TAMIL NADU STATE JUDICIAL ACADEMY

** VOL. XIX — PART05— MAY 2024**

IMPORTANT CASE LAWS

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TABLE OF CONTENTS

SUPREME COURT – CIVIL CASES

Bar of Indian Lawyers Through its President Vs. D.K. Gandhi Ps National Institute Of Communicable Diseases and Anr. [CIVIL APPEAL NO 2646 OF 2009]

Date of Judgment: 14.05.2024

Section 2(42) of Consumer Protection Act, 2019 – Advocates will not fall under the purview of Consumer Protection Act, 2019.

The present appeal before the Court emanates from the Impugned order passed by the National Consumer Disputes Redressal Commission which had held that the services rendered by Lawyers were covered under section 2(42) of the Consumer Protection Act,2019.

The main issue that arose for consideration before the Hon'ble Apex Court was that whether a "Service" hired or availed of an advocate would fall within the definition of "service" contained in the Consumer Protection Act, 2019.

The Court observed that Legal profession is sui generis in nature, having regard to the nature and role of advocates, and cannot be compared with other professions. The service hired or availed of an Advocate is a service under "a contract of personal service" and therefore would fall within the exclusionary part of the definition of "service" contained in the Consumer Protection Act,2019.

The Court had held that Advocates cannot be held liable under the Consumer Protection Act,2019 for deficiency in service and thus had allowed the Appeal.

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Bijay Kumar Manish Kumar Huf Vs. Ashwin Bhanulal Desai [I.A. No.120219/2020 in Special Leave Petition (C) No.4049 of 2020]

Date of Judgment: 17.05.2024

Tenant Continuing in Possession after expiry of Tenancy liable to compensate Landlord by paying 'Mesne Profits'

The present case involved a legal dispute between Bijay Kumar Manish Kumar HUF ("Landlord") and Ashwin Bhanulal Desai ("Tenant") regarding the applicable tenancy law for the lease deed dated November 20, 1992. The issue was whether the tenancy should be governed by the West Bengal Premises Tenancy Act, 1997 (which came into force on July 10, 2001) or the provisions of the Transfer of Property Act, 1882.

The Landlord alleged that the Tenant defaulted on rent payments since 2002 and failed to pay his share of municipal tax since 1996. Consequently, the Landlord initiated eviction proceedings for non-payment of rent, filing suits in the City Civil Court at Calcutta for eviction, recovery of possession, and an injunction to prevent the Tenant from transferring the property. In defense, the Tenant had filed an application under Order VII Rule 11 of the Civil Procedure Code, 1908, seeking the rejection of the suit on jurisdictional grounds. The Tenant argued that the Lease Deed was governed by the WBPT Act, 1997, and contended that the Lease Deed was undetermined and the claims were legally unsound, and the suit was misvalued and insufficiently stamped.

The Trial Court had rejected the Tenant's application, stating that the Tenant's claims could not be substantiated without a full trial. The Tenant then approached the Calcutta High Court, which had upheld the Trial Court's decision in its Civil Revisional Jurisdiction.

Subsequently, the Tenant had appealed to the Supreme Court, which remanded the case back to the Trial Court, directing it to frame and decide preliminary issues relating to the maintainability of the suit and the applicability of the enactments.

Thereafter, the Trial Court framed two issues: (i) whether the suit was triable under the provisions of the WBPT Act, 1997, or the TP Act, 1882, and (ii) whether the suit was maintainable. The Trial Court held that the Lease Deed dated November 20, 1992, predated the WBPT Act, 1997, and was governed by the TP Act, 1882, making the suit maintainable.

Aggrieved by the Trial Court's order, the Tenant had approached the High Court, which had dismissed the suits filed by the Landlord, holding that the WBPT Act, 1997 is applicable and thus the suits were not maintainable. Thereafter, the Landlord had filed Special Leave Petitions ("SLPs") challenging the High Court's order.

During the pendency of these SLPs, the Landlord had filed Interlocutory Applications seeking payment of rent and other benefits. The question that came up for consideration in the Interlocutory applications filed before the Court was whether the Tenant would be liable to pay compensation to the Landlord in the form of 'mesne profit' when there was no eviction order against the Tenant, but he continued to remain in the rented premises.

The Court observed that the Tenant would be liable to pay mesne profit to the Landlord for the period he had been a 'tenant at sufferance. The Court's observation drew support from its judgment in *Indian Oil Corporation Ltd. v. Sudera Realty Private Limited, [2022 LiveLaw (SC) 744*] wherein it was also observed that a tenant continuing in possession after the expiry of the lease became liable to pay mesne profits.

The Court, while allowing the interlocutory applications, held that if the Tenant continued to remain in the rented premises even after the tenancy rights were extinguished, then the Landlord would be entitled to receive compensation in the form of 'mesne profit' from the Tenant.

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Mukatlal Vs. Kailash Chand (D) Through Lrs and Ors. [SLP (CIVIL) NO (S) 12842 OF 2018B]

Date of Judgment: 16.05.2024

Hindu Woman Can Claim Full Ownership of Property Under Section 14(1) of the Hindu Succession Act, 1956 Only If She Possesses It

In a Special Leave Petition filed by the appellant in the suit, the core legal question which arose was whether the plaintiff, as the legal heir of the Hindu widow has the right to enforce her right of succession in the unpartitioned Joint Hindu Family property by virtue of Section 14(1) of the Hindu Succession Act, 1956 (hereinafter referred to as the 'Succession Act') by filing a suit in the Revenue Court.

The Court observed that Section 14 (1) of the Hindu Succession Act required the female Hindu to fulfill two conditions to claim full ownership over the undivided HUF property i.e., firstly, the female Hindu shall be in possession of the property, and secondly, she has acquired the property by way of inheritance or devise, or at a partition or "in lieu of maintenance or arrears of maintenance" or by gift or by her skill or exertion, or by purchase or by prescription. Further, the Court observed that since the Hindu female was not in possession of the HUF property, then merely acquiring a share in the HUF by way of inheritance wouldn't substantiate her claim to claim full ownership over the HUF property.

The Court opined that the essential ingredient of Section 14 (1) of HSA is possession over the property since the deceased female widow was never in possession of the suit property, she cannot claim ownership over the suit property as per Hindu Succession Act. On the point of whether the adopted son/respondent of the deceased female widow could claim right in the suit property by way of filing the partition suit, the Court held that since the female deceased widow was never in possession of the suit property, the suit for partition claiming absolute ownership

under Section 14(1) of the Hindu Succession Act could not be maintained by her adopted son. Thus, the Court had allowed the Appeal.

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Rajesh Kumar Vs. Anand Kumar & Ors. [CIVIL APPEAL No. 7840 of 2023]

Date of Judgment: 17.05.2024

Specific Performance Suit Can't Be Decreed Based On Power Of Attorney Holder's Deposition About Plaintiff's Readiness & Willingness

The appeal has been filed by the plaintiff in the suit. A Suit for specific performance of the contract to execute an agreement of sale was filed by the plaintiff against the defendants. The readiness and willingness of the plaintiff to perform the contract wasn't proved by the plaintiff through his power of attorney, who didn't have knowledge about the plaintiff's readiness and willingness to perform the contract and the transaction that took place between the plaintiff and defendant regarding the suit property. The Trial court had decreed the suit in favour of the plaintiff, however, the decision of the trial court was reversed by the High Court on the ground that the appellant/plaintiff had failed to appear in the witness box and the testimony of his Power of Attorney Holder cannot be read as statement of the plaintiff in a civil suit of this nature. Following this, the plaintiff had preferred the present Appeal.

The Court observed that wherein the plaintiff is required to prove his readiness and willingness to perform the contract, then the suit for specific performance of the contract cannot be decreed based on the deposition made by the plaintiff's power of attorney about the plaintiff's readiness and willingness to perform a contract. The term 'readiness and willingness' refers to the state of mind and conduct of the purchaser (plaintiff), as well as his capacity and preparedness, one without the other being not sufficient. Therefore, a third party having no personal knowledge about the transaction cannot give evidence about the readiness and willingness of his principal.

The Court held that if a plaintiff, in a suit for specific performance, is required to prove that he was always ready and willing to perform his part of the contract, it is

necessary for him to step into the witness box and depose the said fact and subject himself to cross-examination on that issue and having failed to step into the witness box to prove his readiness and willingness to perform his part of the contract would result in rejection of the suit of specific performance due to non-fulfilment of the requisites of Section 12 of Specific Relief Act, 1963 and dismissed the Appeal.

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S. Shivraj Reddy(Died) thr his Lrs. and Anr. Vs. S. Raghuraj Reddy and Ors. [SLP(Civil) No(s). 4237 of 2015)]

Date of Judgment: 16.05.2024

Time-Barred Suit Must Be Dismissed Even If Plea of Limitation Isn't Raised As Defence

The appeal has been preferred by the defendant in the suit. The suit had been instituted seeking relief of dissolution of the firm and rendition of accounts. The said suit was allowed by the Trial Court. Aggrieved by the said Judgment, the Defendant had filed an Appeal before the single Judge of the High Court. The Hon'ble High Court allowed the said Appeal on the ground that suit was barred by limitation as one of the partners in subsisting partnership firm had expired in 1984, therefore the firm stood dissolved immediately on the death of the partner. Since the original suit was filed in 1996, it was barred by limitation. Thereafter, the Plaintiff had filed an Appeal before the Division Bench of the High Court. The Division Bench had observed that the plea of limitation was never raised during the pleadings in the trial Court and the learned Single Judge of the High Court ought not to have dealt with that issue at all. Thus, the Defendants had preferred the present Appeal.

The Court by placing reliance on the case of ***V.M. Salgaocar and Bros. v. Board of Trustees of Port of Mormugao and Another [(2005) 4 SCC 613]*** observed that as per the mandate of Section 3 of the Limitation Act, the court has to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. The court observed that the filing of a suit for the rendition of an account of the partnership firm by another partner ought to be filed within the prescribed limitation period of three years being calculated from the date of the partner's death. Any suit filed beyond the limitation period would not be maintainable due to the enforcement of a specific bar to entertain the time-barred suit under the Limitation Act.

The Court held that even if the plea of limitation is not set up as a defence, the Court has to dismiss the suit if it is barred by limitation. Thus, the court allowed the appeal and restored the judgment of the Single Judge of the High Court.

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SUPREME COURT – CRIMINAL CASES

S. Nitheen & Ors. Vs. State of Kerala & Anr. [SLP (Criminal) No(s). 8529 of 2019]

Date of Judgment: 15.05.2024

Section 494 of IPC- Friends/Relatives cannot be held to have common Intention for offence of Bigamy by mere presence in Second Marriage

The present Appeal has been preferred challenging the Judgment of the High Court which had dismissed the quash petition filed by the Appellant.

The brief facts of the case is that the husband who is the Complainant had married accused no.1 (wife) on April 16,2007. It is claimed that on 13th August, 2010 the Accused No.1 had married Accused No.2 under special Marriage Act, 1954 even though she was already married to the Complainant. The Complainant had alleged that the friends and family of the accused were also responsible for the offence of bigamy since they wanted this to happen by way of common intention to commit the offence. Thereafter, the Trial Court had framed charges against all the accused (including family members and relatives of the accused) under section 494 of IPC read with section 34 of IPC on the basis of evidence led on behalf of the Complainant. Thereafter, the Appellants had filed a quash petition before the High Court which got dismissed. Hence, the present Appeal was filed.

The Court observed that the charge under the offence of bigamy, punishable under section 494 of IPC, can be framed only against the spouse to the second marriage. By the mere presence of friends and relatives in the second marriage, it cannot be held that they had the common intention to commit the offence of bigamy unless the complainant prima facie proves the overt act or omission of the accused persons and also establish that such accused were aware about the subsisting marriage.The Court by placing reliance on the Judgment of the Hon'ble Apex Court in the case of *Gopal Lal vs. State of Rajsthan* had concluded that the order framing charges

against the Appellants (family members and relatives of the Accused) suffers from patent error as only the spouse to the second marriage could have been charged for the offence of Bigamy.

Thus, the Court had quashed the criminal proceedings initiated against the friends and relatives of the Appellant and further directed the Trial Court to proceed with the Trial of the main accused alone (spouse).

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Ajwar Vs. Waseem & Anr. [SPECIAL LEAVE TO APPEAL (CRIMINAL) NO.513 OF 2023]

Date of Judgment: 17.05.2024

Bail can be challenged by same court which granted it, if there are serious allegations even if the accused has not misused Bail

The present Appeal has been filed challenging the order passed by the High Court which had granted bail to the accused. The Appellant had contended that the accused was granted bail without taking into consideration the material evidence placed on record by the prosecution showing the involvement of the accused in the crime and the previous criminal antecedents of the accused.

The Court observed that a Court before granting bail to an accused must consider relevant factors like the nature of accusations made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the criminal antecedents of the accused, the probability of tampering the witnesses and repeating the offence, if the accused are released on bail, the likelihood of the accused being unavailable in the event bail is granted, the possibility of obstructing the proceedings and evading the Courts of justice and the overall desirability of releasing the accused on bail.

The court had stated that if bail, once granted, it should not be revoked automatically. However, an unjustified or unreasonable bail decision can be reviewed by the Superior Court. If there are serious allegations against the accused, even if he has not misused the bail granted to him, such an order can be cancelled by the same Court that had granted the bail. The court should exercise caution, recognizing that at the bail stage, only a preliminary case assessment is necessary, and detailed discussions on case merits that could prejudice the accused should be avoided. The bail order must elucidate the factors considered by the Court in granting relief to the accused. In the present Appeal, the Court observed that the

High court had erred in granting bail to the Respondent/accused by not looking into the previous criminal history of the accused and thus the court had allowed the Appeal.

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Amanatullah Khan Vs. The Commissioner of Police, Delhi & Ors. [SLP (Crl) No. 5719/2023]

Date of Judgment: 07.05.2024

History Sheet cannot include details of minor children in absence of evidence against them

The Court was dealing with a Special leave petition filed by Delhi's AAP MLA against the Delhi High Court's order dismissing his plea for quashing of the 'History Sheet' opened against him and the proposal to declare him as 'Bad Character'. The History Sheet contained disturbing contents related to the School-going minor children of the Appellant and his wife

The court observed that the amended Standing Order dated 21.03.2024 issued by the Delhi Police officials had addressed the issues raised by the appellant by ensuring that the identities of minor children were not disclosed unless there is evidence of their involvement to the crime. The Court stated that the said standing order must be implemented in the present case. The court further observed that Section 74 of the Juvenile Justice (Care and Protection of Children) Act, 2015 must be strictly adhered to. The court while allowing the appeal observed the importance of protecting the dignity and privacy of individuals, especially minors, as enshrined under Article 21 of Indian Constitution. The court by exercising its suo moto powers had recommend the Police authorities in other States and Union Territories to ensure that no mechanical entries in History Sheet are made of innocent individuals, simply because they happen to hail from the socially, economically and educationally disadvantaged backgrounds, along with those belonging to Backward Communities, Scheduled Castes & Scheduled Tribes.

The Court further ordered that no details of any minor relatives should be recorded anywhere in the History Sheet unless there is evidence that such a minor has

afforded shelter to the offender The Court also observed that the police authorities must exercise extra care and precaution to ensure that the child's identity is not disclosed in the History Sheet. Thus, the Court had modified the Judgment of the High Court to the extent that the details of the Appellant's minor school -going children and his wife, against whom there was no adverse material would not be included in the 'History Sheet'.

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Anees vs. The State (Govt. of NCT of Delhi) [Criminal Appeal No. 437 of 2015]

Date of Judgment: 03.05.2024

Section 106 of the Evidence Act cannot be applied until Prosecution establishes a Prima Facie Case

Prosecutors Must Effectively Cross-Examine Hostile Witnesses to Show They're Lying; Merely Marking Contradictions Not Sufficient

If There Are Lapses by Prosecutors, Trial Judges Should Play Active Role In Evidence Process

The Criminal appeal has been filed against the Judgment and order passed by the High Court of Delhi, affirming the trial court conviction order passed against the appellant/accused for the offence punishable under Section 302 of the Indian Penal Code, 1860. The case pertains to the conviction of the appellant for the murder of his wife. The appellant was convicted for the murder of his wife in his home. The only eyewitness was their 5-year-old daughter, who turned hostile.

The Apex Court observed that after the witness was declared hostile, all that the public prosecutor did was to put few suggestions to her for the purposes of cross-examination. Even proper contradictions were not brought on record. The Court had stated that trial judges should take a proactive role instead of acting as "mere tape recorders" recording witness statements. If there is any lapse by the prosecutor, then the judge should intervene and ask necessary questions to the witness to elicit relevant information.

The Apex Court had stated that the prosecutors often only confront them with their police statement, aiming to highlight contradictions but not fully explore the witness's testimony, the Court said. The Court emphasized that the purpose of cross-examination is to challenge the accuracy and credibility of the witness's statement, uncover hidden facts, and establish if the witness is lying. Public

Prosecutors should conduct detailed cross-examinations to reveal the truth and establish the witness's first-hand knowledge of the incident described in their police statement.

Further, the Apex Court had stated that a court cannot independently use statements made to the police that have not been proven, nor can it base its questions on such statements if they conflict with the witness's testimony in court. The phrase 'if duly proved' in Section 162 of the Criminal Procedure Code (Cr.P.C.) indicates that the statements of witnesses recorded by the police cannot be immediately admitted as evidence or examined. They must first be proven through eliciting admissions from the witness during cross-examination and also during the cross-examination of the Investigating Officer. While statements made to the Investigating Officer can be used for contradiction, this can only be done after strict compliance with Section 145 of the Evidence Act. This requires drawing attention to the specific parts of the statement intended for contradiction.

Further, the Court observed the scope of Section 106 of the Evidence Act and held that until the prosecution establishes a prima facie case through evidence, the burden remains on them, not on the accused. Section 106 of the Evidence Act cannot compensate for the prosecution's failure to present evidence indicating the guilt of the accused. It cannot serve as grounds for conviction unless the prosecution has fulfilled its obligation by proving all elements necessary for the offense.

On the issue whether the Appellant was entitled to the benefit of exception 4 under section 300 of IPC, the Court had stated that the sine qua non for the application of an Exception to Section 300 always is that it is a case of murder but the accused claims the benefit of the Exception to bring it out of that Section and to make it a case of culpable homicide not amounting to murder. This plea, therefore, assumes that this is a case of murder. Hence, as per Section 105 of the Evidence Act, it is for the accused to show the applicability of the Exception. On a plain reading of

Exception 4, it appears that the help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or having acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4, all the ingredients mentioned in it must be found.

The Court found that the present case was not one of culpable homicide not amounting to murder, as the Appellant had contended, but was instead a case of murder. Therefore, the Court dismissed the Appeal.

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Child in Conflict with Law Through His Mother Vs. The State of Karnataka & Anr. [Special Leave Petition (Crl.) No. 3033 of 2024]

Date of Judgment: 07.05.2024

Juvenile Justice (care and Protection) Act, 2015 - 3 Months' Time Limit for Preliminary Assessment of Juvenile as per Sec. 14(3) is not Mandatory but Directory in nature

30 Days' time Limit to Prefer Appeal against Juvenile Justice Board Preliminary Assessment Order

Appeal against Preliminary Assessment Order is Maintainable before Children's Court, Not Sessions Court

The case involves an FIR filed against the accused for offenses under sections 376 (i), 342 of the Indian Penal Code, and sections 4, 5, 6, 7, and 8 of the Protection of Children from Sexual Offenses Act, 2012. Following the investigation, a charge sheet was submitted, leading the Board to decide whether the accused should be tried by the Board or as an adult by the Children's Court.

A decision was made by the Board members stating that, based on the preliminary assessment report and the social investigation report, the inquiry into the alleged offence committed by the CCL was to be conducted by the Board as a juvenile. An application under Section 19 of the Juvenile Justice (Care and Protection of Children) Act, 2015, was filed by the complainant/mother of the victim before the Board, requesting the termination of proceedings and transferring the matter to the Children's Court.

The CCL filed objections to this application. Subsequently, the Board dismissed the application. Aggrieved by this decision, the complainant filed a revision petition before the High Court, which was granted. The order passed by the Board was set

aside, and the Board was directed to transmit the record to the Children's Court for trial. Against this decision, the CCL then approached the Supreme Court.

The main issue that arose for consideration in the Appeal was whether the period provided for completion of preliminary assessment under section 14(3) of the Act is mandatory or directory in nature.

The Court observed that "As in the process of preliminary inquiry there is involvement of many persons, namely, the investigating officer, the experts whose opinion is to be obtained, and thereafter the proceedings before the Board, where for different reasons any of the party may be able to delay the proceedings, in our opinion the time so provided in Section 14(3) cannot be held to be mandatory, as no consequences of failure have been provided as is there in case of enquiry into petty offences in terms of Section 14(4) of the Act." Further, the Court observed that neither any time has been fixed for filing the appeal nor any provision is provided for condonation of delay in case where the appeal is sought to be preferred under Section 101(2) of the JJ Act against the JJB's preliminary assessment order passed under Section 15(1). Thus, the Court sought to fill up the gap by prescribing 30 days time limit which otherwise does not go against the scheme of the Act.

Section 101(2) of the JJ Act provides that against an order passed by the Board after preliminary assessment under Section 15 of the Act, the appeal is maintainable before the Court of Sessions. Here, the word Children's Court is not mentioned. The court opined that the words 'sessions court' and 'children's court' ought to be used interchangeably. This means thereby, where the children's court is not established then the appeal would be preferred before the sessions court, however, where the children's court is established then despite maintainability of the appeal under Section 101(2) before the Sessions Court, the appeal would be preferred before the Children's Court.

The Court held that the time limit of three months prescribed under Section 14(3) of the Juvenile Justice (Care & Protection) Act, 2015 for ascertaining the mental and physical capacity of a child below the age of sixteen years to commit a serious offence is not mandatory but directory in nature. However, the period can be extended, for the reasons to be recorded in writing, by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate.

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HIGH COURT CRIMINAL CASES

C.R. Balasubramanian Vs. P. Eswaramoorthi [Crl.O.P. No. 947/2024]

Date of Judgment: 22.01.2024

S. 148 NI Act - Don't Impose Condition of Deposit of Minimum 20% Compensation/ Fine Amount 'Mechanically': Madras HC to District Courts

The petitioner who is the accused in a 138 Negotiable Instruments Act case had preferred the petition challenging the order to deposit 20% of the cheque amount.

In this case, the petitioner had raised a prima facie ground before the lower appellate court and sought exemption from depositing the cheque amount/compensation amount. However, the lower court, while suspending the sentence had imposed certain conditions including the petitioner to deposit 20% of the cheque amount which has been challenged in the present petition.

The Court had opined that the lower appellate Court should have considered this ground and passed a reasoned order, which it failed to do. The Court had relied on the Judgment of the Hon'ble Apex Court in the case of *Jamboo Bhandari vs. MP State Industrial Development Corporation Ltd [2023 LiveLaw (SC) 776]* wherein, it was held that a deposit of minimum 20% amount u/s 148 of NI Act as a condition to suspend sentence is not an absolute rule. Therefore, the Court had remanded the matter back to the Trial Court to address the petitioner's request for exemption in depositing 20% of the compensation amount and pass appropriate orders in this regard on its own merits.

The Court had stated that while dealing with an application for suspension of sentence or for grant of bail when an appeal is filed against the conviction for offence u/s.138 of the Act, the District Courts must not mechanically impose a condition of deposit of 20% of the compensation/ cheque amount u/s 148 of the Act. Further, the court observed that there is an element of application of mind that

is involved while directing a deposit of 20% of the amount as contemplated under this provision and that if the accused person can make out a ground for reduction of this percentage or exemption of deposit, the same has to be considered by the appellate Court by passing a reasoned order before directing deposit of compensation amount as a condition while suspending the sentence/ granting bail.

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M. Balamurugan Vs. State through the Inspector of Police, All Women Police Station Tutitcorin District [Crl.A.(MD) No.184 of 2020]

Date of Judgment: 18.04.2024

I.P.C., Sections 376(2)(1), 506(i); Evidence Act, Section 119

The present Appeal is filed under section 374 (2) of Code of Criminal Procedure, 1973 to set aside the Judgment of the Trial Court which had convicted and sentenced the Appellant.

The brief facts of the case are that the victim was a deaf and mute girl, aged about 26 years, and a relative of the appellant hailing from the same locality. They were known to each other. The appellant was accused of committing rape on the victim. The appellant had contended that he and the victim girl were close relatives known to each other and a case of consensual relationship between them had been projected as a case of rape and a false complaint had been given to the respondent – Police by the father of the victim girl. The case of the prosecution is that the accused committed rape on the victim girl against her will by obtaining her consent under threat of putting her and her family members in the fear of death or hurt, whereas it is the case of the accused that the relationship between the appellant and the victim girl was a consensual one and she was a consenting partner and that the complaint was not given by the victim and it was given only by the father of the victim that too only after he came to know about the pregnancy of the victim/his daughter and that it is also admitted by the victim that she would not have preferred the complaint if she had not become pregnant.

The Court observed that the Victim was a grown-up girl aged 26 years having studied up to 9th Standard and her family members and the family members of the accused are known to each other and she is also aware that the accused is a married man. She had sufficient intelligence to understand the significance and moral quality of the act for which she was consenting or rather keeping silent. She

had not resisted to the overtures of the accused, and in fact succumbed to them. She, thus, freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly, when she was conscious of the fact that the accused was a married man. Further, she had also admitted to the fact that she would not have given the complaint if she had not become pregnant and that she had not informed about the act to anyone for two months after the incident and that the complaint had been given by her father only after he found out that his daughter was pregnant and only after the talks for marriage failed to fructify. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

The Court had held that the Trial court, without proper appreciation of evidence, had found the accused guilty and convicted him and therefore, the judgment passed by the Trial Court was liable to be set aside. Thus, the Criminal Appeal was allowed and the accused was acquitted of all charges.

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Vijayan Vs. State Rep. by Inspector of Police, Sathyamangalam Police Station, Erode District[Crl.A.No.79 of 2019]

Date of Judgment: 08.04.2024

POCSO Act - Sec. 4, 9, 10 and 12; I.P.C- Sec. 361, 366

The Criminal Appeal was *filed* by the sole accused challenging the conviction and sentence imposed upon him by the Trial Court. It is the case of the prosecution that the victim who was aged 10 years at the time of occurrence; while she was playing, the appellant who was her neighbour with the intention to commit sexual assault had called her into his house under the guise of changing the TV channel with the consent of the victim's mother; that when the victim came to the house, he locked the house; that he removed her nighty and undergarments, removed his lungi and made the child sit on his private part; and thereby committed the offence under Section 4 of POCSO Act.

It is the appellant case that primarily the complaint is belated and the evidence suggests that there was prior enmity between the family of the victim and the appellant which had prompted PW1 to give a false complaint; that in any case, the allegations do not disclose the offence under Section 4 of the POCSO Act and prayed for acquittal. On the other hand, the learned Additional Public Prosecutor contended that though the accused was charged and convicted for the offence under Section 4 of the POCSO Act, he was liable to be convicted under Section 6 of the POCSO Act, because the appellant had committed aggravated penetrative sexual assault; that the motive for false prosecution has not been probabilised by the defence; and that the evidence led before the Trial Court were cogent and the trial Court had rightly convicted the appellant and no interference is called for.

The Court observed that enticement or taking away of the minor child has to be done without the consent of the lawful guardian. Admittedly, the appellant had taken the victim with the consent of PW1. In such circumstances, we are of the view that the offence of kidnapping is not made out and consequentially the offence

under Section 366 of the IPC is also not made out. Therefore, the Court had set aside the judgment of conviction as regards the finding of guilt under Section 366 of the IPC. Further, the Court observed that based on the findings of the Accident Register Exhibit, that there was an 'attempted rape' and no external injuries were found on the victim, delay in filing of the complaint and the fact that victim's evidence does not clearly establish that there was a penetrative sexual assault, hence, the Court was of the view that it would be highly unsafe to convict the appellant for the offence under Section 4 or 6 of the POCSO Act. However, based on the evidence presented before the Court, the court observed that the appellant had committed sexual assault, which involved physical contact with the private part of the victim and also physical contact of the victim with the private part of the appellant. The victim was aged 10 years at the time of occurrence and therefore, the act committed by the appellant would be a aggravated sexual assault falling within Section 9(m) of the POCSO Act, which is punishable under Section 10 of the POCSO Act.

Thus, the court had convicted the appellant under Section 10 read with Section 9(m) of the POCSO Act instead of Section 4 of the POCSO Act and partly allowed the criminal appeal.

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HIGH COURT – CIVIL CASES

Sahayaraj Vs. M/s. Shriram Transport Finance Company Ltd. & Anr.[CRP(MD) No. 576 of 2024]

Date of Judgment: 04.03.2024

If Arbitration Award Not Challenged under Section 34, Can't Be Challenged At Execution:

The parties had entered into a hypothecation agreement wherein the petitioner had availed a loan from the respondent. The agreement contained an arbitration clause. A dispute had arisen between the parties regarding the non-payment of the loan amount. As a result, the respondent had issued a notice of demand dated 18.05.2020. The petitioner did not participate in the arbitral proceedings, and the tribunal proceeded ex-parte. The arbitrator passed an award dated 03.10.2020 against the petitioner, directing them to pay Rs.62,32,808/-. The petitioner did not challenge the arbitral award under Section 34 of the Arbitration and Conciliation Act. Upon the expiry of the time period to challenge the award, the respondent moved for execution under Section 36 of the Act. Before the Executing Court, the petitioner challenged the award on the grounds that the interest rate awarded was exorbitant and that the payments made by the petitioner were not considered by the arbitral tribunal. However, the Executing Court rejected the challenge, observing that such objections could only be decided under Section 34 and not otherwise. Aggrieved by this decision, the petitioner had filed a revision petition before this Hon'ble Court.

The Court while dismissing the Revision Petition held that an Executing Court cannot go behind an arbitration award and decide issues on the merit of the award. An arbitration award can only be challenged under Section 34 of the Arbitration and Conciliation Act, and a party failing to challenge the award therein cannot raise contentious issues on the merit of the award before the Executing Court. Therefore, the Hon'ble Court had dismissed the revision petition.

M/s. Colorhome Developers Pvt. Ltd. Vs. M/s. Color Castle Owners Society [OSA(CAD) No. 113 of 2022]

Date of Judgment: 25.03.2024

When Plea Regarding Lack of Jurisdiction Not Raised Before the Arbitrator, It Cannot Be Raised In Appeal:

The Appeal filed as against the order of dismissal of a challenge petition and upholding an Arbitration Award. The dispute between the parties was referred to arbitration by the Court. At the time of the appointment, the Court had rejected the objection by the appellant to the invocation of arbitration by the Secretary of Housing Society (Respondent). The arbitrator allowed the claims of the respondent and directed the appellant to pay certain sums to the respondent. Aggrieved thereby, the appellant had challenged the award before the Single Bench. The Single Bench had dismissed the challenge petition and upheld the arbitration award. Hence, the appellant had filed appeal under Section 37 of the A&C Act.

The appellant had challenged the award on the ground that the invocation of the arbitration was invalid since the secretary could not invoke the arbitration on behalf of the housing society. Further, there was no arbitration agreement between the parties, and therefore, the entire proceedings and the resultant award had to be vitiated.

The Court observed that the first objection/ground of the appellant regarding invalid invocation of arbitration was already dealt by the Appointing Court which had rejected the objection and appointed the arbitrator. The Court has stated that an objection regarding validity of the invocation of the arbitration dismissed by the Court under Section 11 cannot be raised again in appeal. The Court also dealt with the issue of lack of arbitration agreement. The Court observed that this objection was never raised before the arbitrator or before the Single Bench under Section 34.

Further the Court observed that Section 16(2) requires a party to take objection to jurisdiction not later than the submission of the statement of defence.

The Court while dismissing the Appeal held that that a plea regarding lack of jurisdiction or invalidity of the appointment of the arbitrator must be raised before the arbitrator during the arbitral proceedings. If such a plea is not taken at the first instance under Section 16(2), the Court in appeal cannot entertain such an objection.

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S. Ekambaram Vs. K. Nallathambi [S.A No. 664 of 2018]

Date of Judgment: 08.03.2024

The defendant in the suit had preferred the second appeal. The Plaintiff was the son of (late) one Mr. Kandasamy Mudaliar, who had nine sons and three daughters, and out of the said three daughters, one of the daughter had passed away. According to the plaintiff, the suit property was ancestral property belonging to his grandfather, Palani Mudaliar, who had only one son, Kandasamy Mudaliar, the father of the plaintiff. The plaintiff claimed that he was entitled to half share in the suit property, and since it was ancestral property, his sisters would not be entitled to any share. The defendant was the purchaser of the suit property from the plaintiff's father. The defendant filed a written statement contending that he was a bona fide purchaser of the entire suit property from the plaintiff's father, who had absolute right to deal with the property. Therefore, the plaintiff was not entitled to seek the relief of partition. The defendant also raised the plea of non-joinder of the plaintiff's sisters as parties to the suit. The trial Court, finding that the property was ancestral property at the hands of the plaintiff's father, had held that the plaintiff was entitled to one-half share. Thereafter, the Defendant had preferred an Appeal, and the first Appellate Court had concurred with the findings of the trial Court and had dismissed the appeal.

The Hon'ble Court had observed that the suit for partition was filed by the Plaintiff only in the year 2007 after the issuance of a pre-suit notice on 11.09.2007. On the said date, the Hindu Succession (Amendment) Act, Act 39 of 2005, had come into force, giving equal rights to daughters in coparcenary property, treating them on an equal footing with sons. That being the position, the Court held that non-joinder of the sisters of the plaintiff was clearly fatal to the suit for partition. Further, the Court observed that the Plaintiff was not able to produce any valid document to establish that the suit property was an ancestral property at the hands of the Plaintiff's father. Thus, the Court had allowed the second Appeal.

P. Jayachandran Vs. A. Yesuranthinam (Died) and Ors. [A.S.No. 340 of 2016]

Date of Judgment: 07.06.2024

Live-In Relationship with Married Man Cannot Be Treated As Relationship "In the nature of Marriage"

The defendant had preferred the appeal. The Plaintiff had instituted suit for declaration of title and recovery of possession. The Plaintiff was the father of Ms. Y. Margarette Arulmozhi. She had lived together with Mr. P. Jayachandran (Defendant), who was already married. Since the Defendant's marriage with Mrs. Stella had not been dissolved according to the Indian Divorce Act, the Defendant and Ms. Margarette Arulmozhi were living together without being married. While things stood thus, the Defendant had executed a settlement deed in favor of the Plaintiff's daughter. Subsequently, Ms. Margarette Arulmozhi had passed away. Following her death, the settlement deed executed by the Defendant in favour of Ms. Margarette Arulmozhi was unilaterally cancelled. The Plaintiff had contended as per section 42 of the Indian Succession Act, 1925 the Plaintiff who was the father of the deceased Ms. Y. Margarette Arulmozhi, was entitled to succeed the property of the deceased daughter. On the other hand, the Defendant had filed a written statement contending that he and Margarette Arulmozhi had lived as husband and wife and that, based upon their relationship, Ms. Margarette Arulmozhi had nominated him for the special provident fund cum gratuity and for family pension with school authorities. Further, the Defendant had claimed that their relationship was recognized as a legitimate marriage and therefore prayed for the dismissal of the suit.

The trial court observed that since the Defendant and Margarette's marriage had not been converted into a legitimate marriage, the Plaintiff was entitled to the decree of title of the suit property. Thus, the Court had directed the Defendant to deliver

possession of the property to the Plaintiff. Aggrieved by it, the Defendant had preferred the appeal.

The court observed that, unlike the Hindu Marriage Act which had recognized the caste system, the Indian Divorce Act did not recognize any such system nor any customary form of divorce. Therefore, the court held that in the absence of recognition of any customary divorce, it could not accept the Defendant's plea that he had customarily divorced his wife, Mrs. Stella. Further, the Court observed that in the absence of any positive evidence of divorce, the relationship between the Defendant and the Plaintiff's daughter could not assume the legal status of husband and wife. With respect to the Defendant being nominated as the beneficiary in service records, the court had stated that the same would not mean that the Defendant was the legal heir. Observing that such nomination was only a self-declaration, the court held that merely because of such description, Ms. Margarette could not be called the legally wedded wife of the Defendant.

Thus, observing that a live-in partner could not seek succession or inheritance of property in the absence of codified law, the court had upheld the Trial court's decision and dismissed the appeal.

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K. Kamala & Ors. Vs. Executive officer, Arulmigu Nandeeswaraswamy Devasthanam & Anr. [S.A No. 398 of 2017]

Date of Judgment: 20.12.2023

The Appellant is the Plaintiff in the suit. The Plaintiff had instituted suit for declaration of Title and recovery of possession. The Plaintiff had claimed title to the property as a Personal Grant and continued to be in possession and enjoyment of Inam lands. The Defendant has filed an Application to reject the Plaint inter alia on the ground that the Civil Court jurisdiction is barred. The said application was allowed by the Trial court and was further affirmed by the First Appellate Court. Aggrieved by it, the Plaintiff had filed the present second Appeal.

The Court observed that it is settled law that while considering the Application for rejection of the Plaint, the Court shall only refer to the Plaint averments and the documents filed in support of the Plaint aversments. Only in cases, where Plaint is liable to be rejected on any one of the grounds enumerated under order 7 Rule 11 of CPC on the face of the averments made in the Plaint and the Plaint documents, the Plaint can be rejected. The Court is not entitled to refer to the defence and the Defendant's documents while considering the Petition for rejection of the Plaint. Further, the court observed that both the Trial Court and the First Appellate Court had referred to the documents filed by the Defendant and had allowed the Application for rejection of Plaint. On the issue of jurisdiction of civil court, the Court by referring to the Full Bench Judgment passed by this Hon'ble Court in the case of Srinivasan and 6 ors. vs. Sri Madhyarjuneswaraswami, Pattavaiathalai, Thiruchirapalli Dist. [1998 (1) CTC 630 (FB]) had observed that even if the order passed in the settlement proceedings had attained finality, still the Civil court has jurisdiction to decide the question of title. Thus, the Court had allowed the second Appeal and had set aside the Judgment and the Decree passed by the First Appellate Court.

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