining the real value of the land. We have adverted to the assertion of the claimants about the proximity and various other attending circumstances. It is seen from the evidence of PW-2, Power of Attorney holder of the appellants that the acquired plot was located in the midst of commercial properties, had commercial potentiality and for similar properties, the rates in the locality were not less than Rs. 6,000/- per sq. mtr. He tendered evidence and placed documents Ex. PW-2/1 to PW-2/11 which includes Eicher City Map. PW-2 has also highlighted that the plot was located within the developed commercial hub of Karol Bagh having all facilities. As rightly observed by the High Court, the Reference Court overlooked the evidence on record that after the property was purchased by the appellants in 1961, considerable development in and around the area had taken place. The acquired property was purchased by the appellants in the year 1961 and it is not in dispute that the acquisition proceedings started in the year 1983 i.e. after a period of 22 years from the date of 4 (1) notification (9/5/1983). The High Court has also relied on ***Ram Lal Bansiwal v. Union of India and Ors.*** R.F.A. No. 131/88 a decision of fixing market value @ Rs. 2320/- per sq. yard for commercial plots based on the circle rates. When the appeal was carried to this Court, by decision dated 17.02.1997, this Court enhanced the amount of compensation to Rs. 3,000/- per sq. yd by observing that the land was located in a commercial hub and was adjoining to a petrol pump. It is pointed out that the said decision relates to Chowkri Mubarkabad being a locality adjacent to Karol Bagh situated by the side of main Rohtak Road. It is also demonstrated that the same is in close proximity to Karol Bagh area and the plot in question was located in the midst of Karol Bagh. Though in the award, the Land Acquisition Collector has mentioned that the plot is 2 km. away from the commercial area in the Karol Bagh admittedly, the very same Joshi Memorial Hospital was running on the land under acquisition since 1970-71 and the hospital was paying rent to the pattedars/owners. This information has been mentioned in the synopsis filed by the Union of India in their Civil Appeal No. 8637 of 2002.

We have also verified the Delhi Government Map survey of 1982. On going through the location as found in the Government Map, the assertion of PW-1, an officer of the Government, PW-2, Power of Attorney of the appellants, various activities in and around the plot and considering the fact that the Land Acquisition Collector relied on the three property transactions relating to 1980- 81, 1981-82 and 1982-83 and not nearer to the date of notification under Section 4(1) i.e. 09.05.1983 and also of the fact that even on the date of notification the very same hospital i.e. Joshi Memorial Hospital was running on the land, we hold that even if we eschew `circle rate', the amount determined by the High Court is just, reasonable and acceptable. For the same reasons and in the absence of additional material, we are not inclined to increase the market value as claimed by the claimants-appellants.

In the light of the above discussion, the appeals filed by the claimants as well as the Union of India are dismissed. No costs.

2010 CIJ 205 PLJ

Smt. Poonam
Vs.
Sumit Tanwar

In ***Thakur Sukhpal Singh v. Thakur Kalyan Singh and Anr, AIR 1963 SC 146***, this Court has held that in absence of proper assistance to the Court by the lawyer, there is no obligation on the part of the Court to decide the case, for the simple reason that unless the lawyer renders the proper assistance to the Court, the Court is not able to decide the case. It is not for the Court itself to decide the controversy. The counsel cannot just raise the issues in his petition and leave it to the Court to give its decision on those points after going through the record and determining the correctness thereof. It is not for the Court itself to find out what the points for determination can be and then proceed to give a decision on those points.

While deciding the said case, this Court placed reliance upon the judgment of Privy Council in ***Mst. Fakrunisa and Ors. v. Moulvi Izarus Sadik and Ors. AIR 1921 PC 55*** wherein it had been observed as under:

> "In every appeal it is incumbent upon the appellants to show some reason why the judgment appealed from should be disturbed; there must be some balance in their favour when all the circumstances are considered to justify the alteration of the judgment that stands. Their Lordships are unable to find that this duty has been discharged."

In ***The Bar Council of Maharashtra v. M.V. Dabholkar and Ors, AIR 1976 SC 242***, this Court had observed as under:-

> "Be it remembered that the central function of the legal profession is to promote the administration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice - social justice...Law is no trade, briefs no merchandise."

In ***T.C. Mathai and Anr. v. District & Sessions Judge, Thiruvananthapuram, AIR 1999 SC 1385***, this Court observed:

The work in a Court of law is a serious and responsible function. The primary duty of a...court is to administer...justice. Any lax or wayward approach, if adopted; towards the issues involved in the case, can cause serious consequences for the parties concerned.... In the adversary system which is now being followed in India, both in civil and criminal litigation, it is very necessary that the Court gets proper assistance from both sides.... Efficacies discharge of judicial process very often depends upon the valuable services rendered by the legal profession

In ***D.P. Chadha v. Triyugi Narain Mishra and Ors, AIR 2001 SC 457***, this Court has observed as under:

> "...Mutual confidence in the discharge of duties and cordial relations between Bench and Bar smoothen the movement of the chariot. As responsible officers of the Court, as they are called ---- and rightly, the counsel have an overall obligation of assisting the Courts in a just and proper manner in the just and proper administration of justice.

Thus, in view of the above, law can be summarised to the effect that, in case, the counsel for the party is not able to render any assistance, the Court may decline to entertain the petition.

There is another aspect of the matter. In case, petitioner's counsel is not able to raise a factual or legal issue, though such a point may have a good merit, the Court should not decide the same as the opposite counsel does not "have a fair opportunity to answer the line of reasoning adopted" in this behalf. Such a judgment may be violative of principles of natural justice. (vide ***New Delhi Municipal Committee v. State of Punjab, AIR 1997 SC 2847***).

While dealing with a similar issue, this Court ***in Re: Sanjiv Datta (1995) 3 SCC 619*** observed as under:

> "Of late, we have been coming across several instances which can only be **described as unfortunate both for the legal profession and the administration of justice**. It becomes, therefore, our duty to bring it to the notice of the members of the profession that it is in their hands to improve the quality of the service they render both to the litigant-public and to the courts, and to brighten their image in the society. **Some members of the profession have been adopting perceptibly casual approach to the practice of the profession** as is evident from their absence when the matters are called out, the filing of incomplete and inaccurate pleadings -- many times even illegible and without personal check and verification, the non-payment of court fees and process fees, the failure to remove office objections, the failure to take steps to serve the parties, et al. **They do not realise the seriousness of these acts and omissions. They not only amount to the contempt of the court but do positive disservice to the litigants and create embarrassing situation in the court leading to avoidable unpleasantness and delay in the disposal of matters**. This augurs ill for the health of our judicial system.... The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society.

In ***Vijay Dhanji Chaudhary v. Suhas Jayant Natawadkar (2010) 1 SCC 166***, this Court has taken note of the ongoing rampant unethical practice by some of the Advocates-on-Record, duly enrolled under the provisions of the Supreme Court Rules, 1966, as many special leave petitions are being filed by them being merely as name- lenders, without having, or taking any responsibility for the case. As a result of prevalence of such a practice, in such cases, the Advocates-on-Record do not appear when matters are listed before the Court, nor do they take any interest or responsibility for processing or conducting the case. They also play no role in preparation of the petitions, nor ensure that requirements of Rules are fulfilled and defects are cured. If role of an Advocate-on-Record is merely to lend his name for filing cases without being responsible for conduct of a case, the very purpose of having the system of Advocates-on-Record would get defected.

In the said case, this Court did not merely dismiss the petition for not rendering any assistance by the appearing counsel in absence of the Advocate-on-Record, rather issued notice to the Supreme Court Bar Association and the Advocates-on-Record's Association asking for suggestions for improving the system and to compel such mere name-lending Advocates-on-Record to serve the purpose for which they have been enrolled. The matter is to come for further consideration after those Associations submit their suggestions for observance and strict adherence to the Rules, as is evident from the proceedings in that case dated 30.11.2009, 08.03.2010, 15.03.2010 and 18.03.2010.

The aforesaid facts reveal that application for dissolution of marriage was filed only on 9.9.2009 before the Family Court and the said application was disposed of vide order dated 25.11.2009 asking the parties to wait for six months. Thus, it is not a case that there had been any delay in disposal of the case by the Family Court. The petition has been filed without any sense of responsibility either by the parties or their counsel. Such a practice is tantamount to not only disservice to the institution but it also adversely affects the administration of justice. Conduct of all of them has been reprehensible.

For the reasons aforesaid, this petition is dismissed.

HIGH COURT CITATIONS

2010 (2) CTC 365

The Periyar Self Respect Propaganda Institution rep. by its Secretary Thiru. K. Veeramani
Vs
Periyar Dravidar Kazhagam rep. by its President, T.S. Mani

Copyright Act, 1957 (14 of 1957), Sections 17(a), 52(1)(m) & 55 – Injunction – Grant of injunction – Grant of injunction is equitable relief and exemptions provided by law ahsould be taken into account – Any act falling under exemptions set out in Section 52 would not constitute infringement of copyright - Section 52(1)(m) exempts reproduction of articles would not amount to infringement provided author of such article expressly reserved to himself right to such reproduction – Person who wrote several articles in his newspaper relating to then existing economical, political, social and religious topics did not reserve right to himself to reproduce such articles – No copyright was vested with any one such articles – Mere compilation of old issued of newspaper wherein such articles were published by some society would not vest copyright on such matters with society – Over all owner of copyright has right akin to right to property – If work over which such copyrights is made public then public should have right to access to same on reasonable terms – Injunction sought by Plaintiff which is society restraining defendants from publishing such articles cannot be granted as Plaintiff had no copyright over such articles.

Whether re-publication of the works of E.V. Ramasami (Popularly called as Periyar) by the respondents will amount to infringement of copyright of the plaintiff-Association represented by its Secretary Mr. K. Veeramani and whether they are entitled to get a temporary injunction against the respondents are the issued involved in this Application.

The first respondent's President had left the plaintiff association by tendering resignation on 14.09.2000. The second respondent was expelled from the plaintiff-Association on 8.7.1987. After leaving the plaintiff Association, they started a new association, namely Periyar Dravidar Kazhagam (R1).

The cause of action for filing the Suit by the plaintiff arose when a 'Kumudam' reporter, a bi-weekly, in its issue, dated 21.8.2008 published an interview given by the second respondent, in which it was stated that the Secretary of the plaintiff-Association never compiled the issued of 'Kudiyarasu' for the last 26 years. Therefore, they had obtained copies from the Thanjai Pagutharivu Kazhagam and were intending to publish the same. Hence, the present Suit was filed for the relief of a permanent injunction, restraining the respondents/defendants in any manner infringing the copyrights of the plaintiff relating to Kudiyarasu and other scripts, books, publications, etc. and for awarding of damages for Rs.1.5 lakhs.

It is now claimed that Periyar had copyright over his writings and certain correspondence were shown that some publishers had asked for permission to publish his writings. Certain other documents were also enclosed to show the details of publications done by the plaintiff-Society as well as number of books purchased by the State Government for distribution in Public libraries. It was also stated that the plaintiff-Society themselves have brought out the old issues of Kudiyarasu in the form of three compact discs (CD) covering the period from April, 1928 to 1931. Therefore, they have a continuous right over its usage being the owner of the copyright. It was therefore prayed that the injunction should be continued pending the Suit.

In response, the respondents have filed a detailed counter affidavit along with supporting documents. The first respondent association stated that the plaintiff cannot claim any copyright as Periyar never assigned his copyright in favour of any one. In 1952, the society was formed only for managing the immovable property owned by Periyar, since Periyar wanted to divest his legal heirs from succeeding to his estate. It was also stated that V. Anaimuthu, a trusted disciple of Periyar, as early as in the year 1972-1973 had collected the works of Periyar in the form of three volumes running into 2500 pages. Those volumes were released in a grand function during 1974, in which the Secretary of the plaintiff society had participated and the function was held in the presence of the Chief Minister of Tamilnadu. It was also stated that the memorandum of association never provides for transfer of any ownership of Periyar's writings and they are available to public domain.

It was further stated that the publication of Kudiyarasu was done in the name of various individuals and only for a very short period, Periyar was its Printer and publisher. Most of the times, he was its Editor. His first wife, his sister and brother were its publishers for different periods. Thereafter, the publishing right went out of the family. He also ceased to be the Editor of the said newspaper. The allegation that only the Thanjai Pagutharivalar Kazhagam was in possession of original issues and that a copy of it was obtained from them to be published by the respondents was denied. It was stated that the original issued of the work was available in several libraries, individuals. They include the National Archives, New Delhi, Delhi University Library, New Delhi, Connemara Public Library, Chennai, etc. A list of 31 places where those issues were collected was listed in the two counter affidavits.

With reference to their attempt to publish the present compilation, it was stated that the issues of Kudiyarasu were collected from various libraries. The attempt of the first respondent is to publish the writings of Periyar so that his ideology can be spread far and wide. It was also stated that there is no copyright in newspaper articles, since Periyar wrote in his newspapers his views on topics covering social, political and religious themes. The allegation that the second respondent has surreptitiously obtained the copies of literary works of Periyar was denied.

The grant of injunction is also an equitable relief and such relief can be granted only subject to statutory limitation and the Courts will also have to keep in mind the exemptions provided under Section 52 of the Copy Right Act. In this context, the Supreme Court in Academy of General Education, Manipal and another v. B. Malini Mallya, 2009 (4) SCC 256, has held as follows:

"35. Decree for injunction is an equitable relief. The Courts while passing a decree for permanent injunction would avoid multiplicity of proceedings. The Court while passing such a decree, is obligated to consider the statutory provisions governing the same. For the said purpose, it must be noticed as to what is a copyright and in respect of the matters the same cannot be claimed or otherwise the same is lodged by conditions and subject to statutory limitation."

"39. Section 52 of the Act provides for certain acts which would not constitute an infringement of copyright. When a fair dealing is made, inter alia, of a literary or dramatic work for the purpose of private use including research and criticism or review, whether of that work or of any other work, the right in terms of the provisions of the said Act cannot be claimed. Thus, if some performance or dance is carried out within the purview of the said clause, the order of injunction shall not be applicable."

In the present case, it has been made clear that the author of Kudiyarasu, i.e. Late Periyar, was the owner and the articles published in the newspaper mostly related to the then existed economical, political, social and religious topics. Therefore, unless the author had expressly reserved his right of reproduction, no copyright will vest with anyone as reproduction of such articles cannot constitute an infringement of copyright as per Section 52(1)(m) set out above.

In the present case, a reading of memorandum of association and the Rules and Regulations does not disclose any such vesting of ownership with the society. In fact, Rules 22 and 23 only talk about future purchases of properties vesting with the society. The copyright in literary materials can only be an intellectual property and there has to be material to show that it was specially assigned. It is an admitted case that Periyar (E.Ve.Ra) died intestate and there is no written or other materials to show that a copyright has been reserved by him as an author of those articles and that he also assigned it in favour of the plaintiff.

The compilations made by Thanjai Pagutharivu Kazhagam for all the old issues of Kudiyarasu cannot create any copyright in favour of the plaintiff society, though it might have taken substantial work in compiling the same. In fact, the Supreme Court had discarded "Sweat of the brow" notion of copyright law. There may be novelty or invention in arranging the same as subject wise or chronological order. But in the present case, there is no material to show that the respondents have taken away such compilation and had verbatim reproduced the same. On the contrary, the respondents have pointed out the earlier publication of three volumes of Kudiyarasu issues by them and their intention was to publish the balance in 27 volumes. They have also asserted that the original issues of Kudiyarasu is available all over the World. They had pointed out atleast 31 places where it is still available.

If it is seen in the above factual matrix and legal precedents, then it can be safely held that the plaintiff had failed to establish any ownership of the copyright in their favour and a corresponding infringement of copyright on the part of the respondents. Neither there is a prima facie case nor balance of convenience is in favour of grant of any interim order or to continue the order of injunction. The applicant/plaintiff has not made out any case. The issue raised here is squarely covered by the exemption provided under Section 52(1)(m) of the Copyright Act, 1957. Accordingly, the Application is dismissed. No costs.

Before parting there is a caveat by this Court. Periyar's writing in 'Kudiyarasu' appeared in the period between the two World Wars. He faced incarceration at the hands of the Colonial rulers. The security furnished to the press was forfeited several times. He was ostracized by the Hindu Orthodoxy. He had to leave the national movement to fight for the cause of social justice thus facing the wrath of the powerful Congress Party. Yet he continued his mission without expecting anything in return. Many times, the issues of Kudiyarasu had to be freely distributed as his ideas had to reach the educated ones since illiteracy was then rampant. The year 2009 is going to be the 130th year of his birth and it is painful to see a legal battle on copyright issues over his writings. In this fratricidal dispute, his ideas should not be submerged in Court dockets. It is hope of this Court that reason will prevail. Out motto should be: "Let hundred flowers bloom and thousand thoughts contend."

<u>2010 (2) CTC 379</u>

Kamalammal (dead) Annapoornammal (dead) 1. Kalyani 2. K. Ravi
Vs
Girija and 2 others

<u>Code of Civil Procedure, 1908 (5 of 1908) Order 2, Rule 2</u> – Bar under – Cause of action in both former and later Suits should be same – Plaintiff should have omitted or relinquished any portion of his claim in former Suit and failed to obtain leave of Court for instituting subsequent Suit – On facts held that cause of action in both Suits are different and therefore Order 2, Rule 2 is not attracted.

Facts: Second Appeals and Civil Revision Petition arose out of Suit for possession, permanent injunction and damages. Findings were challenged by way of Civil Revision Petitions. High Court dismissed both the Second Appeals and Civil Revision Petition on the ground that the Lower Courts have decided the matter in an appropriate manner and recorded concurrent findings, which required no interference.

Held: The following are the principles formulated in the above said decisions, which have to be borne in mind while dealing whether the case falls within the purview of Order 2, Rule 2, C.P.C.;

The cause of action in the former Suit and the latter Suit shall be the same.

The plaintiff should have omitted or intentionally relinquished any portion of his claim in the earlier Suit and his failure to obtain leave of the Court for instituting subsequent Suit.

Failure of the party to produce pleadings who seeks bar under Order 2, Rule 2, of C.P.C.

If any of the points No.1 and 2 is deduced by the Court, then the plaintiff has to be non-suited for the relief in the subsequent Suit. Principle No.3 is self explanatory. The law in this behalf is explicit.

Applying the above said principles to the facts of the present case, the subsequent Suit in O.S. No.7470 of 1996 has no relevance to the earlier Suit in O.S. No.968 of 1958 as to the cause of action and causes of action in both the Suits are entirely different. The earlier Suit was with regard to a small portion viz., 30' x 12' and the latter Suit is for an extent of 6 grounds and 520 sq.ft.

<u>Code of Civil Procedure, 1908 (5 of 1908), Section 11</u> – Res judicata – No substantial issue raised in subsequent Suit was decided in earlier Suit – Principle of res judicata not attracted.

<u>Adverse Possession</u> – Proof of – In order to prove adverse possession, one must expose his possession in property hostile to true owner, with his knowledge – Such possession should be uninterrupted one – Mere long possession will not amount to adverse possession – On facts, held that there is no proof of adverse possession.

From the above said judicial pronouncements, it emerges that in order to perfect or prescribe adverse possession, one must expose his possession in the property hostile to true owner and with his knowledge, he has been enjoying the property as his own, provided the said possession has to be an uninterrupted one. This position has been illuminatingly highlighted in the decisions mentioned above. Even if the predecessors in title had been considered to be in possession of the property, there had been continuous interruption to them on the part of Vidyuthavalli Thayar and thereafter by the first respondent. Even though in certain proceedings they admitted the possession of the appellants in the property, which would not make the said possession as an adverse possession, since to qualify the same, it must be for statutory period. There is no evidence nor material to show that with the knowledge of the true owners, these appellants had been possessing the property as their own continuously and unobjectionably. There had been no hostile possession of the appellants to the true owners.

It can be stated that they might have acquired adverse possession as far as the extent of 360 sq.ft covered by the Suit in O.S. No.968 of 1958. But they have not established that in other larger portions, they have been in possession for over a statutory period of 12 years without any objection from the true owners. The necessary legal requirements in the matter of adverse possession are not available in this case. Mere possession however long is not adverse possession as per the settled principle. It could not be stated that since the right of Vidyuthavalli Thayar to take delivery of the property covered by the Suit in O.S. No.968 of 1958 was barred, she lost her right over the remaining larger extent. Even though the appellants were stated to have been in possession of certain portions of the suit property, it is a possession which would not constitute adverse possession in the absence of evidence as required by law so as to make them competent to claim adverse possession.

In the above circumstances, following the principles laid down in the decisions of the Supreme Court, it is held that the appellants have not prescribed title to the suit property, by adverse possession.

<u>Transfer of Property Act, 1882 (4 of 1882), Section 126</u> – Settlement deed – Revocation of – No proof of fraud or misrepresentation or undue influence or coercion at time of execution of settlement deed – Delivery of possession also effected in favour of settlee – Subsequent cancellation of settlement deed is not valid.

In view of the above discussion and of the law holding the field, it is held that the cancellation by means of Ex.B-7 is not valid. There is no evidence with regard to fraud, misrepresentation, undue influence or coercion repeatedly perpetrated upon Vidhuthuvalli Thayar at the time of execution of Ex.A-3 Settlement deed. The competent persons connected to Ex.A-3 were not brought before the Court to show the alleged coercion and undue influence exerted upon the executant. In the absence of specific pleadings to prove, the contention that it was obtained through such devices could not be countenanced.

Since both the settlement deeds were duly accepted and it is indicated through documents that delivery of possession was also effected in favour of the first respondent, subsequent cancellation through Ex.B-7 by Vidhuthavalli Thayar is not legally valid.

<u>2010 (2) CTC 411</u>

T. Narayanan
Vs
The Official Liquidator, High Court, Madras and others

<u>Companies Act, 1956 (1 of 1956), Section 457</u> – Practice and Procedure – Sale of properties after winding up order – Official Liquidator has to act not only for benefit of creditors but also to

contributories – Duty cast on Official Liquidator to realize sale proceeds by making sale of only such of properties required to discharge liabilities crystallized and return surplus assets to contributories – Sale of entire assets of Company without proper publicity and for low valuation, held, improper and set aside.

Companies Act, 1956 (1 of 1956) – Functus Officio – Powers of Company Court – Auction sale by Official Liquidator confirmed – Court does not become functus officio merely because sale has been confirmed – Sale can be set aside even after confirmation if interests of creditors at large or contributories is affected and there was no proper exercise of judicial discretion.

Held: It was repeatedly contended by the learned Counsel for the auction purchaser and creditor Banks that the appellant was unable to show any irregularity or fraud in the conduct of the sale, and hence it should not be set aside. It should not be forgotten that the Court can set aside the sale even though the same was confirmed, if the interest of the creditors at large, contributories and all concerned is affected. Merely because of the confirmation of the sale, the Court will not become functus officio. In the instant case, no doubt this would cause inconvenience or even a loss to the highest bidder, but the same cannot be helped since in the instant case, the sale was conducted in the Court premises, but not in a business house. Though the sale is not attacked on any ground of irregularity or fraud in the conduct of the sale, when the Court is able to notice that there was neither just nor proper exercise of the judicial discretion, the sale has to be set aside on that ground. In the instant case, there was no proper publication. Two bidders were present in Court who did not have the EMD amount. Then the sale was adjourned, and even on that day, two bidders were present. Both of them were not present in Court pursuant to the publication made. Hence it would be quite clear that they should have been brought by others who were interested in the sale of the properties, but detrimental to the interest of all others.

2010 (2) CTC 449

R. Nivendran and 5 others
Vs
Nivashini Mohan @ M. Nivashini

Protection of Women from Domestic Violence Act, 2005 (43 of 2005), Section 2(q) – Whether "Respondent" includes a female also or whether it is restricted to a male member alone – Proviso to Section 2(q) does not limit word "relative" to a male member – Definition of "Respondent" is limited to a male partner/husband yet female relatives of the husband can be added as Respondents in an Application under Section 12 of Act, though granting of relief against a female relative would depend on facts and circumstances of each case.

Facts: The matter was referred to the Division Bench to settle the conflict in the decisions holding that an application can and cannot be made against a female relative of the husband/male partner, by a wife/lady under the Protection of Women from Domestic Violence Act, 2005. The High Courts of Andhra Pradesh, Bombay, Kerala, Rajasthan as well as Madras approved holding that an Application can be made under the Act against a female relative also. Decision of Madhya Pradesh High Court not approved.

Held: Proceeding is initiated by the aggrieved person who is in domestic relationship with the respondent by filing an Application under Section 12 of the Act seeking for one or more reliefs. The "Domestic Relationship" defined under Section 2(f) of the Act is wide. Aggrieved person being wife or female living in a relationship in the nature of marriage may also file a Complaint against a relative of her husband or the male partner. In other words, the relationship of "marriage" or in the "nature of marriage", would enable an aggrieved wife or female to file a Complaint against a relative of her husband or the male partner.

The next question is as to whether a "relative" referred to in the Proviso to Section 2(q) of the Act can only be a 'male' relative. First of all, it has to be noted that the definition of "respondent" uses the word male and the Proviso refers to "male" partner. But while referring to a "relative", the word "male" is not used. If it is the intention of the Legislature that "relative" mentioned in the Proviso can only be a "male" relative, it would have mentioned so, but it is absent.

As already seen, the Statement of Objects and Reasons of the Act also refers to any 'relative' of the husband or the male partner and the Proviso to sub-section (1) of Section 19 of the Act makes it clear that the word mentioned in Proviso to Section 2(q), is not restricted to a "male" relative and would include a "female" relative. But, however, whether relief can be granted against the 'female' relative would depend on the facts and circumstances of each case.

<u>2010 (2) CTC 461</u>

Kusum Sharma & Others
Vs
Batra Hospital & Medical Research Centre & Others

Consumer Protection Act, 1986 (68 of 1986), Sections 2(1)(g) & 21 – Deficiency in Service – Medical negligence – Complainant's husband underwent surgical operation for removal of abdominal tumor and subsequently died – Test revealed that tumor was found to be malignant and he died on account of pyogenic meningitis – Complainant attributed negligence on Doctor and sought compensation – She further claimed that surgical approach adopted by Doctor is incorrect – Doctor ought to have adopted Posterior approach and not Anterior approach – Medical texts and evidences show Anterior approach is preferable – Complainant did not prove that Posterior approach is only possible approach – Doctors in complicated cases have to take chance even if rate of survival is low – Courts have to be extremely careful to ensure that unnecessarily professionals are not harassed so that they will be able to perform duty without fear – Complainant had not made out a case of negligence – Order of National Commission dismissing Complaint, held justified.

On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well known principles must be kept in view:

i) Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

ii) Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

iii) The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

iv) A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

v) In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional Doctor is clearly not negligent merely because his conclusion differs from that of other professional Doctor.

vi) The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

vii) Negligence cannot be attributed to a Doctor so long as he performs his duties with reasonable skill and competence. Merely because the Doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

viii) It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

ix) It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

x) The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medial practitioners.

xi) The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that Doctors can never be prosecuted for medical negligence. As long as the Doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the Doctors must be able to perform their professional duties with free mind.

2010 (2) MLJ 861

T.G. Balaguru
Vs
Ramachandran Pillai

As soon as execution of promissory note is proved, rule of presumption laid down under Section 118 of Negotiable Instruments Act is to be raised that promissory note is supported by consideration. Presumption under Section 118 of Negotiable Instruments Act is one of law and thereunder a Court shall presume inter alia that negotiable instrument or the indorsement was made for consideration. Once statutory presumption is raised, onus of proving absence of consideration is one the executant. When initial burden is discharged by the plaintiff, the burden shifts to the defendant to prove that promissory note is not supported by valid consideration. It is for the defendant to rebut the presumption by establishing that he did not receive consideration by direct evidence or by bringing on record the preponderance of probabilities.

Presumption could be rebutted either by circumstantial evidence or by oral evidence. Mere defence plea of denial of signature in Exhibit A-1 promissory note is not sufficient to rebut the statutory presumption raised under Section 118 of Negotiable Instruments Act. It cannot be said that Courts below erred in placing burden of proof upon the defendant and the Substantial Question of law No.2 is answered against the appellant-defendant.

Both trial Court as well as Appellate Court compared the disputed signature of defendant in Exhibit A-1 promissory note with that of his admitted signature and held that there are no dissimilarities between the disputed signature and admitted signature and held that signature in Exhibit A-1 promissory note is that of the defendant. Learned counsel for the appellant contended that even though, Section 73 of Indian Evidence Act gives power to the Court, Court should not take upon itself the task of comparing the disputed signature and Court has to adopt cautious approach in basing its conclusion slowly on the opinion formed by the Court.

As per Section 73 of Indian Evidence Act, Court is competent to compare the disputed writings of a person with the other writings which are admitted or proved to be his writings. Section 73 of Indian Evidence Act gives express power to the Court to compare the disputed handwriting with admitted writings. Appellate Courts are also the competent to exercise powers under Section 73 of Evidence Act. Such comparison by the Court is with a view to appreciate the other evidence available on record on the question of writings. Prudence demands that Court should be extremely slow in venturing an opinion on the basis of mere comparison. Court should be slow to base its conclusion on such mere comparison. In the light of denial of signature by the defendant and to appreciate the evidence of P.Ws.1 and 2, Courts below exercising powers under Section 73 of Indian Evidence Act chosen to compare the signature. On such comparison of disputed signature in Exhibit A-1 with the admitted signatures in the Written Statement, Vakalat and Exhibit X-1, both trial Court and Appellate Court arrived at concurrent findings that signature in Exhibit A-1 is that of the defendant. Such concurrent findings of fact cannot be interfered with by the High Court.

2010 CIJ 569 Mad (1)

K.Selvam
Vs
CBI, Chennai

(A) **Prevention of Corruption Act, 1988 (49 of 1988) – Sec. 19 – Code of Criminal Procedure, 1973 (2 of 1974) – Sec.248, 255 – Interpretation of Statutes – Workable construction – Criminal trial – Corruption – Framing of Charge – Discharge – Petitioner was accused of indulging in corrupt activity and prosecuted – After charges were framed, in the cross-examination of the sanctioning authority, the accused alleged that he elicited some favourable answer regarding the authority of the sanctioning authority to grant sanction-Later, he sought for discharge on this ground which was dismissed – Dismissal order was challenged by the petitioner who contended that when the sanctioning authority has no power to grant sanction, continuance of trial was bad and the Prevention of Corruption Act enabled such discharge even after framing of charge – Respondents contested the stand of the petitioner and argued that the sanctioning authority was having power to grant sanction and after framing charges, discharge was not possible-Held, when the prosecution contended that the sanctioning authority was having power, his competency to grant sanction could be decided only after trial-After framing charges, there was no provision either in Cr.P.C. or in Prevention of Corruption Act enabling the Court to discharge the accused – Act to be construed in a workable manner - Revision dismissed.**

2010 CIJ 617 Mad (1)

G. Sundarraj @ Sundaram
Vs
Rajamani & Another

In order to substantiate the contention of the decree holder/the 1st respondent, the partition deed dated 15.12.1975 was marked as Ex.P-7. A perusal of the said partition deed would show that the subject property along with the other properties originally owned by one Gopalakrishna Chettiar, who is the father of appellant/ obstructor and the 2nd respondent/judgment debtor. By way of a partition deed, the properties were shared between the appellant/decree holder and the judgment debtor along with other two brothers namely Varadarajan and Navaneetha Kannan. In the said partition, the subject property was allotted to Varadarajan, shown as Schedule 'B' in the partition deed. The other property bearing Door No.20, Market Street was allotted to the brother, viz., Navaneetha Kannan, in Schedule 'D'. Later on, by way of the deed of exchange dated 22.09.1976, the subject property was given to the judgment debtor, namely, Lakshmi Narayanan by his brother Varadarajan and the said exchange deed was marked as Ex.P-3. Similarly, the property bearing Door No.20, Market Street, which was allotted to Navaneetha Kannan was given to the obstructor by way of a deed of exchange dated 29.03.1976, which was marked as Ex.P-6.

A combined reading of the said documents would show that the judgment debtor is the absolute owner of the subject property and the obstructor is the absolute owner of property at No.20, Market Street. Moreover, the obstructor who was examined as R.W.1 before the executing court has admitted in the cross examination about the partition deed executed among the brothers and also about the deed of exchange executed by his brother Navaneetha Kannan in his favour. That apart, the documents produced on the side of the decree holder and the admission made by the obstructor in his cross examination would demonstrably go to show that the subject property is the property of the judgment debtor. As could be seen from the evidence of R.W.2, Vaduvaiyan, one of the attestors to the Will, that he had signed in the hand written Will, whereas Ex.R-1 Will is a document with typed version. Further, I find that the father of the appellant died after four years from the date of execution of the Will. But the evidence on record would show that the father of the appellant had died even in the year 1989 itself. These vital contradictions would show that R.W.2 is a fabricated witness and the Will marked as Ex.R-1 is a concocted document. No acceptable reason was forthcoming from the submissions made by the learned counsel for the appellant to reject Exs.P-3, P-6 and P-7. The cumulative effect of the entire evidence and documents would undoubtedly go to show that the so-called Will has been created only in order to defeat the legitimate right of the decree holder from taking delivery of the property by playing a fraud on court. Moreover, as contended by the learned counsel for the 1st respondent/decree holder that once the sale is confirmed by the Court, the title of the auction purchaser becomes perfect. In this regard, a reference could be placed on the judgment reported in ***AIR 1952 PUNJAB 407 (ABDUL BASIT ..vs.. ABDUL ALIM)***, wherein it has been stated as follows:

> "The title of an auction-purchaser becomes perfect not from the date of his getting symbolical possession but from the date when the property is sold. The property vests in the purchaser immediately after the sale is confirmed by the Court and vesting is not postponed until after the grant of the certificate".

With regard to the contention put forth by the 1st respondent/decree holder by relying upon several judgments that since the appellant has committed the forgery, for which a criminal action should be taken by the Court as per Section 195 of Criminal Procedure Code, this Court is not inclined to take such harsh proceedings against the appellant. A perusal of the order would show that Ex.R-1 Will filed on the side of the appellant was considered in detail and negated by the trial court and under such circumstances, I am not inclined to accept the contention made by the learned counsel for the appellant that the Will was not properly considered, particularly in the circumstances when the other documents would show that the theory of Will is a concocted story. Under such circumstances, the case of the appellant has to be dismissed.

For the foregoing reasons, the appeal fails and accordingly, it is dismissed. No costs. Consequently, connected M.P.is closed.

2010 CIJ 628 Mad (1)

Shanmugam
Vs
Elumalai Gounder & Ors

The first defendant in the suit is the appellant in the above second appeal. The plaintiff is the first respondent and defendants 2 to 4 are the respondents 2 to 4 in the above second appeal.

The plaintiff filed the suit in O.S. No. 140 of 1988 on the file of District Munsif Court, Tindivanam for declaration and injunction.

The brief case of the plaintiff in the suit is as follows:

(i) According to the plaintiff, the suit property measuring an extent of 80 cents in S. No. 278/8 originally belonged to Kuppa Gounder and Arumuga Gounder sons of Ayyadurai Gounder and they were enjoying the property in common and about 40 years ago, they partitioned the property. The said Kuppa Gounder did not have male issue. He had three daughters namely, Lakhmigantham, Saroja and Sarasu. The said Kuppa Gounder was allotted 44 cents in S. No. 278/8 out of the total extent of 80 cents. The said Kuppa Gounder,sold an extent 0.30 cents, out of 44 cents, to his son-in-law, Venni Gounder (husband of Saroja) on 21.9.1968. On the same day, he also settled the remaining extent of 0.14 cents in S. No. 278/8 to his daughter Saroja. Further, in the said two documents, the survey numbers were mentioned wrongly as 278/7. However, the boundaries were mentioned correctly in the said two documents. Venni Gounder and Saroja were enjoying the lands as per the boundaries mentioned in the two documents. Venni Gounder and Saroja are the defendants 2 and 3 in the suit. On 17.8.1970, defendants 2 and 3 sold their lands measuring an extent of 44 cents to the plaintiff. The plaintiff obtained patta in respect of the property purchased on 17.8.1970. The plaintiff purchased the property as a bonafide purchaser from the defendants 2 and 3 with the survey number mentioned wrongly as survey No. 278/7.

(ii) According to the plaintiff, subsequent to the sale of the land to the plaintiffs, the defendants 2 and 3 joined hands with the first defendant and tried to interfere with the possession and enjoyment of the plaintiff's property. The fourth defendant is the owner of Survey No. 278/7. The first defendant's father Arumuga Gounder died 20 years ago, Kuppa Gounder died 15 years ago and his wife died about 10 years ago. Since the defendants tried to interfere with the possession and enjoyment of the plaintiff's property, the plaintiff filed the suit.

The brief case of the first defendant is as follows:

(i) According to the first defendant, though the land measuring an extent of 80 cents in Survey No. 278/8 originally belonged to Ayyadurai Gounder, it was not enjoyed in common by Kuppa Gounder and Arumuga Gounder. The first defendant denied the partition between the said Kuppa Gounder and Arumuga Gounder 40 years ago. On 28.2.1931, Kuppa Gounder son of Ayyadurai Gounder and his wife Rajambal, sold an extent of 50 cents in the said 80 cents to one Ratnasabapathy Udayar and the remaining 0.30 cents belonged to Arumuga Gounder. After the sale of 50 cents on the northern side, Kuppsamy Gounder and Rajambal did not have any right over the said land in Survey No. 278/8.

(ii) According to the first defendant, the predecessor Ratnasabapathy sold the land to another Kuppusamy son of Narayanasamy. The said Kuppusamy's wife is the Ayyadurai Gounder's daughter. Though the said Kuppusamy belongs to Vanniar Community, he used to write his name as Kuppusamy Naidu. The said Kuppusamy Naidu is the son-in-law of Ayyadurai Gounder. The said Kuppusamy Naidu is staying in Malaysia along with his son and grand-childen. Therefore, after the sale of 50 cents by Kuppusamy Goudner to Ratnasabapathy Udayar, the above referred Kuppusamy Naidu did not possess any land.

(iii) According to the first defendant, the sale deed dated 21.9.1968 is not true and genuine. Therefore, the plaintiff has no right over the suit property. Arumuga Gounder was enjoying 0.30 cents out of the total extent of 80 cents on the southern side. After the death of Arumuga Gounder, the first defendant was enjoying the said property on behalf of Kuppusamy Naidu and the plaintiff has no right over the said 0.30 cents of land on the southern side. Therefore, the first defendant prayed for dismissal of the suit.

Before the trial court, on the side the plaintiff, three witnesses were examined and 16 documents, Ex.A-1 to Ex.A-16 were marked and on the side of the defendants also, three witnesses were examined and 17 documents, Ex.B-1 to Ex.B-17 were marked.

The trial court after taking into consideration, the oral and documentary evidences of both the parties, decreed the suit as prayed for.

Aggrieved over the judgment and decree of the trial court, the first defendant preferred appeal in A.S. No. 73 of 1984 on the file of Additional Sub Court, Tindivanam and the lower appellate court also after taking into consideration the materials available on record, confirmed the judgment and decree of the trial court and dismissed the appeal.

Aggrieved over the judgments and decrees of the courts below, the first defendant has filed the above second appeal.

Heard Mrs. N. Mala, learned Counsel appearing for the appellant and Mr. V. Raghavachari, learned Counsel for the first respondent.

At the time of admission of the above Second Appeal, the following substantial questions of law arose for consideration:

"1.Whether the Courts below were right in law in over looking the contentions of the appellant herein that the vendors of the 1st respondent had no title to pass under Ex.A.3 by virtue of the ancient sales under Exs.B.1 and B.2?

2. Whether the Courts below are right in law in not adverting to and relying upon Exs.B.1 an B.2, the ancient sale deeds of more than 30 years old filed by the appellant contrary to the presumption contemplated under Section 90 of the Evidence Act?

3. Whether the courts below are right in law in not accepting secondary evidence to prove the execution and registration of Exs.B.1 and B.2 - ancient documents?"

The main contentions raised by Mrs. N.Mala, learned Counsel appearing for the appellant are that:

(i) the burden of proof was wrongly casted on the defendants;

(ii) the respondents cannot question the evidentiary value of Exs. B1 and B2, which are ancient documents; and

(iii) since Exs. B2 sale deed was acted upon, the respondents have no right over the suit property.

In support of the said contentions, learned Counsel for the appellant relied upon a judgment reported in ***1993 (1) MLJ 472 (A. Sankaralingam v. Arunachala Reddiar and Ors.)*** In the said judgment, this Court held that where a piece of evidence even assuming not proved in the proper manner, has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of litigation. Relying on the above judgment, the learned Counsel for the appellant submitted that since Exs. B1 and B2 sale deeds are the documents of the year 1933 and 31 respectively, were marked without objections by the respondents, the evidentiary value of the said document cannot be questioned at a later stage.

Countering the submission made by the learned Counsel appearing for the appellant, Mr. V. Raghavachari, learned Counsel for the respondents 1 to 3 submitted that the appellant is under the obligation to prove the contents of Exs. B1 and B2, though the said documents were marked in the suit and that the consent given by a party for marking the documents, does not dispense with either proof of contents of the documents or truth of contents of the document. The learned Counsel for the respondent/plaintiff has clearly proved his case by oral and documentary evidence. On the contrary, appellant/1st defendant failed to prove his case by any acceptable evidence. Learned Counsel also submitted that Ex.B2 sale deed was not acted upon till date. Learned Counsel for the respondents 1 to 3 in support of his contentions relied upon a judgment reported in ***AIR 1975 Mad 257 (Karuppanna Thevar (died) and Ors. v. Rajagopala Thevar and Ors.),*** wherein the Division Bench of this Court held that the consent given by a party for marking a document does not dispense with either the proof of contents of the document or the truth or otherwise of the contents. On the same lines, the Apex Court also held in ***1972(4) SCC 562 (Sait Tarajee Khimchand and Ors. v. Yelamarti Satyam @ Satteyya and Ors.)*** that the mere marking of an exhibit does not dispense with the proof of documents.

In ***2008(4) SCC 530 (Thirvegadam Pillai v. Navaneethammal and Anr.),*** the Apex Court held that the admissibility of a document into evidence and proof of genuineness of such document are different issues.

In ***2008(3) SCC 745 (Narbada Devi Gupta v. Birendra Kumar Jaiswal and Anr.),*** the Apex Court held that the mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents.

With regard to marking the certified copies of the sale deeds as Exs. B-1 and B-2, learned Counsel for the respondent relied upon the following judgments:

(i) ***2007(2) KLT 804 (SC) (Yashoda v. Shobha Rani),*** wherein the Apex Court held as follows:

> "8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that

secondary evidence "means and includes" and then follow the five kinds of secondary evidence.

9. The rule which is the most universal, namely hat the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be proved by primary evidence. Section 65 however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section.

(ii) ***1996 (8) SCC 357 (Lakhi Baruah and Ors. v. Padma Kanta Kalita and Ors.),*** wherein the Apex Court held as follows:

16. ...If the document produced was a copy admitted under Section 65 as secondary evidence and it was produced from proper custody and was over thirty years old, then the signature authenticating the copy might be presumed to be genuine; but production of the copy was not sufficient to justify the presumption of de execution of the original under Section 90".

On a careful consideration of the materials available on record and the submissions made by both the learned counsels, it could be seen that the suit property is an extent of 44 cents out of the larger extent of 80 cents in Survey No. 278/8. The land measuring an extent of 80 cents in S. No. 278/8 originally belonged to Kuppa Goudner and Arumuga Gounder sons of Ayyadurai Goudner. According to the first respondent/plaintiff, they were enjoying the property in common and that they partitioned the property about 40 years ago. Kuppa Gounder did not have male issues and had three daughters namely, Lakhmigantham, Saroja and Sarasu. According to the first respondent/plaintiff, 44 cents were allotted to the Kuppa Gounder and out of the said 44 cents, he sold 30 cents to his son-in-law Venni Gounder, the second respondent, under Ex.A-1 dated 21.9.1968. On the same day, under Ex.A-2 settlement deed, the said Kuppa Gounder also settled the remaining extent of 14 cents to his daughter Saroja, the third defendant.

According to the first respondent/plaintiff, the property measuring an extent of 80 cents in Survey No. 278/8 was not the common property of Kuppa Goudner and Arumuga Goudner and there was no partition 40 years ago. According to the appellant, out of 80 cents of land, Ayyadurai Gounder's son Kuppa Gounder and his wife Rajambal sold an extent of 50 cents on 28.2.1931 under Ex.B2 sale deed to one Ratnasabapathy Udayar and the remaining 30 cents on the southern side was enjoyed by Ayyadurai Gounder's second son Arumuga Gounder; that after the sale of 50 cents to Ratnasabapathy on 28.2.1931, Kuppa Gounder and his wife Rajambal did not have any land left with them in Survey No. 278/8. Though the appellant contended that when Kuppusamy Naidu left to Malaysia, handed over the possession of 50 cents to Arumuga Gounder and after the death of Arumuga Gounder, the appellant was in enjoyment of the entire extent of 80 cents, from the above contention it could be seen that even according to the appellant his father, Arumuga Goudner was only a care taker of the land belonged to Kuppusamy Naidu and he did not have any title or right over the land measuring an extent of 50 cents. The appellant did not produce any document to prove his title or enjoyment over the suit property. The appellant marked Ex. B1 sale deed dated 11.2.1933 executed by one Muthu Ratnasabapathy Udayar in favour of Kuppusamy Naidu. Ex.B-2 is the certified copy of sale deed dated 28.2.1931 executed by Kuppa Gounder and others in favour of Ratnasabapathy Udayar. Learned Counsel for the appellant contended that since these two documents are ancient documents, it need not be proved; since these two documents were marked in the suit without objections by the respondents, the evidentiary value of the said document cannot be questioned at a later point of time. However, from the judgments relied on by the learned Counsel for the respondents, it is clear that the consent given by a party for marking a document does not dispense with either the proof of contents of the document or the truth or otherwise of the contents. The mere marking of a document does not dispense with the proof of the said documents. The admissibility of a document into evidence and proof of genuineness of such document are different issues.

In the present case, the appellant/defendant though marked the documents as Exs.B-1 and B-2, did not examine any witness to prove the contents of the documents. Its execution has to be proved by admissible evidence, that is, by the evidence of those persons who can vouchsafe for the truth of the facts in issue. Therefore, I am of the view that the two sale deeds namely, Exs. B-1 and B-2 marked on the side of the appellant cannot be construed as proved documents.

With regard to the contention of ancient documents, the language of Section 90 of Indian Evidence Act clearly indicates that the production of the particular document may be necessary for applying statutory presumption. If the document produced was a copy admitted under Section 65 as secondary evidence and it was produced from proper custody and was over 30 years old, then the signature authenticating the copy might be presumed to be genuine but the production of the copy was not sufficient to justify the presumption of due execution of the original under Section 90. Though the documents Exs. B-1 and B-2 sale deeds are of the year 1933 and 1931 respectively, the said documents are only the certified copies of the original sale deeds.

Applying the principles laid down in the above judgments, it is not sufficient to justify the presumption of due execution of the original under Section 90 of the Indian Evidence Act. In these circumstances, the judgments relied pon by the learned Counsel for the appellant is not applicable to the case on hand. The appellant also failed to produce any evidence to prove that Kuppusamy Naidu purchased the property in the year 1931 under Ex.B2 and that he is in possession and enjoyment of the suit property. That apart, the appellant also failed to prove by any acceptable evidence that the said Kuppsamy Naidu handed over the possession of the suit property to appellant's father Arumuga Goudner and after the death of Arumuga Goudner, the appellant is in possession and enjoyment of the property. The respondent produced Ex.A3 sale deed executed by respondents 2 and 3/defendants 2 and 3 to prove that the property belongs to him. He also produced Ex.A-4 patta to prove his possession over the property. The respondent also produced Adangal, Chitta and tax receipts to prove his possession over the suit property. Therefore, the courts below have rightly decreed the suit as prayed for.

In these circumstances, I find no ground much less substantial question of law to interfere with the findings of the courts below. The above second appeal is liable to be dismissed. Accordingly, the above Second Appeal is dismissed. However, there shall be no order as to costs.