SJA NEWSLETTER

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Topic of the Month

Law of Entropy afflicts as much our judicial system as it pervades the universe. All things move from order to disorder. But, the human mind has always imposed order even on Chaos. This is the time for us, to clean up our house and set it back into order.

We are all too familiar with the symptoms and the disease afflicting our judicial system - sky rocketing litigation, the arrears of cases and consequently, the delayed justice. The causes for these *mala fides* are not far to seek: Increase in the population and the increase in literacy rate, has bred litigation. The lack of courts, the vacancies on the Bench, the poor infrastructures of the courts has undermined our ability to cope with the mounting litigation. The consequences are that the poor litigant must go through labyrinthine judicial processes, must wait for years on end to see even a glimmer of justice.

The malice is not curable. But the illness calls for a multi pronged cure. The foundation of any system is the knowledge of the people who work the system. Therefore, the first task before us, is to improve the quality of legal education in the country. With bad seeds, one cannot expect a good harvest. Unless our law students are taught properly, they can neither make good lawyers, nor good Judges. Good lawyers and good Judges will dispose of cases at a faster rate and with less cacophony.

In order to reduce the number of cases coming into courts, Alternative Dispute Redressal, such as Arbitration, Lok Adalat, Panchayat Courts should be encouraged amongst the people. Since the Government is the biggest litigant, it needs to evolve a method of solving the disputes within the Government department. This will certainly reduce service-cases, to a large extent. These ADR Fora will also reduce the number of litigation, coming into the Court.

(Excerpts from speech delivered on the 'Administration of Judicial System' in Rajasthan, Jaipur by Dr. Justice A.R. Lakshmanan, Judge, Supreme Court of India)

ACADEMY NEWS

One day workshop for making "ADR an effective tool for reduction of Arrears and Speedy Justice" for Judicial Officers of the rank of Sub-Judges and Munsiffs was organized by the State Judicial Academy on 14th February 2009 at Jammu. The workshop was addressed by Shri Bushan Lal Saraf, District & Sessions Judge (Retd.) presently Member, State Consumer Commission, in the first session. He, while interacting with the participants in the workshop, laid emphasis on resorting to Alternate Dispute Resolutions in view of the growing arrears in the courts and also under-lined the importance of Alternate Dispute Resolutions in providing speedy and inexpensive justice to the litigants. Shri Saraf further told the participants that a matter if resolved through ADRs does not leave behind any trace of rancor or enmity between the parties.

Shri Sanjay Dhar, Secretary, High Court Legal Services Committee as a Resource Person in the 2nd session of the workshop highlighted the importance of Lok Adalats in reducing the arrears and for providing speedy justice. While interacting with the participants, he told them that Lok Adalats are being regularly conducted at tehsil and district level and some mega lok adalats have also been conducted at Jammu and Srinagar wing of the High Court, and the results thereof are very encouraging. He also told the participants about the effectiveness of mediation as an Alternate Dispute Resolution method and was of the view that Judicial Officers as well as some Advocates need to be trained in mediation as the same has been done in the other parts of the country because the mediation has proved to be very effective tool as alternate dispute resolution in providing speedy and inexpensive justice to the people seeking justice from courts. Shri Dhar also told the participating officers that immediately after the formal trial of a suit begins, the parties should be persuaded by the Presiding Officers to refer their matters for resolution through ADR.

LEGAL JOTTINGS

(Case No: Criminal Appeal No. 2062 of 2008) Lal Suraj @ Suraj Singh versus State of Jharkhand Date of Decision : 18/12/2008.

Judge(s): Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Cyriac Joseph.

Subject Index: Criminal Procedure Code, 1973 — s**ection 319** — scope of — section 319 of the Code is a special provision. It seeks to meet an extraordinary situation. It although confers a power of wide amplitude but is required to be exercised very sparingly — before an order summoning an accused is passed, the Trial Court must form an opinion on the basis of the evidences brought before it that a case has been made out that such person could be tried together with the other accused — there is no dispute with the legal proposition that even if a person had not been charge sheeted, he may come within the purview of the description of such a person as contained in Section 319 of the Code — the learned Sessions Judge as also the High Court committed a serious error in passing the impugned judgment. On the basis of the aforementioned evidence, there was no possibility of recording a judgment of conviction against the appellants at all.

(Case No: Criminal Appeal No. 2061 of 2008) Ex. Constable Ramvir Singh versus Union of India

Date of Decision : 18/12/2008.

Judge(s): Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Cyriac Joseph

Subject Index: Border Security Force Act, 1968 — trial under before the Summary Security Force Court — two charges — dismissed from service. A statutory petition filed by him under Section 117 of the Act was rejected by the Director General of Border Security Force by an order dated 28.6.2001. Legality and/ or validity of the said order came to be questioned by the appellant by filing a Writ Petition before the Punjab & Haryana High Court — appellant did not even raise any contention before the Summary Security Force Court that he intended to consult a lawyer or to select a friend of his choice as provided for in Rule 157 of the Rules. The High Court, therefore, has rightly opined that such a contention cannot be permitted to be raised — except the cases where the punishment is shockingly disproportionate, the Superior Courts would not ordinarily interfere with the quantum of punishment — not find any infirmity in the judgment of the High Court. The appeal is dismissed.

(Case No: Criminal Appeal No. 132 of 2007)

Chetu and another versus State of Madhya Pradesh. Date of Decision : 18/12/2008.

Judge(s): Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Cyriac Joseph.

Subject Index: IPC 302, 342, 436 and 34 — trial Court convicted the appellants, sentenced them to life — division bench of M.P. High Court affirmed trial Court's conviction — High Court held that the deceased sustained several injuries with deadly weapon, though his house was set on fire afterwards

— his body was recovered from the room of appellants — key in possession of wife of the appellant — in case of hostile witness, the whole testimony cannot be discarded — appealed — S.C. held that the veracity of the entire prosecution case should have been considered by trial Judge and High Court — High Court committed error in holding that, as the defence could not prove its case, the prosecution must be held to have proved its case — High Court judgment set aside — appellants directed to be set at liberty.

(Case No: Civil Appeal No. 6197 of 2000)

Alka Bose versus Parmatma Devi and others

Date of Decision : 17/12/2008.

Judge(s): Hon'ble Mr. Justice R.V. Raveendran and Hon'ble Mr. Justice P. Sathasivam.

Subject Index: Specific Reliefs Act, 1963 — Section 16(c) — Indian Contract Act — Section 10 — Agreement of sale between appellant's predecessor and first respondent to sell a portion of appellant's house for a consideration — earnest money was paid on condition that sale deed will be executed within 3 months and balance consideration money would be paid at the time of execution of sale deed — as appellant failed to execute the sale deed, first respondent filed suit for specific performance — subordinate judge decreed the suit against the defendant — defendant challenged the decree by a first appeal before Patna High Court — single Judge allowed the first appeal and dismissed the suit — first respondent filed L.P.A. — a division bench of High Court allowed the L.P.A. by setting aside judgment passed by single Judge and restoring judgment and decree of trial Court — aggrieved, Kanika Bose — the defendant appealed by way of special leave pending appeal — Kanika Bose died and the legal representatives were brought on record — issue before all the Courts was whether signature on the agreement for sale was that of Kanika Bose, the defendant-appellant — Held : High Court single Judge committed an error — Held : evidence of witnesses shows a concluded contract — though agreement was in the format intended for execution by both vendor and purchaser, parties proceeded in such a way that it was intended to be executed by vendor alone — Held : agreement of sale signed only by the vendor was valid and enforceable by purchaser — vendee had performed her part of the contract — judgment of division bench of High Court upheld, wherein judgment and decree of the trial Court was affirmed — appeal fails — dismissed — no costs.

(Case No: Writ Petition (Civil) No. 375 of 2007)

Shanti Bhushan versus Union of India

Date of Decision : 17/12/2008.

Judge(s): Hon'ble Dr. Justice Arijit Pasayat and Hon'ble Dr. Justice Mukundakam Sharma.

Subject Index: Public interest litigation — writ petition under Constitution of India, Articles 32, 217(1) and 224(1) — seeking issue of a writ of quo-warranto or any other writ/direction quashing appointment of respondent no. 2 as a Judge of Madras High Court — primary ground of contention — opinion of Chief Justice of India has to be formed collectively after taking into account the views of his senior colleagues who are required to be consulted by him — counsel for Union of India submitted that a total of more than 350 Addl. judges have been appointed as permanent judges between January 1999 to end of July 2007 — Held : judicial rview in such matters is extremely limited — "in the peculiar circumstances of the case, we are not inclined to accept the prayer of petitioners" — "whenever materials are brought to the notice of Chief Justice of India about lack of mental and physical capacity, character and integrity, it is for him to adopt such modalities which according to him would be relevant for taking a decision in the matter — as for the case of respondent no. 2, "if it comes to the notice of Chief Justice of India that action needs to be taken in respect of him for any aberration while functioning as a judge, it goes without saying appropriate action as deemed proper shall be taken" — petition disposed of.

(Case No: Criminal Appeal No. 2055 of 2008)

Dharimal Tobaco Products Ltd. and others Appellants versus Sate of Maharashtra and another Respondents

Date of Decision : 17/12/2008.

Judge(s): Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Cyriac Joseph.

Subject Index: Cr.P.C. Section 482 and section 397 — Constitution of India, Articles 227 and 136 — Prevention of Food Adulteration Rules, 1955 — Rule 62(1) — question whether an application under sec. 482 of Cr.P.C. 1973 can be dismissed only on the premise that an alternative remedy of filing a revision application under section 397 of the Cr.P.C. 1973 is available — anti-caking agents found in Gutkha — food adulteration — Criminal complaint before First-Class Judicial Magistrate — summons issued to appellants — appellants filed application under Cr.P.C. sec. 482 before High Court — application rejected — High Court held that jurisdiction under Sec. 482 of Cr.P.C. will not be exercised if recourse to a Revision Application under sec. 397 of Cr.P.C. is available — appealed — Held: maintainability of revision petition cannot be a bar on entertaining an

application under sec. 482, Cr.P.C. — Held: V.K. Jain and others 2005 (3) Mah. L.J. 778 does not lay down a good law — it is over-ruled — High Court judgment set aside — directed to consider afresh on merits.

(Criminal Appeal No. 385 of 2009) Amin Khan versus State of Rajasthan. Date of Decision: 25/2/2009. Judge(s): Hon'ble Mr. Justice Arijit Pasayat & Asok Kumar Ganguly. Subject Index: IPC- S. 396 & Arms Act- six persons faced trial - the learned Sessions Judge, acquitted the accused persons of all the charges - on 26.5.2006 the High Court granted leave & summoned the respondents through bailable warrants. On 14.8.2006 the State filed an application in terms of Section 390 read with Section 482 of Code for revoking the earlier order & to commit the accused persons to prison after summoning them through non bailable warrants - the High Court has found that prima facie the evidence regarding identification made in court & DNA test has not been considered in the proper perspective by the trial Court. It was noted that the DNA report of the hair allegedly seized from the hands of the deceased prima facie established that it was of the accused Mubin & Amin who remained throughout the trial in custody. That being so, this Court does not find any infirmity in the impugned judgment to warrant interference.

NEWS AND VIEWS

Lok Adalat

In the month of December 2008, 512 cases were settled in the Lot Adalats held in different parts of the State of Jammu & Kashmir. Out of these, 79 cases were settled at pre-litigation stage. Compensation to the tune of Rs 29.45 lacs was awarded in Motor Accident Claim cases during the month. These Lok Adalats were organized by different District Legal Services Authorities / Tehsil Legal Services Committees of the State. Beside this, 74 eligible persons were given free legal aid during the month.

Gratuitous passenger not entitled to Motor Accident Claim : SC

In the event of a goods vehicle's accident, gratuitous passengers travelling in it cannot claim compensation for death or injuries from an insurance company, the Supreme Court has ruled.

Only the owner of the goods being carried by the vehicle or his authorised representatives will be entitled to such a compensation, the court said.

The apex court rejected the arguments of a plea made on behalf of a deceased person that he was a member of the marriage party which was escorting the gifts received from the bride's party and hence entitled to compensation. "The witnesses examined on behalf of the claimants themselves stated that about 30-40 persons were travelling in the truck. All 30-40 persons by no stretch of imagination could have been the representatives of the owners of goods, meaning thereby, the articles of gift," the apex court said. Interpreting Section 147 of the Motor Vehicles Act the apex court said that in cases of accidents involving goods, it is only the owner of the goods or his authorised representatives who would be entitled to compensation. A bench of Justices S B Sinha and Cyriac Joseph passed the ruling while setting aside a compensation of Rs 1.4 lakh awarded by the motor accidents tribunal and affirmed by the Punjab & Haryana High Court in this matter. The accident took place on May 15, 2002 when the deceased Sunil Kumar, along with other injured persons belonging to a marriage party of 30-40 persons, was travelling in a Tata goods vehicles which met with an accident in which he died.

(HT/12.01.2009)

SC declines PIL on police encounters

The Supreme Court refused to go into the allegation that NHRC guidelines dealing with encounters have not been implemented by various police forces.

"Killing in fake encounter as such is illegal and you are seeking laying down of guidelines," a Bench headed by Chief Justice K G Balakrishnan said during the hearing of the PIL alleging that due to non-implementation of the NHRC and apex court guidelines, the cases of fake encounter have risen. The PIL-filed by a Hyderabad-based advocate Ramesh Reddy had submitted that the non-implementation of guidelines was because of the inadequate infrastructure available with the State Human Rights Commissions.

The Bench, also comprising Justice P Sathasivam, said such issues cannot be looked into by the apex court and the advocate can knock the doors of High Courts. The PIL had also sought a response about the steps taken by the Centre, state governments and Union Territories to check killings of innocent people in police encounters. The PIL pointed out that of the 35 states and UTs, only 16 have their human rights commissions and only 11 of them were functioning with a chairperson.

It was submitted that Bihar and Jharkhand did not have a State Human Rights Commission.

The petitioner submitted that since the state commissions were not functioning properly, the pendency of the cases at NHRC was rising as the affected people have been directly approaching it.

The counsel said the critical state of affairs of state human rights commissions was reflected in the NHRC's annual report for 2004-05 which had said casual approach by the state machineries have resulted in rise of fake encounter killings. The petitioner later withdrew the petition.

(HT/19.01.2009)

No need to prove dowry agreement : SC

The Supreme Court has held that in case of dowry death, the prosecution need not prove that there had been a dowry agreement between the families of the bride and the groom.

Interpreting Section 304-B IPC the apex court said if courts insist on such agreements, then no offender could be convicted.

"Demand neither conceives nor would conceive of any agreement. If for convicting any offender, agreement for dowry is to be proved, hardly any offenders would come under the clutches of law. When Section 304-B refers to 'demand of dowry', it refers to the demand of property or valuable security as referred," the apex court observed.

(HT/12.01.2009)

CASE COMMENTS

Shivaji-Alhat v. State of Maharashtra
AIR 2009 SC 56

The slogan 'No, Death Penalty' has been, well and truly, paid put.

Apart from examining the value of circumstantial evidence to base conviction of the accused in the crimes like murder and rape, the Hon'ble Apex Court, in this authority, has been dissertational on the subject of penology. Within the economy of words, the point has been, lucidly, brought home to the protagonists of 'No death penalty'.

The activists clamour that the Statue Book should be purged of the capital punishment sentence, no matter the severity of the offence it may be attracted to. They equate this punishment with revenge killing by the State and treat the citizens as accomplices to 'the Criminal act of hanging'. Possible reversibility of the guilt, fallibility of the Judge as a human being, and deficiency in the certitude are buttressed to canvas the abolition of the death penalty.

In this case, the Hon'ble Supreme Court has put the rationale of sentencing in proper perspective. According to it the protection of ths society and stamping out criminal proclivity must be the object of the law, which can be achieved by proper sentencing. The law should meet challenges confronting society. Then, it says that undue sympathy to impose inadequate sentence would do great harm to the Justice system. Any liberal attitude by imposing meager sentence or taking sympathetic view would, according to the Hon'ble Court, be counter productive and will go against the societal interest. It concludes by saying that the string of deterrence inbuilt in the sentencing system would strengthen the cause of the society. Offences impacting social order and public interest require exemplary treatment.

Reiterating the time honoured standards prescribed for the courts to observe while awarding the extreme penalty, the Hon'ble apex court has addressed fully the concerns of the activists. Our society cannot bear with Jeremy Benthen when he says "All Punishment is mischief; all punishment itself is evil". Societal response is "Crime is bad and evil; it should be dealt with as such".

(B.L. Saraf)
Member
State Consumer Commissioner
Formerly District & Sessions Judge

M/s Shankar Finance & Investments
v.
State of Andhra Pradesh & Ors.
AIR 2009 SC 422

The question that arouse for consideration before the Hon'ble Supreme Court, was whether the complaint under Section 138 of the Negotiable Instruments Act signed by an Attorney holder is maintainable. The Hon'ble Supreme Court had the occasion to answer the said question in the above titled case wherein High Court of Andhra Pradesh had held that the complaint was not signed by the payee, the sole proprietor of the payee concern, but was signed by his Power of Attorney which was not permissible. The Hon'be Supreme Court while going through Section 190 and 200 of Cr.P.C and section 142 of the Negotiable Instrument Act held that the court has always recognized that the Power of Attorney holder can initiate criminal proceedings on behalf of his principal. The attorney holder is an agent of the grantor, when the grantor authorised the

Attorney holder to initiate legal proceedings and the Attorney holder accordingly initiates legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his Attorney holder and not by the Attorney holder in his personal capacity. The Hon'ble Supreme Court further held that where the payee is a proprietary concern, the complaint can be filed :-

a) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the payee;
b) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and
c) the proprietor or the proprietary concern represented by the Attorney holder under a power of attorney executed by the sole proprietor.

Therefore, in the above titled case, the Hon'ble Supreme Court disagreed with the order of the Hon'ble High Court of Andhra Pradesh and held the complaint of the payee (proprietary concern) through its Power of Attorney is maintainable.

(Kamlesh Pandit)
Sub-Judge, Ramnagar

Lalliram & Anr. v. State of M.P.
2008 (10) SCC 69

The Hon'ble Supreme Court of India in Criminal Appeal No. 791 of 2006, titled Lalliram and Anr. Versus State of M.P. Decided on 15th September 2008, reported as 2008 (10) SCC 69: 2008 (12) SCALE 491, has reiterated that the existence of injuries on the body of prosecutrix is not the only factor to decide whether rape has been committed, and that there is no rule of law that the testimony of prosecutrix cannot be acted upon without corroboration in material particularls. The observations made by the Hon,ble Apex Court are quoted as under:

"9. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in Pratap Misra and Ors. v. State of Orissa (1977 (3) SCC 41) where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See Aman Kumar & Ors. v. State of Haryana (2004 (4) SCC 379).

10. As rightly contended by learned counsel for the appellants a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In Aman Kumar's case (supra) it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value it may search for evidence direct or circumstantial."

(Rajeev Gupta)
Sub-Judge
J&K State Judicial Academy
Jammu

Mandeep Mishra & Ors. v. Union of India & Anr.
AIR 2009 Cal. 24

The prompt judgment after the conclusion of the hearing is the right of the parties.

The Code of Civil as well as Criminal Procedure provides that after the case has been heard, the court shall pronounce the judgment in open court, etiher at once or on some future day. The Code gives discretion to the court to pronounce the judgment after the stipulated period or after the extended period, by giving reasons for such delay. The Hon'ble Supreme Court and the Hon'ble High Courts have several time expressed regret in delay in pronouncing judgments.

In the aforesaid case, the Hon'ble High Court of Calcutta while relying upon the judgment of Hon'ble Supreme Court in the Anil Rai case (AIR 2001 SC 3173) has held as under :-

"If the right to justice is a constituent of the basket of rights that Article 21 of the Constitution guarantees, the right to prompt judgment upon conclusion of the hearing of a matter is the logical adjunct.

The unexplained delay in the pronouncing judgment would make it vulnerable *per se*. If a matter involves a trial requiring tonnes of documentary evidence and unending papers of oral testimony to be examined or if the gravity of the matter demands, the time between the conclusion of hearing and delivery of judgment may prolong

beyond the acceptable limit. But ideally, the period for which judgment stays reserved should be counted in days rather than in larger units of time....."

(M.K. Sharma)
Sub-Judge
Electricity Magistrate,
Jammu

Rajesh Ranjan Yadav alias Papu Yadav
v.
CBI through its Director
AIR 2007 SC 451

Long incarceration alone is no ground for bail.

Recourse to plea of long incarceration albeit in grave and heinous offences for securing bail is not unusual at bar.

Hon'ble Supreme Court in the aforementioned case repelled such contention by holding that there is no absolute rule that bail must necessarily be granted because a long period of imprisonment has expired. It was further observed by Hon'ble Apex Court that mere fact that the accused has undergone certain period of incarceration by itself would not entitle him to enlargement on bail, nor the fact that trial is not likely to be concluded in near future, either by itself or coupled with the period of incarceration would be sufficient for enlarging the accused on bail when the gravity of the offences alleged is severe.

The accused in this case has been Member of Parliament on four occasions and was in jail for more than six years in connection with triple murder case.

Another argument of accused that he can not conduct his defenc effectively being in jail was also rejected by Hon'ble Apex Court by holding that, "If this argument is to be accepted, then logically in every case bail has to be granted".

Again while terming the plea of accused being four time member of parliament as "wholly irrelevant", Hon'ble Apex Court ruled that law is no respecter of persons and is the same for every one.

The judgment, therefore, is an elegant reflection as to how various factors which are *sine qua non* for consideration in bail are inter twined and that a circumstance or two alone can't bail an accused out.

(Amarjeet Singh Langeh)
Munsiff, Ramban

State of H.P. v. Mango Ram
(2000) 7 SCC 224

Submission of body under fear of terror does not amount to consent - Sexual violence apart from being malevolent and savage act is an unlawful intrusion on the right of privacy and sanctity of a female. It degrades and humiliates the victim and leaves behind traumatic experience, particularly where the victim is a help-less innocent child or minor. Rape on minor is not only a crime against the person of a hapless child but it is a crime against entire society for it pulverizes the entire psychology of victim.

A significant question which arose in the case under comment was what constitutes consent and consequences of the absence of marks of violence on the body of the prosecutrix and accused. It has been held by Hon'ble Apex Court :

"Submission of body under the fear of terror can not be construed as consented sexual act. Consent for the purpose of Section 375 IPC requires voluntarily participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between the resistance and assent. Whether there was consent or not, is to be ascertained only on careful study of all relevant circumstances".

It was further laid down that "absence of marks of violence on the body of the prosecutrix as well as accused are not of much significance, when accused was examined three days after the incident".

In the aforesaid case, Hon'ble Supreme Court also cautioned the courts that the offences of rape being serious in nature should receive careful attention and greater sensitivity from the trial court.

(Rajesh Sekhri)
Addl. District & Sessions Judge
TADA / POTA, Srinagar

Kamala & Ors. v. K.T. Eshwara & Ors.
2008 AIR SCW 5364

In a partition suit, preliminary decree stood passed and court appointed Commissioner for effecting the demarcation of decretal property, consequently the final decree proceedings were underway, in the meanwhile same were dismissed in default. That one of the parties thereafter filed fresh suit for partition of a specific share by meets and bounds. In the said suit, the other party came up with an application for rejection of plaint on the ground that same is barred by principle of res judicata. The trial

court accepted the application thereby rejecting the plaint, the order came to be affirmed by the Hon'ble High Court. When the matter reached before the Apex Court, it held that Order 7 Rule 11 D has limited applications. Since the question of suit being hit by principle of res judicata involves mixed question of law and fact so plaint could not be rejected.

The Hon'ble Apex Court further observed that :-

"For the purpose of invoking Order 7 Rule 11 of C.P.C, no quantum of evidence can be looked into. The issue of merits of the matter which may arise between the parties would not be within the realm of the court at this stage".

It was argued before the court that since earlier suit stood concluded in preliminary decree and demarcation proceedings being underway so there wasn't any property needed to be partitioned, hence subsequent suit was barred being without any cause of action. The Hon'ble Apex Court observed :-

"Whether any property is available for partition or not is itself a question of fact and that whether plaint discloses cause of action or not is essentially question of fact" which cannot be gone into at initial stage. The court further has authoritatively held that different clauses of Order 7 Rule 11 should not be mixed up. Whatever may be the defence of the opposite party that needs to be looked into only on considering the issues in the matter and for rejecting the plaint what is to be seen are the basic averments in the plaint. Only that material is to be considered by the court at that stage.

(Sanjay Parihar)
Addl. District & Sessions Judge
Rajouri

Hemaji Waghaji Jat
v.
Bhikhabhai Khengarbhai Harijan & Ors.
AIR 2009 SC 103

The Apex Court in the above mentioned case has laid down as to what are the requisites of adverse possession and in the same case the Apex court has recommended suitable changes in the law of adverse possession. The Apex court while relying on an earlier decision in Karnataka Board of Wakf v. Government of India, 2004 (10) SCC 779 observed :-

"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is not intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. it must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period".

The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show : (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

The Apex court while noting the unkind view of the courts around the world towards statute of limitation overriding property rights observed:

"34. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

35. We fail to comprehend why the law should place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to lose its possession only because of his inaction in taking back the possession within limitation. We recommend te union of India to seriously consider and make suitable changes in the law of adverse possession."

(Gh. Mohi-ud-Din Dar)
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