Important citations on the Code of Civil Procedure

Section 2(2).-Collusive decree.- Scope of challenge.-Ejectment of Lessee allowed by decree.-Non-impleadment of lessee permissible in law.-Challenge to decree by sub- lessee as collusive is not permissible.``Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose.The mere fact that the defendant agrees with the plaintiff that if a suit is brought he would not defend it, would not necessary prove collusion. It is only if this agreement is done improperly in the sense that a dishonest purpose is intended to be achieved that they can be said to have colluded. The law does not require that the sub-lessee need be made a party. It has been rightly pointed out by the High Court that in all cases where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and does not implied the sub-lessee as a party to the suit, the object of the landlord is to eject the sub-lessee from the land in execution of the decree and sub an object is quite legitimate. The decree in such a suit would bind the sub-lessee. This may act harshly on the sub-lessee; but this is a position well understood by him when he took the sub-lease. The law allows this and so the omission cannot be said to be an improper act. *Rupchand Gupta v. Raghuvanshi (Private) Ltd. and another,* AIR 1964 SC 1889: 1964(2) SCWR 95: 1964(7) SCR 760

Section 2(2).-Collusive decree.- Collusive suit.-Challenge to sale made by father.-Legal necessity to sell ancestral property disputed.- Karta/father had experience of legal matters by working in Civil Court.- Suit held be a collusive suit. *Sunder Das and others v. Gajananrao and others,* AIR 1997 SC 1686: 1996(9) Scale 336: 1996(11) JT 255: 1997(9) SCC 701

Section 2(2).-Decree without judgement.-Permissibility.-Necessity to record reasons.-Grant of decree merely on the basis of plaint is illegal. Trial of a civil dispute in Court is intended to achieve, according to law and the procedure of the Court, a judicial determination between the contesting parties of the matter in controversy. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactory reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge; a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest: it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the Court has decided against him, and more so, when the judgment is subject to appeal. The Appellate Court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just. It is unfortunate that the learned Trial Judge has recorded no reasons in support of his conclusion, and the High Court in appeal merely recorded that they thought that the plaintiff had sufficiently proved the case in the plaint. It is true that Rules 1 to 8 of Order 20 of the Code of Civil Procedure are, by the express provision contained in Order 49, Rule 3 Clause (5), inapplicable to a Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction. A Judge of a Chartered High Court is not obliged to record a judgment strictly according to the provisions contained in Rules 4(2) and 5 of Order 20, Code of Civil Procedure. But the privilege of not recorded a judgment is intended normally to apply where the action is undefended, where the parties are not at issue on any substantial matter, in a summary trial of an action where leave to defend is not granted, in making inter-locutory orders or in disposing of formal proceedings and the like. Order 49, Rule 3 of the C.P.C. undoubtedly applies to the trial of suits: but the question is not one merely of power but of exercise of judicial discretion in the exercise of that power. The function of a judicial trial is to hear and decide a matter in contest between the parties in open Court in the presence of parties according to the procedure prescribed for investigating of the dispute, and the rules of evidence. The conclusion of the Court ought normally to be supported by reasons duly recorded. This requirement transcends all technical rules of procedure. *Smt. Swaran Lata Ghosh v. Harendra Kumar Banerjee and another,* AIR 1969 SC 1167: 1969 (1) SCWR 768: 1969(3) SCR 976: 1969(1) SCC 709

Section 2(2).-Decree.-Appellate decree.-Nature of.-Determination of. In determining the character of the appellate decree, we have to look at the appellate decree taken in its entirety and compare it with the decision of the trial Court as a whole and decide whether the appellate decree is one of affirmance or not. In this esquire the nature of the variation made whether it is in favour of the intending appellant or otherwise would not be relevant. *Management Committee T.K. Ghosh's Academy v. T.C. Palit and others,* AIR 1974 SC 1495: 1974(2) SCC 354: 1974(3) SCR 872

Section 2(2).-Decree.-Award.- Affirmation by Court.-Effect of.- Where the decision of the Court is not delivered as a *persona designata*, it is open to appeal under the common law. *Hanskumar Kishan Chand v. The Union of India,* AIR 1958 SC 947: 1959 SCR 1177: 1959 SCJ 603 **Section 2(2).-Decree.-Change in law.-Effect of.-Pendency of appeal against the decree.-The Appellate Court is bound to take notice of change in law, which may have taken place during the pendency of proceedings and apply the law as it stands on the date of decision.** *Ramjilal and others v. Ghisa Ram*

etc., AIR 1996 SC 3338: 1996(7) SCC 507: 1996(2) Scale 401: 1996(2) JT 649: 1996 Har. Rent. R. 470

Section 2(2).-Decree.-Collusion and fraud.-Distinction of.-In case of collusion the contest is unreal or sham while in case of fraud the decree is obtained on the basis of untrue claim. There is a fundamental distinction between a proceeding which is collusive and one which is fraudulent. Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. In such a proceeding, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant has managed to obtain the verdict of the Court in his favour and against his opponent by practising fraud on the Court. Such a proceeding is started with a view to injure the opponent, and there can be no question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham, in a fraudulent suit it is real and earnest. *Nagubai Ammal and others v. B. Shama Rao and others,* AIR 1956 SC 593: 1956 Andh LT 1029: 1956 SCR 451

Section 2(2).-Decree.-Decision of Executing Court itself is a decree.- Appeal accompanied by certified copy of the decision is maintainable. *Shakuntala Devi Jain v. Kuntal Kumari and others,* AIR 1969 SC 575: 1969 (1) SCJ 912: 1969(1) SCR 1006

Section 2(2).-Decree.-Meaning of.-Reference under Section 49(1) of Land Acquisition Act, 1894.-Nature of.-Order is not a decree under Section 2(2) and 96 Civil Procedure Code.-Appeal against order not maintainable. *Deep Chand and others v. Land Acquisition Officer and others,* AIR 1994 SC 1901: 1994(4) SCC 99: 1994(2) Scale 325: 1994(3) JT 319: 1994(3) Pun. LR 197: 1994 LACC 279

Section 2(2).-Decree.-Nullity.- Absence of signatures of the trial Judge on the decree.-Failure to file appeal.-Challenge to decree is not permissible. *Jamnadas Harakhchand and others v. Narayanlal Bansilal and others,* AIR 1970 SC 1221: 1970 Mah LJ 714: 1970(3) SCC 854

Section 2(2).-Decree.-Nullity.- Decree obtained by fraud.-Duty of litigant to come to the Court with true case and to prove it with true evidence.-Withholding of vital documents in order to gain advantage over the other parties.- The decree obtained by fraud is a nullity. *S.P. Chengalvaraya Naidu (dead) by LRs. v. Jagannath (dead) by LRs. and others,* AIR 1994 SC 853: 1994(1) SCC 1: 1993 (4) Scale 277: 1993(6) JT 331: 1994(1) Guj. LH 81: 1994(1) Orissa LR 201

Section 2(2).-Decree.-Nullity.- Decree against lunatic.-Guardian of lunatic not appointed.-The decree is nullity and sale of property in execution of such decree is void *ab initio.* *Ram Chandra Arya v. Man Singh and another,* AIR 1968 SC 954: 1968 All WR (HC) 626: 1968(2) SCR 572

Section 2(2).-Decree.-Nullity.- Decree passed in suit barred by time.-The decree is illegal and not in nullity. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it had acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong the decrees rendered by them cannot be treated as nullities. Section 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleading. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code. *Ittyavira Mathai v. Varkey and another,* AIR 1964 SC 907: 1963 Ker LJ 952: 1964(1) SCR 495

Section 2(2).-Decree.-Nullity.- Decree passed by Court without jurisdiction is nullity. *Urban Improvement Trust, Jodhpur v. Gokul Narain and another,* AIR 1996 SC 1819: 1996(4) SCC 178: 1996(3) Scale 721: 1996(4) JT 446: 1996(2) Raj. LW 122

Section 2(2).-Decree.-Nullity.- Determination of.-Decree made void by statute with retrospective effect by taking away jurisdiction of civil court and vesting it in Special Tribunal.-The executing court can entertain such objection. *Sunder Dass v. Ram Parkash,* AIR 1977 SC 1201: 1977(2) SCC 662: 1977(3) SCR 60: 1977(1) RCJ 575

Section 2(2).-Decree.-Nullity.-Erroneous decision on interpretation of Section 96 of CPC does not render the decision nullity. *Isher Singh v. Sarwan Singh and others,* AIR 1965 SC 948: 1965 SCD 608

Section 2(2).-Decree.-Nullity.-Effect of fraud.-A decree obtained by fraud is nullity. *Gowrishankar and another v. Jshi Amba Shankar Family Trust and others,* AIR 1996 SC 2202: 1996(3) SCC 310: 1996(2) Scale 454: 1996(2) JT 560: 1996 Rajdhani LR 179

Section 2(2).-Decree.-Nullity.-Impleadment of necessary parties.- Necessity of.-A Decree cannot be disowned in subsequent proceedings on the ground that a necessary person was not party to the proceedings when no prejudice caused to the objectors. *Nirmaljit Singh and others v. Harnam Singh*

(dead) by LRs. and others, AIR 1996 SC 2252: 1996(8) SCC 610: 1996(1) Scale 584: 1996(1) JT 622: 1996(1) RRR 754

Section 2(2).-Decree.-Nullity.- Order for delivery of possession of undivided share in joint family property.-The order not without jurisdiction and therefore is not nullity. It was, however, said that the order for delivery of possession made in the present case was a nullity because Sivayya and his transferee who had purchased an undivided share in coparcenery property were not entitled to any possession at all. We agree that the order cannot be supported in law but we do not see that it was for this reason a nullity. It is not a case where the order was without jurisdiction. It was a case where the learned Judge making the order had, while acting within his jurisdiction, gone wrong in law. Such an order has full effect if it is not set aside. *M.V.S. Manikayala Rao v. M. Narasimhaswami and others,* AIR 1966 SC 470: 1966(1) SCWR 120: 1966(1) SCR 628

Section 2(2).-Decree.-Order in arbitration.-Reference of dispute by parties to the trial Judge for final decision.-Decision of the Judge held to be judgment of the court and not an arbitration award.-Writ of mandamus seeking cancellation of the order not called for. The Registrar on the Original Side, under the Rules of the Calcutta High Court, was bound to file it on the record and retain it there. The appellant could have sought apprpriate remedy for having that judgment vacated and, if such a remedy had been sought against that judgment directly, the question whether it was a good judgment and should be retained on the record or not could have been appropriately decided. *Arati Paul v. Registrar, Original Side, High Court, Calcutta and others,* AIR 1969 SC 1133: 1969 (2) SCC 756: 1969(3) SCR 926

Section 2(2).-Mortgage Decree.- Severance of interest.-Permissibility .-Excess in case of evidence to the contrary, a mortgage decree is one and indivisible. The general law undoubtedly is that a mortgage decree is one and indivisible and exceptions to this rule are admitted in special circumstances where the integrity of the mtge. has been disrupted at the instance of the mortgagee himself; e.g., when there is severance of the interests of the mortgagors with the consent of the mortgagee. or a portion of the equity of redemption is vested in the latter. Thus in case of a mortgage debt when the loan has been advanced to more than one person, if one of the debtors happens to be an agriculturist while others are not, the agriculturist debtor would certainly be entitled to have his debts scaled down under the provisions of this Act in spite of the provision of general law which prevents a mortgagor from denying the liability of the interest which he owns in the mortgaged property to satisfy the entire mortgage debt. There is, therefore, nothing wrong in law in scaling down a mortgage decree in favour of one of the judgment-debtors, while as regards others the decree is kept intact. *V. Ramaswami Aiyengar and others v. T.N.V. Kailasa Thevar,* AIR 1951 SC 189: 1951(1) MLJ 560: 1951 SCJ 278: 1951 SCR 292

Section 2(2).-Nullity.-Ignorance of stay order.-the order passed in ignorance of stay order, passed by the superior Court, staying the proceedings, is not in nullity. *Mulraj v. Murti Raghunath Maharaj,* AIR 1967 SC 1386: 1967 All WR (HC) 594: 1967 BLJR 665: 1967(3) SCR 84 **Section 2(2).-Pre-emption decree.- Form of.-Absence of direction about the consequences of non-payment within stipulated time.-The mandatory provisions under Order 20, Rule 14 come into operation.- Dismissal of suit is not improper.** The dismissal of the suit is as a result of the mandatory provisions of Order 20, Rule 14 and not by reason of any decision of the Court and the omission to incorporate this direction in the decree could not in any way affect the rights of the parties. *Naguba Appa v. Namdev,* AIR 1954 SC 50

Section 2(2).-Decree.-Decision of Inter-State Water Disputes Tribunal as notified, is not a 'decree of Civil Court'.

The language of the provisions of Section 6 of the Inter-State Water Disputes Act, 1956 is clear and unambiguous and unequivocally indicates that it is only the decision of the Tribunal which is required to be published in the Official Gazette and on such publication that decision becomes final and binding on the parties. It is not required that the report containing the arguments or basis for the ultimate decision is also required to be notified so as to make that binding on the parties. This being the position, the decision of the Tribunal as notified, is not a decree of a civil suit and that decree cannot be understood in the light of the judgment of the suit. *State of Andhra Pradesh vs. State of Karnataka and others,* AIR 2001 SC 1560 : 2000(9) SCC 572 : 2000(6) JT 1

Section 2(2).-Decree.-Rejection of application for condonation of delay not amounting to decree.-Consequent dismissal of appeal as time-barred also not a decree.

In order that decision of a Court should become a decree there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. If those parameters are to be applied then rejection of application for condonation of delay would not amount to a decree. Consequently, dismissal of an appeal as time barred is also not a decree. *Ratansingh vs. Vijaysingh and others,* AIR 2001 SC 279 : 2000(1) SCC 469 : 2000(S3) JT 499 : 2001(1) KLT 327 : 2001(1) Civ CR 497

Section 2(9).-Appellate Judgments.-Expression 'judgment' in C.P.C. not applicable to word 'judgment' occurring in Clause (10) of Letters Patent.-Interlocutory order passed by one Judge of High Court on application under Section 17B of Industrial Disputes Act determining entitlement of workman to receive benefit within meaning of Clause (10) of Letters Patent.

Section 17B of the I.D. Act confers valuable rights on the workman and correspondingly imposes an

onerous obligations on the employer. The order in question passed by the learned single Judge determines the entitlement of the workmen to receive benefits and imposes an obligation on the appellant to pay such benefits provided in the said section. That order cannot but be 'judgment' within the meaning of Clause 10 of Letters Patent, Patna. The High Court is obviously in error in holding that the said order is not judgment within the meaning of Clause 10 of the Letters Patent of Patna. For the above reasons we hold that the order of the learned single Judge passed on application under Section 17B of the I.D. Act is judgment within the meaning of Clause 10 of the Letters Patent of Patna and is, therefore, appealable. *Employer in Relation to Management of Central Mine Planning and Design Institute Ltd. vs. Union of India and another,* AIR 2001 SC 883 : 2001(2) SCC 588 : 2001(2) JT 87 : 2001(1) LLJ 1069

Section 2(9), Order 40, Rule 4(2).-Judgment.-Meaning and scope.

Judgment should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the Court and in what manner. The process of reasoning by which the Court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment. Whether it is a case which is contested by the defendants by filing a written statement or a case which proceeds ex-parte and is ultimately decided as an ex-parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10 C.P.C., the Court has to write judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved. Even if the definition were not indicated in Order 20, Rule 1(2) C.P.C., the judgment would still mean the process of reasoning by which a Judge decides a case in favour of one party and against the other. In judicial proceedings, there cannot be arbitrary orders. A Judge cannot merely say "suit dismissed" or "suit decreed". The whole process of reasoning has to be set out for deciding the case one way or the other. *Balraj Taneja and another vs. Sunil Madan and another,* AIR 1999 SC 3381 : 2000(1) Land LR 116 : 1999(4) Rec Civ R 438 : 1999(6) Andh LD 21 : 1999(8) SC 396 : 1999(8) DLT 779

Sections 2(2), 21 and 99.-Decree without jurisdiction.-Validity of.- Decree passed without territorial or pecuniary jurisdiction cannot be validated by consent of party. A decree passed by a Court without jurisdiction is a nullity, and that is invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. Section 99 therefore gives no protection to decrees passed on merits, when the Courts which passed them lacked jurisdiction as a result of over-valuation or under-valuation. It is with a view of avoid this result that Section 11 was enacted. It is the same principle that has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 93 C.P.C. and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on the technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objection to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court. Monghyr, should be treated as a nullity cannot be sustained under Section 11 of the Suits Valuation Act. *Kiran Singh and others v. Chaman Paswan and others,* AIR 1954 SC 340: 1954 All LJ 551: 1954 BLJR 426: 1954 SCJ 514: 1955 SCR 117

Sections 2(3) and 34.-Mesne profits.-Computation of.-Interest is integral part of mesne profit.-Reasonable rate of interest.-Determination of.-Considerations for. Under Section 2(12) of the Civil Procedure Code which contains the definition of mesne profits, interest in an integral part of mesne profits and has, therefore, to be allowed in the computation of mesne profits itself. That proceeds on the theory that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest on which income. It is, no doubt, true that the rate of interest to be allowed in regard to mesne profits or under Section 34 in such cases is discretionary, seeing there is, in them no question of any contractual rate or any particular rate fixed by statute. The only limitation which is prescribed by Section 34, as it stands now, is that the rate shall not exceed 6 per cent p.a..-a limitation which did not figure in the section before its amendment though Courts as a general rule seldom awarded any rate in excess of 6 per cent p.a. Learned counsel is, therefore, right in saying that the rate of 6 per cent granted by the learned trial Judge is not per se unreasonable. The amended Section 34, Civil Procedure Code is, in fact, a statutory recognition that 6 per cent is not by itself an unconscionable or an unreasonably high rate. *Mahant Narayana Dasjee Varu and others v. Board of Trustees, The Tirumalai Tirupathi Devasthanam and others,* AIR 1965 SC 1231: 1965(2) SCJ 9: 1965(2) SCWR 259

Section 9.-Absence of jurisdiction.- Effect of.-The court can decide only the question of jurisdiction and return the plaint if it comes to the conclusion that it has no jurisdiction.-It cannot decide any question on merits. *Athmanathawami Devasthanam v. K. Gopalaswami Ayyangar,* AIR 1965 SC 338: 1964(3) AndhWR (SC) 42: 1964(1) Mad LJ 42: 1964(3) SCR 763

Section 9.-Association of persons.- Expulsion of member.-Judicial Review.-Scope of interference by

Civil Court. The source of the power of associations like clubs and lodges to expel their members is the contract on the basis of which they become members. The next question is whether the doctrine of strict compliance with rules implies that every minute deviation from the rules, whether substatnial or not, would render the act of such a body void. The answer to this question will depend upon the nature of the rule infringed; whether a rule is mandatory or directory depends upon each rule, the purpose for which it is made and the setting in which it appears. The following principles may be gathered from the discussion. (1) A member of a masonic lodge is bound to abide by the rules of the lodge; and if the rules provide for expulsion, he shall be expelled only in the manner provided by the rules. (2) The lodge is bound to act strictly according to the rules; whether a particular rule is mandatory or directory falls to be decided in each case, having regard to the well settled rules of construction in that regard. (3) The jurisdiction of a civil court is rather limited; it cannot obviously sit as a court of appeal from decisions of such a body; it can set aside the order of such a body, if the said body acts without jurisdiction or does not act in good faith or acts in violation of the principles of natural jutice as explained in the decisions cited supra. The rules governing tribunals and courts cannot *mutatis mufandi*s be applied to such bodies as Lodges. We have to see broadly in the circumstances of each case whether the principles of natural justice have been applied. In the circumstances of this case, particularly when we find that the appellant had not raised any objection, we cannot say that the resolution passed by the Lodge Victoria is bad for violating any principles of natural justice. Civil courts have no jurisdiction to decide on the merits of a decision given by a private association like a Lodge. *T.P. Daver v. Lodge Victoria No. 363, S.C. Belgaum and others,* AIR 1963 SC 1144: 1963(2) MLJ (SC) 100: 1963(2) SCJ 465: 1964(1) SCR 1

Section 9.-Bar to jurisdiction.- Burden of proof.-It is for the party who seeks to oust the jurisdiction of Civil court, to establish its contention .-Statute ousting jurisdiction must be strictly construe. *Abdul Waheed Khan v. Bhawani and others,* AIR 1966 SC 1718: 1966 Jab LJ 1022: 1966(3) SCR 617

Section 9.-Bar to jurisdiction.- Citizenship of a person.- Adjudi- cation of dispute.-Jurisdiction of Civil Court.-The Central Government alone has been constituted as the exclusive forum.- Civil Court has no jurisdiction. *State of U.P. v. Mohammad Din and others,* AIR 1984 SC 1714: 1984 Supp. SCC 346: 1984(10) All LR 558

Section 9.-Bar to jurisdiction.- Challenge to land acquisition.- Relief in the form of mandatory injunction sought against State seeking to restrain it from proceeding in accordance with law or denotify the acquisition.-Suit is not maintainable. *S.P. Subramanya Shetty and others v. Karnataka State Road Transport Corporation and others,* AIR 1997 SC 2076: 1997(3) Scale 514: 1997(4) JT 594: 1997(1) LACC 446

Section 9.-Bar to jurisdiction.- Challenge to legality of order of termination of service.-The civil has jurisdiction to entertain such suit. *Ram Kumar v. State of Haryana,* AIR 1987 SC 2043: 1987 Supp. SCC 582: 1987(3) SCR 1057: 1987(2) Scale 340: 1987(3) J.T. 357

Section 9.-Bar to jurisdiction.- Declaratory suit.-Nature of land.- Indirect challenge to revenue entries by claiming ownership of land.-Suit is barred by Local Land Reforms Act. *Ram Singh and others v. Gram Panchayat Mehal Kalan and others,* AIR 1986 SC 2197: 1986(4) SCC 364: 1986(3) SCR 831: 1986(2) Scale 472: 1986 JT 497: 1986 Pun LJ 636

Section 9.-Bar to jurisdiction.- Determination of.-Mere creation of a special tribunal under Statute does not bar the jurisdiction of civil court.-A civil suit can always lie in the question that the tribunal created under the Statute exercise its power within the scope of the Statute and not in its abuse or violation. Under Section 9 of the Code of Civil Procedure the Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil Courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil Courts. The statute may specifically provide for ousting the jurisdiction of civil Courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the Civil Court's jurisdiction is not completely ousted. A suit in a civil Court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions. *Firm Seth Radha Kishan (deceased) represented by Hari Kishan and others v. Administrator Municipal Committee, Ludhiana,* AIR 1963 SC 1547: 1963 Cur LJ (SC) 1: 65 Pun LR 912: 1964(2) SCR 273

Section 9.-Bar to jurisdiction.- Effect of.-The bar extend to complicated issues of fact or law or questions relating to the title also. There is nothing in Section 7 which shows that the Custodian cannot enter into all questions whether of fact or of law in deciding whether certain property belongs to an evacuee. There is no reason to hold that under Section 7 the Custodian cannot decide what are called complicated questions of law or questions of title. It is difficult to see how the Custodian can avoid deciding a question of title if it is raised before him in proceedings under Section 7. Nor do we find it

possible to make a distinction between questions of fact and questions of law that may arise before the Custodian under Section 7. If he has the power to decide questions of fact, which the learned Judges in the order under appeal seem to concede, we do not see why he should not have the power of deciding questions of law also. Further if the learned Judges in the order under appeal are correct in saying that if a question of title rests on a simple allegation of fact it can be finally determined by the Custodian, we cannot see on what reasoning it can be said that where a question of title depends on a question of law it cannot be finally decided under Section 7 by the Custodian. His power under Section 7 is to decide whether certain property is evacuee property or not and there is nothing in Section which restricts that power to deciding only questions of fact. There can in our opinion be no escape from the conclusion that under Section 7 when deciding whether certain property is evacuee property or not, the Custodian has to decide all questions, whether of fact or law, whether simple or complicated, which arise therein. *Custodian, Evacuee Property, Punjab and others v. Jafran Begum,* AIR 1968 SC 169: 70 Pun LR 1: 1967(3) SCR 695

Section 9.-Bar to jurisdiction.-Effect of.-The Court can not exercise jurisdiction not vested in it on the ground that very small amount is involved or the party involved is Gram Panchayat. *State of Gujarat v. Rajesh Kumar Chimanlal Barot and another,* AIR 1996 SC 2664: 1996(5) SCC 477: 1996(6) Scale 14: 1996(6) AD (SC) 289: 1996(2) APLJ 45

Section 9.-Bar to jurisdiction.-Effect of.-The statutory bar coming into force after passing of decree.- The Appellate court dismissing the appeal against the decree would be confirming decree and thus it would amount to passing a decree in suit which is barred.-Order setting aside decree, affirmed. *Amarjit Kaur v. Pritam Singh,* AIR 1974 SC 2068: 1974(2) SCC 363: 1975(1) SCR 605

Section 9.-Bar to jurisdiction.-Effect of local land law.-Nature of land.-Determination of.-Where the special Statute does not provide for adjudication of real nature of the land and the jurisdiction of Statutory Tribunal is limited to grant or forfeiture of lease, the jurisdiction of Civil Court is not barred. It is clear that even where the statute has given finality to the orders of the special tribunal the civil Court's jurisdiction can be regarded as having been excluded if there is adequate remedy to do what the civil Court would normally do in a suit. In other words, even where finality is accorded to the orders passed by the special tribunal one will have to see whether such special tribunal has powers to grant reliefs which Civil Court would normally grant in a suit and if the answer is in the negative it would be difficult to imply or infer exclusion of civil Court's jurisdiction. *State of Tamil Nadu v. Ramalinga Wamigal Madam,* AIR 1986 SC 794: 1985(4) SCC 10: 1985 Supp. (1) SCR 3: 1985(1) Scale 1138: 1985 TLNJ 1

Section 9.-Bar to jurisdiction.-Effect of provisions of Trust Act. A party seeking to oust jurisdiction of an ordinary civil court shall establish the right to do so. Section 93 of the Act does not impose a total bar on the maintainability of a suit in a civil Court. It states that a suit of the nature mentioned therein can be instituted only in conformity with the provisions of the Act; that is to say, a suit or other legal proceeding relating to matters mentioned therein. Now, what are those matters? They are: (1) administration or management of religious institutions; and (2) any other matter or dispute for determining or deciding which provision is made in the Act. The clause determining or deciding which a provision is made in this Act, on a reasonable construction, cannot be made to qualify the administration or management but must be confined only to any other matter or dispute. Even so, the expression administration or manage- ment cannot be construed widely so as to take in any matter however remotely connected with the administration or management. The limitation on the said words is found in the phrase except under and in conformity with the provisions of this Act. To state it differently, the said phrase does not impose a total bar on a suit in a civil court but only imposes a restriction on suits or other legal proceedings in respect of matters for which a provision is made in the Act. Any other construction would lead to an incongruity, namely, there will be a vacuum in many areas not covered by the Act and the general remedies would be displaced without replacing them by new remedies. *Sri Vedagiri Lakshmi Narasimha Swami Temple v. Induru Pattabhirami Reddi,* AIR 1967 SC 781: 1967 (1) SCR 280

Section 9.-Bar to jurisdiction.- Finality clause in statute.-Effect of.-High Court and Civil Courts are governed by different principles.- Finality clause in a statute may bar jurisdiction of Civil Court but it can not bar exercise of constitutional power.-Challenge to levy of municipal tax held to be barred, by civil suit.-Onerous alternate remedy under the statute can not render the suit maintainable. An onerous provision may be ground for entertaining a writ petition on the ground that the alternative remedy provided by the statute is not an adequate or efficacious remedy. But that can never be a ground for maintaining a civil suit. Both the jurisdictions are different are governed by different principles. Articles 226 provides a constitutional remedy. It confers the power of judicial review on High Courts. The finality clause in a statute is not a bar to exercise of this constitutional power whereas the jurisdiction of a civil court arises from another statute, viz., Section 9 of the CPC. *Srikant Kashinath Jituri and others v. Corporation of the City of Belgaum,* AIR 1995 SC 288: 1994(6) SCC 572: 1994(4) Scale 447: 1994(6) JT 496

Section 9.-Bar to jurisdiction.- Finality of decision.-Where the decision of statutory tribunal has been rendered final by the Statute, the jurisdiction of Civil Court stands excluded. 1788 Where the Statute gives finality to the orders of a special tribunal the Civil Court's jurisdiction must be held to be excluded insofar as the merits of the case is concerned. If jurisdiction only to examine whether the

provisions of the statute have not been complied with or the tribunal had or had not acted in conformity with the fundamental principles of judicial procedure. *Anwar v. 1st Additional District Judge, Bulandshahr and others,* AIR 1986 SC 1785: 1986(4) SCC 21: 1986(3) SCR 540: 1986 JT 111: 1986(2) Scale 249: 1986 All WC 1021

Section 9.-Bar to jurisdiction.- Implied bar.-Determination of.- Levy of octroi under local law.-The provisions of statute providing provision for aggrieved party to challenge the levy under the local law itself.-Any error in assessment must be corrected in the manner prescribed under local law.-Remedy by way of suit is barred. *Bata Shoe Co. Ltd. v., Jabalpur Corporation,* AIR 1977 SC 955: 1977(2) SCC 472: 1977(3) SCR 182

Section 9.-Bar to jurisdiction.- Jurisdiction of Court.-Deter- mination of.-The allegations made in the plaint decide the forum.-The jurisdiction does not depend upon the defence taken in written statement. *Abdulla Bin Ali and others v. Galappa and others,* AIR 1985 SC 577: 1985(2) SCC 54: 1985(1) Scale 1205: 1985 Srinagar LJ 29

Section 9.-Bar to jurisdiction.- Land use.-Jurisdiction to determine the use of land conferred on special tribunal constituted under Land Reform Act.-Jurisdiction of Civil Court to determine the same. *Shri Chandrika Singh and others v. Raja Vishwanath Pratap Singh and another,* AIR 1992 SC 1318: 1992(3) SCC 90: 1992(1) Scale 883: 1992(3) JT 55: 1992 All LJ 535

Section 9.-Bar to jurisdiction.- Local land law.-The local law is not providing any bar against civil court power to decide title to land and right to possession.-Suit for actual possession is not barred. *Gurucharan Singh v. Kamla Singh and others,* AIR 1977 SC 5: 1976(2) SCC 152: 1976(1) SCR 737

Section 9.-Bar to jurisdiction.- Necessary pleadings.-Defence of adverse possession raised in suit for possession on the basis of title.-No defence on the basis of Rent Control Act pleaded.-Such plea cannot be advanced for the first time before the Supreme Court. *Sultan and others v. Ganesh and others,* AIR 1988 SC 716: 1988(1) SCC 664: 1988(1) Scale 304: 1988(1) JT 277

Section 9.-Bar to jurisdiction.- Management of educational institution.-Interference with.-Permissibility.-Provision of local Act also barring the interference.-In the absence of any jurisdictional deficiency interference by civil court is not permissible. By every suspension the alleged deliquent will sustain some disadvantage. Does that justify the court coming in the way of the internal management of a college, club or other like enterprise? It will be strange jurisprudence which will paralyse autonomous bodies if courts can intervene on some *ipse dixit* to undo acts of internal management against employees especially when the power of the employer is made out. Moreover, there is the fact that, *prima facie,* the order of suspension has been found to be good by the Regional Inspectress of Girls' Education, Varanasi. On top of all there is the statutory provision Varanasi. On top of all there is the statutory provision contained in Section 16-G which expressly lends finality to the order of the Inspector and forbids its validity being questioned in any court. Without holding finally on this interdict, we regard this a *prima facie bar* unless jurisdictional deficiency in the appellant Committee is made out. *Shyam Lal Yadev and others v. Smt. Kusum Dhawan and others,* AIR 1979 SC 1247: 1979(4) SCC 143: 1979 All LJ 785

Section 9.-Bar to jurisdiction.- Pleading of.-It is a legal plea and therefore, can be accepted without a specific pleading or specific issue. *The State of Rajasthan v. Rao Raja Kalyan Singh,* AIR 1971 SC 2018: 1972(4) SCC 165

Section 9.-Bar to jurisdiction.-Princely States.- Petition challenging the White Paper of Indian State in regard to the settlement of the private properties belonging to the erstwhile ruler.-Not maintainable.-The Court cannot go behind the covenant or the agreement between the erstwhile rulers and the Governments in view of this bar. *Union of India v. Prince Muffakam Jah and others,* AIR 1995 SC 227: 1995 Supp (1) SCC 702: 1994(4) Scale 566

Section 9.-Bar to jurisdiction.- Presidential Notification.-The notification declaring list of Scheduled Castes and Scheduled Tribes under Article 341 and 342 of Constitution is final subject to amendment by notification.- Challenge to notification or to seek declaration in this respect or to seek relief of grant of social status certificate.-Jurisdiction of Civil Court is impliedly barred. *State of Tamil Nadu and others v. A. Gurusamy,* AIR 1997 SC 1199: 1997(3) SCC 542: 1997(2) Scale 344: 1997(3) JT 346: 1997(2) Mad LJ 49

Section 9.-Bar to jurisdiction.- Refund of tax illegally collected.- Consideration for determination of the scope of bar.-Conditions in which the jurisdiction of Single Judge Court may be ousted by statutory Tribunal.-Determination of. (1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive.

In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not. (3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals. (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit. (5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies. (6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry. (7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply. *Dhulabhai etc. v. State of Madhya Pradesh and anther,* AIR 1969 SC 78: 1968(3) SCR 662

Section 9.-Bar to jurisdiction.- Revenue tribunal.-New rights and liabilities created under Land Reforms Act.-Jurisdiction of Civil Court is barred in respect of such matters, by necessary implication. 3086 After the advent of independence, the land reforms was one of the policies of the Government abolishing feudal system of land tenures and conferment of the Ryotwari patta on the tiller of the soil. Thereby, the land reforms laws extinguished pre-existing rights and create new rights under the Act. The Act confers jurisdiction on the Tribunals in matters relating thereto and hierarchy of appeals/revisions are provided thereunder giving finality to the orders passed thereunder. Thereby, by necessary implication, the jurisdiction of the civil Court to take cognizance of the suits of civil nature covered under the land reform laws stands excluded giving not only the finality to the decisions of the Tribunal but also ensuring expeditious, inexpensive and simple procedure for disposal of the matters by the Tribunal and make the Ryotwari patta granted to the tiller of the soil conclusive. Under the normal course of civil procedure, the jurisdiction of the trial of the civil suits in relations to the matters covered under the Acts being time consuming and tardy the lack of his financial support or otherwise incapacity in defending or working the rights in the civil courts and by hierarchy of appeals defeat justice. Obviously, therefore, the civil suits by necessary implication stands excluded unless the fundamental principles of procedure are not followed by the Tribunal constituted under the land reform laws. In this case the Act concerned extinguishes the pre-existing right, creates new rights under the Act and requires Tribunals to enquire into the rival claim and a form of appeal has been provided against the order of the primary authority. Thereby the right and remedy made conclusive under the Act are given finality by the orders passed under the Act. Thereby, by necessary implication, the jurisdiction of the civil Court stands excluded. *Venkamamidi Venkata Subba Rao v. Chatlappalli Seetharamaratna Ranganayakamma,* AIR 1997 SC 3082: 1997(5) SCC 460: 1997(4) JT 713: 1997(1) LACC 457: 1997(2) Hindu LR 253

Section 9.-Bar to jurisdiction.- Scope of.-Agitation of industrial dispute in Civil Court.-Permissibility.-The remedy provided under the special Statutes not available directly to the person aggrieved but through a reference of dispute.-The jurisdiction of civil court is not completely ousted.-The person availing remedy under Industrial Disputes Act, is not entitled to approach the Civil Court and vice versa. Through the intervention of the appropriate government of course not adjudication of industrial disputes. But since an individual aggrieved cannot approach the Tribunal or the Labour Court directly for the redress of his grievance without the intervention of the government, it is legitimate to take the view that the remedy provided under the Act is not such as to completely oust the jurisdiction of the Civil Court for trial of industrial disputes. If the dispute is not an industrial dispute within the meaning of Section 2(k) or within the meaning of Section 2A of the Act, it is obvious that there is no provision for adjudication of such disputes under the Act. Civil Courts will be the proper forum. But where the industrial dispute is for the purpose of enforcing any right, obligation or liability under the general law or the common law and not a right, obligation or liability created under the Act, then alternative forums are there giving an election to the suitor to choose his remedy of either moving the machinery under the Act or to approach the Civil Court. It is plain that he can't have both. He has to choose the one or the other. But we shall presently show that the Civil Court will have no jurisdiction to try and adjudicate upon an industrial dispute if it concerned enforcement of certain right or liability created only under the Act. In that event Civil Court will have no jurisdiction even to grant a decree of injunction to prevent the threatened injury on account of the alleged breach of contract if the contract is one which is recognized by and enforceable under the Act alone. The principles applicable to the jurisdiction of the Civil Court in relation to an industrial dispute may be stated thus: (1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil Court. (2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil Court is alternative, leaving it to the election of the suitor concerned to chose his remedy for the relief which is competent to be granted in a

particular remedy. (3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.(4) If the right which is sought to be enforced is a right created under the Act such as Chapter VA then the remedy for its enforcement is either Section 33C or the raising of an industrial dispute, as the case may be. *The Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke and others,* AIR 1975 SC 2238: 1976(1) SCC 496: 1976(1) SCR 427

Section 9.-Bar to jurisdiction.- Scope of.-The provision of Delhi Land Reforms Act, providing complete procedure for claim of Bhoomidar rights.-Suit for declaration before the Civil Court is not maintainable. It is true that the declarations made by the revenue authorities without going through the judicial procedure are subject to due adjudication of rights; but such adjudication must be by an application under item 4 of Schedule I and not by approach to the Civil Court is clearly barred by Section 185 of the Act read with the various items of the First Schedule mentioned above. If a Bhumidar seeks a declaration of his right, he has to approach the Revenue Assistant by an application under item 4, while, if a Gaon Sabha wants a clarification in respect of any person claiming to be entitled to any right in any land, it can institute a suit for a declaration under item 28, and the Revenue Assistant can make a declaration of the right of such person. So far as suits for possession are concerned, Section 84 read with item 19 of the First Schedule gives the jurisdiction to the Revenue Assistant to grant decree for possession, and that the suit for possession in respect of agricultural land, after the commencement of the Act, can only be instituted either by a Bhumidar or an Asami or the Gaon Sabha. There can be no suit by any person claiming to be a proprietor, because the Act does not envisage a proprietor as such continuing to have rights after the commencement of the Act. The First Schedule and Section 84 of the Act provide full remedy for suit for possession to persons who can hold rights in agricultural land under the Act. *Hatti v. Sunder Singh,* AIR 1971 SC 2320: 1971(2) SCJ 452: 1970(2) SCC 841: 1971(2) SCR 163

Section 9.-Bar to jurisdiction .- Scope of.-The Tribunal created under the special Statute disregarding the provisions relating to hearing and inquiry under the Act .-The jurisdiction of Civil Court is not completely barred by the provisions of Minimum Wages Act, 1948. Section 24 of the Act creates an express bar in respect of a particular kind of suits, namely, suits for recovery of wages in certain eventualities. The obvious intention was that a poor employee was not to be driven to file a suit for the payment of the deficit of his wages but that he could avail himself of the machinery provided by the Act to get quick relief. It does not in terms bar the employer from instituting a suit when his claim is that he has been called upon to pay wages and compensation to persons who are not governed by the notification under the Minimum Wages Act. On an analysis of the provisions of the Act, we find (1) suits of the nature to be found in this case are not expressly barred by the Act; (2) There is no provision for appeal or revision from the direction of the authority given under Section 20(3) of the Act; and (3) The authority acting under Section 20(3) might levy a penalty which might be as high as ten times the alleged deficit of payment which again is not subject to any further scrutiny by any higher authority. In view of our findings as above, as also the fact that the authority in this case disregarded the provision as to hearing and inquiry contained in the Act for all practical purposes, we hold that the civil court had jurisdiction to entertain the suits. *The Pabbojan Tea Co., Ltd. etc., v. The Deputy Commissioner, Lakhimpur and others,* AIR 1968 SC 271: 1967(2) SCWR 878: 1968(1) SCR 260

Section 9.-Bar to jurisdiction.- Service law.-correction of date of birth.-Remedy of individual dispute under Section 2-A Industrial Disputes Act, 1947.-The civil Court has jurisdiction to grant relief of rectification of record even though it cannot grant the relief of back wages. *Ishar Singh v. National Fertilizers and another,* AIR 1991 SC 1546: 1991 Supp (2) SCC 649

Section 9.-Bar to jurisdiction.- Statutory remedy.-Where a particular remedy is provided, general remedy of suit is barred.-A particular remedy to be sought in a particular forum in a particular way, it must be sought in that forum and manner.-All other forum and modes of seeking it are excluded. *Munshi Ram and others v. Municipal Committee, Chheharta,* AIR 1979 SC 1250: 1980 Supp. SCC 781: 1979(3) SCR 463: 1979 Rev. LR 419

Section 9.-Bar to jurisdiction.- Statutory tribunal.-Principles determining scope of power of the Tribunal created by statute. The exclusion of the jurisdiction of the Civil Courts must either be explicitly expressed or clearly implied. Further even if the jurisdiction is so excluded the Civil Courts have jurisdiction to examine into the cases where the provisions of the Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure. *Sree Raja Kandregula Srinivasa Jagannadharao Panthulu Bahadur Guru v. The State of Andhra Pradesh and others,* AIR 1971 SC 71: 1971(1) An WR: 1971(1) MLJ (SC) 26: 1969(3) SCC 71: 1970(2) SCR 714

Section 9.-Bar to jurisdiction.- Statutory tribunal.-Effect of constitution thereof under Bihar Cess Act, 1880. Where the statute gives a finality to the orders of the special tribunals, the civil courts' jurisdiction must be held to be excluded, if there is adequate remedy to do what the civil court would normally do in a suit. Questions of the correctness of the assessment apart from their constitutionality are for the decisions of the authorities and a civil suit does not lie if the orders of the authority are declared final or there is an express prohibition under the particular Act. We do not think that the civil courts have jurisdiction to examine the correctness of the computation of the net profits made by the authorities under

the Act. *The State of West Bengal v. The Indian Iron and Steel Co. Ltd.,* AIR 1970 SC 1298: 1970 SCD 544: 1971(1) SCR 275: 1970(2) SCC 39

Section 9.-Bar to jurisdiction.-Suit challenging legality of notification under Section 4 and declaration under Section 6 of Land Acquisition Act, 1894.-The Land Acquisition Act, 1894 is a complete Code in itself, meant to serve public purpose.-The power of Civil Court stands excluded by necessary implication.-It has no jurisdiction to go into the question of validity of notification.-The appropriate remedy is only by way of writ petition under Article 226 of the Constitution. *State of Bihar v. Dhirendra Kumar and others,* AIR 1995 SC 1955: 1995(4) SCC 229: 1995(3) Scale 700: 1995(2) Mah. LJ (SC) 340

Section 9.-Bar to jurisdiction.-Suit seeking declaration that terminating of service is illegal and invalid and that he continues to be in service.-The dispute relating to enforcement of rights arising out of Industrial Disputes Act.-The only remedy for the workmen is to approach the forums created by the said Industrial Disputes Act, 1947. *Ram Bhajan Singh and others v. Madheshwar Singh (Dead) by LRs. and others,* AIR 1995 SC 1685: 1995 Supp (2) SCC 757: 1995(3) Scale 709: 1995(2) CCC 637

Section 9.-Bar to jurisdiction.- Termination of services.-Relief of reinstatement and back wages cannot be granted by Civil Court as contract of employment for personal service cannot be specifically enforced. *Jitendra Nath Biswas v. M/s. Empire of India and Ceylone Tea Co. and another,* AIR 1990 SC 255: 1989(3) SCC 582: 1989(3) SCR 640: 1989(2) Scale 158: 1989(3) JT 310: 1989(2) Guj LH 373

Section 9.-Bar to jurisdiction.-Title of agriculture land.-The authority under the Local Tenancy Act having the jurisdiction to decide the question and the local law barring the jurisdiction of the Civil Court.-Any question arising for determination of the title must be referred to the authority under the Act for determination. *Bhimaji Shankar Kulkarni v. Dundappa Vithappa Udapudi and another,* AIR 1966 SC 166: 1966(1) Mys LJ 171: 1966(1) SCJ 141: 1966(1) SCR 145

Section 9.-Bar to jurisdiction.- Ultra vires statute.-Suit for refund of tax paid under the provisions declared to be ultra vires the powers of Legislature.-Suit is maintainable. If a statute imposes a liability and creates an effective machinery for deciding questions of law or fact arising in regard to that liability, it may, by necessary implication, bar the maintainability of a civil suit in respect of the said liability. A statute may also confer exclusive jurisdiction on the authorities constituting the said machinery to decide finally a jurisdiction fact thereby excluding by necessary implication the jurisdiction of a civil court in that regard. But an authority created by a statute cannot question the vires of that statute or any of the provisions thereof whereunder it functions. It must act under the Act and not outside it. If it acts on the basis of a provision of the statute, which is ultra vires, to that extent it would be acting outside the Act. In that event, a suit to question the validity of such an order made outside the Act would certainly lie in a civil court. On the said legal basis it follows that in the instant case the sales-tax authorities have acted outside the Act and not under it in making an assessment on the basis of the relevant part of the charging section which was declared to be ultra vires by this Court. M/s. K.S. Venkataraman and Co. (P) Ltd. v. State of Madras, AIR 1966 SC 1089: 1966(1) Andh WR (SC) 108: 1966(1) Mad LJ (SC) 108: 1966(2) SCR 229

Section 9.-Civil dispute.-Right to worship.-Denial of entry to temple.-It is a civil right subject to the jurisdiction of Civil Courts. A right to worship is a civil right, interference with which raises a dispute of a civil nature though as noticed earlier disputes which are in respect of rituals or ceremonies alone cannot be adjudicated by Civil Courts if they are not essentially connected with Civil rights of an individual or a sect on behalf of whom a suit is filed. *Ugam Singh and another v. Kesrimal and others,* AIR 1971 SC 2540: 1971(2) SCJ 539: 1970(3) SCC 831: 1971(2) SCR 836

Section 9.-Civil suit.-Challenging excommunication of the Catholic by the Synod.-Jurisdiction of Civil Court to consider the validity of the excommunication canonically or conventionally.-Scope of exercise of jurisdiction, discussed. *Most. Rev. P.M.A. Metropolitan and others, etc. v. Moran Mar Marthoma and another etc.,* AIR 1995 SC 2001: 1995 Supp (4) SCC 286: 1995(4) Scale 1: 1995(5) JT 1: 1995(2) Hindu LR 342

Section 9.-Civil suit.-Relating to the religious office in Catholic Church.-Effect of Article 25 of the Constitution.-The right to sue is an inherent right in every person unless it is barred by a Statute.-Suit for declaration that Syrian Churches are Episcopal.-Non-existence of ecclesiastical courts.-Where dispute about religious office involves adjudicating upon religious matter, Court may refuse to exercise its jurisdiction but merely such refusal cannot be interpreted as a bar to the jurisdiction itself. *Most. Rev. P.M. A. Metropolitan and others, etc. v. Moran Mar Marthoma and another etc.,* AIR 1995 SC 2001: 1995 Supp (4) SCC 286: 1995(4) Scale 1: 1995(5) JT 1: 1995(2) Hindu LR 342

Section 9.-Determination of jurisdiction.-Power of.-Scope of the powers of statutory Tribunals to ascertain its own jurisdiction. There are two classes of cases dealing with the power of such a tribunal (1) where the legislature entrusts a tribunal with the jurisdiction including the jurisdiction to determine whether the preliminary state of facts on which the exercise of its jurisdiction depends exists and (2) where the legislature confers jurisdiction on such tribunals to proceed in a case where a certain state of facts exists or is shown to exist. The difference is that in the former case the tribunal has power to determine

the facts giving it jurisdiction and in the latter case it has only to see that a certain state of facts exists. *Chaube Jagdish Prasad and another v. Ganga Prasad Chaturvedi,* AIR 1959 SC 492: 1959 All WR (HC) 287: 1959 SCJ 495: 1959 Supp (1) SCR 733

Section 9.-Dispute of civil nature.-Suit for demarcation of boundary of property is maintainable. HAny one party may wish to have the limits of the area belonging to him demarcated so that he may either enclose the area to prevent trespass or to exercise acts of possession without encroaching into the neighbouring plot. If the other party on demand does not cooperate, a cause of action arises to have the limits of his property determined through court. Again the property conveyed or alloted may have been described only with reference to neighbouring properties. Those properties may or may not have been limited in extent and shape to a survey field. In that case, a fixation of the boundary of those properties conveyed or alloted. If there is no co-operation in doing that, that may result in a dispute. These instances are only illustrative and not exhaustive. All these disputes are disputes of a civil nature and they can form the subject matter of a suit under Sec. 9 C.P.C. There is no express or implied bar under any other law. *E. Achuthan Nair v. P. Narayanan Nair and another,* AIR 1987 SC 2137: 1987(4) SCC 71: 1987(2) Scale 342: 1987(3) J.T. 360: 1987(2) Ker. LT 777

Section 9.-Enforcement of civil rights.-Compromise between communities.-The compromise entered through prominent persons belonging to each community but no indication that they represented the community.-It cannot bar the members of communities from exercising their rights. *Shaikh Piru Bux (dead) and others v. Kalandi Pati and others,* AIR 1970 SC 1885: 35 Cut LT 671: 11 Orissa JD 17: 1969(2) SCR 563

Section 9.-Judicial review of administrative order.-Scope of.-The order cannot be challenged on merit.-The challenge of order on the ground of being ultra vires and beyond the powers of the authority passing the same, is permissible and suit to this effect is maintainable. *Anne Besant National Girls High School v. Deputy Director of Public Instruction and others,* AIR 1983 SC 526: 1983(1) SCC 200: 1982(2) Scale 1344: 1983(1) Kant. LJ 273: 1983 Mah LJ 806

Section 9.-Levy of tax illegally collected.-Suit for declaration that the claim of revenue stood abated.-Held that suit is not barred. *Ranendra Narayan Sinha and others v. State of West Bengal,* AIR 1971 SC 1245: 1970(3) SCC 109: 1971(2) SCR 537

Section 9.-Recovery of tax.-Tax due under local law.-Existence of provision of recovery by summary remedy provided under local law does not bar a suit by State Government for recovery of tax. *Raja Jagdish Pratap Sahi v. State of Uttar Pradesh,* AIR 1973 SC 1059: 1973(3) SCC 815: 1973(3) SCR 528

Section 9.-Rent control Legislation .-Effect of.-Order of eviction passed by the Rent Controller on account of non-payment of rent.-The Rent Controller vested with jurisdiction to decide the question of non payment under the Act.-Error in deciding the question cannot confer jurisdiction on the civil Court.-The decision of Rent Controller cannot be questioned in civil Court. When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exist and if they exercise the jurisdiction without its existence, what they do may be questioned and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned, it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction. There can be no doubt that the present case falls within the second category because here the Act has entrusted the Controller with a jurisdiction, which includes the jurisdiction to determine whether there is non-payment of rent or not, as well as the jurisdiction, on finding that there is non-payment of rent, to order eviction of a tenant. Therefore, even if the Controller may be assumed to have wrongly decided the question of non-payment of rent, which by no means is clear, his order cannot be questioned in a civil Court. *Rai Brij Raj Krishna and another v. M/s. S.K. Shaw and Brothers,* AIR 1951 SC 115: 1951 ALJ SC 5: 64 MLW 366: 1951 SCJ 238: 1951 SCR 145

Section 9.-Sovereign functions.-Act of State.-Accession.-Acquisition of estate of an alien out side the State.-Act is not justiciable in civil court. The term `act of State' has many uses and meanings. In France and some Continental countries the acts of the State and its officers acting in their official capacity are not cognizable by the ordinary law of the land. The reason of the rule is stated to be that the State as

the fount of all law cannot be subordinate to it. In our system of law which is inherited from English Jurisprudence this is not accepted and save some acts must be justified as having a legal foundation. In this sense `act of State' means not all governmental acts as it does in the French and Continental Systems but only some of them. The term is next used to designate immunities and prohibitions sometimes created by statutes. The term is also extended to include certain prerogatives and special immunities enjoyed by the soverign and its agents in the business of internal government. The term is even used to indicate all acts into which, by reason that they are official in character, the Courts may not inquire, or in respect of which an official declaration, is binding on the Courts. It is a sovereign act which is neither grounded in law nor does it pretend to be so. Examples of such `catastrophic changes' are to be found in declarations of war, treaties, dealings with foreign countries and aliens outside the State. On the desirability or the justice of such actions the Municipal Courts cannot form any judgment. In civil commotion, or even in judgment. In civil commotion, or even in war or peace, the State cannot act `catastrophically' outside the ordinary law and there is legal remedy for its wrongful acts against its own subjects or even a friendly alien within the State. The act of the Dominion in thus assuming the administration of the Junagadh State was an act of State pure and simple and the action of the Adminstrator was taken before the act of State was over. The essence of an act of State is the exercise of soverign power and that is done arbitrarily, on principles either outside of paramount to the municipal law. The fact that the sovereign allows the inhabitants to retain their old laws and customs does not make the sovereign subject to them and all rights under those laws are held at the pleasure of the sovereign. It is only when the sovereign can be said to have purported to act within the laws that the act of State ceases to afford a plea in defence. Before that stage is reached, government may be influenced by the existing laws and rights and obligations but is not governed or bound by them. *The State of Saurashtra v. Memon Haji Ismail Haji Valimohammed,* AIR 1959 SC 1383: 1960 SCJ 394: 1960(1) SCR 537

Section 9.-Sovereign function.- Effect of treaty.-Covenant between the rulers that the question of accession shall be decided by the Rajpramukh .-Suit seeking declaration as real successor of the Jagir, is impliedly barred. The words of the Covenant are unambiguous and it is declared therein that no other authority except the Rajpramukh of Rajasthan will be competent to decide the question of succession. That being so, no suit can be maintained in a civil Court to direct a sovereign to perform his sovereign duties in a particular manner. The power of recognising an heir to the Gaddi of Indergarh which was once exercised by the Maharao of Kotah and which is not being exercised by the Rajpramukh of Rajasthan, is political in character and is an incident of sovereignty, and a matter that has to be exclusively settled in exercise of such a power cannot possibly be the subject of adjudication in a civil Court. *Umrao Singh Ajit Singhji and another v. Bhagwati Singh Balbir Singh (minor) and others,* AIR 1956 SC 15:

Section 9.-Sovereign functions.- Judicial Review.-Permissibility.- Annexation of territory and change in ruler.-The rights created under the earlier ruler can be enforced by the Court only in as far as such rights are recognised. When a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. *Raja Rajinder Chand v. Mst. Sukhi and others,* AIR 1957 SC 286: 1957 SCR 889: 1957 SCJ 119

Section 9.-Suit of civil nature.- Determination of.-Suit in the matter of religious rights and ceremonies.- Scope of.-Necessity of claim to an office of a civil nature.-Effect of. A court cannot entertain a suit which is not of a civil nature. Prima facie suits raising questions of religious rites and ceremonies only are not maintainable in a civil court, for they do not deal with legal rights of parties. But the explanation to the section accepting the said undoubted position says that a suit in which the right to property or to an officer is contested is a suit of civil nature notwithstanding that such right may depend entirely on the decision of a question as to religious rites or ceremonies. It implies two things, namely, (i) a suit for an office is a suit of a civil nature; and (ii) it does not cease to be one even if the said right depends entirely upon a decision of a question as to the religious rites or ceremonies. It implies further that questions as to religious rites or ceremonies cannot independently of such a right form the subject-matter of a civil suit. Honours shown or precedence given to religious dignitaries when they attend religious ceremonies in a temple cannot be placed on a higher footing than the religious rites or ceremonies, for they are integral part of the said rites or ceremonies in the sense that the said honours are shown to persons partaking in the ceremonies Prima facie honours, such as who is to stand in the ghoshti, in what place, who is to get the tulasi, etc., in which order, and similar others, cannot be considered to be part of the remuneration or perquisites attached to an office, for they are only tokens of welcome of an honoured guest within the precincts of a temple. We may summarize the law on the subject thus: (1) A suit for a declaration of religious honours and privileges simpliciter will not lie in a civil court. (2) But a suit to establish one's right to an office in a temple, and to honours and privileges attached to the said office as its remuneration or perquisites, is maintainable in a civil court. (3) The essential condition for the

existence of an office is that the holder of the alleged office shall be under a legal obligation to discharge the duties attached to the said office and for the non-observance of which he may be visited with penalties. (4) So judged, there cannot be an independent office of theerthakar, for a theerthakar has no obligatory duties to perform; not can there be an office of arulipad; the said word only connotes that the names of the theerthakars are called out by the archaka in a certain order. (5) Even if theerthan is given or other honours are shown in a particular order to a person holding an office, it does not necessarily follow that the said honours are part of the remuneration attached to the office; but it is a question of fact to be ascertained on the evidence whether the said honours are attached to the office as part of its perquisites in the sense that they have become an integral part of the ritual to the performed by the recipient as the office-holder or are only shown to him as a mark of respect on the occasion of his visit to the temple. *Sri Sinha Ramanuja Jeer alias Sri Vanamamalai Ramanuja Jeer Swamigal v. Sri Ranga Ramanuja Jeer,* AIR 1961 SC 1720: 1962(1) An WR (SC) 1: 1962(1) Mad LJ (SC) 1: 1962(2) SCR 509

Section 9.-Civil Court.-Bar to jurisdiction.-Order passed by Debt Recovery Tribunal directing sale of mortgaged property.-Order is appealable only under Section 20 of Recovery of Debts due to Banks and Financial Institutions Act.-This fast track procedure cannot be allowed to be derailed either by taking recourse to Articles 226 and 227 of the Constitution or by filing a civil suit.

The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act. *Punjab National Bank vs. O.C. Krishnan and others*, AIR 2001 SC 3208 : 2001(6) SCC 569 : 2001(5) Scale 196 : 200(6) JT 408

Section 9.-Court.-Essential conditions.

In order to constitute a Court in the strict sense of the term, an essential condition is that the Court should have, apart from having some of the trappings of a judicial Tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement. *P. Sarathy vs. State Bank of India,* AIR 2000 SC 2023 : 2000(3) Mad LJ 108 : 2000(2) Land LR 583 : 2000(4) Andh LD 68 : 2000(2) Ker LT 771 : 2000(5) SCC 355 : 2000(2) Cur CC 280

Section 9.-Jurisdiction of Civil Court.-Eviction suit.-Instituted within exemption period of ten years.-Civil Court can continue with suit after expiry of exemption period.-Civil Court not prevented from passing a decree and enforce it.

There is no provision in the Rent Act taking away the jurisdiction of a Civil Court to dispose of a suit validly instituted. There is also no provision preventing the execution of a decree passed in such a suit. Rent Act does not expressly refer to execution of a decree for possession. On a reading of all the provisions of the Haryana Urban (Control of Tent and Eviction) Act, 1973, it is evident that it has not prevented a Civil Court from adjudicating the right accrued and the liabilities incurred prior to the date on which the Act became applicable to the building question. If the Legislature had intended to take away the jurisdiction of the Civil Court to decide a suit which had been validly instituted, it would have been worded differently. The purpose for which the exemption granted statutorily is to encourage construction of new buildings. That purpose would be defeated if the owner of the building is deprived of his right to get possession of the building unless he gets a decree within a period of ten years from the date of its completion. Therefore, a suit instituted during the period of exemption of building from operation of Act could be continued and a decree passed therein could be executed even though the period of exemption came to an end during the pendency of the suit. There is nothing in the Act which prevents the Civil Court from continuing the suit and passing a decree which could be executed. *Kishan alias Krishan Kumar vs. Manoj Kumar etc.,* AIR 1998 SC 999 : 1998(1) Mad LW 521 : 1998(118) PUN LR 593 1998(1) JT 633

Section 9.-Jurisdiction of Civil Court.-Exclusion of.-Not to be readily inferred and presumption to be drawn in favour of existence of jurisdiction.-Tests applied for examining jurisdiction.

The normal rule of law is that Civil Courts have jurisdiction to try all suits of civil nature except those of which cognizance by them is either expressly or impliedly excluded as provided under Section 9 of the Code of Civil Procedure but such exclusion is not readily inferred and the presumption to be drawn must be in favour of the existence rather than exclusion of jurisdiction of the Civil Courts to try civil suit. The test adopted in examining such a question is (i) whether the legislative intent to exclude arises explicitly or by necessary implication, and (ii) whether the statute in question provides for adequate and satisfactory alternative remedy to a party aggrieved by an order made under it. Where a statute gives finality to the orders of the special Tribunals jurisdiction of the Civil Courts must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the

statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure. *State of Andhra Pradesh vs. Manjeti Laxmi Kanta Rao (dead) by LRs and others,* AIR 2000 SC 2220 : 2000(1) Cur LJ (CCR) 476 : 2000(3) SCC 689 : 2000(3) All Mah LR 664 : 2000(3) Civ LJ 218

Section 9.-Jurisdiction of Civil Court.-Finding recorded by Civil Court on jurisdictional fact, binding on parties.

It is improper to say that inasmuch as the civil suit is barred in view of the provisions of Section 331 read with Schedule II of the U.P. Zamindari Act, any finding recorded by the Civil Court could not be taken note of in the proceedings under the Consolidation Act. Section 331 read with Schedule bars jurisdiction of Civil Court only in respect of such reliefs which are mentioned in Schedule II and for their adjudication another authority has been prescribed thereunder. Further it is not every suit of declaration that is barred under Section 331. The categories of declaration which cannot be granted by a Civil Court are those mentioned against Section 34 and they are of the types specified in Sections 229, 229-B and 229-C. The suits in question were filed for the reliefs of declaration of Bhumidari rights and for a ejectment of the persons in possession including the appellants. The only grounds on which the suit was held to be barred was that the appellants were Asamis and their ejectment could not be granted by the Civil Court. A finding recorded by the Civil Court on the question of jurisdictional fact is binding on the parties to the suit. *Kali Prasad and others vs. Dy. Director of Consolidation and others,* AIR 2000 SC 3722 : 2000 All LJ 3054 : 2000(6) SCC 640 : 2000(4) LRI 519

Section 9.-Jurisdiction of Civil Court.-Rape committed on woman by railway employee.-Civil suit for damages maintainable.

Where rape was committed by railway employees on a woman in a building belonging to railways, a writ petition filed victim against government for compensation would be maintainable and it cannot be said that she should have approached the Civil Court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution. Where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law. It was more so when it was not a mere matter of violation of fundamental rights which was involved as petitioner was a victim of rape which is violative of the fundamental right of a person guaranteed under Article 21 of the Constitution. *Chairman, Railway Board and others vs. Mrs. Chandrima Das and others,* AIR 2000 SC 988 : 2000(2) Mad LJ 26 : 2000(1) Cur CC 190 : 2000(2) SCC 465 : 2000(1) Ker LT 655 : 2000(1) Mah LR 853 : 2000(3) Cal LT 44

Section 9.-Jurisdiction of Civil Court.-Service matter.-Order passed by disciplinary authority could be questioned under service rules.-Litigation pending in Civil Court for more than five years.-Opinion of Single Judge hearing second appeal that civil court had no jurisdiction improper.-Appellant cannot be non-suited for failure to take recourse to proceedings under service rules.-Matter remanded back to High Court for disposal on merits of case.

Service Rules, neither expressly nor by implication have taken away the jurisdiction of the Civil Courts to deal with service matter. The opinion of the learned Single Judge does violence both to the Code of Civil Procedure, the Specific Relief Act and the Service Rules. As a matter of fact it appears to us that the learned single Judge failed to exercise the jurisdiction vested in him while non-suiting the appellant. It, therefore, appears appropriate to us to allow this appeal, set aside the order of the learned single Judge and remit the matter of the High Court for a fresh decision of the regular second appeal and the cross-objections on their own merits. The appeal, therefore, succeeds and is allowed. The RSA and cross-objections are remitted to the High Court for fresh disposal on merits in accordance with law. *Ramendra Kishore Biswas vs. State of Tripura and others,* AIR 1999 SC 294 : 1999(1) Mad LJ 138 : 1999(1) SCC 472 : 1999(1) Mad LW 245 : 1999(1) Cur LR 846

Section 9.-Jurisdiction of Courts.-Effect of change of law on pending cases.-Prospective law.-Does not affect pending cases .

In some statutes the legislature no doubt says that no suit shall be 'entertained' or 'instituted' in regard to a particular subject matter. It has been held by the Supreme Court that such a law will not affect pending actions and the law is only prospective. But the position is different if the law states that after its commencement, no suit shall be “disposed of” or “no decree shall be passed” or “no Court shall exercise powers or jurisdiction”. In this class of cases, the Act applies even to pending proceedings and has to Electricity Board taken judicial notice of by the Civil Court. *United Bank of India, Calcutta vs. Abhijit Tea Co. Ltd. and others,* AIR 2000 SC 2957 : 2000(102) Com Cas 53 : 2001(1) Banks Cas 1 : 2000(4) All Mah LR 875 : 2000(7) SCC 357 : 2000(6) Andh LD 55

Sections 9 and 93.-Bar to jurisdiction.-Relief in the nature of change of scheme of trust.-Such relief specifically covered by local law barring the civil suit.-Suit is not maintainable. By claiming a right to have the idols and portraits in the Dharamshala hall and also the right to read the books propounded by the followers of Abji Bapa, the respondents- plaintiffs in pith and substance are asking for alterations in the scheme of the trust already settled. In any case, the right of trustees to decide the place where devotees would recite the scriptures and also the place where the idols and portraits are to be installed has been questioned in the suit. The respondents- plaintiffs are indirectly trying to interfere with the

management of the temple. The main purpose of the suit filed by the followers of Abji Bapa is to establish the superiority of their sect and impose their way of thinking and worship in the management of the temple and as a consequence in the administration of the trust. *Kanbi Manji Abji and others v. Kanbi Vaghji Mavji and others,* AIR 1993 SC 1163: 1993 Supp (4) SCC 351

Sections 9 and 151.-Bar to jurisdiction.-Determination of.-The Civil Court has inherent jurisdiction to decide the question of its own jurisdiction although as a result of inquiry it may turn out that it has not jurisdiction over the subject-matter of the suit.-It has the jurisdiction to decide if it has the jurisdiction to entertain a suit or not. *Messrs. Bhatia Co-operative Housing Society Limited v. D.C. Patel,* AIR 1953 SC 16: 1952 SCJ 642: 1953 SCR 185

Section 10.-Second Appeal.-Powers of Court.-Plaintiffs claiming that they were hereditary trustees of the temple.-Rejected by High Court.-Their claim attained finality.-High Court for the first time in second appeal could not have granted appeal at all. *M.S.V. Raja and another vs. Seeni Thevar and others*, AIR 2001 SC 3389 : 2001(6) SCC 652 : 2001(5) Scale 210 : 2001(6) JT 537

Section 10.-Second Appeal.-Powers of Court.-Plaintiffs claiming that they were hereditary trustees of the temple.-Rejected by High Court.-Their claim attained finality.-High Court for the first time in second appeal could not have granted appeal at all. *M.S.V. Raja and another vs. Seeni Thevar and others*, AIR 2001 SC 3389 : 2001(6) SCC 652 : 2001(5) Scale 210 : 2001(6) JT 537

Section 10, Order 37, Rule 1.-Stay of subsequently instituted suit.-Summary suit.-Bar of suit.-Word 'trial' in Section 10 does not mean entire proceedings starting with institution of suit.-In summary suit trial begins after grant of leave to defend.-Concept of trial applicable only to a regular ordinary suit and not to a summary suit filed under Order 37.

The word 'trial' in Section 10 in the context of summary suit cannot be interpreted to mean the entire proceedings starting with institution of the suit by lodging a plaint. In a summary suit the 'trial' really begins after the Court or the judge grants leave to the defendant to contest the suit. Therefore, the Court or the judge dealing with the summary suit can proceed up to the stage of hearing the summons for judgment and passing the judgment in favour of the plaintiff if: (a) the defendant has not applied for leave to defend or if such application has been made and refused or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted. *Indian Bank vs. Maharashtra State Co-operative Marketing Federation Ltd.,* AIR 1998 SC 1952 : 1998(3) Andh LT 18 : 1998 MPLJ 101 : 1998(2) Bom LR 104

Section 11.-Application of.-Court of limited jurisdiction.-The explanation VIII is wide enough to include a Court of limited pecuniary jurisdiction.-Decision of such Court may operate as *res judicata* between the parties. The expression the Court limited jurisdiction in Explanation VIII is wide enough to include a Court whose jurisdiction is subject to pecuniary limitation and other cognate expressions analogous thereto. There- fore, Section 11 is to be read in combi- nation and harmony with Explanation VIII. The result that would flow is that an order or an issue which had arisen directly and substantially between the parties or their privies and decided finally by a competent Court or tribunal, though of limited or special jurisdiction, which includes pecuniary jurisdiction, will operate as *res judicata* in a subsequent suit or proceeding, notwithstanding the fact that such court of limited or special jurisdiction was not a competent Court to try the subsequent suit. The issue must directly and substantially arise in a later suit between the same parties or their privies. *Sulochana Amma v. Narayanan Nair,* AIR 1994 SC 152: 1994(2) SCC 14: 1993(3) Scale 880: 1993(5) JT 448: 1993(2) Ker.L.T. 938: 1993(3) RRR 682

Section 11.-Constructive res judicata.-Application of.-Omission in pleading.-Effect of.-Subsequent proceedings in respect of plea omitted is barred by *res judicata*. *Nirmal Enem Horo v. Smt. Jahan Ara Jaipal Singh,* AIR 1973 SC 1406: 1973 Pat LJR 469: 1973(2) SCC 129 **Section 11.-Constructive res judicata.-Interpretation of statute in previous litigation.-Effect on subsequent litigation.-The question that a party is entitled to take advantage of provision of statute is different from the interpretation of that statute itself.-Such decision in previous litigation does not bar the interpretation of the statute in question in subsequent litigation.** *Ram Nandan Prasad Narayan Singh and another v. Kapildeo Ramjee and others,* AIR 1951 SC 155: 1951 SCJ 199: 1951 SCR 138

Section 11.-Precedent.-Construction of deed.-Effect on persons not party to the decision of Privy Council.-Though the decision is not binding on such person, yet it operates as a judicial precedent. *Sahu Madho Das and others v. Mukand Ram and another,* AIR 1955 SC 481: 1955(2) Mad LJ (SC) 1: 1955 SCJ 417: 1955(2) SCR 22

Section 11.-*Res judicata*.-Arbitrary decision.-A decision became final between the parties cannot be reopened on the ground of being violative of Article 14 of the Constitution. The doctrine of *res judicata* is a universal doctrine laying down the finality of litigation between the parties. When a particular decision has become final and binding between the parties, it cannot be set at naught on the ground that such a decision is violative of Art. 14 of the Constitution. So far as the parties are concerned, they will always be bound by the said decision. In other words, either of the parties will not be permitted to reopen the issue decided by such decision on the ground that such decision violates the equality clause under the Constitution. The judgment which is binding between the parties and which operates as *res judicata*

between them cannot be said to overrule the provision of Article 14 of the Constitution even though it may be, to some extent, violative of Article 14 of the Constitution. *Supreme Court Employees Welfare Association v. Union of India and others,* AIR 1990 SC 334: 1989(4) SCC 187: 1989(3) SCR 488: 1989(2) Scale 107: 1989(3) JT 188

Section 11.-*Res judicata*.- Affirmation in appeal.-Effect of.-Where a decision on merits was affirmed by the Appellate Court by dismissing the appeal on the ground of limitation or default, it cannot be said that such decision cannot operate as *res judicata*. In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial Court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multi-variousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letter of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be *res judicata* in a subsequent suit. It is well settled that where a decree on the merits is appealed from, the decision of the trial Court loses its character of finality and what was once *res judicata* again becomes res sub judice and it is the decree of the appeal Court which will then be *res judicata.* But if the contention of the appellant were to be accepted and it is held that if the appeal court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming into the trial court's decision given on merits, the appeal court's decree cannot be *res judicata,* the result would be that even though the decision of the trial Court given on the merits is confirmed by the dismissal of the appeal on a preliminary ground there can never be *res judicata.* We cannot, therefore, accept the contention that even though the trial Court may have decided the matter on the merits there can be no *res judicata* if the appeal court dismisses the appeal on a preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits. *Sheodan Singh v. Daryao Kunwar,* AIR 1966 SC 1332: 1966 All LJ 578: 1966 All WR (HC) 449: 1966(3) SCR 300

Section 11.-*Res judicata*.- Application of.-Affirmation of a judgement in writ jurisdiction.-The judgement operates as *res judicata* and question decided therein cannot be reopened by statutory revenue authorities in exercise of their statutory powers. Sobhag Singh and others v. Jai Singh and others, AIR 1968 SC 1328: 1969 (1) SCJ 418: 1968(2) SCR 848 **Section 11.-*Res judicata*.-Application of.-Assessment of income tax.-The principle of *res judicata* has no application on such proceedings.** *Raja Bahadur Visheshwara Singh and others v. Commissioner of Income-tax, Bihar and Orissa,* AIR 1961 SC 1062: 1961(1) SCJ 704: 1961(3) SCR 287 **Section 11.-*Res judicata*.-Application of.-Dismissal of a petition u/a 226, in liming, bars subsequent petitions under Section 32 of the Constitution.** *The Virudhunagar Steel Rolling Mills Ltd. v. The Government of Madras,* AIR 1968 SC 1196: 1968 (2) Andh WR (SC) 92: 1968 (2) Mad LJ (SC) 92: 1968(2) SCR 740 Section 11.-*Res judicata*.- Application of.-Failure to challenge the order by way of appeal.-Order becoming final.-Challenge to the decision of Lower Authority before the Supreme Court is not permissible. *Phool Chand Sharma and others v. Chandra Shanker Pathak and others,* AIR 1964 SC 782: 1963(1) SCWR 416: 1963 Supp (2) SCR 328

Section 11.-*Res judicata*.- Application of.-General doctrine of *res judicata* can be invoked as the provisions is not exhaustive to ensure finality of litigation. Section 11 of the C.P.C. is not exhaustive of the general doctrine of *res judicata* and though the rule of *res judicata* as enacted in Section 11 has some technical aspects the general doctrine is founded on considerations of high public policy to achieve two objectives, namely, that there must be a finality to litigation and that individuals should not be harassed twice over with the same kind of litigation. It is in the interest of the public at large that finality should attch to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. *Gulam Abbas and others v. State of U.P. and others,* AIR 1981 SC 2198: 1982(1) SCC 71: 1982(1) SCR 1077: 1981(3) Scale 1707

Section 11.-*Res judicata*.- Application of principle.-The rule of *res judicata* is based on public policy and it can be invoked in a petition under Article 32 of Constitution on the basis of decision of High Court under Article 226. On general considerations of public policy there seems to be no reason why the rule of *res judicata* should be treated as inadmissible or irrelevant in dealing with petitions filed under Art. 32 of the Constitution. It is true that the general rule can be invoked only in cases where a dispute between the parties has been referred to a court of competent jurisdiction, there has been a contest between the parties before the court, a fair opportunity has been given to both of them to prove their case, and at the end of court has pronounced its judgment or decision. Such a decision pronounced by a court of competent jurisdiction in binding between the parties unless it is modified or reversed by adopting a procedure prescribed by the Constitution. *Daryao and others v. State of U.P. and others,* AIR 1961 SC 1457: 1961(2) SCA 591: 1962(1) SCR 643

Section 11.-*Res judicata*.- Application on arbitration.-Reference in respect of a claim.- Subsequent

petition seeking similar relief is barred by principle of *res judicata.* *K. V. George v. The Secretary to Govt., Water and Power Dept., Trivandrum and another,* AIR 1990 SC 53: 1989(4) SCC 595: 1989 Supp. (1) SCR 398: 1989(2) Scale 822: 1989(4) JT 166: 1989 All. W.C. 1408

Section 11.-*Res judicata*.- Application on co-plaintiffs.- Permissibility .- Considerations for application of.For a judgment to operate as res judicata between or among co- defendants, it is necessary to establish that (1) there was a conflict of interest between co-defendants; (2) that it was necessary to decide the conflict in order to give the relief which the plaintiff claimed in the suit; and (3) that the Court actually decided the question. The doctrine may apply even though the party, against whom it is sought to enforce it, did not in the previous suit think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided. We see no reason why a previous decision should not operate as *res judicata* between co-plaintiffs if all these conditions are *mutatis mutandis* satisfied. *Iftikhar Ahmed v. Syed Meharban Ali,* AIR 1974 SC 749: 1974(3) SCR 464: 1974(2) SCC 151

Section 11.-*Res judicata*.- Application on co-defendants.- Necessity of great care and caution.- Effect of fraud and collusion.-If a party obtains decree by practising fraud or collusion, he cannot be allowed to say that the matter is *res judicata* and cannot be re-opened.- There can also be no question of *res judicata* in a case where signs of fraud or collusion are transparently pregnant or apparent from the facts on record. For application of this doctrine between co-defendants four conditions must be satisfied, namely, that (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims; (3) the question between the defendants must have been finally decided; and (4) the co-defendants were necessary or proper parties in the former suit. Where the above four conditions did not exist the decree does not operate as *res judicata.* It must, therefore, be that all the persons who have right, title and interest are made parties to the suit and that they should have knowledge that the right title and interest would be in adjudication and the finding or the decree therein would operate as a *res judicat*a to their right, title and interest in the subject-matter of the former suit. Even in their absence a decree could be passed and it may be used as an evidence of the plaintiff's title either accepted or negatived therein. The doctrine of *res judicata* would apply even though the party against whom it is doubt to be enforced, was not co-nomine made a party nor entered appearance nor did he contest the question. The doctrine of *res judicata* must, however, be applied to co-defendants with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. If a party obtains a decree from the court of justice. If a party obtains a decree from the court by practicing fraud or collusion, he cannot be allowed to say that the matter is *res judicata* and cannot be re-opened. There can also be no question of *res judicata* in a case where signs of fraud or collusion are transparently pregnant or apparent from the facts on record. *Mahboob Sahab v. Syed Ismail and others,* AIR 1995 SC 1205: 1995(3) SCC 693: 1995(2) Scale 395: 1995(3) JT 168: 1995(1) Hindu LR 440

Section 11.-*Res judicata*.- Application on execution proceedings.-Even if provision does not apply, principles of constructive *res judicata* apply. The decision given in the first set of execution proceedings was thus not one of law only but of a mixed question of law and fact. Such a decision undoubtedly would operate as *res judicata.* In execution proceedings Section 11 of the Code of Civil Procedure does not apply in terms but the rule of constructive *res judicata* has always been applied. *Kani Ram and another v. Smt. Kazani and others,* AIR 1972 SC 1427: 1972(2) SCC 192: 1973(1) SCR 254

Section 11.-*Res judicata*.-Application on interlocutory orders.-Failure to appeal or challenge interlocutory orders.-Effect of such order does not operate as *res judicata.* A party is not bound to appeal against every interlocutory order which is a step in the procedure that leads up to a final decision or award. Interlocutory judgments which have the force of a decree must be distinguished from other interlocutory judgments which are a step towards the decision of the dispute between parties by way of a decree or a final order. *The United Provinces Electric Supply Co. Ltd. v. T.N. Chatterjee and others,* AIR 1972 SC 1201: 1973(1) SCJ 13: 1972(2) SCC 54: 1972 (3) SCR 754

Section 11.-*Res judicata*.- Application on restitution proceedings.-The restitution is in the nature of execution of decree.-Principles of *res judicata* are applicable on such proceedings. *Maqbool Alam Khan v. Mst. Khodaija and others,* AIR 1966 SC 1194: 1966 BLJR 566: 1966(3) SCR 479

Section 11.-*Res judicata*.- Application on statutory inquiry.- Decree against a person in occupation of property.-The property claimed to be property of a trust of religious and charitable in nature.- Decree passed against a person claimed to be trespasser on property.-Inquiry by municipal authority to determine the nature of trust to ascertain if it was religious or charitable or not, are not barred by principles of *res judicata.* *The Municipality of Taloda v. The Charity Commissioner, Bombay and others,* AIR 1968 SC 418: 70 Bom LR 332: 1968 Mah LJ 435: 1968(1) SCR 652

Section 11.-*Res judicata*.- Application on writ proceedings.- Challenge to right of Government or Electricity Board to revise electricity rates.-Disposal of the writ petition challenging such right does not bar a petition challenging the rates revised by the Board. *Mysore State Electricity Board v. Bangalore Woollen, Cotton and Silk Mills Ltd. and others,* AIR 1963 SC 1128: 1963 Supp. (2) SCR 127

Section 11.-*Res judicata*.- Application to income tax assessment .-Permissibility. The doctrine of *res judicata* does not apply so as to make a decision on a question of act or law in a proceeding for assessment in one year binding in another year. The assessment and the facts bound are conclusive only in the year of assessment: the findings on questions of fact may be good and cogent evidence in subsequent years, when the same question falls to be determined in another year, but they are not binding and conclusive. *M.M. Ipoh and others v. Income Tax Commissioner, Madras,* AIR 1968 SC 317: 1968(1) SCR 65

Section 11.-*Res judicata*.-Change in law.-Dismissal of petition as barred by limitation.-The decision became final.-Subsequent change in law removing the bar of limitation retrospectively.-The person who did not challenge the order by way of appeal can not file a fresh petition. The matter will be different if any claiming having filed a petition for claim beyond time which has been rejected by the Tribunal or the High Court, the claimant does not challenge the same and allows the said judicial order to become final. The aforesaid Amending Act shall be of no help to such claimant. The reason being that a judicial order saying that such petition of claim was barred by limitation has attained finality. But that principle will not govern cases where the dispute as to whether petition for claim having been filed beyond the period of twelve months from the date of the accident is pending consideration either before the Tribunal, High Court or this Court. In such cases, the benefit of amendment of sub-section (3) of Section 166 should be extended. *Dhannalal v. D.P. Vijayvargiya and others,* AIR 1996 SC 2155: 1996(4) SCC 652: 1996(4) Scale 458: 1996(5) JT 601: 1996(2) Ker. LT 283

Section 11.-*Res judicata*.-Change in law.-The earlier proceedings initiated under an earlier Statute stood dismissed.-Subsequent proceedings on the grounds available under a new Statute is not barred by *res judicata*. *Shantilal Rampuria and others v. M/s. Vega Trading Corporation and others,* AIR 1989 SC 1819: 1989(3) SCC 552: 1989(3) SCR 632: 1989(2) Scale 250: 1989(3) JT 301

Section 11.-*Res judicata*.-Claim under same contract.-The decree passed in earlier suit, in terms of compromise.-Principle of *res judicata* found to have no application but on the principle of estoppel the parties estopped from taking a contrary stand in subsequent suit. Where the right claimed in both suits is the same the subsequent suit would be barred as *res judicata* though the right in the subsequent suit is sought to be established on a ground different from that in the former suit It would be only in those cases where the rights claimed in the two suits were different that the subsequent suit would not be barred as *res judicata* even though the property was identical. It is therefore clear that the plaintiff in the case before us was litigating under the same title, i.e., in the same right as the adopted son of Shankar though that claim of his was sought to be based on a later adoption than the one in the former suit. The bar of *res judicata* however, may not in terms be applicable in the present case, as the decree passed in Suit No. 291 of 1937 was a decree in terms of the compromise. The terms of Section 11 of the Civil Procedure Code would not be strictly applicable to the same but the underlying principle of estoppel would still apply. *Sunderabai w/o Devrao Deshpande and another v. Devaji Shankar Deshpande,* AIR 1954 SC 82: 1953 SCJ 693: 1953(2) Mad LJ 782

Section 11.-*Res judicata*.-Collusive decree.-Non-impleadment of necessary parties.-Finding that the earlier decree was collusive and therefore not binding is a finding of fact not liable to interference in appeal. *Sher Singh and others v. Gamdoor Singh,* AIR 1997 SC 1333: 1997(2) SCC 485: 1997(1) Scale 214: 1997(1) JT 396: 1997(2) Raj. LW 208

Section 11.-*Res judicata*.-Common claims.-Application on partition suit.-A decree becoming final against one person operates as *res judicata* against another person representing identical or common claim.In a partition suit each party claiming that the property is joint, asserts a right and litigates under a title which is common to others who make identical claims. If that very issue is litigated in another suit and decided we do not see why the others making the same claim cannot be held to be claiming a right in common for themselves and others. Each of them can be deemed, by reason of explanation VI, to represent all those the nature of whose claims and interests are common or identical. If we were to hold otherwise, it would necessarily mean that there would be two inconsistent decrees. One of the tests in deciding whether the doctrine of res judicata applies to a particular case or not is to determine whether two inconsistent decrees will come into existence if it is not applied. We think this will be the case here. Narayana Prabhu Venkateswara Prabhu v. Narayana Prabhu Krishna Prabhu (dead) by L.Rs., AIR 1977 SC 1268: 1977(2) SCC 181: 1977(2) SCR 636

Section 11.-*Res judicata*.-Common judgment.-Effect of finality.-An appeal arising out of connected suits, stood dismissed on merits.-Other appeals also cannot be heard and have to be dismissed. *Premier Tyres Limited v. Kerala State Road Transport Corporation,* AIR 1993 SC 1202: 1993(2) KLT 130: 1993 Supp. (2) SCC 146

Section 11.-*Res judicata*.-Common judgment.-Effect of finality.-No appeal filed against the judgment in a connected suit.-The finality of decision precluded the court from proceeding with the appeal arising out of other connected suit. *Premier Tyres Limited v. Kerala State Road Transport Corporation,* AIR 1993 SC 1202: 1993(2) KLT 130: 1993 Supp. (2) SCC 146

Section 11.-*Res judicata*.- Compromise decree.-Omission in respect of one of the matters.-The parties are bound by the terms of compromise decree unless it is vitiated by fraud, misrepresentation, mis- understanding or mistake. The compromise closed once for all the controversy

about taking any account of the joint family businesses including the motor business after the first March, 1946, and the plaintiff is bound by the terms of the compromise and the consent decree following upon it. The plaintiff is barred by the principle of *res judicata* from reagitating the question in the present suit. It is well settled that a consent decree is as binding upon the parties thereto as a decree passed by invitum. The compromise having been found not to be vitiated by fraud, mis- representation, misunderstanding or mistake, the decree passed thereon had the binding force of *res judicata. Shankar Sitaram Sontakke and another v. Balkrishna Sitaram Sontakke and others*, AIR 1954 SC 352: 57 Bom LR 1: 1954 SCA 914: 1954 SCJ 552: 1955 SCR 99

Section 11.-*Res judicata*.-Composite judgment.-Disposal of two suits by a common judgement.-Appeal in one of the suit became time barred.-Dismissal of the appeal in other suit on the principle of *res judicata* is not permissible. The question of *res judicata* arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of *res judicata* does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment and the matter decided concerns the entire suit. As such, there is no question of the application of the principle of *res judicata*. The same judgment cannot remain effective just because it was appealed against with a different number or a copy of it was attached to a different appeal. *Narhari and others v. Shanker and others,* AIR 1953 SC 419: 1950 SCR 754

Section 11.-*Res judicata*.-Consent decree.-The judgement passed with the consent of the parties is as effective an estoppel between the parties as a judgement passed in a contested case. *Sailendra Narayan Bhanja Deo v. The State of Orissa,* AIR 1956 SC 346: 22 Cut LT 251: 1956 SCR 72

Section 11.-*Res judicata*.-Court of special jurisdiction.-The plea of *res judicata* is available in respect of the decisions delivered by Court of exclusive jurisdiction. The condition regarding the competency of the former Court to try the subsequent suit is one of the limitations engrafted on the general rule of *res judicata* by Section 11 of the Code and has application to suits alone. When a plea of *res judicata* is founded on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit. A plea of *res judicata* on general principles can be successfully taken in respect of judgments of Courts of exclusive jurisdiction, like revenue Court, land acquisition Courts, administration Courts etc. It is obvious that these Courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statute. *Raj Lakshmi Dasi and others (Smt.) v. Banamali Sen and others,* AIR 1953 SC 33: 1952 SCJ 618: 1953 SCR 154

Section 11.-*Res judicata*.-Consent decree.-The question not decided by the consent decree, does not operate as *res judicata*. *Baldevdas Shivlal and another v. Filmistan Distributors (India) Pvt. Ltd. and others,* AIR 1970 SC 406: 11 Guj LR 150: 1970(1) SCR 435: 1969(2) SCC 201

Section 11.-*Res judicata*.-Consolidation of suit.-Disposal by common judgment.-Dismissal of appeal from judgement in one suit.-Effect of. Where a suit has been tried and finally decided on the merit, if the defeated party wishes in another suit between the same parties relating to the same property to have the same questions re-agitated, he cannot be allowed to do so, because his cause of action as passed into a judgment, and the matter has become *res judicata.* Whatever may have been the common issues between the two suits, one issue which is not common and makes the subject-mattter of both the suits different is that whether the plaintiff in Title Suit No. 94 of 1956, that is the first respondent in these appeals, is solely entitled to compensation from the State of Bihar. This issue is not necessarily confined to the existence or validity of the parntership but as to whether the other parties to the suit have contributed to the capital of the firm or paid Murli Prasad any amounts which they are entitled to recover from out of the compensation amount. This was not the subject-matter of Title Suit No. 68 of 1954. Even as the learned Advocate contends, there is no longer any question of partnership being dissolved once the subject-matter has disappeared by the revocation of the licence and afer the entire assets of the partnership were taken over by the Government. Even if the partnership was illegal and void as contended by the respondent in the other title suit, the same question, namely, whether the plaintiff-first respondent alone would be entitled to the entire compensation, was not the subject-matter of the Title Suit No. 68 of 1954. If so, no question of *res judicata* would arise. *Ramagya Prasad Gupta and others v. Murli Prasad and others,* AIR 1974 SC 1320: 1974 Pat LJR 455: 1974(2) SCC 227: 1974(3) SCR 931

Section 11.-*Res judicata*.- Constructive *res judicata*.-It should not be applied on writ petitions filed under Article 32 and Article 226 of the Constitution of India. *Amalgamated Coalfields Ltd. and another v. Janapada Sabha Chhind- wara and others (In all the Appeals),* AIR 1964 SC 1013: 1963 Supp (1) SCR 172

Section 11.-*Res judicata*.- Constructive *resjudicata*.-Acquiescence.-Execution of decree.-No objection as to limitation raised but set aside of sale sought on the basis of revival of execution proceedings.-Subsequent challenge to execution of decree is barred by the principle of *res judicata*. *Prem Lata Agarwal v. Lakshman Prasad Gupta and others,* AIR 1970 SC 1525: 1970 Ker LJ 649

Section 11.-*Res judicata*.- Constructive*resjudicata*.-Application .-The principles underlying the

provision can not be ignored in writ jurisdiction. *Devilal Modi v. Sales Tax Officer, Ratlam and others,* AIR 1965 SC 1150: 1965(1) SCJ 579: 1965(1) SCR 868

Section 11.-*Res judicata*.- Constructive *resjudicata*.-Application on writ proceedings.-Scope of. The provisions of Section 11, C.P.C., are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of *res judicata* any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceeding is immaterial. We do not see any good reason to preclude such decisions on matters in controversy in writ proceedings under Arts. 226 or 32 of the Constitution from operating as *res judicata* in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest. We therefore, hold that, on the general principle of *res judicata*, the decision of the High Court on a writ petition under Art. 226 on the merits on a matter after contest will operate as *res judicata* in a subsequent regular suit between the same parties with respect to the same matter. *Gulabchand Chhotalal Parikh v. State of Gujarat,* AIR 1965 SC 1153: 67 Bom LR 673: 1965(2) SCR 547

Section 11.-*Res judicata*.- Constructive *resjudicata*.-Application on writ proceedings.-A question raised in writ petition about the competence of an authority.-Dismissal of writ petition without decision on such question.-Subsequent suit raising the same question is barred. *Union of India v. Nanak Singh,* AIR 1968 SC 1370: 1968 Cur LJ 864: 1968(2) SCR 887

Section 11.-*Res judicata*.-Constructive *resjudicata*.-Decision in Writ jurisdiction.-It may operate as *res judicata* to subsequent suit in respect of same subject matter. *State of Punjab v. Bua Das Kaushal,* AIR 1971 SC 1676: 1970(3) SCC 656

Section 11.-*Res judicata*.-Constructive *resjudicata*.-Failure to take plea of lack of jurisdiction.-Subsequently such plea is barred by principles of *res judicata*. The plea of entitlement under Section 106 of the Land Reforms Act was available to the appellant in the eviction proceedings and if it would have been raised, the Rent Controller would have had no jurisdiction to proceed further but to refer the same to the Land Tribunal for decision under Section 125(3) of the Land Reforms Act. However, the appellant merely chose to deny the title of the landlords and did not raise the plea of Section 106 of the Land Reforms Act. The rule might and ought envisaged in Explanation IV to Section 11, C.P.C. squarely applies to the facts of the case and, therefore, it is no longer open to the appellant to plead that, Civil Court has no jurisdiction to decide the matter and it shall be required to be referred to the Land Tribunal. *P.K. Vijayan v. Kamalakshi Amma and others,* AIR 1994 SC 2145: 1994(4) SCC 53: 1994(2) Scale 368: 1994(3) JT 92: 1994(1) Ker LT 942

Section 11.-*Res judicata*.-Constructive *resjudicata*.-Failure to raise the plea of *mala fide* in earlier proceedings in which party was relegated to alternate statutory remedy.-Such plea can not be raised in subsequent petition. *State of Punjab and others v. M/s. Surinder Kumar and Co. and others,* AIR 1997 SC 809: 1997(1) Scale 151: 1997(1) JT 393: 1997 (9) SCC 66: 1997(115) Pun. LR 779: 1997(2) Rec. Civ. R 32

Section 11.-*Res judicata*.-Constructive *resjudicata*.-A plea though available but not taken in earlier litigation cannot be raised in subsequent petition in respect of same cause of action. The principle of estoppel per *res judicata* is a rule of evidence. It may be said to be the broader rule of evidence which prohibits the reassertion of a cause of action. This doctrine is based on two theories; (i) The finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of community as a matter of public policy and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vatality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of res judicata. It may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to chose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process. *State of Uttar Pradesh v. Nawab Hussain,* AIR 1977 SC 1680: 1977(2) SCC 806: 1977(3) SCR 428

Section 11.-*Res judicata*.-Constructive *resjudicata*.-Statutory remedies for redress of grievance, availed.-The decision of statutory authority affirmed in writ jurisdiction and stood final.-Re-agitation of same question in the proceedings arise out of civil suit is not permissible. *Munshi*

Muzbool Raza v. Hasan Raza, AIR 1978 SC 1398: 1978(3) SCC 578: 1978 All LJ 756

Section 11.-*Res judicata*.-Constructive *res judicata*.-New plea in subsequent proceedings.-Permissibility .-The grounds raised in subsequent petition absent in earlier petition.-Subsequent petition is barred by *res judicata*. The High Court in our opinion was not right in holding that the earlier judgment would not operate as *res judicata* as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to Section 11, C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided, it is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. Forward Construction Co. and others v. Prabhat Mandal (Regd.) Andheri and others, AIR 1986 SC: 1986(1) SCC 100: 1985 Supp. (3) SCR 766: 1985(2) Scale 1123: 1986(1) Mah. LR 189

Section 11.-*Res judicata*.-Constructive *res judicata*.-The question raised in the suit could have been raised in the earlier suit and apparently raised as an after-thought .-The contentions are barred by the principle of constructive *res judicata*. *Moran Mar Basselios Catholicos v. Thukalan Paulo Avira and others,* AIR 1959 SC 31: 1958 Ker LJ 721: 1958 Andh L.T. 834

Section 11.-*Res judicata*.- Constructive *res judicata*.-Similar issues.-Earlier decision of Court given on the basis of the petition moved by similarly situated parties .-Subsequent petition on the ground that adequate opportunity not granted to the persons adversely affected.-The contention raised in the petition already considered.- Decision operates as *res judicata*. *Junior Telecom Officers Forum and others v. Union of India and others,* AIR 1993 SC 787: 1992(2) Scale 605: 1992(5) JT 525: 1993 Supp (4) SCC 693: 1992 Supp (1) SCR 764: 1993 UPLBEC 333

Section 11.-*Res judicata*.-Constructive *res judicata*.-Dismissal of Special Leave Petition in limine by Supreme Court does not necessarily bar entertainment of writ petition on the same grounds. *The Workmen of Cochin Port Trust v. The Board of Trustees of the Cochin Port Trust and another,* AIR 1978 SC 1283: 1978(3) SCC 119: 1978(3) SCR 971: 1978(2) LLJ 161

Section 11.-*Res judicata*.-Cross suits.-Decision on issue became final in a decree from one of the suits .-Such issue cannot be reagitated in appeal arising from decree in other suit. *Ram Prakash v. Smt. Charan Kaur & another,* AIR 1997 SC 3760 1997(9) SCC 543: 1997(2) Scale 58: 1997(2) JT 527: 1997 RD 410: 1997(2) All WC 980

Section 11.-*Res judicata*.-Decision of Revenue Court.-Subsequent suit filed in Civil Court about declaration of the title of the property.-Revenue Court is not competent to try such suit.-Subsequent suit has no bar. The present suit is for a declaration of the plaintiff's title to the plaint schedule properties and for an injunction restraining the execution of the decree obtained by the defendant in the Revenue Court. The plaintiff claims title to the suit properties on the ground that he was a member of a joint Hindu family along with his deceased brother and, therefore, he succeeded to his share by right of survivorship. Under Section 230 of the Act, the Revenue Court has no exclusive jurisdiction to entertain a suit of the nature that is before us. If it is not a suit of that nature, under that section, the Civil Court's jurisdiction is not ousted. *Bhagwan Dayal (since deceased) and thereafter his heirs and legal representatives Bansgopal Dubey and another v. Mst. Reoti Devi (deceased) and after her death, Mst. Dayavati, her daughter,* AIR 1962 SC 287: 1962(3) SCR 440.

Section 11.-*Res judicata*.-Decision on merits.-Interest of a decision .-Dispossession of the suit on the ground of infirmity in framing of suit for want of court fee, misjoinder of parties or such technical mistake.- Such decision cannot operate as *res judicata*. *Sheodan Singh v. Daryao Kunwar,* AIR 1966 SC 1332: 1966 All LJ 578: 1966 All WR 449: 1966(3) SCR 300

Section 11.-*Res judicata*.-Decision without jurisdiction.-The juris- diction of Civil court expressly barred in respect of eviction of tenant.-Decision of civil court cannot operate as *res judicata*. Where the decision is on a question of law, i.e. the interpretation of a statute, it will be *res judicata* in a subsequent proceeding between the same parties where the cause of action is the same, for the expression the matter in issue in Section 11 of the Code of Civil Procedure means the right litigated between the parties, i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the court or a decision of the Court sanctioning something which is illegal, by resort to the rule of *res judicata* a party affected by the decision will not be precluded from challenging the validity of that order under the rule of *res judicata*, for a rule of procedure cannot supersede the law of the land. In our opinion a court which has no jurisdiction in law cannot be conferred with the jurisdiction by applying principles of *res judicata*. It is well settled that there can be no estoppel on a pure question of law and in this case the question of jurisdiction is a pure question of law. *Smt. Isabella Johnson v. M.A. Susai (dead) by LRs.,* AIR

1991 SC 993: 1991(1) SCC 494: 1990 Supp (2) SCR 213: 1990(4) JT 406

Section 11.-*Res judicata*.-Decision without jurisdiction.-Finding of Court which had no jurisdiction to give such finding does not operate as *res judicata* in subsequent proceedings before court of competent jurisdiction. *Rcihpal Singh and others, etc. v. Dalip,* AIR 1987 SC 2205: 1987(4) SCC 410: 1988(1) SCR 93: 1987(2) Scale 527: 1987(3) JT 516

Section 11.-*Res judicata*.-Decree under Land Reforms Act, declaring him to be not a tenant, allowed to become final.-The erstwhile tenant can not contend that he is still a tenant under the Act and the decree is nullity. *Bharmappa Nemanna Kawale and another v. Dhondi Bhima Patil and others,* AIR 1997 SC 122: 1996(8) SCC 243: 1996(3) Scale 507: 1996(4) JT 299: 1996(113) Pun.L.R 320: 1996(2) Mah.LR 596

Section 11.-*Res judicata*.-Defect in order.-Decree passed in earlier suit for partition on the basis of arbitration award.-Impleadment of necessary party or defect in service of notice.-Decree cannot be disowned on the ground that a necessary person was not party to the proceedings and when no prejudice can said to have been caused to the objectors.-Subsequent suit on the same cause of action is barred by *res judicata*. *Nirmaljit Singh and others v. Harnam Singh (dead) by LRs. and others,* AIR 1996 SC 2252: 1996(8) SCC 610: 1996(1) Scale 584: 1996(1) JT 622: 1996(1) RRR 754

Section 11.-*Res judicata*.-Determination of jurisdiction.- Where the court determines its own jurisdiction and its order attains finality, similar question is barred in subsequent proceedings. If the court which rendered the first decision was competent to entertain the suit or other proceeding, and had therefore competency to decide the issues or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being *res judicata* in later proceedings. Similarly, as stated already, though Section 11 of the Civil Procedure Code clearly contemplates the existence of two suits and the findings in the first being *res judicata* in the later suit, it is well establishe that the principle underlying it is equally applicable to the case of decisions rendered of successive stages of the same suit or proceeding. But where the principle of *res judicata* is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the equity which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable. *Arjun Singh v. Mohindra Kumar and others,* AIR 1964 SC 993: 1964(2) An LT 341: 1964(5) SCR 946

Section 11.-*Res judicata*.-Determination of jurisdiction.- Erroneous decision of court in respect of its jurisdiction cannot operate as *res judicata*. Where, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of *res judicata* a party affected by the decision will not be precluded from challenging the validity of the order under the rule of *res judicata,* for a rule of procedure cannot supersede the law of the land. A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as *res judicata*. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute the question cannot operate as *res judicata* between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise. *Mathura Prasad Sarjoo Jaiswal and others v. Dossibai N. B. Jeejeebhoy,* AIR 1971 SC 2355: 73 Bom LR 492: 1971 Maha LJ 37: 1971 MPLJ 10: 1970(1) SCC 613: 1970 (3) SCR 830

Section 11.-*Res judicata*.-Dismissal of suit.-Technical ground for dismissal.-Lack of *locus standi* to seek injunction for want of possession resulting in dismissal of suit.-Subsequent suit seeking declaration and recovery of possession is not barred by *res judicata*. The only ground on which the previous suit was dismissed was the technical ground that a suit for a mere declaration cannot lie without claiming possession once it is found that the plaintiff had lost possession. Injunction could not be granted to the plaintiff against dispossession as he had already been dispossessed. The court came to the conclusion that a mere declaration of his status as a tenant could not be granted unless the consequential relief for possession was prayed. It was for this technical reason that the suit was dismissed. It would have been a different matter if in the previous suit the court had decided the question of status as lessee against the plaintiff, in which case, perhaps, it could be argued that the second suit based on the factum of tenancy was not maintainable. It is only when the subject matter of any suit is directly and substantially in issue in the previous suit that the subsequent suit would be barred by *res judicata* if the competent court trying it had decided the issue regarding tenancy against the plaintiff. *Shri Inacio Martins, deceased through LRs. v. Narayan Hari Naik and others,* AIR 1993 SC 1756: 1993(3) SCC 123: 1993(2) SCR 1015: 1993(2) JT 723: 1993(2) LW 1

Section 11.-*Res judicata*.-Dismissal of appeal in default.-Effect of.- Decision of suit after contest.-Decision operate as *res judicata*.- When matter was not heard and finally decided on merits, it does not operate as *res judicata*. Where a former suit was dismissed by a trial Court for want jurisdiction or for default of plaintiffs appearance etc., and pointed out that in respect of such class of cases, the decision not being on merits, would not be *res judicata* in subsequent suit. *Ram Gobinda Daw and others v. Smt.*

H. Bhakta Bala Dassi, AIR 1971 SC 664: 1971(1) An LT 250: 1971(1) SCC 387: 1971(3) SCR 340

Section 11.-*Res judicata*.-Dismissal on merits.-Necessity of.-Order dismissing the proceedings on formal defect does not operate as *res judicata*. The dismissal of a proceeding by an authority not on merits but merely on account of a formal defect will not attract the applicability of the general principles of *res judicata* and will not debar the authority exercising concurrent jurisdiction from entertaining the subsequent proceedings for the same relief and passing proper orders on merits. *Govindbhai Gordhanbhai Patel and others v. Gulam Abbas Mulla Allibhai and others,* AIR 1977 SC 1019: 1977(3) SCC 179: 1977(2) SCR 511

Section 11.-*Res judicata*.-Dismissal in default.-Application of seeking to set aside the order also stood dismissed.-Effect of.-Subsequent application seeking to challenge execution of another decree on similar grounds, is barred by principle of resjudicata. *M/s. Parasram Harnand Rao v. M/s. Shanti Parsad Narinder Kumar Jain and another,* AIR 1980 SC 1655: 1980(3) SCC 565: 1980(3) SCR 444: 1980 Cur LJ (Civil) 367

Section 11.-*Res judicata*.-Dispute about title of property.-Previous decision in land acquisition proceedings on the question of title operate as *res judicata*. The rule of *res judicata,* while founded on ancient precedent, is dictated by wisdom which is for all time. `It hath been well said' declared Lord Code, *interest reipublicae ut sit finis litium*.-otherwise, great oppression might be done under colour and pretence of law' (6 Coke 9a). Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnaneswara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: `If a person, though defeated at law, sue again, he should be answered, You were defeated formerly. This is called the plea of former judgment. And so the application of the rule by the Courts in India should be influenced by no *technical considerations of form, but by matter of substance within the limits allowed by law.*' The test of *res judicata* is the identity of title in the two litigations and not the identity of the actual property involved in the two cases. *Raj Lakshmi Dasi and others (Smt.) v. Banamali Sen and others,* AIR 1953 SC 33: 1952 SCJ 618: 1953 SCR 154

Section 11.-*Res judicata*.-Doctrine of.-Application of.-Where the provision is not applicable general doctrine of resj udicata cannot be applied in suit. *The Union of India v. Pandurang Kashinath More,* AIR 1962 SC 630: 1961 (2) FJR 5

Section 11.-*Res judicata*.-Erroneous decision.-Even erroneous decision operates as *res judicata*.-The correctness of a judicial decision has no bearing upon the question of *res judicata*. *Mohanlal Goenka v. Benoy Kishna Mukherjee and others,* AIR 1953 SC 65: 1953 SCJ 130: 1953 SCR 377

Section 11.-*Res judicata*.-Erroneous decision.-Question of law.-The decision relevant to the facts in issue even if erroneous binds the party and operate as *res judicata*.A decision on an abstract question of law unrelated to facts which give rise to a right cannot operate as *res judicata.* Nor also can a decision on the question of jurisdiction be *res judicata* in a subsequent suit or proceeding. But, if the question of law is related to the fact in issue, an erroneous decision on such a question of law may operate as res judicata between the parties in a subsequent suit or proceeding, if the cause of action is the same. *Supreme Court Employees Welfare Association v. Union of India and others,* AIR 1990 SC 334: 1989(4) SCC 187: 1989(3) SCR 488: 1989(2) Scale 107: 1989(3) JT 188

Section 11.-*Res judicata*.-Erroneous judgment.-Decision by the Court of competent jurisdiction binds the parties even if it erroneous *Gorie Gouri Naidu (Minor) and another v. Thandrothu Bodemma and others,* AIR 1997 SC 808: 1997(2) SCC 552: 1997(1) Scale 292: 1997(1) JT 538: 1997(2) Raj LW 294

Section 11.-*Res judicata*.-Erroneous order.-Even a wrong order, inter se, is binding in all subsequent proceedings between the same parties though the Supreme Court is entitled to correct its own error brought to its notice by way of petition or *ex debitio justitiae*. *A.R. Antulay v. R.S. Nayak and another,* AIR 1988 SC 1531: 1988(2) SCC 602: 1988 Supp (1) SCR 1: 1988(2) JT 325

Section 11.-*Res judicata*.-*Ex parte* decision.-The proceedings duly contested by the other parties who defaulted to appear before Privy Council after having obtained judgment in its favour in the Courts below.-The decision cannot be said to be *ex parte*.-It operates as *res judicata*. *Raj Lakshmi Dasi and others (Smt.) v. Banamali Sen and others,* AIR 1953 SC 33: 1952 SCJ 618: 1953 SCR 154

Section 11.-*Res judicata*.-Ex-parte proceedings.-Dismissal of application on account of non-appearance.-Such order cannot operate as *res judicata*. *Mrs. Hem Nolini Judah (since deceased) and after her legal representative Mrs. Marlean Wilkinson v. Mrs. isolyne Sarojbashini Bose and others,* AIR 1962 SC 1471: 1962 ALL LJ 695: 1962 Supp. (3) SCR 294

Section 11.-*Res judicata*.-Finality of a part of decree.-Appeal filed from decree only in respect of a part of the decree.-The other part of a decree became final in appeal as *res judicata*. *A.J. Pinto and another v. Smt. Sahebbi Kom Muktum Saheb,* AIR 1971 SC 2070: 1972 (4) SCC 238

Section 11.-*Res judicata*.-Finality of decision.-Grant of certificate of fitness to appeal against the decree does not take away the finality of decision. The question whether there is a bar of *res judicata* does not depend on the existence of a right of appeal of the same nature against each of the two decisions but on the question whether the same issue, under the circumstances given in Section 11, has been heard and finally decided. That was certainly purported to be done by the High Court in both the appeals before

it subject, of course, to the rights of parties to appeal. The mere fact that the defendant-appellant could come up to this Court in appeal as of right by means of a certificate of fitness of the case under the unamended Article 133(1)(c) in the partition suit, could not take away the finality of the decision so far as the High Court had determined the money suit and no attempt of any sort was made to question to the correctness or finality of that decision even by means of an application for Special Leave to Appeal. *Narayana Prabhu Venkateswara Prabhu v. Narayana Prabhu Krishna Prabhu (dead) by L.Rs.,* AIR 1977 SC 1268: 1977(2) SCC 181: 1977(2) SCR 636

Section 11.-*Res judicata*.-Finality of decree.-Failure to file appeal.-Challenge to decree is void for want of signatures of the Judge.-Challenge is not permissible. *Jamnadas Harakhchand and others v. Narayanlal Bansilal and others,* AIR 1970 SC 1221: 1970 Mah LJ 714: 1970(3) SCC 854

Section 11.-*Res judicata*.-Finality of litigation.-The issues involved in dispute regarding succession of property, stood settled by the Judgment of the Court of last resort .-Reopening of issues, subsequently on the basis of a suit filed subsequently by one of the legal heirs who was party to the earlier decision, not permissible. *Smt. Mithlesh Kumari and another v. Thakur Sheo Saran Singh and others,* AIR 1996 SC 3417: 1996(9) SCC 457: 1996(5) Scale 58: 1996(6) JT 211

Section 11.-*Res judicata*.-Finding by court of limited jurisdiction.- Finding of small causes court in respect of title of immovable property cannot operate as *res judicata* for the purpose of regular suit before civil court. When a finding as to title to immovable property is rendered by a Court of Small Causes *res judicata* cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as*res judicata* the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata. It has long been held that a question of title in a Small Cause suit can be regarded as incidental only to the substantial issue in the suit and cannot opertae as *res judicata* in a subsequent suit in which the question of title is directly raised. *Smt. Gangabai v. Smt. Chhabubai,* AIR 1982 SC 20: 1982(1) SCC 4: 1982(1) SCR 1176: 1981(3) Scale 1753

Section 11.-*Res judicata*.-Finding on the question of jurisdiction of a Tribunal based on pure question of law.-Finding given by an authority suffering from inherent lack of jurisdiction.-Such decision cannot be sustained merely on the doctrine of *res judicata*. *Chief Justice of A.P. and another v. L.V.A. Dikshitulu and others,* AIR 1979 SC 193: 1979(2) SCC 34

Section 11.-*Res judicata*.-Finding on merits.-Necessity of.-The earlier proceedings disposed off without any finding on merits.-Subsequent proceedings are not barred by *res judicata*. *State of U.P. v. The Civil Judge, Nanital and others,* AIR 1987 SC 16: 1986(4) SCC 558: 1987(1) SCR 99: 1986(2) Scale 714: 1986 J.T. 774: 1987(100) Mad.L.W. 111

Section 11.-*Res judicata*.-Finding without jurisdiction.-Finding on title by a Statutory Tribunal viz. Rent Controller does not bind a party.-An owner is entitled to approach civil court to claim the rent of the premises from the tenant as fixed by the Rent Controller. On a proper construction of the Rent Control Act, the question on which the jurisdiction of the civil Court is excluded is only the determination as to the fair rent of the premises. If the civil Court in this case had come to the conclusion that there is a relationship of a landlord and a tenant and that the LIC was entitled to recover the rent from the tenants, it will have to pass a decree in favour of the LIC on the basis of the fair rent fixed by the Rent Controller. It will not be open to the civil Court to re-determine the rent payable by the tenant to the landlord because that is a matter squarely and exclusively within the jurisdiction of the Rent Controller and, therefore, impliedly excluded from the purview of the civil Court. But his decision is not final on the issue that opens up his jurisdiction and cannot preclude an owner from contending, in a civil Court, that he should not be asked to pay rent for his own property to some one else. *Life Insurance Corporation of India v. M/s. India Automobiles and Co. and others,* AIR 1991 SC 884: 1990(4) SCC 286: 1990(3) SCR 545: 1990(2) Scale 180: 1990(3) JT 383

Section 11.-*Res judicata*.-Identical issue.-Determination of.-Different nature of relief claimed in both the suits.-A finding given on a question arising in the previous suit bind the parties in subsequent suit in respect of identical question. *Ishwardas v. The State of Madhya Pradesh and others,* AIR 1979 SC 551: 1979(4) SCC 163

Section 11.-*Res judicata*.-Ingredients of.-Necessity to compare the pleadings.-Mere recital of contention in the judgement is not sufficient. Before a plea of *res judicata* can be given effect, the following conditions must be proved: (1) that the litigating parties must be the same; (2) that the subject-matter of the suit also must be identical; (3) that the matter must be finally decided between the parties; and (4) that the suit must be decided by a court of competent jurisdiction. The best method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suits, and then to find out as to what had been decided by the judgments which operate as *res judicata.* Pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment. *Syed Mohd, Salie Labbai (Dead) by L.Rs. and others v. Mohd. Hanifa (Dead) by L.Rs. and others,* AIR 1976 SC 1569: 1976(4) SCC 780: 1976(3) SCR 721

Section 11.-*Res judicata*.-Interlocutory decisions.-The decision given by a Court at earlier stage is binding on subsequent stage of same proceedings. The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceedings. The tenant's submission that the eviction petition could not be allowed to continue and should be dismissed on the finding of the Court in the proceeding for setting aside the ex parte order was negatived by the High Court on the ground that those findings were made in the context of setting aside the ex parte order and not in the context of deciding the main petition for eviction. We think that the High Court was not right in brushing aside in this fashion the findings arrived at in the proceedings to set aside the ex parte order. That the decision given by a Court at an earlier stage of a case is binding at a later stage is well settled though Interlocutory judgments are open for adjudication by an appellate authority in an appeal against the final judgment. *Prahlad Singh v. Col. Sukhdev Singh,* AIR 1987 SC 1145: 1987(1) SCC 727: 1987(1) Scale 423: 1987(1) J.T. 541: 1987 MPRCJ 215

Section 11.-*Res judicata*.-Interlocutory order.-Challenge to final decree on merits.-It is open to the appellant to challenge inter- locutory orders passed by the Court below even if such orders were not challenged earlier and had become final. *Amar Chand Butail v. Union of India and others,* AIR 1964 SC 1658: 67 Pun LR 90

Section 11.-*Res judicata*.-Interlocutory order.-Dismissal of application, objecting execution of decree under Section 47, in default.-Order of dismissal is not a final order and therefore, does not operate as *res judicata.* Before a plea can be held to be barred by the principles of *res judicata,* it must be shown that the plea in question had not only been pleaded but it had been heard and finally decided by the Court. A dismissal of a suit for default of the plaintiff, we think, would not operate as *res judicata* against a plaintiff in a subsequent suit on the same cause of action. If it was otherwise there was no need for the legislature to enact Rule 9, Order 9, Civil Procedure Code which in specific terms says that where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. *Shivashankar Prasad Sah and another v. Baikunth Nath Singh and others,* AIR 1969 SC 971: 1969(3) SCR 908: 1969(1) SCC 718

Section 11.-*Res judicata*.-Interlocutory order.-Application of principle of *res judicata* thereon. Interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status qo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of *res judicate* does not apply to the findings on which these orders are based, though if application were made for relief on the same basis after the same has once been disposed of the court would be justified in rejecting the same as an abuse of the process of Court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. The case of an application under Order IX, Rule 7, would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate court. In that sense, the refusal of the court to permit the defendant to set the clock back does not attain finality. But what we are concerned with is slightly different and that is whether the same Court is finally bound by that order at later stage, so as to preclude its being reconsidered. Even if the rule of *res judicata* does not apply, it would not follow that on every subsequent day on which the suit stands adjourned for further hearing, the petition could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the Court does not however necessarily rest on the principle of *res judicata*. Thus if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application of any rule of *res judicata*, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of *res judicata* and a rejection of the ground that no new facts have been adduced to justify a different order is vital. If the principle of *res judicata* is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issues, where as in the other case, on proof of fresh facts, the court would be competent, nay would be bound to take those into account and make an order conformably to the facts freshly brought before the

court. *Arjun Singh v. Mohindra Kumar and others,* AIR 1964 SC 993: 1964(2) An LT 341: 1964(5) SCR 946

Section 11.-*Res judicata*.-Interlocutory order.-Remand order .-Appeal to Supreme Court after decision of trial Court and High Court after remand of the case.-The whole case is opened before the Supreme Court and principle of *res judicata* is not applicable. The remand order by the High Court is a finding in an intermediate stage of the same litigation. When it came to the trial Court and escalated to the High Court, it remained the same litigation. The appeal before the Supreme Court is from the suit as a whole and, therefore, the entire subject-matter is available for adjudication before us. If, on any other principle of finality statutorily conferred or on accounf *res judicata* attracted by a decision in an allied litigation the matter is concluded, we too are bound in the Supreme Court. Otherwise, the whole lis for the first time comes to this Court and the High Court's finding at an intermediate stage does not prevent examination of the position of law by this Court. Intermediate stages of the litigation and orders passed at those stages have a provisional finality. *Jasraj Indersingh v. Hemraj Multanchand,* AIR 1977 SC 1011: 1977(2) SCC 155: 1977(2) SCR 973

Section 11.-*Res judicata*.-Interlocutory order.-Appeal against the order not filed.-The appellate court is not precluded from interfering the order at a latter stage in the same suit. The parties can challenge in this Court in the appeal against the final judgment in the suit any finding given by the High Court at the earlier stage in the suit when the award made by the arbitrators was set aside and the suit thrown open for trial. *Smt. Sukhrani (dead) by LR's and others v. Hari Shanker and others,* AIR 1979 SC 1436: 1979(2) SCC 463: 1979(3) SCR 671

Section 11.-*Res judicata*.- Jurisdiction of Court.-Necessity of .-The jurisdiction of the Court which decided the formal suit must be determined with reference to the date of decision of formal suit and not on the date of subsequent suit. In order to determine whether a Court which decided the former suit, regard must be had to the jurisdiction of that Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit, had it been then brought, the decision of such Court would operate as `*res judicata*' although subsequently by a rise in the value of the property that Court had ceased to be a proper Court, so far as regards its pecuniary jurisdiction, to take cognizance of a suit relating to that very property. *Jeevantha and others v. Hanumantha and others,* AIR 1954 SC 9

Section 11.-*Res judicata*.-Jurisdictional competence.- Necessity of .-The Court trying earlier suit must be competent the whole of subsequent suit and not part of it. The word suit has not been defined in the Code; but there can be little doubt that in the content the plain and grammatical meaning of the word would include the whole of the suit and not a part of the suit, so that giving the word suit its ordinary meaning it would be difficult to accept the argument that a part of the suit or an issue in a suit is intended to be covered by the said would in the material clause. The argument that there should be finality of decisions and that a person should not be vexed twice over with the same cause can have no material bearing on the construction of the word suit. Besides, if considerations of anomaly are relevant it may be urged in support of the literal construction of the word suit that the finding recorded on a material issue by the Court of the lowest jurisdiction is intended not to bar the trial of the same issue in a subsequent suit filed before a Court of unlimited jurisdiction. To hold otherwise would itself introduce another kind of anomaly. *Mst. Gulab Bai and others v. Manphool Bai,* AIR 1962 SC 214: 1962(1) MLJ (SC) 283: 1962(3) SCR 483.

Section 11.-*Res judicata*.- Judgement without pleadings.- Effect of.-Absence of proper pleadings and necessary issues.-Observation made in the course of judgement do not bind the parties even though it may adversely effect the parties to the suit. *Mohammad Mustafa v. Sri Abu Bakar and others,* AIR 1971 SC 361: 1970(3) SCC 891

Section 11.-*Res judicata*.-Lack of pecuniary jurisdiction.-Effect of.-The previous decision by court not having pecuniary jurisdiction does not operate as *res judicata*. In order to operate as *res judicata* it must be established that the previous decision was given by a court which has jurisdiction to try the present suit. So far as we could see the defendants have nowhere in the written statement alleged that the value of the property, for the recovery of which the plaintiff has now sued was worth in 1941 only Rs. 5000/- or less, in which case the Civil Judge, Junior Division, would have jurisdiction to try the present suit. The High Court has quite rightly pointed, with reference to the sale deeds executed by the appellants in 1947 in favour of defendants 8, 9 and 10 that the suit property must have been worth, even in 1941 much more than Rupees 5000/-. If that is so it follows that the Civil Judge, Junior Division, who tried Civil Suit No. 80 of 1941 had no jurisdiction to try the present suit. It follows that the decision in Civil Suit No. 80 of 1941 has been rightly held not to operate as *res judicata* both by the trial court and the High Court. *Pandurang Mahadeo Kavade v. Annaji Balwant Bokil and others,* AIR 1971 SC 2228: 1971(3) SCC 530

Section 11.-*Res judicata*.-Letter of administration.-Challenge to the Will.-Permissibility.-Testation of Will.-Proof of.-The question of *animus testandi* is barred by principle of *res judicata*. Thakurain Raj Rani and others v. Dwarkanath Singh and others, AIR 1953 SC 205: 1953 SCR 913

Section 11.-*Res judicata*.-Matter directly and substantially in issue.-Meaning of. The question has to be decided (a) on the pleadings in the former suit, (b) the issues struck therein, and (c) the decision in the suit. The question whether a matter is directly and substantially in issue would depend upon whether a

decision on such an issue, would materially affect the decision of the suit. That in the former suit the heirship of the respondents to Jati deceased (a) was in terms raised by the pleadings, (b) that an issue was framed in regard to it by the trial Judge, (c) that evidence was led by the parties on that point directed towards this issue, (d) a finding was recorded on it by the appellate court, and (e) that on the construction of the pleadings it would have been necessary to decide the issue in order to properly and completely decide all the points arising in the case to grant relief to the plaintiff. We thus find that every one of the conditions necessary to satisfy the test as to the applicability of Section 11, Civil Procedure Code is satisfied. *Isher Singh v. Sarwan Singh and others,* AIR 1965 SC 948: 1965 SCD 608

Section 11.-*Res judicata*.-Matters in issue.-The bar subsequent suit is applicable only if the matter directly and substantially in issue in the former suit, has been heard and decided.-Dismissal of earlier suit for want of jurisdiction or non-joinder of party shall not bar subsequent suit. *State of Maharashtra and another v. M/s. National Construction Company, Bombay and another,* AIR 1996 SC 2367: 1996(1) SCC 735: 1996(1) Scale 176: 1996(1) JT 156: 1996(2) RLW 27

Section 11.-*Res judicata*.-Nature of suit.-Finding on title in a suit for injunction may operate as *res judicata* in subsequent suit between the same parties, based on title. It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as*res judicata. Sulochana Amma v. Narayanan Nair,* AIR 1994 SC 152: 1994(2) SCC 14: 1993(3) Scale 880: 1993(5) JT 448: 1993(2) Ker.L.T. 938: 1993(3) RRR 682

Section 11.-*Res judicata*.-Operation against co-defendant.-Permissi- bility. A decision operates as res judicata between co-defendants if (1) there is a conflict of interest between them; (2) it is necessary to decide that conflict in order to give the plaintiffs the reliefs which they claim and (3) the question between the co-defendants is finally decided. *Shashibhushan Prasad Misra and another v. Babuaji Rai and others,* AIR 1970 SC 809: 1970 BLJR 455: 1969 (2) SCR 971

Section 11.-*Res judicata*.- Opportunity to challenge the findings.-The judgment in favour of a party who could not file the appeal against judgment.-Observation in the judgment which was unnecessary cannot operate as *res judicata* against such party. *Ramesh Chandra v. Shiv Charan Dass and others,* AIR 1991 SC 264: 1990 Supp SCC 638: 1990 Supp (2) SCR 97: 1990(2) Scale 738: 1990 All. LJ 885

Section 11.-*Res judicata*.-Partition suit.-Possession of properties taken by the separated parties.-Second suit for partition after about 35 years is barred by limitation.-Destruction of record of earlier suit cannot help when the subsequent conduct of the parties itself proved that the earlier decree was acted upon. *Chandra Kant Misir and others v. Balakrishna Misir and others,* AIR 1970 SC 1536: 1970 (3) SCC 446

Section 11.-*Res judicata*.-Pendency of appeal.-Effect of.-Decision in question pending before appellate court.-The decision does operate as *res judicata*. *Shashibhushan Prasad Misra and another v. Babuaji Rai and others,* AIR 1970 SC 809: 1970 BLJR 455: 1969 (2) SCR 971

Section 11.-*Res judicata*.-Pendency of appeals from decree in connected suits.-Decree in one suit cannot constitute as *res judicata* in other suit, during the pendency of appeal. *Koshal Pal and others v. Mohan Lal and others,* AIR 1976 SC 688: 1976(1) SCC 449: 1976(2) SCR 827

Section 11.-*Res judicata*.- Pleading .-Form of.-The plea cannot be established without the judgment and decree, on the basis of which it is pleaded. *Gurbux Singh v. Bhooralal,* AIR 1964 SC 1810: 1964(1) SCWR 668: 1964(7) SCR 831

Section 11.-*Res judicata*.-Pleading of.-Necessity of.-Absence of specific plea in Written Statement.-Waiver to question of *res judicata* by conduct.- Permissibility. Although no specific plea was taken in the written statement nor was any issue framed before the trial court but the necessary facts were present to the mind of the parties and were gone into by the court. It was stated in the judgment of the trial court that the plaintiff before seeking the remedy of filing a regular suit had moved the High Court in the writ petition. The judgment in the writ petition had been placed on the record. After referring to a decision of the Orissa High Court in *Bhupindra Kumar Bose v. State of Orissa*, AIR 1960 Orissa 46, in which the view was expressed that a judgment in a writ petition was binding and conclusive between the parties, the trial court held that the previous judgment in the writ petition was binding on the parties in the present case. The judgment of the first appellate court was on similar lines. We are wholly unable to understand how in the above circumstances any question of waiver could arise when the point had throughout been under consideration and discussion and how the appellant could be precluded from pressing that point before the High Court. *State of Punjab v. Bua Das Kaushal,* AIR 1971 SC 1676: 1970(3) SCC 656

Section 11.-*Res judicata*.-Pleading of.-The plea of resjudicata raised for the first time before second appellate court.-The plea not raised before the courts below.-Plea of *res judicata* rightly rejected by the second appellate court. *Krishnapasuba Rao Kundapur v. Dattatraya Krishnaji Karani,* AIR 1966 SC 1024: 1966(1) SCJ 601

Section 11.-*Res judicata*.- Representative suit.-A decision in such suit constructively operate as *res judicata* against the entire body of the interested persons. 447 A suit under Section 92 of the

Code is a suit of a special nature for the protection of Public rights in the Public Trusts and charities. The suit is fundamentally on behalf of the entire body of persons who are interested in the trust. It is for the vindication of public rights. The beneficiaries of the trust, which may consist of public at large, may choose two or more persons amongst themselves for the purpose of filing a suit under Section 92 of the Code and the suit-title in that event would show only their names as plaintiffs. Can we say that the persons whose names are on the suit-title are only parties to the suit? The answer would be in the negative. The named plaintiffs being the representatives of the public at large which is interested in the trust all such interested persons would be considered in the eyes of law to be parties to the suit. A suit under Section 92 of the Code is thus a representative suit and as such binds not only the parties named in the suit-title but all those who are interested in the trust. It is for that reason that explanation VI to Section 11 of the Code constructively bars by *res judicata* the entire body of interested persons from reagitating the matters directly and substantially in issue in an earlier suit under Section 92 of the Code. A suit whether under Section 92 of Civil Procedure Code or under Order 1, Rule 8 of Civil Procedure Code is by the representatives of large number of persons who have a common interest. The very nature of a representative suit makes all those who have common interest in the suit as parties. *R. Venugopala Naidu and others v. Venkatarayulu Naidu Charities and others,* AIR 1990 SC 444: 1989 Supp. (2) SCC 356: 1989 Supp. (1) SCR 760: 1989(2) Scale 902: 1989(4) J.T. 262: 1989 All. WC 1479

Section 11.-*Res judicata*.-Return of plaint.-No appeal filed.-Plaint returned to be filed before Revenue Court which also refused to entertain the plaint.-Another suit before the civil suit, is barred by *res judicata*. *Avtag Singh and others v. Jagjit Singh and another,* AIR 1979 SC 1911: 1979(4) SCC 83: 1980(1) SCR 122: 1980 Sri LJ 1 (SC)

Section 11.-*Res judicata*.-Similar issue.-Necessity of.-The scope of *res judicata* is limited to the matters directly and substantially and not matters to which it could be logically extended. It is true that Section 11 is now made applicable by the Explanations and interpretation to certain proceedings giving more extensive meaning to the word `suit'. In its comprehensive sense the word `suit' is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between parties in a court of justice the proceeding by which the decision of the Court is sought may be a suit. But if the proceeding is of a summary nature not falling within the definition of a suit, it may not be so treated for the purpose of Section 11. In the absence of the details of the proceeding concerned in the instant case, it has not been possible for us to hold that it was of the nature of a suit and not a summary proceeding. Admittedly the appellants' application was decided ex parte. It is true that ex parte decree operate to render the matter decided *res judicata*, and the defendants' failure to appear will not deprive the plaintiff of the benefit of his decree. But in the case of suit in which a decree is passed ex parte, the only matter that can be `directly and substantially in issue' is the matter in respect of which relief has been claimed by the plaintiff in the plaint. A matter in respect of which no relief is claimed cannot be `directly and substantially in issue' in a suit in which a decree is passed ex parte though the Court may have gone out of its way and declare the plaintiff to be entitled to relief in respect of such matter. In the instant case applying the above principle the order having been passed ex parte, assuming the doctrine of *res judicata* applied, it could be only to the extent of the appellants having been not entitled to possession at the relevant time, and it could not be extended logically to the issue whether the defendants were tenants under the Act. *Pandurang Ramchandra Mandlik (since deceased by his LRs) and antoher v. Smt. Shantabai Ramchandra Ghatge and others,* AIR 1989 SC 2240: 1989 Supp. (2) SCC 627: 1989 Supp. (2) SCR 1: 1989 (2) Scale 572: 1989(3) JT 647

Section 11.-*Res judicata*.-Similar parties.-It is not necessary that all the parties must be common.-It is sufficient if an issue between the same parties or under whom they or any of them claim is decided in the suit. Section 11.-*Res judicata*.-Scope of .-Decision on multiple issues.- Obiter.-All the issues on which suit is decided, operate as *resjudicata*. If the final decision in any matter at issue between the parties is based by a Court on its decisions on more than one point.-each of which by itself would be sufficient for the ultimate decision.-the decision on each of these points operates as *res judicata* between the parties. If the Court decides the various issues raised on the pleadings, it is difficult to see why the adjudication of the rights of the parties, apart from the question as to the applicability of Section 80 of the Code and absence of notice thereunder should not operate as *res judicata* in a subsequent suit where the identical questions arise for determinations between the same parties. *Gangappa Gurupadappa Gugwad v. Rachawwa and others,* AIR 1971 SC 442: 1971(2) SCJ 555: 1970(3) SCC 716: 1971(2) SCR 691

Section 11.-*Res judicata*.-Speaking order.-Necessity of.-Dismissal of special leave petition in limine.-No speaking order passed.-The order does not operate as *res judicata*. *Union of India and another v. Sher Singh and others,* AIR 1997 SC 1796: 1997(3) SCC 555: 1997(2) Scale 165: 1997(2) JT 659: 1997(66) DLT 260: 1997(1) LACC 226

Section 11.-*Res judicata*.-Status of tenancy.-Determination of status in earlier proceedings.-Subsequent proceedings challenging the same question is not maintainable. *Rangnath v. Daulatrao and another,* AIR 1975 SC 2146: 1975(1) SCC 686: 1975(3) SCR 99

Section 11.-*Res judicata*.-Status of joint family.-Finding in earlier proceedings between the parties

or their predecessors that there was a disruption of family.-These findings operate as *res judicata* amongst the parties. *Shri Jai Kishan Dass and others v. Smt. Nirmala Devi and others,* AIR 1984 SC 589: 1984(1) SCC 682: 1984(10) All. LR 295

Section 11.-*Res judicata*.-Sub- silentio.-Effect of.-Earlier suit for title of land without claiming partition.-No finding by the court on the question of partition.- Subsequent suit for partition is not barred by *res judicata*. *Shankarrao Dajisaheb Shinde (since deceased) by heirs v. Vithalrao Ganpatrao Shinde and others,* AIR 1989 SC 879: 1989 Supp. (2) SCC 162: 1989(1) Scale 477: 1989(1) JT 375: 1989(1) Hindu LR 345

Section 11.-*Res judicata*.-Suit for declaration of title and possession.- Dismissal of earlier suit.-Change in status of tenure holder.-Subsequent suit is not barred by principle of res judicata. *Korin v. Indian Cables Co. Ltd. and others,* AIR 1978 SC 312: 1978(1) SCC 98

Section 11.-*Res judicata*.-Technical defect.-Rejection of one application on technical reasons.-Subsequent application moved after removing the defect is not barred by *res judicata*. *Bhanwar Lal v. Satyanarain and another,* AIR 1995 SC 358: 1995(1) SCC 6: 1994(4) Scale 597: 1994(6) JT 626: 1995(1) Rent LR 95

Section 11.-*Res judicata*.-Transfer of proceedings.-Insolvency proceedings pending before a District Court as also before a High Court in different States.-Order passed by District Court transferring the further proceedings to the High Court operates as *res judicata*. The order was passed in proceedings to which the respondents were parties, and so far as the District Court was concerned, it dealt with the whole of the dispute then pending between the Official Assignee and the respondents. In terms, the order had provided that if the Bombay High Court decided that the assets and effects of the insolvent should be administered from Bombay, the said assets and account books should be handed over to the Official Assignee at Bombay, and so, there can be no doubt that the said order was complete and final. In view of the subsequent events, the said order became effective and the Official Assignee was entitled to request the District Court to act upon it and send the assets and account books and documents to Bombay. *Official Assignee, High Court, Bombay v. Haradagiri Basavanna Gowd,* AIR 1963 SC 754: 1963 Supp. (1) SCR 809

Section 11.-*Res judicata*.-Wrong decision.-It binds the party until it is set aside in appeal or review. A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides. *State of West Bengal v. Hemant Kumar Bhattacharjee and others,* AIR 1966 SC 1061: 1963 Mad LJ (Cri) 613: 1963 Supp (2) SCR 542

Section 11.-Application for grant of succession certificate.-Finding given are not final and do not operate as *res judicata*, irrespective of fact that issues were framed and evidence led.

Subsequent suit filed by respondent is not liable to be dismissed on the principles of *res judicata.* Section 387 of the Succession Act takes a decision given under para X of the Succession Act outside the purview of Explanation VIII to Section 11 of the Code of Civil Procedure. Section 387 gives a protective umbrella to ward off from the rays of *res judicata* to the same issue being raised in a subsequent suit or proceeding. *Joginder Pal vs. Indian Red Cross Society and others,* AIR 2000 SC 3279 : 2000(4) Cur CC 104 : 2000(8) SCC 143 : 2000(4) All WC 3347

Section 11.-Constructive *res judicata*.-Inter se seniority of Sales Tax Inspectors.-List prepared pursuant to directions of Administrative Tribunal.-Tribunal's decision affirmed by Supreme Court.-Rules not providing carrying forward of vacancies.-Such plea cannot be raised in third round of litigation before Supreme Court.-Plea barred by principles of constructive *res judicata*.

In the absence of such rule which specifically provide for carrying forward the vacancies falling in either category, no such carry forward rule could be implied either in Recruitment Rules or in the Seniority Rules. This contention need not detain us any longer because such a contention was available to the appellants in the earlier proceedings, namely, Transfer Application No. 822 of 1991 and the same was not put in issue. That not having been done, it must follow that such a contention is barred by principles of constructive *res judicata.* Neither the contesting respondents nor the appellants ever raised this contention at any stage of the proceedings in Transfer Petition. It would, therefore, be too late to raise such a contention when the seniority list has been finalised pursuant to the judgment of the MAT, Bombay Bench, in Transfer Petition. *Maharashtra Vikrikar Karamchari Sangathan vs. State of Maharashtra and another,* AIR 2000 SC 622 : 2000(1) Cur LR 487 : 2000(2) Mah LJ 360 : 2000(2) SCC 552 : 2000(2) BLJ 8 : 2000(3) Serv LJ 1

Section 11.-*Res judicata*.-Adoption of son by widow after death of her husband.-Findings in previous suit that widow was not living as member of HUF of her father-in-law and was entitled only to maintenance.-Would operate as *res judicata* in subsequent suit for possession by adopted son.

Where the plaintiff in a suit for possession of properties claimed that he was adopted in the year 1967 by a widow after death of her husband and that her husband, *i.e.* his his adoptive father was also adopted to her father-in-law, the findings in previous suit before date of his adoption to which the widow was party, to the effect that adoption of defendant in that suit to her father-in-law and not of her husband was proved and that she was not living as a member of HUF of her father-in-law and was entitled to

maintenance, would operate as *res judicata*, because the plaintiff in subsequent suit could only claim by succession to his mother who would have become full owner of property under Hindu Succession Act and not independently as a coparcener of his father on the basis of a legal fiction. Moreover by virtue of Section 12 of the Act of 1956, the plaintiff would not have any right only on the basis that he was adopted son of widow's husband because he could not have divested his mother of her full ownership even by virtue of his adoption. *Rajendra Kumar vs. Kalyan (dead) by LRs,* AIR 2000 SC 3335 : 2000(3) Mad LJ 170 : 2000(2) Hindu LR 353 : 2000(4) Pat LJR 210 : 2000(8) SCC 99 : 2000(2) Marri LJ 491 : 2000(3) Cur C 274

Section 11.-*Res judicata.*-Appli-cability.-Bar of second application.-Filing of second application before first application was decided.-Both applications heard together.-No question of there being a decision finally deciding a right or claim between parties.-Application to dismiss execution application filed on ground of non-compliance of procedure prescribed under Sections 38, 39 and 40 C.P.C..-Before deciding first application second application filed raising defence of non-compliance of Section 13(b).-Both applications heard and decided together.-Existence of decision finally deciding a right or claim between parties is necessary.-In view of one common order, principle of *res judicata* is not applicable. *International Woollen Mills vs. Standard Wool (U.K.) Ltd.,* AIR 2001 SC 2134 : 2001(5) SCC 265 : 2001(S) JT 147

Section 11.-*Res judicata.*-Appli-cability to taxation matters.

Shri T.K. Andhyarajna, learned Senior Advocate for the appellant club, contended that the learned Judges of the High Court committed an error in rejecting the plea of the Club based upon the principle of *res judicata* and in this connection, invited our attention to the decisions of the English Courts and of the Supreme Court, apart from the treatise in Text Books on the subject, Shri V.A. Mohta, learned Senior Counsel for the respondent, with equal force contesting the claim on behalf of the appellant-Club, brought to our notice certain decisions. We consider it unnecessary to adjudicate on this issue, since the claim can be decided even otherwise on merits, without detriment to the appellant-Club. We have left open the question relating to the applicability or otherwise of the principle of *res judicata* in relation to taxation matters to be decided in an appropriate case of necessity. *Delhi Golf Club Ltd. and another vs. N.D.M.C.,* AIR 2001 SC 615 : 2001(2) SCC 633 : 2001(2) JT 447

Section 11.-Res judicata.-Collusive decree.-Contention that earlier judgment was obtained by collusion.-Not necessary to file independent suit for declaration that earlier suit was collusive.

In order to contend in a latter suit or proceeding that an earlier judgment was obtained by collusion, it is not necessary to file an independent suit for a declaration as to the collusive nature for setting it aside, as a condition precedent. A contrary view would go against the provisions of Section 44 of the Evidence Act. That section provides that any party to a suit or proceeding may show that any judgment, order or decree which is relevant under Sections 40, 41, 42 and which has been delivered by a Court not competent to deliver it or was obtained by fraud or collusion. *Gram Panchayat of Village Naulakha vs. Ujagar Singh and others,* AIR 2000 SC 3272 : 2000(4) Cur CC 151 : 2000(4) Rec Civ R 749 : 2000(7) SCC 543 : 2000 HRR 734

Section 11.-*Res judicata.*-Construc-tive *res judicata.*-Bar of.-Plea not raised by respondents.-Effect.-Case would remain in domain of independent proceedings giving rise to entirely different cause of action.

It is no doubt true that principle of constructive *res judicata* can be invoked even *inter se* respondents, but it is well settled that before any plea by contesting respondents could be said to be barred by constructive *res judicata* in future proceedings *inter se* such contesting respondents, it must be shown that such a plea was required to be raised by the contesting respondents to meet the claim of the appellant in such proceedings. If such plea is not required to be raised by the contesting respondents with a view to successfully meet the case of the appellants then such a plea *inter se* contesting respondents would remain in the domain of independent proceedings giving an entirely different cause of action *inter se* the contesting respondents with which the appellants would not be concerned. *Ferro Alloys Corporation Ltd. and another vs. Union of India and other,* AIR 1999 SC 1236 : 1999(88) Cut LT 772 : 1999(4) SCC 149 : 1999(3) Civ LJ 732

Section 11.-*Res judicata.*-Decision on issue.-Operates as *res judicata.*-Finding incidentally recorded does not come within periphery of *res judicata.*

In order to apply the general principle of *res judicata* Court must first find, whether an issue in a subsequent suit, was directly and substantially in issue in the earlier suit or proceeding was it between the same parties, and was it decided by such Court. Thus, there should be an issue raised and decided, not merely any finding on any incidental question for reaching such a decision. So if no such issue is raised and if on any other issue, if incidentally any finding is recorded it would not come within the periphery of the principle of *res judicata. Madhvi Amma Bhawani Amma and others vs. Kunjikutty Pillai Meenakshi Pillai and others,* AIR 2000 SC 2301 : 2000(3) Andh LT 35 : 2000(3) Mad LJ 78 : 2000(2) Land LR 542 : 2000(2) Hindu LR 9 : 2000(2) Ker LT 518 : 2000(2) Cur CC 212

Section 11.-*Res judicata.*-Develop-ment of concept.-Bringing within its compass more litigation.

The principle of *res judicata* as enshrined in Section 11 is evolved from the maxim "*nemo debet bis vexari pro una et eadem causa*". This principle enunciates that no man should be vexed twice over for the same

cause. This principle gradually developed further by bringing within its compass more such litigation. Thus with the passage of time this principle gradually expanded. This shows that sphere of *res judicata* as enshrined in Section 11 C.P.C. is not exhaustive, it is ever growing. One such example of its growth is exhibited by the incorporation of Explanation VIII in Section 11 by means of Amending Act in 1976. *Madhvi Amma Bhawani Amma and others vs. Kunjikutty Pillai Meenakshi Pillai and others,* AIR 2000 SC 2301 : 2000(3) Andh LT 35 : 2000(3) Mad LJ 78 : 2000(2) Land LR 542 : 2000(2) Hindu LR 9 : 2000(2) Ker LT 518 : 2000(2) Cur CC 212

Section 11.-Res judicata.-Disputed property shown as Wakf property in official gazette.-Entries became final and conclusive.-Tehsildar in *suo moto* inquiry held that it was not wakf property.-Tehsildar not competent to find out whether *inam* land was held by Dargah and adjudicate upon character of wakf property.-Finding that it was not Wakf property wholly erroneous and beyond jurisdiction of Tehsildar would not constitute *res judicata.*

The disputed property was shown as Wakf property in the A.P. Official Gazette or 30-11-1961 and no suit having been filed challenging the Wakf property, the entries in the official gazette describing the property as Wakf property became final and conclusive. Under Section 3 of the Inams Act, Tahsildar may *suo motu* make an enquiry for the purpose of grant of patta on three points, one of them being, whether the inam land is held by any institution. While making an enquiry in the present case as to find out whether the inam land was held by the Dargah, the Tehsildar was not required to enquire into and adjudicate upon the character of the Wakf property mentioned in the list of Wakfs published in the official gazette under sub-section (2) of Section 3 of the Wakf Act, as the dispute in that regards as to its character could only be decided in the manner provided in Section 6 of the Wakf Act. Assuming that the Wakf property was not found to be held by the Dargah under Section 3 of the Inam Act, it was not open to the Tahsildar to adjudicate upon the character of the Wakf property as the same was a grant by way of service inam for purposes recognised by the Muslim law as pious, religious or charitable which constituted the property as Wakf. Thus, we find that the finding of the Tahsildar that the property was not Wakf, was wholly erroneous and beyond his jurisdiction. Consequently, the finding of the Tahsildar that the property is not a Wakf property would not constitute as *res judicata* in the subsequent suit filed by the Wakf Board. *Sayyed Ali vs. Andhra Pradesh Wakf Board, Hyderabad and others,* AIR 1998 SC 972 : 1998(2) SCC 642 : 1998(1) Scale 277 : 1998(1) J 304

Section 11.-*Res judicata*.-Earlier suit dismissed on ground of extinguishing cause of action or any other similar cause.-Defendant depositing rent in court during pendency of suit.-Plaintiff permitted to withdraw amount.-His grievance stood fully redressed.-Defendant in subsequent suit cannot be permitted to challenge title of landlord.-Would operate as *res judicata.*

In this case the position is still stronger for the appellant. Dismissal of the first suit was only on account of what the respondent did during the pendency of the suit, i.e. depositing the arrears of rent claimed by the appellant. The Court permitted the plaintiff to withdraw that amount under deposit for satisfying his claim. Such a decree cannot be equated with a case where the suit was dismissed as not maintainable because any adverse finding in such a suit would only be obiter dicta. The finding made in OS. 75-A/90 that appellant was the real owner of the building as per Ext. P-11 sale deed became final. If the respondent disputed the finding he should have filed an appeal in challenge of it. We, therefore, agree with the plea of the appellant that there is bar of *res judicata* in re-agitating on the issue regarding appellant's title to the building. *Pawan Kumar Gupta vs. Rochiram Nagdeo,* AIR 1999 SC 1823 : 1999(3) Mad LJ 62 : 1999(2) Cur CC 65 : 1999(2) Raj LW 270 : 1999(4) SCC 243 : 1999(2) All CJ 1396

Section 11.-*Res judicata*.-Earlier suit for declaration by appellant-plaintiffs claiming ownership for whole property known as 'Badi Takia' for over 250 years.-Allegation that defendants without plaintiff's consent trespassed and keeping their 'Tazia' on suit land.-Trial court finding that property was wakf property.-Confirmed by Supreme Court.-Subsequent suit for declaration that appellants have no right over same property.-Barred by principles of *res judicata.*

The basis upon which the High Court disposed of the matter is noticed by this Court but it was pointed out that in the suit the principal question was relating to the plot where Tazia had been placed and that whether the property had been dedicated to wakf or not and when those findings had become final and not disturbed by this Court, we think that the learned District Judge was justified in holding that the proceedings were barred by *res judicata*. However, the contention put forth by respondents is that the previous suit was in respect of only a plot measuring 6´ × 6´ and not entire property of 'Badi Takia'. A careful examination of the pleadings in the previous suit will indicate that though the plaintiffs had not raised the issue as to the entire property in 'Badi Takia', the defendants (respondent) raised a plea that the entire property in 'Badi Takia' was wakf property and, therefore, the suit was liable to be dismissed. Hence, even before this Court the point dismissed. Hence, even before this Court the point agitated and put in issue was that the entire property in 'Badi Takia' was wakf property which has rejected by stating that though the Mosque and the school were wakf property that inference would not result in holding that the entire 'Badi Takia' is wakf property as no proof had been placed to reach any such conclusion and thus the conclusion or the findings of the High Court affirming that of the trial Court were not upset or modified in any manner. The findings of the High Court as to the nature of the property having remained

unaltered the claim of the respondents in the suit being contrary is barred by principles of *res judicata. Nazim ali vs. Amjuman Islamia, Chhattarpur and others,* AIR 1999 SC 1098 : 1999(3) Mad LJ 43 : 1999(2) Land LR 552 : 1999(2) Rec Civ R 219 : 1999(3) SCC 91 : 1999(1) Cur CC 134

Section 11.-*Res judicata.*-Injunction suit.-Incidental findings on title.-Not binding in later suit or proceeding deciding question of title. The earlier suit by the respondent against the Panchayat was only a suit for injunction and not one on title. No question of title was gone into nor decided. The said decision cannot, therefore, be binding on the question of title. See in this connection *Sajjadanashin Syed vs. Musa Dadabhai Ummer,* AIR 2000 SC 1238 where this Court on a detailed consideration of law in India and elsewhere held that even if in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a latter suit or proceeding where title is directly in question, unless it is established that it was 'necessary' in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was found or based on the finding on title. Even the mere framing of an issue on title may not be sufficient as pointed out in that case. *Gram Panchayat of Village Naulakha vs. Ujagar Singh and others,* AIR 2000 SC 3272 : 2000(4) Cur CC 151 : 2000(4) Rec Civ R 749 : 2000(7) SCC 543 : 2000 HRR 734

Section 11.-*Res judicata.*-Issue "directly and substantially" in issue or "collaterally or incidentally".-Determination of.

The test to determine whether an issue was directly and substantially in issue in earlier proceedings or collaterally or incidentally is that if the issue was necessary to be decided for adjudicating on the principal issue and was decided, it would have to be treated as 'directly and substantially' in issue and if it is clear that the judgment was in fact based upon that decision, then it would be *res judicata* in a latter case. One has to examine the plaint, the written statement, the issue and the judgment to find out if the matter was directly and substantially in issue. It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the Court considers the adjudication of the issue material and essential for its decision. *Sajjadasashin Sayed Mohd. B.E. Edr (dead) by LRs vs. Musa Dadabhai Ummer and others,* AIR 2000 SC 1238 : 2000(2) Mad LJ 172 : 2000(2) Land LR 281 : 2000(3) Guj LR 1913 : 2000(3) SCC 350 : 2000(2) All Mah LR 444 : 2000(1) Cur CC 286

Section 11.-*Res judicata.*-Parties and properties in earlier and subsequent suit same.-Petitioner in earlier suit sought declaration of his right to manage and possess graveyard and Dargah.-Trial court finding that grave-yard, Dargah and house were wakf property and house was used as Musafirkhana.-Finding would operate as res judicata in subsequent suit for possession.

It was conceded before the trial Court that the entire property as Wakf property. The trial Court recorded the said concession as follows:

"Mr. K.R. K. Iyengar, the learned counsel for the plaintiff had admitted across the bar that the suit graveyard together (with) Darga are Wakf by user".

The Court gave a further finding as follows:

"There can be no doubt that the suit grave-yard together with the Darga adjoining the Regimental Bazar Mosque, constitute Wakf property."

It was nextly held that the graveyard, Darga and house were under the management of the present plaintiff. The finding in para 17 of the trial Court in the earlier suit reads as follows:

"It is, however, in evidence that the defendant (i.e. present plaintiff) has been performing the Urs for the Darga. PW-3 Azimuddin, a person aged 60 years swears that the graveyard is under the management of the Regimental Bazar Mosque and the management of the graveyard was entrusted to the first defendant and (the) house in the graveyard was used as a Musafir Khana. The plaintiff does not challenge the testimony of the witness."

Therefore, the finding was that this house was being used as a Musafir Khana. The above findings operate as *res judicata* in the present suit. *Wali Mohammed (dead) by LRs vs. Rahmat Bee (Smt.) and others,* AIR 1999 SC 1136 : 1999(4) Civ Lj 8 : 1999(3) Mad LW 267 : 1999(2) All Mah LR 453 : 1999(4) Andh LW 20 : 1999(3) SCC 145 : 1999(1) All Rent Cas 608

Section 11.-*Res judicata.*-Public wakf.-Founder's power to spend income for his maintenance as well as for his family members.-Whether wakf declared as "private" and in subsequent proceedings declared as 'public'.-Earlier decision would operate as *res judicata* in later proceedings.-Subsequent proceedings would prevail over earlier proceedings.

It is well settled that an earlier decision which is binding between the parties loses its binding force if between the parties a second decision decides to the contrary. Then, in the third litigation, the decision in the second one will prevail and not the decision in the first. In a proceeding before the Assistant Charity Commissioner a wakf was declared as 'private' without taking notice of change in law and in subsequent proceedings the wakf was declared as 'public'. The earlier decision could not operate as *res judicata* in later proceedings, since subsequent proceedings would prevail. *Sajjadasashin Sayed Mohd. B.E. Edr (dead) by LRs vs. Musa Dadabhai Ummer and others,* AIR 2000 SC 1238 : 2000(2) Mad LJ 172 : 2000(2)

Land LR 281 : 2000(3) Guj LR 1913 : 2000(3) SCC 350 : 2000(2) All Mah LR 444 : 2000(1) Cur CC 286

Section 11.-*Res-judicata.*-Decision in proceedings for grant of Succession Certificate.-Not final decision.-Principle of *res judicata* has no application.

Any decision made in proceeding under Section 372 of the Succession Act, 1925, would not bar any party to the said proceeding to raise the same issue in a subsequent suit. The decision in succession certificate proceeding does not operate as *res judicata.* Sub-section (3) of Section 372 of Succession Act which deals with procedure for grant of certificate reveals two things, first adjudication for grant of certificate is in summary proceedings and secondly if the question of law and fact are intricate or difficult, it could still grant the said certificate based on applicant *prima facie* title. In other words the grant of certificate under it is only a determination of *prima facie* title. This is a necessary corollary confirms that it is not a final decision between the parties. So, it cannot be construed that mere grant of such proceeding would constitute to be a decision on an issue finally decided between the parties. If that be so the principle of *res judicata* cannot be made applicable. *Madhvi Amma Bhawani Amma and others vs. Kunjikutty Pillai Meenakshi Pillai and others,* AIR 2000 SC 2301 : 2000(3) Andh LT 35 : 2000(3) Mad LJ 78 : 2000(2) Land LR 542 : 2000(2) Hindu LR 9 : 2000(2) Ker LT 518 : 2000(2) Cur CC 212

Section 11, Explanation VIII.-Applicability of Explanation VIII of Section 11 C.P.C. to pending suits at the time of commencement of Amendment Act of 1976.

Where the suit in question was pending at the time of commencement of Amendment Act of 1976 the amended provisions of Section 11, namely Explanation VIII would be applicable. Some differentiation exists between a procedural statute and statute dealing with substantive rights and in the normal course of events, matters of procedure are presumed to be retrospective unless there is an express ban on to its retrospective. Moreover, no person has, in fact, a vested right in procedural aspect.-One has only a right of prosecution or defence in the manner as prescribed by the law for the time being and in the event of any change of procedure by an Act of Parliament one cannot possibly have any right to proceed with the pending proceedings excepting as altered by the new legislation. *Rajendra Kumar vs. Kalyan (dead) by LRs,* AIR 2000 SC 3335 : 2000(3) Mad LJ 170 : 2000(2) Hindu LR 353 : 2000(4) Pat LJR 210 : 2000(8) SCC 99 : 2000(2) Marri LJ 491 : 2000(3) Cur C 274

Sections 11 and 47.-*Res judicata.*-Challenge to auction sale .-Earlier application moved on the basis of different provision of law, dismissed.-Subsequent application on the basis of new law which came into force is not barred by *res judicata.* In order to decide the question whether a subsequent proceeding is barred by res judicata it is necessary to examine the question with reference to the (i) forum or the competence of the Court, (ii) parties and their representatives, (iii) matters in issue, (iv) matters which ought to have been made ground for defence or attack in the former suit and (v) the final decision. The cause of action for making that claim arose only after Ordinance No. XXVII of 1949 was passed. A whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff or the applicant. It refers entirely to the grounds set forth in the plaint or the application as the case may be as the cause of action or in other words to the media upon which the plaintiff or the applicant asks the court to arrive at a conclusion in his favour. In order that a defence of res judicata may succeed it is necessary to show that not only the cause of action was the same but also the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was foundation of the former suit or proceedings. In the instant case but for the new law contained in Section 17(2) of Ordinance XXVII of 1949 the Custodian would not have been able to question the court sale in question. Since the Custodian could not, therefore, have asked for the relief which he claimed in the application which has given rise to this appeal before March 28, 1949 it cannot be said that the present proceedings are barred by the rule of *res judicata,* even though in both the proceedings the prayer made by the Custodian was that the sale of the properties in question should be set aside. *Jaswant Singh and another v. Custodian of Evacuee Property, New Delhi,* AIR 1985 SC 1096: 1985(3) SCC 648: 1985 Supp. (1) SCR 331: 1985(1) Scale 1173: 1985(28) DLT 333

Sections 11 and 92.-*Res judicata.*- Representative Suit.-Suit for management of the Trust.-The presumption is that all persons interested in the suit are represented .-Subsequent suit raising contractually and substantially the same matter shall be barred by *res judicata.* 1Where a representative suit is brought under Section 92 and a decree is passed in such a suit, law assumes that all persons who have the same interest as the plaintiffs in the representative suit were represented by the said plaintiffs and, therefore, are constructively barred by *res judicata* from reagitating the matters directly and substantially in issue in the said earlier suit. A similar result follows if a suit is either brought or defended under Order 1, Rule 8. In that case, persons either suing or defending an action are doing so in a representative character, and so, the decree passed in such a suit binds all those whose interests were represented either by the plaintiffs or by the defendants. Thus, it is clear that in determining the question about the effect of a decree passed in a representative suit, it is essential to enquire which interests were represented by the plaintiffs or the defendants. If the decree was passed in a suit under Section 92, it will become necessary to examine the plaint in order to decide in what character the plaintiffs had sued and what interests they had claimed. If a suit is brought under Order 1, Rule 8, the same process will have to

be adopted and if a suit is defended under Order 1, Rule 8, the plea taken by the defendants will have to be examined with a view to decide which interests the defendants purported to defend in common with others. *Ahmad Adam Sait and others v. M.E. Makhri and others,* AIR 1964 SC 107: 1964(2) SCR 647

Section 13.-Foreign judgment- -Binding effect.-The courts in India are not to inquire whether the conclusion recorded in the judgment are supported by evidence or not. *R. Viswanathan and others v. R. Gajambal Ammal and others,* AIR 1963 SC 1: 1963(3) SCR 22.

Section 13.-Foreign judgement.- Competence of the Court.- Determination of.-The Court delivering the judgement should not only be competent by law of the foreign State but also under the provisions of the Code in an international sense.-A foreign judgement in rem is permissible and has the binding effect over the subject matter. A judgment of a foreign court to be conclusive between the parties must be a judgment pronounced by a court of competent jurisdiction; and competence contemplated by Section 13 of the Code of Civil Procedure is in an international sense, and not merely by the law of the foreign State in which the Court delivering judgment necessary to emphasize that what is called private international law is not law governing relations between independent States: private international law, or as it is sometimes called Conflict of Laws, is simply a branch of the civil law of the State evolved to do justice between litigating parties in respect of transactions or personal status involving a foreign element. The rules of private inter- national law of each State must, therefore, in the very nature of things differ, but by the comity of nations certain rules are recognised as common to civilised jurisdictions. Through part of the judicial system of each state these common rules have been adopted to adjudicate upon disputes involving a foreign element and to effectuate judgments of foreign courts in certain matters, or as a result of international conventions. The Roman lawyers recognised a right either as a jus in rem or a jus in personam. According to its literal meaning jus in rem is a right in respect of a thing, a jus in personam is a right against or in respect of person. In modern legal terminology a right in rem, postulates a duty to recognise the right imposed upon all persons generally, a right in personam postulates a duty imposed upon a determinate person or class of persons. A right in rem is, therefore protected against the world at large; a right in personam against determinate individuals or persons. An action to enforce a jus in personam was originally regarded as an action in personam and an action to enforce a jus in rem was regarded as an action in rem. But in course of time, actions in rem and actions in personam acquired different content. When in an action the rights and interest of the parties themselves in the subject matter are sought to be determined, the action is in personam. The effect of such an action is therefore merely to bind the parties thereto. Where the intervention of the Court is sought for the adjudication of a right or title to property, not merely as between the parties but against all persons generally, the action is in rem. Judgment in rem, has been defined as `a judgment of a court of competent jurisdiction determining the status of a person or thing (as distinct from the particular interest in it of a party to the litigation); and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided.Undoubtly, a court of a foreign country has jurisdiction to deliver a judgment in rem which may be enforced or recognised in an Indian Court, provided that the subject-matter of the action is property whether movable or immovable within the foreign country. It is also well settled that a court of a foreign country has no jurisdiction to deliver a judgment capable of enforcement or recognition in another country in any proceeding the subject- matter of which is title to immovable property outside that country. But there is no general rule of private international law that a court can in no event exercise jurisdiction in relation to persons, matters or property outside jurisdiction. *R. Viswanathan and others v. R. Gajambal Ammal and others,* AIR 1963 SC 1: 1963(2) SCR 22.

Section 13.-Foreign judgement.- Decree of divorce.-Decree if binding on Indian Courts.- Determination of jurisdiction of foreign Court. The concept of domicil is not uniform throughout the world and just as long residence does not by itself establish domicil, brief residence may not negative it. But residence for a particular purpose fails to answer the qualitative test for, the purpose being accomplished the residence would cease. The residence must answer a qualitative as well as a quantitative test, that is, the two elements of factum at animus must concur. The respondent went to Nevada forum-hunting, found a convenient jurisdiction which would easily purvey a divorce to him and left it even before the ink on his domiciliary assertion was dry. Thus, the decree of the Nevada Court lacks jurisdiction. It can receive no recognition in our courts. Section 13(a) of the Code of Civil Procedure, 1908 makes a foreign judgment conclusive as to any matter thereby directly adjudicated upon except where it has not been pronounced by a court of competent jurisdiction. Learned counsel for the respondent urged that this provision occurring in the Civil Procedure Code cannot govern criminal proceedings and therefore the want of jurisdiction in the Nevada Court to pass the decree of divorce can be no answer to an application for maintenance under Section 488, Criminal Procedure Code. This argument is misconceived. The judgment of the Nevada Court was rendered in a civil proceeding and therefore its validity in India must be determined on the terms of Section 13. It is beside the point that the validity of that judgment is questioned in a criminal court and not in a civil court. If the judgment falls under any of the clauses (a) to (e) of Section 13, it will cease to be conclusive as to any matter thereby adjudicated upon. The judgment will then be open to a collateral attack on the grounds mentioned in the five clauses of Section 13. Under

Section 13(e), Civil Procedure Code, the foreign judgment is open to challenge where it has been obtained by fraud. Fraud as to the merits of the respondent's case may be ignored and his allegation that he and his wife have lived separate and apart for more than three (3) consecutive years without cohabitation and that there is no possibility of a reconciliation may be assumed to be true. But fraud as to the jurisdiction of the Nevada Court is a vital consideration in the recognition of the decree passed by that court. It is therefore, relevant that the respondent successfully invoked the jurisdiction of the Nevada Court by lying to it on jurisdictional facts. *Smt. Satya v. Teja Singh,* AIR 1975 SC 105: 1975(1) SCC 120: 1975(2) SCR 197

Section 13.-Foreign judgment.-Enforcement of money decree.-The decree passed by the Court of Pakistan which was not treated as evacuee property and not vested in custodian.-Suit for enforcement of decree is maintainable. *Roshanlal Nuthiala and others v. R.B. Mohan Singh,* AIR 1975 SC 824: 1975(4) SCC 628: 1975(2) SCR 491

Section 13.-Foreign judgment.- Merits of the case.-Ex parte judgment.-Due notice of the judgement given to the party who chose not to appear.-Execution of decree cannot be resisted on the ground that the judgement is not on merits. *Lalji Raja and Sons v. Firm Hansraj Nathuram,* AIR 1971 SC 974: 1971(1) SCC 721: 1971(3) SCR 815

Section 13.-Foreign judgment.- Non-compliance of principle of natural justice.-Effect of. It is a well-established principle of private international law that if a foreign judgment was obtained by fraud, or if the proceedings in which it was obtained were opposed to natural justice, it will not operate as *res judicata*. Though a judgment would be *res judicata* and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the Court was mistaken, it might be shown that it was misled. There is an essential distinction between mistakes and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be bruoght on the ground that it has been decided wrongly, namely that on the merits the decision was one which should not have been rendered, but that it can be set aside if the Court was imposed upon or tricked into giving the judgment. It is now firmly established that a foreign judgment is impeachable for fraud in the sense that upon proof of fraud it cannot be enforced by action or operate as *res judicata*. *Sankaran Govindan v. Lakshmi Bharathi and others,* AIR 1974 SC 1764: 1975(3) SCC 351: 1975 (1) SCR 57

Section 13.-Non-compliance.- Effect of.-Execution of decree of foreign court at the time of passing the decree without compliance of the provision.-Subsequent accession of State.-It does not alter position.- Decree is not executable against the ex-ruler. *Raj Rajendra Sardar Motoji Nar Singh Rao Shitole v. Shankar Saran and others,* AIR 1962 SC 1737: 1963 MPLJ 809: 1963(2) SCR 527

Section 13.-Scope of.-The provision is laid down as substantive law and is not merely a rule of procedure. *Raj Rajendra Sardar Motoji Nar Singh Rao Shitole v. Shankar Saran and others,* AIR 1962 SC 1737: 1963 MPLJ 809: 1963(2) SCR 527

Sections 13 and 11.-Foreign judgement.-*Res judicata*.- Application of.-Foreign judgement between the parties is conclusive of the matter adjudicated between the parties.-The provision incorporates a rule of res judicata on all foreign judgments delivered by a competent court. The language of Section 13 of the Code of Civil Procedure, 1908, is explicit: a foreign judgment is made thereby conclusive between the parties as to any matter directly adjudicated and it is not predicated of the judgment that it must be delivered before the suit in which it is set up was instituted. Section 13 incorporates a branch of the principle of *res judicata,* and extends it within certain limits to judgments of foreign Courts if competent in an international sense to decide the dispute between the parties. The rule of *res judicata* applies to all adjudications in a former suit, which expression by the Explanation I to Section 11 of the Code of Civil Procedure denotes a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto. This explanation is merely declaratory of the law: the decisions of the Courts in India prior to its enactment establish that proposition conclusively. *R. Viswanathan and others v. R. Gajambal Ammal and others,* AIR 1963 SC 1: 1963(2) SCR 22.

Sections 13, 42 and 42A.-Execution of decree.-Jurisdiction of a foreign Court.-Objection to passing of decree not raised before the Court.-Subsequent transfer of decree is not invalid. A person who appears in obedience to the process of a foreign Court and applies for leave to defend the suit without objecting to the jurisdiction of the Court when he is not compellable by law to do so must be held to have voluntarily submitted to the jurisdiction of such Court. Therefore, it cannot be said that this decree suffered from the defects which a foreign ex parte decree without such submission would suffer from. The order for transfer was made at a time when the Indian Code of Civil Procedure became applicable to the whole of India including the former territories of Hyderabad State. The order of transfer was, therefore, valid and effective and the decree could, therefore, be executed. *Shalig Ram v. Firm Daulatram Kundanmal,* AIR 1967 SC 739: 1963(1) Andh LT 302: 65 Bom LR 331: 1963 Man LJ 941: 1963 MPLJ 829

Section 13(a).-Residence of defendant.-Residence of legal representative.-Effect of.-The surviving legal representative of deceased defendant residing out of India.-The suit filed in court having legal jurisdiction over deceased defendant at the time of filing when he was alive.-The court before which it was filed, continue to have jurisdiction to try the suit. There is no scope for the application of the rule of private international law to a case where the suit as initially filed was competent and the Court

before which it was filed had jurisdiction to try it. In such a case if one of the defendants dies and his legal representative happen to be non-resident foreigners the procedural step taken to bring them on the record is intended to enable them to defend the suit in their character as legal representatives and on behalf of the deceased defendant and so the jurisdiction of the Court continues unaffected and the competence of the suit as originally filed remains unimpaired. In form it is a personal action against the legal representatives but in substance it is an action continued against them as legal representatives in which the extent of their liability is ultimately decided by the extent of the assets of the deceased as held by them. *Andhra Bank Ltd. v. R. Srinivasan and others,* AIR 1962 SC 232: 1963(1) An WR (SC) 14: 1962 (3) SCR 391.

Section 13(b).-Foreign judgment.-Ex parte decree.-Cannot be presumed to be on merits by aid of Section 114, Illustration (e) of Evidence Act. *International Woollen Mills vs. Standard Wool (U.K.) Ltd.,* AIR 2001 SC 2134 : 2001(5) SCC 265 : 2001(S) JT 147

Section 13(b), 44A.-Foreign judgment.-Enforcement in India.-Judgment must be given on merits.-Ex parte judgment, whether can be said to be given on merits.-Held.-'No'.

An ex parte judgment in favour of the plaintiff may be deemed to be a judgment given on merits if some evidence is adduced on behalf of the plaintiffs and the judgment, however, brief, is based on a consideration of that evidence. Where however no evidence is adduced on the plaintiff's side and his suit is decreed merely because of the absence of the defendant either by way of penalty or in a formal manner, the judgment may not be one based on the merits of the case. The broad proposition that any decree passed in absence of defendant, is a decree on merits as it would be the same as if defendant has appeared and conferred cannot be accepted. It cannot also be also that the decree was on merits as all documents as particulars had been endorsed with the statement of claim. At stage of issuance of summons the Court only forms a prima facie opinion. Thereafter Court has to consider the case on merits by covering into the evidence led and documents proved before it as per its rules. It is only if this is done that the decree can be said to be on merits. *International Woollen Mills vs. Standard Wool (U.K.) Ltd.,* AIR 2001 SC 2134 : 2001(5) SCC 265 : 2001(S) JT 147

Section 15.-Valuation of suit.-Improper valuation.-Mesne profit claimed within the pecuniary jurisdiction of the Court.-The claim not fanciful to bring the suit within pecuniary jurisdiction.-Return of plaint by the Court not justified. *Smt. Nandita Bose v. Ratanlal Nahata,* AIR 1987 SC 1947: 1987(3) SCC 705: 1987(3) SCR 792: 1987(2) Scale 215: 1987(3) J.T. 217

Sections 15, 115.-Amendment of decree.-Interest pendente lite not awarded by Arbitrator nor by trial Court.-Order of executing Court refusing to grant interest pendente lite upheld by High Court.-Such a omission cannot be corrected under Section 152 C.P.C..-Nothing can be added or subtracted in decree. *K. Rajamouli vs A.V.K.N. Swamy,* AIR 2001 SC 2316 : 2001(5) SCC 37 : 2001(S1) JT 168

Section 20.-Jurisdiction.-Contract of school building.-Awarded by government company.-Award containing arbitration clause passed at Bangalore.-Application for setting aside award by government company.-During pendency of application, contractor decree-holder filed application for execution of award at Raichur and attachment order issued without noticing clause in contract as to jurisdiction of Court.-Court at Raichur has no jurisdiction to entertain execution application.

In view of Section 20 of the Code that only one Court will have jurisdiction to try the suit. It is not that the Principal City Civil Court, Bangalore is not a Court within the meaning of Section 2(e) of the Act. Whether Principal City Civil Judge, Bangalore has jurisdiction in the matter or not is still pending with him which proceedings were filed earlier in time than the execution application by the appellant in the District Court a t Raichur. The award had not attained finality. In these circumstances we are of the view that the Principal District Judge, Raichur should not have entertained the application for execution and ordered attachment of movable properties of the respondents. The High Court referred to the concession by both the parties that all the applications under the Act had to be treated as original suits and if the Court finds that it had no jurisdiction to entertain, it cannot dismiss the suit but has to return the same for the presentation to the proper Court. Whatever may be the concession of the parties, we are of the view in the circumstances of the present case Principal District Judge, Raichur should have stayed his hands and should not have entertained the execution application by the appellant. High Court took a correct view of the matter and rightly set aside the impugned orders. *Khaleel Ahmed Dakhani vs. Hatti Gold Mines Co. Ltd.,* AIR 2000 SC 1926 : 2000(3) SCC 755 : 2000(3) JT 492 : 2000(2) Rec Civ R 603 : 2000(1) Arbi LR 668 : 2000(2) Cur CC 47

Section 20.-Territorial jurisdiction.-Cause of action.-Meaning explained in restricted and wider sense.

The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. Compendiously the expression means every fact which it would be necessary for the plaintiff to prove. If traversed, in order to support his right to the judgment, of the Court. Every fact which is necessary to be proved, as

distinguished from every piece of evidence which is necessary to prove each fact, comprises in 'cause of action'. It has to be left to the determined in each individual case as to where the cause of action arises. *Rajasthan High Court Advocates Association vs. Union of India and others,* AIR 2001 SC 416 : 2001(2) SCC 294 : 2001(1) JT 287

Sections 20 and 21.-Territorial jurisdiction.-Waiver of objection.- Effect of. As a general rule, neither consent nor waiver nor acquiescene can confer jurisdiction upon a Court, otherwise incompetent to try the suit. But Section 21 of the Code provides an exception, and a defect as to the place of suing, that is to say, the local venue for suits cognisable by the Courts under the Code may be waived under this section. The waiver under Section 21 is limited to objections in the appellate and revisional Courts. But Section 21 is a statutory recognition of the principle that the defect as to the place of suing under Sections 15 to 20 may be waived. Independently of this section, the defendant may waive the objection and may be subsequently precluded from taking it. *Bahrein Petroleum Co. Ltd. v. P.J. Pappu and another,* AIR 1966 SC 634: 1966 Ker LJ 41: 1966(1) SCR 461

Section 20(c).-Territorial Juris- diction.-Cause of action.-Suit arising out of contract.-Likely places of cause of action.-For performance of contract, the place of performance is the place where suit should be filed. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occured. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have (been) performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is the place where the suit is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the Court where the suit is filed and that contract is found to be invalid, such part of cause of the action disappears. *A.B.C. Laminart Pvt. Ltd. and another v. A.P. Agencies, Salem,* AIR 1989 SC 1239: 1989(2) SCC 163: 1989(2) SCR 1: 1989(1) Scale 633: 1989(2) JT 38: 1989(2) APLJ (SC) 15

Section 21.-Consequent failure of justice.-Implication of the term.- The provision does not preclude the objection to its territorial jurisdiction if the court has not given the decision on merits. The suit has not yet been tried on the merits. So far, only the preliminary issue as to jurisdiction has been tried. That issue was decided in favour of the defendants by the trial Court and the District Court and against them by the High Court, and from the order of the High Court, this appeal has been filed. There cannot be a consequent failure of justice at this stage. The condition unless there has been a consequent failure of justice implies that at the time when the objection is taken in the appellate or revisional Court, the suit has already been tried on the merits. The section does not preclude the objection as to the place of suing, if the trial Court has not given a verdict on the merits at the time when the objection is taken in the appellate or revisional Court. *Bahrein Petroleum Co. Ltd. v. P.J. Pappu and another,* AIR 1966 SC 634: 1966 Ker LJ 41: 1966(1) SCR 461

Section 21.-Legal representative.- Meaning of.-It includes Legatee who only obtain part of the Estate of the deceased. The whole object of widening the scope of the expression legal representative which the present definition is intended to achieve would be frustrated if it is held that legatees of different portions of the estate of a deceased do not fall within its purview. Logically it is difficult to understand how such a contention is consistent with the admitted position that persons who intermeddle with a part of the estate are legal representatives. In regard to the intermeddlers they are said to represent the estate even though they are in possession of parcels of the estate of the deceased and so there should be no difficulty in holding that the clause a person who in law represents the estate of a deceased person must include different legatees under the will. There is no justification for holding that the Estate in the context must mean the whole of the estate. *Andhra Bank Ltd. v. R. Srinivisan and others,* AIR 1962 SC 232: 1963(1) An WR (SC) 14: 1962 (3) SCR 391.

Section 21.-Objection to jurisdiction .-Acquiescence.-Disposal of case by Administrative Member of Tribunal contrary to the roster issued by Chairman.-No lack of inherent jurisdiction.-Unsuccessful party can not challenge the judgment on the ground of lack of jurisdiction. *Indermani Kirtipal v. Union of India and others,* AIR 1996 SC 1567: 1996(2) SCC 437: 1996(2) Scale 274: 1996(2) JT 646: 1996(2) Mad LJ 112

Section 21.-Objection to jurisdiction .-Failure to justice.-Necessity of.- The objection taken before

appellate Court.-Failure to satisfy that it resulted in failure of justice.-All the conditions laid down by the provision not satisfied.-Objection relating to jurisdiction cannot be allowed. *R.S.D.V. Finance Co. Pvt. Ltd. v. Shree Vallabh Glass Works Ltd.,* AIR 1993 SC 2094: 1993(2) SCC 130: 1993(1) SCR 455: 1993(1) JT 617: 1993(1) Scale 262: 1993(2) LJR 631

Section 21.-Territorial Jurisdiction .-Stage of objection.-The objection raised for the first time in appeal.-Necessary ingredients to sustain the objection.-Resultant failure of justice is a necessary pre-condition. In order that an objection to the place of suing may be entertained by an appellate or revisional court, the fulfiment of the following three conditions is essential: (1) The objection was taken in the Court of first instance. (2) It was taken at the earliest possible opportunity and in cases where issues are settled, at or before such settlement.(3) There has been a consequent failures of justice. All these three conditions must co-exist. *Koopilan Uneen's daughter Pathumma and others v. Koopilan Uneen's Son Kutty dead by LRs. and others,* AIR 1981 SC 1683: 1981(3) SCC 589: 1982(1) SCR 183: 1981(3) Scale 1240

Section 22.-Transfer of proceedings .-Considerations for.-Similar matrimonial disputes between the parties pending at two places.-No financial hardship to be suffered by the husband in contesting the proceedings at other place.- Direction given that both the proceedings be heard to the place where wife was residing. Having regard to the nature of the dispute involved in the two cases, we are of the view that it is highly expedient that the cases are heard by the same Court. On an earlier occasion the respondent made an application for transfer of the Dibrugarh case to Delhi, which was rejected by this Court. The Dibrugarh case, therefore, has to be heard there. In the circumstances it is proper to transfer the Delhi case to Dibrugarh although it may cause the respondent some trouble of undertaking the journey to Dibrugarh but, for that reason in the facts of the present case it cannot be assumed that he will be prejudiced in prosecuting his case. If he is not in any financial difficulty, as it appears from the records and his own statement before this court, he can make an appropriate arrangement for his representation at Dibrugarh and may not remain at Dibrugarh continuously for looking after the cases. It is expected that the trial Judge may fix a firm date for hearing of the cases to avoid adjournments so that the respondent may not have to pay repeated visits to Dibrugarh. *Ms. Shakuntala Modi v. Om Prakash Bharuka,* AIR 1991 SC 1104: 1991(2) SCC 706: 1992(1) JT 53

Section 22.-Divorce petition filed by husband at Bombay.-Wife staying in Delhi with her parents.-Not in a position to bear expenses of her travel to and stay at Bombay.-Petition transferred to Delhi. *Mona Aresh Goel vs. Aresh Satya Goel,* AIR 2000 SC 3512(1) : 2000(39) All LR 377 : 2000(3) ICC 338 : 2000(19) OCR 605

Section 22.-Transfer petition.-Divorce petition filed by husband at Bombay.-Wife stationed at Jaipur.-With a small child.-Difficult for her to go from Jaipur to Bombay to contest proceedings from time to time.-Divorce petition transferred from Bombay to Jaipur. *Lalita A. Ranga vs. Ajay Champalal Ranga*, AIR 2000 SC 3406(1) : 2000(1) Hindu LR 413 : 2000(19) OCR 599 : 2000(3) All Mah LR 250 : 2000(2) Marri LJ 206

Sections 22 and 23.-Transfer of suit.-Allegations against Presiding Officer.-Report from the Presiding Officer should be confined to allegations in respect of impartiality and fairness and not with respect to correctness or otherwise of orders passed by him. When a transfer petition is filed making such or similar allegations, the report if and when called for, should normally be confined to the allegations made against the impartiality or fairness of the Judge and not with respect to the correctness or otherwise of the orders passed by him. We are saying this because it appears that on the transfer petition being filed, the learned District Judge appears to have called for a report from the Presiding Officer. In his report, the Presiding Officer not only denies the imputations made against him but also explains and justifies the orders passed by him. This he did evidently because in the transfer petition, the correctness of some of his orders was questioned. In our opinion, a Presiding Officer of a court should not be put to such an explanation, barring exceptional circumstances. *Pushpa Devi Saraf and another v. Jai Narain Parasrampuria and others,* AIR 1992 SC 1133: 1992(2) SCC 676: 1992(1) Scale 598: 1992(2) JT 188: 1992 BBCJ 170

Section 24.-Proceedings.-Meaning of.-It includes a reference under Section 146(1) of Cr. P.C. 1898. The expression proceeding used in this section is not a term of art which has acquired a definite meaning. What its meaning is when it occurs in a particular statute or a provision of a statute will have to be ascertained by looking at the relevant statute. Looking to the context in which the word has been used in Section 24(1)(b) of the Code of Civil Procedure it would appear to us to be something going on in a Court in relation to the adjudication of a dispute other than a suit or an appeal. Bearing in mind that the term proceeding indicates something in which business is conducted according to a prescribed mode it would be only right to give it, as used in the aforesaid provision, a comprehensive meaning so as to include within it all matters coming up for judicial adjudication and not to confine it to a civil proceeding alone. *Ram Chandra Aggarwal and another v. The State of Uttar Pradesh and another,* AIR 1966 SC 1888: 1966 All WR 674: 1966 Supp. SCR 393

Section 24.-Transfer of case.-No objection by other side.-Not a ground for transfer of case.-Court not obliged to allow option of parties.

A change of Court is not allowable merely because the other has no objection for such change. Or else, it

would mean that when both parties combine together they can avoid a court and get a court of their choice. Court is not disposed to give such an option to the parties. *Mahabir Prasad Singh vs. Jacks Aviation Pvt. Ltd.,* AIR 1999 SC 287 : 1999(1) Ker LJ 530 : 1998(2) Guj Lh 923 : 1999(1) Civ CC 367 : 1999 (121) Pun LR 680 : 1999(1) SCC 37 : 1999(1) Andh LT 27

Section 24.-Transfer petition.-Ground peculiar facts and circumstances.-Divorce petition filed at Faridabad.-Transferred to District Judge, Delhi. *Renu Gautam vs. Vinod Gautam,* AIR 2000 SC 3405(1) : 2000(1) DMC 396 : 2000(1) All Cri LR 845 : 2000(38) All LR 773

Sections 24, 25.-Transfer petition.-Divorce petition filed by husband at Chandigarh.-Wife seeking transfer of petition from Chandigarh to competent Court at Delhi.-Grounds for transfer perused.-Without expressing any opinion petition withdrawn from Courts at Chandigarh and transferred to District Judge, Delhi. *Ravinder Kaur vs. Hitinder Singh,* AIR 2000 SC 3403(2) : 2000(1) Hindu LR 292 : 2000(2) DMC 590 : 2000(1) Marri LJ 581 : 2000(2) Cur CC 17 : 2000(2) BLJ 297

Sections 24 and 151.-Original jurisdiction of High Court.-Exercise of.-Permissibility.-Original jurisdiction not conferred on the High Court by way of any statute though it is vested with powers of withdrawing any suit itself.-It has no jurisdiction to entertain a suit of civil nature merely because extra- ordinary situation requires it to do so. Jurisdiction of a Court means the extent of the authority of a Court to administer justice prescribed with reference to the subject-matter, pecuniary value and local limits. Barring cases in which jurisdiction is expressly conferred upon it by special statutes, *e.g.,* the Companies Act; the Banking Companies Act, the High Court of Mysore exercises appellate jurisdiction alone. As a Court of Appeal it undoubtedly stands at the apex within the State, but on that account it does not stand invested with original jurisdiction in matters not expressly declared within its cognizance. But jurisdiction to try a suit, appeal or proceeding by a High Court under the power reserved by Section 24(1)(b)(i) arises only if the suit, appeal or proceeding is in exercise of the power of the High Court transferred to it. Exercise of this jurisdiction is conditioned by the lawful institution of the proceeding in a subordinate Court of competent jurisdiction, and transfer thereof to the High Court. Power to try and dispose of a proceeding after transfer from a Court lawfully seized of it does not involve a power to entertain a proceeding which is not otherwise within the cognizance of the High Court. Section 151 of the Code of Civil Procedure preserves the inherent power of the Court as may be necessary for the ends of justice or to prevent abuse of the process of the Court. That power may be exercised where there is a proceeding lawful before the High Court; it does not, however, authorise the High Court to invest itself with jurisdiction where it is not conferred by law. By jurisdiction is meant the extent of the power which is conferred upon the Court by its constitution to try a proceeding; its exercise cannot be enlarged because what the learned Judge calls an extraordinary situation requires the Court to exercise it. *Raja Soap Factory and others, v. S.P. Shantharaj and others,* AIR 1965 SC 1449: 1966(1) SCJ 116: 1965(2) SCR 800

Section 25.-Transfer of Suit.- Considerations for.-Convenience of parties.-Suit transferred to the court at the place found to be convenient to the parties for the purpose of trial. It cannot be said that if a particular suit, is ex facie instituted deliberately in a wrong court, it will not have any bearing whatsoever, on the question of transfer. The court may bear it in mind as an additional factor if there is, *prima facie,* on the pleadings sufficient justification for such a plea. We are clearly of opinion that having an overall view of the case, the relationship between the parties, the nature of the suit, as well as the circumstances in which the suit has been filed in the Calcutta High Court, great hardship will be caused to the petitioners in defending such a suit in Calcutta. On the other hand, the plaintiff has two sons in Delhi and he had earlier instituted action in the Delhi Court against the petitioners. Convenience of the parties for a smooth and speedy trial will be more in Delhi than in Calcutta. Since the cause of action has arisen out of civil proceedings in the Delhi Court, it will add to the convenience of the parties so far as production of records and even witnesses before the trial Court is concerned. Arvee Industries and others v. Ratan Lal Sharma, AIR 1977 SC 2429: 1977(4) SCC 363: 1978(1) SCR 418

Section 25.-Transfer of suit.- Considerations for.-Similar cause of action.-The powers of Supreme Court are wide enough to direct transfer in the interest of justice.- Principle for exercise of discretion, indicated. As compared with Section 24, the power of transfer of a civil proceeding to another Court, conferred under the new Section 25 on the Supreme Court, is far wider. And so is the amplitude of the expression, expedient in the interest of justice which furnishes a general guideline for the exercise of the power. Whether it is expedient or desirable in the interest of justice to transfer a proceeding to another Court is a question which depends, on the circumstance of the particular case. Although the exercise of this discretionary power cannot be imprisoned within the strait-jacket of any cast iron formula uniformly applicable to all situations. Yet, certain broad propositions as to what may constitute a ground for transfer can be deduced from judicial decisions. One of them is that where two suits raising common questions of facts and laws between parties common to both the suits, are pending in two different courts, it is generally in the interest of justice to transfer one of those suits to the other forum to be tried by the same Court, with consequent avoidance of multiplicity in the trial of the same issues and the risk of conflicting decisions thereon. *Indian Overseas Bank, Madras v. Chemical Construction Co. and others,* AIR 1979 SC 1514: 1979(4) SCC 358: 1979(3) SCR 920

Section 24(1)(b).-Withdrawal of case.-Considerations for.- Oppor- tunity to observe the demeanour

of witness.-Involvement of public interest and need for speedy disposal of cases.-Withdrawal of case by High Court, affirmed. We are not inclined to exaggerate the importance of the demeanour of witnesses observed by the trial Judge, especially when years have lapsed, heaps of evidence have been recorded and judicial memory with hyper- psychic sensitivity may, for a case like this, be said to be more in the books than in the wear and tear of life. What weighs with us is the importance of shortening the longevity of these quasi-public litigations, reducing the enormous expenditures involved for both sides and entrusting even the first determination, now that all evidence has been recorded, to the highest deck of Justice in the State. *Baslius Mar Thoma Mathews J and others v. Paulose Mar Athanasius and others,* AIR 1979 SC 1909: 1980(1) SCC 601: 1980(1) SCR 250: 1980 Ker LT 1

Section 25.-Transfer of proceedings .-Consideration for.-Petition for restitution of conjugal right by one spouse and for judicial separation for another spouse filed in different States.-The power of Supreme Court is not circumscribed by the provisions of Sections 21 and 21-A of Hindu Marriage Act, 1955. *Guda Vijayalakshmi v. Guda Ramachandra Sekhara Sastry,* AIR 1981 SC 1143: 1981(2) SCC 646: 1981(3) SCR 223: 1981(1) Scale 794

Section 25.-Transfer of proceedings .-Considerations for.-Hardship to parties.-Witnesses situated in the other cities.-Documents and record also not within the territorial jurisdiction of court.-Document under challenge also executed beyond the territorial jurisdiction of the court.-suit directed to be transferred at the place of residence of defendants. *Beni Shankar Sharma and others v. Surya Kant Sharma and others,* AIR 1982 SC 52: 1981(3) SCC 627

Section 25.-Transfer of proceedings .-Financial hardship.-Difficulty of defendant to defend the matter in another State.-The other party agreeing bear expenditure for travel.-Direction given for payment of Rs. 750/- on each occasion in advance.-Relief of transfer, declined. *Shiv Kumari Devendra Ojha v. Ramajor Shitla Prasad Ojha and others,* AIR 1997 SC 1036: 1997(2) SCC 452: 1997(1) Scale 410: 1997(3) JT 295: 1997(2) Civ. LJ 552

Section 25.-Transfer of suit.-Hard- ship to *dominus litis*.-The relevant consideration is that the trial in chosen forum will result in denial of justice. The cardinal principle for the exercise of power under this section is that the ends of justice demand the transfer of the suit, appeal or other proceeding. The question of expediency would depend on the facts and circumstances of each case but the paramount consideration for the exercise of power must be to meet the ends of justice. It is true that if more than one Court has jurisdiction under the Code to try the suit, the plaintiff as *dominus litis* has a right to choose the Court and the defendant cannot demand that the suit be tried in any particular Court convenient to him. The mere convenience of the parties or any one of them may not be enough for the exercise of power but it must also be shown that trial in the chosen forum will result in denial of justice. Cases are not unknown where a party seeking justice chooses a forum most incon- venient to the adversary with a view to depriving that party of a fair trial. The Parliament has, therefore, invested this court with the discretion to transfer the case from one Court to another if that is considered expedient to meet the ends of justice. Words of wide amplitude.-for the ends of justice .-have been advisedly used to leave the matter to the discretion of the apex Court as it is not possible to conceive of all situations requiring or justifying the exercise of power. But the paramount consideration must be to see that justice according to law is done; if for achieving that objective the transfer of the case is imperative, there should be no hesitation to transfer the case even if it is likely to cause some inconvenience to the plaintiff. The petitioner's plea for the transfer of the case must be tested on this touchstone.If the ends of justice so demand, the case may be transferred under this provision notwithstanding the right of dominus litis to choose the forum and considerations of plaintiff's con- venience, etc., cannot eclipse therequirements of justice. Justice must be done at all costs, if necessary by the transfer of the case from one Court to another. *Dr. Subramaniam Swamy v. Ramakrishna Hegde,* AIR 1990 SC 113: 1990(1) SCC 4: 1989 Supp (1) SCR 469: 1989(2) Scale 860: 1989(4) JT 131

Section 25.-Transfer of suit.-Order for joint trial.-One of the suit disposed off and appeal pending against decree.-Directions given that the pending suit may also be disposed off by trying the same on day today basis and transmit the entire record to appellate court. *Bihar State Food & Supplies Corporation Ltd. v. Godrej Soaps Private Limited,* AIR 1997 SC 3779: 1997(1) SCC 748: 1992(2) Pat. LJR 14: 1997(2) Civ. LJ 201

Section 25.-Transfer of suit.-Transfer out of State.-The subject matter of suit related to sensitive matter.-Unusual situation prevailing in the State.-The suit transferred to a court outside the State to prevent bitterness in communal feelings. In this case in view of the nature of allegations regarding of her respondents who have been added, strong feelings are likely to be roused in some section of community. In such an atmosphere to meet the ends of justice it would be desirable to have the case transferred to a calmer and quieter atmosphere. Justice it would be done in such a way. The power of this Court to transfer a suit or proceeding from one State to another State is a power which should be used with circumspection and caution but if the ends of justice so demand in an appropriate case, this Court should not hesitate to act. The fact that an extraordinary atmosphere exists in Punjab cannnot be denied. To contend otherwise would be to contend for an unreality. The suit is unusual and sensitive, and the time is critical. This Court should act by tranferring the case outside the State of Punjab to meet the ends

of justice, that is an absolute imperative in this case. *Union of India and another v. Shriomani Gurdwara Prabandhak Committee and others,* AIR 1986 SC 1896: 1986(3) SCC 600: 1986(3) SCR 472: 1986(2) Scale 208: 1986 JT 287: 1986 BBCJ (SC) 144

Section 25.-Transfer application.-Matter pending before Family Court.-Certain unfounded allegations made against Presiding Judge apprehending justice by petitioner.-Family matters being sensitive in character Judges of Family Courts have to pay greater participatory role.-Objective of Act can only be achieved if rapport between Judges and parties is established.-Supreme Court left option to transfer case with concerned Judge of Family Court. *Shehnaz Mudbhatkal vs. Arvind Ramakrishna and another,* AIR 1999 SC 1524 : 1998(6) JT 638 : 1998(5) SCC 596 : 2000(1) Hindu LR 72

Section 25.-Transfer of case.-Divorce by mutual consent.-Petition filed at Bokaro.-Memorandum of settlement filed with petition taken on record.-Transfer petition allowed from Bokaro to Delhi.-Parties given liberty to file petition before transferee court at Delhi.

In this transfer petition moved on behalf of the wife for transferring the Divorce Petition of the respondent husband pending in the court of District Judge, Bokaro, Bihar State, to the District Court at Delhi, the parties have filed a copy of the Memorandum of settlement along with a copy of the petition for dissolution of the marriage under Section 13-B(1) and (2) of the Hindu Marriage Act. Both the parties have agreed that the marriage between them should be dissolved by mutual consent under Section 13-B(1) and (2) of the Hindu Marriage Act. We have taken the copies of the petition and the memorandum of settlement on record. In view of this development we direct transfer of the respondent's divorce petition from the court of District Judge, Bokaro, Bihar state who the District Court at Delhi. The parties are given liberty to file petition for divorce by mutual consent under Section 13-B of the Hindu Marriage Act before the transferee court at Delhi, wherein appropriate orders will then be passed by the District Court at Delhi. *Seema Shrinidhi (Smt.) vs. Praveen Kumar Tiwari* AIR 1999 SC 1560 : 1997(8) SCC 712 : 1998(1) All CJ 398

Section 25.-Transfer of case.-Petition by wife claiming maintenance under Section 125 Cr.P.C. filed at Delhi.-Divorce petition under Section 13 of Hindu Marriage Act filed by husband before Family Court at Agra.-Wife seeking transfer of marriage petition.-No objection by husband.-Divorce petition directed to be transferred from Agra to Delhi. *Savitri vs. Hari Chand,* AIR 1999 SC 55 : 1999(1) Raj LW 2 : 1998(3) SCC 71 : 1999(1) Marri LJ 3 : 1999(1) Andh LT(Cri) SC 44

Section 25.-Transfer petition.-Criminal case filed by wife against husband and her in-laws under Section 498-A/342/34 I.P.C..-Another petition for maintenance by wife.-Husband filed criminal complaint and divorce petition against wife and another case for custody of child.-Wife seeking transfer of all cases filed by husband to Courts where petitions filed by wife are pending.-Transfer petition allowed. *Rita Barua vs. Siddartha Barua,* AIR 2000 SC 3514 : 2000(3) ICC 728 : 2000(2) Hindu LR 153 : 2000(7) JT 327

Section 25.-Transfer petition.-Divorce petition filed by husband at Hyderabad.-Wife unable to bear expenses on travel from Bangalore to Hyderabad to attend day-to-day proceedings.-Wife has minor son and except her aged parents, there is none to accompany her to Bangalore.-Wife had already filed petition for restitution of conjugal rights before Family Court, Bangalore.-Divorce petition transferred from Hyderabad to Family Court at Bangalore. *Theja V. Nagarjuna vs. V. Nagarjuna,* AIR 2000 SC 3529(1) : 2000(3) ICC 732 : 2000(7) JT 342 : 2000(2) Hindu LR 167

Section 25.-Transfer petition.-Matrimonial suit filed by husband in West Bengal.-Wife working in Delhi.-It is difficult for her to attend day-to-day proceedings at Calcutta.-Counter affidavit not filed to deny allegations in petition.-Case transferred from Calcutta to District Judge, Gautam Budh Nagar (Noida). *Shyamali Ghosh vs. Sumit Kumar Ghosh,* AIR 2000 SC 3351 : 2000(3) ICC 727 : 2000(7) JT 306 : 2000(1) DMC 18

Sections 25, 20.-Transfer of case.-Custody of minor child.-Proceedings for.-Interim order granting access to mother.-Mother residing at Chandigarh.-Minor child residing with father at Delhi.-Jurisdiction lies with Courts at Delhi.-By interim order mother allowed to meet minor child on alternative Saturdays.-Case transferred from Chandigarh to Guardians and Wards Courts at Delhi. *Pooja Bahadur vs. Uday Bahadur,* AIR 1999 SC 1741 : 1999(4) Civ LJ 39 : 1999 Mat LR 385 1999(4) SCC 348 : 1999(36) All LR 761

Section 27.-Notice.-Public Notice not served in locality in prescribed manner.-A mere irregularity but does not strike at jurisdiction of authority.-Order cannot be recalled.

No review or recall of the order from the O.E.A. Collector can be sought solely by alleging that the notice which was required to be published in the locality before settling the land in favour of the applicant was not served in accordance with the manner prescribed by law. More so, non-service of the notice was not pleaded but objection was raised only with regard to the manner of service of the notice. The O.E.A. collector was satisfied of the notice having been published. Assuming that the notice was not published in the manner contemplated by law, it will at best be a case of irregularity in the proceedings but certainly not a fact striking at the very jurisdiction of the authority passing the order. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed therein unless set as in the manner known to law by laying a challenge subject to the law of limitation. *Budhia Swain and others vs. Gopinath Deb and others,* AIR 1999 SC 2089 : 1999(3) Mah LJ 132 : 1999(88) Cut LT 673 :

1999(2) Orissa LR 15 : 1999(4) SCC 396

Sections 33 and 107.-Judgment.- Procedure.-The final order announced without passing reasoned judgment.-Orders passed by the High Court are appealable.- Practice deprecated. *State of Punjab and others v. Jagdev Singh Talwandi,* AIR 1984 SC 444: 1984(1) SCC 596: 1984(2) SCR 50: 1983(2) Scale 942: 1984(1) Chand.LR 386

Section 34.-Application of.- Proceedings under special Act.-Sale of hypothecated property under Section 32 of State Financial Corporation Act is not governed by the provision. *Everest Industrial Corporation and others v. Gujarat State Financial Corpn.,* AIR 1987 SC 1950: 1987(3) SCC 597: 1987(3) SCR 607: 1987(2) Scale 75: 1987(3) J.T. 113

Section 34.-Award of interest.-Date of interest.-Suit filed before the amendment of Code by Act of 1976 .-The Court cannot award interest at a rate more than 6 per cent.-Rate of interest modified. *M/s. Shree Bharat Laxmi Wool Store, Panipat and others v. Punjab National Bank and another,* AIR 1992 SC 521: 1992(1) SCC 204: 1991(2) Scale 1170: 1991(2) JT 543

Section 34.-Costs.-Principle for imposition.-Derivation of property.-Grievance of citizen not found to be vexatious.-No costs should be imposed. When a citizen is deprived of his property by a State action and feels aggrieved by the act of the State and approaches the Court and if it cannot be said that his grievance is absolutely frivolous, the citizen in such a case should not be saddled with the costs simply because the Court finds that his grievance has no valid legal basis. To my mind, it cannot be said that the writ petitions filed by the petitioners were vexatious particularly in view of the earlier decision of this Court in *Bharat Coking Coal Ltd. v. P.K. Agarwala*, (1979) 3 SCC 609. I would, therefore, dismiss these writ petitions without any order as to costs. *Sanjeev Coke Manufacturing Company v. M/s. Bharat Coking Coal Ltd. and another,* AIR 1983 SC 239: 1983(1) SCC 147: 1983(1) SCR 1000: 1982(2) Scale 1193

Section 34.-Grant of interest.-Considerations for. The Language of the rule gives a certain amount of discretion to the Court sequent interest is concerned and it was no longer absolutely obligatory on the Courts to decree interest at the contractual rates upto the date of redemption in all circumstances even if there is no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. We are of opinion that in the circumstances of the present case the respondent should be granted interest on the principal sum due at the contractual rate till the date of the suit and simple interest at 6 per cent p.a. on the principal sum adjudged from the date of the suit till the date of the preliminary decree and also at the same rate till the date of realisation. *Soli Pestonji Majoo v. Ganga Dhar Khemka,* AIR 1969 SC 600: 1969 (2) SCJ 93: 1969(3) SCR 33: 1969(1) SCC 220

Section 34.-Grant of interest.-Exercise of discretion.-Considerations for. The question, whether interest should be awarded on the principal amount claimed from the date of the suit, was within the discretion of the Court. In our opinion, the High Court rightly exercised that discretion. It disallowed the interest claimed by the plaintiff- respondent up till the date oof the suit. Coming to the question of interest, subsequent to the date of the institution of the suit, it was found that the appellant had unlawfully withheld the amount due to the respondent even after coming to know that the collection made was an illegal one. Before instituting the suit, the respondent had issued a notice to the appellant, calling upon the appellant to pay the money illegally collected from it; but despite that notice, the appellant failed to pay back the amount illegally collected from the respondent. That being so, in our opinion, the High Court was justified in awarding interest on the principal amount from the date of the suit. *State of Madhya Pradesh and others v. M/s. Nathabhai Desaibhai Patel,* AIR 1972 SC 1545: 1972(4) SCC 396

Section 34.-Interest on damages.- Permissibility. Interest as damages cannot be awarded. Interest up to date of suit, therefore, was not claimable, and a deduction shall be made of such interest from the amount decreed. As regards interest pendente lite until the date of realisation, such interest was within the discretion of the Court. The rate fixed is 6 per cent, which, in the circum- stances and according to the practice of Courts, appears high. Interest shall be calculated at 4 per cent per annum instead of at 6 per cent and the decree shall be modified accordingly. *Mahabir Prasad Rungta v. Durga Datta,* AIR 1961 SC 990: 1961 (1) Andh WR (SC) 142

Section 34.-Interest on mortgage.- Considerations for.-Effect of amendment of 1929. Under Section 34 of the Civil Procedure Code in granting a decree for payment of money the Court had full discretion to order interest at such rate as it deemed reasonable to be paid on the principal sum adjudged from the date of the suit onwards. But Order 34, Rules 2 and 4 which applied to a mortgage suit, enjoined the Court to order an account to be taken of what was due to the plaintiff at the date of such decree for principal and interest on the mortgage. The special provision in Order 34 had therefore to be applied in preference to the general provision in Section 34. Till the period for redemption expired therefore the matter was considered to remain in the domain of contract and interest had to be paid at the rate and with the rests specified in the contract of mortgage but after the period for redemption had expired the matter passed from the domain of contract to that of judgment. The right of the mortgage would henceforth depend not on the contents of his bond but on the directions of the decree. *Soli Pestonji Majoo v. Ganga Dhar Khemka,* AIR 1969 SC 600: 1969 (2) SCJ 93: 1969(3) SCR 33: 1969(1) SCC 220

Section 34.-Interest pendente lite.- Jurisdiction for grant of.-Necessity of existence of agreement, substantive law or equity in favour of plaintiff. It is well established that interest may be awarded for

the period prior to the date of the institution of the suit if there is an agreement for the payment of interest at fixed rate or if interest is payable by the usage of trade having the force of law, or under the provisions of any substantive law as for instance Section 80 of Negotiable Instruments Act or Section 23 of the Trusts Act. Under the Interest Act, 1839, the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it is conceded that the position in the present case is different. In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance. *Vithal Dass v. Rup Chand and others,* AIR 1967 SC 188: 1967 Jab LJ 145: 1966 Supp SCR 164

Section 34.-Interest.-Considerations for grant of.- Interest prior to filing of suit.-Suit for compensation on account of implied bailment which is in the nature of unliquidated amount.-No contract usage or custom for payment of interest on such amount.-Claim of interest, disallowed. Interest may be awarded for the period prior to the date of the institution of the suit if there is an agreement for the payment of interest at fixed rate or if interest is payable by the usage of trade having the force of law, or under the provisions of any substantive law entitling the plaintiff to recover interest, as for instance, under Section 80 of the Negotiable Instruments Act, 1881, the Court may award interest at the rate of 6 per cent per annum, when no rate of interest is specified in the promissory note or bill of exchange. There is in the present case neither usage nor any contract, express or implied, to justify the award of interest. Nor in interest payable by virtue of any provision of the law governing the case. Under the Interest Act, 1839, the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it is conceded that the amount claimed in this case is not a sum certain but compensation for unliquidated amount.But this provision only applies to cases in which the Court of Equity exercises jurisdiction to allow interest. *Union of India v. Watkins Mayor and Co.,* AIR 1966 SC 275: 1965(2) SCWR 289

Section 34.-Interest.-Considerations for grant of.-Claim of compensation on account of the loss of goods in fire while in possession of carrier.-No contract usage or custom for payment of interest on such amount.-Claim of inter-est, disallowed. *The Union of India v. The West Punjab Factories, Ltd.,* AIR 1966 SC 395: 1966(2) Andh LT 269: 1966(1) SCR 580

Section 34.-Interest.-Considerations for.-Compen-sation for non-gratuitous supply of goods to another without enforceable contract.-Plaintiff is entitled to interest at the rate of 6% prior to institution of suit as also 6% from the date of suit till payment.-Interest pendente lite not granted. *Pilloo Dhunji Shaw Sidhwa v. Municipal Corporation of the City of Poona,* AIR 1970 SC 1201: 1970 (1) SCC 213: 1970(3) SCR 415 **Section 34.-Interest.-Pleading of.-Absence of unequivocal claim of interest for the period prior to filing of suit.-Claim not granted by trial court.-Claim of interest rightly disallowed by the appellate court.** *N.M. Siddique v. Union of India,* AIR 1978 SC 386: 1978(2) SCC 349: 1978(1) LLJ 212: 1978 All LJ 29

Section 34.-Interest.-Rate of.- Considerations for determination.- Direction to pay the amount due under policy of insurance upon its maturity with interest at the rate of 15 per cent as charged by the insurer for delay.-Interest awarded is reasonable. Life Insurance Corporation of India and another v. Gangadhar Vishwanath Ranade (dead) by LRs, AIR 1990 SC 185: 1989(4) SCC 297: 1989 Supp (1) SCR 97: 1989(2) Scale 499: 1989(3) JT 637

Section 34.-Applicability.-Interest .-Section 34 of C.P.C. is general provision.-Its application varies as per banking contracts providing for capitalisation interest charged on periodical rests and to make part of principal amount.

Section 34 C.P.C. is general in its application to all money suits and if banking practice of banking contracts providing for capitalisation of interest charged on periodical rests were to be recognised it will mean that application of Section 34 would be different in suits filed by banks and in suits filed by creditors other than bankers. Section 34 is a general procedural provision and whether it would apply or not and if apply then to what extent would obviously depend on the fact situation of each case. *Central Bank of India vs. Ravindra and others,* AIR 2001 SC 3095 : 2001(9) JT 102 : 2001(7) Scale 351

Section 34.-Decree for payment of money.-Expression "principal sum adjudged".-Includes interest capitalised.-Unscrupulous delay in filing suit does not entitle creditor bank to gain an advantage by continuing to charge interest and capitalise with principal sum.

It cannot be accepted that if the expression "the principal sum adjudged" was to be interpreted and assigned a meaning as inclusive of the interest capitalised may result in anomalous situations emerging for instance that if the bank deliberately and unscrupulously delays the suit being filed, for such period of delay the bank would gain an advantage by continuing to charge interest at the contract rate and by capitalising the same. *Central Bank of India vs. Ravindra and others,* AIR 2001 SC 3095 : 2001(9) JT 102 : 2001(7) Scale 351

Section 34.-Decree for payment of money.-Interest.-Expression "the principal sum adjudged" includes amount of interest charged on periodical rests and capitalised with principal sum actually advanced, was to become amalgam of principal amount in cases permitted under contract between parties or an established banking practice.

While decreeing a suit if the decree be for payment of money, the Court would adjudge the principle sum on the date of the suit. The Court may also be called upon to adjudge interest due and payable by the defendant to the plaintiff for the pre-suit period which interest would obviously be other than such interest as has already stood capitalised and having shed its character as interest, has acquired the colour of the principal and having stood amalgamated in the principal sum would be adjudged so. The principal sum adjudged would be the sum actually loaned plus the amount of interest on periodical rests which according to the contract between the parties or the established banking practice has stood capitalised. *Central Bank of India vs. Ravindra and others,* AIR 2001 SC 3095 : 2001(9) JT 102 : 2001(7) Scale 351

Section 34.-Grant of interest.-Complaint by insured who executed discharge voucher in full satisfaction of his claim.-No allegation that voucher was executed under fraud, under influence or misrepresentation etc..-Delay in settlement of claim under policy not a ground for grant of interest. The mere execution of the discharge voucher, by an insured in respect of claim raised under the insurance policy, would not always deprive the insured-Consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of under influence or by misrepresentation or the like..... In the instant case the discharge vouchers were admittedly executed voluntarily and the complaints had not alleged their execution under fraud, undue influence, misrepresentation or the like. In the absence of pleadings and evidence the State Commission was justified in dismissing their complaints and the mere delay of a couple of months in settlement of claims under policies would not authorise the National Commission to grant relief of interest particularly when the insurer had not complained of such a delay at the time of acceptance of the insurance amount under the policy. *United India Insurance vs. Ajmer Singh Cotton & General Mills and others,* AIR 1999 SC 3027 : 1992(2) Andh WR 223 : 1999(123) Pun LR 499 : 1999(4) All Mah LR 291 : 2000(1) Andh LD 11 : 1999(6) SCC 400 : 1999(37) All LR 121

Section 34.-Interest.-Award of.-Arbitrator empowered to grant pendente lite as well as future interest.-Liability arising out of commercial transaction.-Award of interest at rate of 10 per cent cannot be said to be improper. Under the Interest Act, 1978, which came into force on August 19, 1981, Court includes arbitrator. Under Section 5 of the Interest Act Section 34 of the Code of Civil Procedure would, therefore, apply to the arbitrator as well. Arbitrator is thus entitled to award pendente lite and future interest at the rate not exceeding the current rate of interest which has also been defined in Clause (b) of Section 2 of the Interest Act. Under Section 34 of the Code of Civil Procedure interest at the higher rate than 6 per cent can be award where the liability in relation to the sum so adjudged had arisen out of commercial transaction. The award of interest at the rate of 10 per cent per annum by the arbitrator from the date the arbitrator entered into reference till realisation of the amount under the award cannot be said to be improper. *State of J & K and another vs. Dev Dutt Pandit,* AIR 1999 SC 3196 : 1999(7) ADSC 593 : 1999(3) Arbi LR 374 : 1999(7) SCC 339 : 1999(4) Cur CC 119

Section 34.-Interest.-Claim not raised before court making award rule of court.-Claim made for first time in appeal only against decree.-Claimant not entitled to interest for period starting from accrual of cause of action to date of decree. The claim for interest not having been made before the court in which proceedings for making the award the rule of the court were pending would certainly disentitle the appellant for making such a claim during first three stages of pre-arbitration and post-arbitration that is between award and filing of application in as much as several considerations will have to be examined before award of interest and at what rate. Therefore, when the award had not been challenged for not granting interest, the award could not be upset to that extent. The view taken by the High Court appears to be correct to that extent. *M/S. Jagdish Rai and brothers vs. Union of India,* AIR 1999 SC 1258 : 1999(2) Cur CC 15 : 1999(3) SCC 257 : 1999(2) Rec civ R 400 : 1999(1) Band Cas 590

Section 34.-Interest.-Deposit of decretal amount in Court.-Claimant unable to withdraw because of failure to furnish security.-Amount directed to be deposited in fixed deposit so as to earn interest.-Order not complied with by Registry.-Liability for default on part of Registry in carrying out court's order could not be fastened on judgement-debtor.-Division Bench still directed to pay 3 per cent additional interest to claimant.-Claimant allowed interest on decretal amount from date of decree. *Municipal Corporation of Delhi vs. Sushila Devi (Smt.) and others,* AIR 1999 SC 1929 : 1999(3) Land LR 300 : 1999(2) Guj LH 559 : 1999(2) Mad LW 583 : 1999(4) SCC 317 : 1999(3) Raj Lw 373.

Section 34.-Interest.-Grant of.-Collection of Cheque.-Amount collected by transfer not deposited in depositor's account.-Account-holder deprived of user of amount of Rupees one lakh for about seven years.-Account-holder had to suffer winding up proceedings under Companies Act during this period due to financial crunch.-Award of interest at 12 per cent found inadequate.-Interest at 15 per cent per annum with quarterly rests from date of amount till date of payment would serve ends of justice. *Sovintorg (India) Ltd vs. State Bank of India, New Delhi,* AIR 1999 SC 2963 : 2000(1) Mad LJ 5 :

2000(99) Compensation Cas 126 : 1999(3) Rec Civ R 641 : 2000(1) Andh LD 14 : 1999(6) SCC 406 : 1999(123) Pun LR 490

Section 34.-Interest.-Grant of.-Provisions of Section 34 of C.P.C. based on justice, equity and good conscience.-Would also authorise Consumer Redressal Forum and Commissions to award interest in lieu of compensation or damages in appropriate cases.

The general submission that the appellant was entitled to the payment of interest minimum at the rate of 19.4 per cent per annum from the Bank which collected amount of his cheque but did not deposit in his account would not be tenable in view of the provisions of Section 14 of the Consumer Protection Act. There was no contract between the parties regarding payment of interest on delayed deposit or on account of delay on the part of the Bank to render the services. Interest cannot be claimed under Section 34 C.P.C. as its provisions have not been specific made applicable to the proceedings under the Act. However, the general provision of Section 34 being based on justice, equity and good conscience would authorise the Consumer Redressal Forums and Commissions to also grant interest appropriately under the circumstances of each case. Interest may also be awarded in lieu of compensation or damages in appropriate cases. The interest can also be awarded on equitable grounds. *Sovintorg (India) Ltd vs. State Bank of India, New Delhi,* AIR 1999 SC 2963 : 2000(1) Mad LJ 5 : 2000(99) Compensation Cas 126 : 1999(3) Rec Civ R 641 : 2000(1) Andh LD 14 : 1999(6) SCC 406 : 1999(123) Pun LR 490

Section 34.-Interest.-Pre-reference period.-Arbitrator appointed, with or without intervention of Court.-Has jurisdiction to award interest on sums found due and payable for pre-reference period in absence of any specific stipulation or prohibition in contract. *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa vs. N.C. Budharaj (dead) by LRs, etc.* AIR 2001 SC 626 : 2001(2) SCC 721 : 2001(1) JT 486 : 2001(1) Arbi LR 346

Section 34.-Interest.-Stages when interest can be claimed.

There are four stages of grant of interest. Firstly, from the stage of accrual of cause of action till filing of the arbitration proceedings; secondly, during pendency of the proceedings before arbitrator; thirdly, future interest arising between date of award and date of the decree; and fourthly, interest arising from date of decree till realisation of award. *M/S. Jagdish Rai and brothers vs. Union of India,* AIR 1999 SC 1258 : 1999(2) Cur CC 15 : 1999(3) SCC 257 : 1999(2) Rec civ R 400 : 1999(1) Band Cas 590

Section 34.-Interest on interest.-Claim for delayed payment.-Can be termed as interest on damages or compensation for delayed payment.

There cannot be any doubt that the Arbitrators have powers to grant interest akin to Section 34 of the CPC which the power of the Court in view of Section 29 of the Arbitration Act, 1940. It is clear that interest is not granted upon interest awarded but upon the claim made. The claim made in the proceedings is under two heads.-one is the balance of amount under invoices and letter dated February 10, 1981 and the amount certified and paid by the appellant and the second is the interest on delayed payment. That is how the claim for interest on delayed payment stood crystallized by the time the claim was filed before the Arbitrators. Therefore, the power of the Arbitrators to grant interest on the amount of interest which may, in other words, be termed as interest on damages or compensation for delayed payment which would also become part of the principal. If that is the correct position in law, we do not thing that Section 3 of the Interest Act has any relevance in the context of the matter which we are dealing with in the present case. *Oil & Natural Gas Commission vs. M.C. Clelland Engineers S.A.,* AIR 1999 SC 1614 : 1999(2) Cur CC 24 : 1999(4) SCC 327 : 1999(2) All Mah LR 565 : 1999(2) Bom LR 842 : 1999(2) Mad LW 640

Section 35.-Cost.-Considerations for.-Most of the evidence produced in appeal found to be unacceptable .-Denial of cost to appellant, up-held. *Chaturbhuj Pande and others, Collector, Raigarh,* AIR 1969 SC 255: 1969 All LJ 159: 1969 BLJR 196: 1969 Ker LJ 212: 1969(1) SCR 412 **Section 35.-Cost.-Considerations for award of.-Subordinate court impleaded as sole respondent in the proceedings.-No order of cost can be granted against a court.** *Lakshmi Narain v. First Addl. Dist. J., Allahabad and others v. Miss A. Nihal Singh,* AIR 1964 SC 489: 1963 All LJ 515: 1963(2) SCJ 479: 1964(1) SCR 362

Section 35.-Cost.-Considerations for.-Controversy arising on account of the ambiguity in the provision .-Parties directed to bear their own cost throughout. *Santokchand Kanaiyalal Jain v. The Bhusaval Borough Municipality and others,* AIR 1966 SC 1358: 1966 Mah LJ 330: 1966(1) SCR 695

Section 35.-Cost.-Unreasonable contest.-Reasonable request seeking extension of time to make good deficiency of Court fee contested by the other party.-Such party liable for cost of appeal. *Prem Narain v. M/s. Vishnu Exchange Charitable Trust and Others,* AIR 1984 SC 1896: 1984(4) SCC 375

Section 35.-Cost in appeal.- Considerations for.-Government fighting appeal as a test case after the suit having been decreed against it in both the courts below.- Impugned decree set aside by Supreme Court.-Both the parties left to bear their own costs. It was unfortunate for the first respondent to be pitted against the appellants who considered that this was a test case and the matter had to be fought out in detail inasmuch as it affected a series of cases and the properties involved would be considerable as alleged by Mr. Seervai before the trial Court. We are not concerned with the policy of the appellants in making test cases of this character. The only thing that impresses us in this case is that

the unfortunate first respondent has had to bear the brunt of the battle and has been worsted in this preliminary point which was found in her favour both by the trial Court and the Court of Appeal. We cannot make any order for costs in her favour. But we think that the justice of the case requires that the appellants as well as the first respondent will bear and pay their own respective costs both here and in the Court of Appeal. *The Dominion of India (Now the Union of India) and another v. Shrinbai A. Irani and another,* AIR 1954 SC 596: 1954 SCJ 813: 1955(1) SCR 206

Section 35.-Cost in second appeal.-Considerations for.-The appellant not appearing in the first appeal.-The appellant is not entitled to cost of proceedings of second appeal. *Miss S. Sanyal v. Gian Chand,* AIR 1968 SC 438: 1968 (2) SCJ 218: 1968 (1) SCR 536

Section 35.-Cost of litigation.- Determination of.-Agreement between the client and his counsel.-Higher amount of fee prescribed in the rules for the purpose of computing the cost.-Ordinarily the counsel is not entitled to the higher amount under the rules.-In the instant case the agreement also entitling the counsel with the cost in case of success in the suit.-The counsel held to be entitled to the cost of fee, allowed in the suit. *The Firm of N. Peddanna Ogeti Balayya and others v. Katta V. Srinivasayya Setti Sons,* AIR 1954 SC 26: 1953 SCJ 608

Section 35.-Payment of cost.-Effect of.-Acceptance of cost deprives a party an opportunity to challenge the order.-This principle is applicable only where order is conditional. That apart the principle of estoppel which precludes a party from assailing an order allowing a petition, subject to payment of consists where the other party has accepted the costs in pursuance of the said order applies only in those cases where the order is in the nature of a conditional order `and payment of costs is a condition precedent to the petition being allowed. In such a case it is open to the party not to accept the benefit of cost and thus avoid the consequence of being deprived of the right to challenge the order on merits. The said principle would not apply to a case where the direction for payment of costs is not a condition on which the petition is allowed and costs have been awarded independently in exercise of the discretionary power of the court to award because in such a case the party who has been awarded costs no opportunity to waive his right to question the validity or correctness of the order. *Bijendra Nath Srivastava (Dead) through LRs. v. Mayank Srivastava and others,* AIR 1994 SC 2562: 1994(6) SCC 117: 1994(3) Scale 739: 1995(5) JT 195: 1994(2) Arb. LR 277

Section 35.-Costs.-Salary Savings Scheme of LIC.-Premium deducted from employee's salary but not deposited by employer with LIC.-Employer directed to pay cost quantified at Rs. 25,000/- to be paid to LRs of deceased employee for lapse. *Delhi Electricity Supply Undertaking vs. Basanti Devi and another,* AIR 2000 SC 43 : 2000(1) Guj LH 244 : 1999(4) Com LJ 415 : 2000 (17) Mad LW 868 : 1999(8) SCC 229 : 2000(1) Raj LW 9 : 1999 (8) ADSC 454

Section 35-A.-Vexatious or merit- less case.-Bogus litigation.- The court if satisfied against vexatious motives or groundless claim, must take deterrent action under the provision. *T. Arivandandam v. T. V. Satyapal and another,* AIR 1977 SC 2421: 1977(4) SCC 467: 1978(1) SCR 742: 1978(1) RCJ 33

Section 35-B.-Suit for Mandatory Injunction seeking eviction of defendant on ground of licence.-Defendant controverting allegations and taking plea that he was not a licencee.-Amendment seeking incorporation of plea that in case he is not held a licencee, he was entitled to benefit of Section 60(b) of Easement Act, 1882.-Plea sought to be raised is neither inconsistent nor repugnant to plea already raised in defence.-Application for amendment cannot be rejected on ground of prolonged delay.-Plaintiff can be compensated by way of costs. *B.K. N. Pillai vs. P. Pillai and another,* AIR 2000 SC 614 : 2000(2) Mad LJ 20 : 2000(2) Land LR 131 : 2000(1) Ker LJ 261 : 2000(1) Pat LJR 111 : 2000(1) SCC 712 : 2000(1) Ker LT 224 : 2000(2) Raj LW 279 : 2000(2) Mad LW 313 : 2000(1) Cur CC 82 : 2000(2) Civ LJ 867

Sections 35-B and 151.-Cost.- Exemplary cost.-Abuse of process of Court.-Eviction of tenant permitted for demolition and reconstruction of building.-Landlord failing to reconstruct despite opportunities.- Permission granted tenant to re- construct.-Attempt made by son of landlady by challenging construction in Court as also stalling the same through Municipal Corporation.- Abuse of Court by successive petition .-Petition filed by State Government dismissed with exemplary cost to be recovered from concerned officer and legal counsel. State of Kerala v. Thressia and another, AIR 1994 SC 1488

Sections 37, 38 and 39.-Execution of decree.-Territorial jurisdiction.- The Court which had passed the decree ceasing to have jurisdiction over the subject matter after the passing of decree.-It continue to have jurisdiction over execution of its decree alongwith the court which now have the jurisdiction over the subject-matter. It is common ground that when the present suit was instituted in the District Court, East Godavari, it had jurisdiction over the properties, which are the subject-matter of this suit. It is true that by itself this is not sufficient to make the District Court of East Godavari the Court which passed the decree for purpose of Section 38, because under Section 37, it is only when the Court which passed the decree has ceased to have jurisdiction to execute it that the Court which has jurisdiction over the subject-matter when the execution application is presented can be considered as the Court which passed the decree. The Court to whose jurisdiction the subject-matter of the decree is transferred acquires

inherent jurisdiction over the same by reason of such transfer, and that if it entertains and execution application with reference thereto, it would at the worst be an irregular assumption of jurisdiction and not a total absence of it, and if objection to it is not taken at the earliest opportunity, it must be deemed to have been waived, and cannot be raised at any later stage of the proceedings. *Merla Ramanna v. Nallaparaju and others,* AIR 1956 SC 87: 1956 (SC) SLJ 101: 1955(2) SCR 938

Section 38.-Executing Court.- Scope of power.-It is the duty of executing court to give effect to the terms of decree.-It cannot travel beyond the terms of decree.-Though the executing court has to interpret the decree but in the guise of interpretation it cannot make a new decree for the party. *V. Ramaswami Aiyengar and others v. T.N.V. Kailasa Thevar,* AIR 1951 SC 189: 1951(1) MLJ 560: 1951 SCJ 278: 1951 SCR 292 **Section 38.-Execution of decree.- Simultaneous execution at several places.-Permissibility.** Simultaneous execution proceeding in more places than one is possible but the power issued sparingly in exceptional cases by imposing proper terms so that hardship does not occur to judgment-debtors by allowing several attachments to be proceeded with at the same time. *Prem Lata Agarwal v. Lakshman Prasad Gupta and others,* AIR 1970 SC 1525: 1970 Ker LJ 649

Sections 38 and 39.-Execution of decree.-Jurisdiction of transferee Court.-Decree passed under the provisions of Local Act applicable within the State only.-Execution of such decree by a court outside State does not amount extra territorial operation of such Statute. A decree of the Special Judge under the Act is within the United Provinces, a decree for all purposes of the Code. It could therefore be transferred under Section 39 of the Code of Civil Procedure to a court outside the United Provinces, for execution. Now when a decree is transferred, it is the duty of the transferee court to execute it by all methods provided by the Code of Civil Procedure. But it is said that the transferee court must be satisfied that it is a decree under the Code of Civil Procedure before it can order execution under that Code. How then is the transferee court to decide that? It has before it a decree passed not by itself but by another court. It has therefore to satisfy itself that the decree was one which, for that court, was a decree passed under the Code. In order to do that it is asked to apply the United Provinces Act to the decree passed within the United Provinces. How can it be said that if it so applies the United Provinces Act it is giving it an extra-territorial operation? It is doing nothing of the kind. It is applying an Act of the United Provinces to something which happened within the territories of those Provinces; it is applying a United Provinces Act to a matter within the competence of the legislature of the United Provinces to legislate upon. No doubt a court outside the United Provinces is applying a statute of those Provinces, but that does not amount to giving extra-territorial operation to that statute. If the statute is being so applies to one of its legitimate objects, it is not being given any extra-territorial operation at all. *S.K. Sahgal, Additional Collector, Banaras v. Maharaj Kishore Khanna,* AIR 1959 SC 809: 1959 All WR (SC) 582: 1959 SCJ 1099 **Sections 38 and 39.-Foreign judgement.-Execution of.-The date on which decree transferred for execution, the provisions of the Code stood extended to the Court which had passed the decree.-Decree being not a foreign decree and transfer for execution is in accordance with law.** *Lalji Raja and Sons v. Firm Hansraj Nathuram,* AIR 1971 SC 974: 1971(1) SCC 721: 1971(3) SCR 815

Sections 38 and 43.-Transfer of decree.-Transfer to foreign court.-Permissibility.-The decree transferred to a court which was not a part of British India and to which the provisions of the Code did not apply.-The decree cannot be executed by such court. *Firm Hansraj Nathuram v. Firm Lalji Raja and Sons,* AIR 1963 SC 1180: 1963(2) SCJ 228: 1963 (2) SCR 619.

Sections 38, 43 and 44.-Execution of decree.-Territorial jurisdiction.- Change in law.-Duty of court to take notice of change.-The decree initially passed by a court not having jurisdiction but subsequently becoming court of competent jurisdiction.-Execution of decree should not be denied. The right of the judgment-debtor to pay up the decree passed against him cannot be said to be a vested right, nor can the question of executability of the decree be regarded as a substantive vested right of the judgment-debtor. A fortiori the execution proceeding being purely a matter of procedure it is well settled that any change in law which is made during the pendency of the cause would be deemed to be retroactive in operation and the Appellate Court is bound to take notice of the change in law. The decree passed by the Bombay High Court having been passed by a Court of competent jurisdiction and not being a nullity because the judgment-debtor had appeared and participated in the proceedings of the Court to some extent and the order of transfer under Section 38 of the Code of Civil Procedure also not having suffered from any inherent lack of jurisdiction the decree became enforceable and executable as soon as the Code of Civil Procedure was applied to Goa. It was the duty of the Appellate Court, namely the Additional Judicial Commissioner, to take note of the change in law, namely, the applicability of the Code of Civil Procedure to Goa and the repeal of the Portuguese Code which was in force before the provisions of the Code of Civil Procedure were applied. The Addtional Judicial Commissioner was, therefore, fully justified in taking the view that the decree was executable and the bar of inexecutability came to an end, when the provisions of the Code of Civil Procedure were applied to Goa. *Narhari Shivram Shet Narvekar v. Pannalal Umediram,* AIR 1977 SC 164: 1976(3) SCC 203: 1976(3) SCR 149

Section 39.-Execution of decree.- Transmission of decree for execution .-Procedure.-There is not pre-scribed form of application for transmission.-The court may *suo motu* transmit the decree for execution. The Civil Procedure Code does not prescribe any particular form for an application for

transmission of a decree under Section 39. Under sub-section (2) of that section the Court can even *suo motu* send the decree for execution to another Court. It is true that Order 21, Rule 6 provides that the Court sending a decree for execution shall send a copy of the decree a certificate setting forth that satisfaction of the decree had not been obtained by execution within the jurisdiction of the Court and a copy of the order for the execution of the decree but there is authority to the effect that an omission to send a copy of the decree or an omission to transmit to the Court executing the decree the certificate referred to in Clause (b) does not prevent the decree-holder from applying for execution to the Court to which the decree has been transmitted. Such omission does not amount to a material irregularity within the meaning of Order 21, Rule 90 and as such cannot be made a ground for setting aside a sale in execution. *Mohanlal Goenka v. Benoy Kishna Mukherjee and others,* AIR 1953 SC 65: 1953 SCJ 130: 1953 SCR 377

Sections 40, Rule 1.-Suit against Receiver.-Leave of court.-Necessity of.-Consideration for grant of leave.-Ordinarily the court should grant the leave except in exceptional circumstances.-Decree in suit without seeking leave is liable to be set aside. When a court puts a Receiver in possession of property, the property comes under court custody, the Receiver being merely an officer or agent of the court. Any obstruction or interference with the court's possession sounds in contempt of that court. Any legal action in respect of that property is in a sense such an interference and invites the contempt penalty of likely invalidation of the suit or other proceedings. But, if either before starting the action or during its continuance, the party takes the leave of the court, the sin is absolved and the proceeding may continue to a conclusion on the merits. In the ordinary course, no court is so prestige- conscious that it will stand in the way of a legitimate legal proceeding for redressal or relief against its reciver unless the action is totally meritless, frivolous or vexatious or otherwise vitiated by any sinister factor. Grant of leave is the rule, refusal the exception. After all, the court is not, in the usual run of cases, affected by a litigation which settles the rights of parties and the Receiver represent neither party, being an officer of the court. For this reason, ordinarily the court accords permission to sue, or to continue. The jurisdiction to grant leave is undoubted and inherent, but not based on black-letter law in the sense of enacted law. Any litigative disturbance of the court's possession without its permission amounts to contempt of its authority; and the wages of contempt of court in this jurisdiction may well be voidability of the whole proceeding. Equally clearly, prior permission of the court appointing the Receiver is not a condition precedent to the enforcement of the cause of action. Nor is it so grave a vice that later leave sought and got before the decree has been passed will not purge it. If, before the suit terminates, the relevant court is moved and permission to sue or to prosecute further is granted, the requirement of law is fulfilled. Of course, failure to secure such leave till the end of the lis may prove fatal. Since the principle is based on contempt of court, statutory follow-up actions are carved out as exceptions (suits under Order 21, Rule 63). Likewise, where no relief is claimed against the receiver. Similarly, whether the receiver was appointed in a collusive suit or the order itself was unjustified are beside the point. The property being in custodia legis, the court's leave, liberally granted is needed. It is the court appointing the receiver that can grant leave. If a suit prosecuted without such leave culminates in a decree it is liable to be set aside. *Everest Coal Company Pvt. Ltd. v. State of Bihar and others,* AIR 1977 SC 2304: 1978(1) SCC 12: 1978(1) SCR 571

Section 41.-Proceedings.-Meaning of.-It includes reference under Section 146(1) of Cr.P.C. 1898. The expression civil proceeding in Section 141 is not necessarily confined to an original proceeding like a suit or an application for appointment of a guardian etc., but that it applies also to a proceeding which is not an original proceeding. Thus, though we say that it is not necessary to consider in this case whether the proceeding before the civil Court is a civil proceeding as contemplated by Section 141 or not there is good authority for saying that it is a civil. *Ram Chandra Aggarwal and another v. The State of Uttar Pradesh and another,* AIR 1966 SC 1888: 1966 All WR 674: 1966 Supp. SCR 393

Section 42.-Execution of decree.- Jurisdiction of transferee court.- Effect of local amendment as incorporated by U.P. Act 24 of 1954 .-The amendment resulted in restricting the power of transferee court which was deemed to have same power as the court which passed the decree. For the words as if it had been passed by itself occurring in the first sentence of sub-section (1) of Section 42, the Amending Act 24 of 1954 substituted the words as the Court which passed it. The effect of such substitution was that the powers of the transferee Court in executing the transferred decree became conterminous with the powers of the Court which had passed it. The result was that if the power of the transferor Court to execute its own decree were in any respect restricted, the same restriction would attach to the powers of the transferee Court in executing the transferred decree; notwithstanding the position that the powers of the transferee Court in executing its own decree were not so restricted. The Amendment Act XXIV of 1954 had taken away the powers of the transferee Court to execute the transfered decree by attachment and sale of the immovable property by making it conterminous with that of the transferor Court which, in the instant case, was the Small Cause Court and in view of the prohibition contained in Order 21, Rule 82, Code of Civil Procedure, had no power to execute its decree by sale of immovable property. That being the position, the Court of the Munsif to whom the decree had been transferred for execution, had also no jurisdiction to order sale of the judgement-debator. Thus considered, the sale of the immovable property ordered by the Munsif in execution of the decree of the

Court of Small Causes transferred to him, was wholly without jurisdiction and a nullity. *Mahadeo Prasad Singh and another v. Ram Lochan and others,* AIR 1981 SC 416: 1980(4) SCC 354: 1981(1) SCR 732: 1981 Land LR 97 **Section 42.-Transferee Court.- Powers of.-The Court executing a decree has same powers as if the decree was passed by itself.** *Jai Narain Ram Lundia v. Kedar Nath Khetan and others,* AIR 1956 SC 359: 1956 All LJ 345: 1956 BLJR: 1957 Andh LT 81: 1956 SCR 62

Section 44A.-Foreign award.-Enforcement of.-Party has to file a suit.-Judgment obtained on basis of award in country of its origin.-Party in whose favour judgment has been made entitled to file a suit in India.

If a judgment has been obtained on the basis of the award in the country of its origin, the person in whose favour the judgment is made may also be entitled to file suit in India based on that judgment if it satisfies the criteria laid by law in India. That may give that person an alternative mode to enforce the award but that would not mean that the provision of Foreign Awards Act can be given a go by. It cannot, therefore, be said that once the foreign award attained finality in the country of its origin, proceedings to enforce foreign award would not be maintainable and that only suit could be filed on the foreign judgment." *Harendra H. Mehta and others, vs. Mukesh H. Mehta and others,* AIR 1999 SC 2054 : 1999(3) Cur CC 49 : 1999(2) Mah LR 563 : 1999(3) Arbi LR 1 : 1999(5) SCC 108 : 1999(3) Mad LW 132

Section 44A.-Foreign decree.-Enforcement of.-Question whether foreign judgment is judgment in *rem* or judgment in *personam* is of no significance.

The Court held that there exists sufficient reasons and justification in the submission of the decree-holder that it is of no significance at all if the English judgment in question be termed to be the judgment in *rem* or judgment in *personam* especially in the facts of the matter under consideration having due regard to the domestic law and in particular Section 44A of the Code of Civil Procedure. *M.V.A.L Quamar vs. Tsavliris Salvage (International) Ltd. and others,* AIR 2000 SC 2826 : 2000(5) Andh LD 97 : 2000(8) SCC : 2000(3) Cur CC 294

Section 44A.-Foreign judgment.-Enforcement of.-Scheme provided by Section 44A is different from one for execution of domestic executions.

The scheme for execution of foreign judgment provided in Section 44A is a scheme alien to the scheme of domestic execution as is provided under Section 39(3) of the Code. The scheme under the latter section is completely a different scheme wherein the transferee Court must be otherwise competent to assume jurisdiction and the general rule or the principle that one cannot go behind the decree is a permissible proposition of law having reference to Section 39(3). One can thus from the above conclude that whereas the domestic law, execution scheme is available under Sections 37, 38, 39, 41 and 42. Section 44A depicts an together different scheme for enforcement of foreign judgments through Indian Courts. *M.V.A.L Quamar vs. Tsavliris Salvage (International) Ltd. and others,* AIR 2000 SC 2826 : 2000(5) Andh LD 97 : 2000(8) SCC : 2000(3) Cur CC 294

Section 44A.-Foreign judgment.-Enforcement of.-Section 44A is an independent provision.-Displaces common law principles.

Section 44A is an independent provision enabling asset of litigants whose litigation has come to an end by way of a foreign decree and who is desirous of enforcement of the same, it is an authorisation given to the foreign judgments and the section is replete with various conditions and as such independently of any other common law rights, an enabling provision for a foreign decree-holder to execute a foreign decree in this country has been engrafted on to statute book to wit Section 44A of the Code of Civil Procedure. *M.V.A.L Quamar vs. Tsavliris Salvage (International) Ltd. and others,* AIR 2000 SC 2826 : 2000(5) Andh LD 97 : 2000(8) SCC : 2000(3) Cur CC 294

Sections 44A, 11.-Foreign decree.-Enforcement in India.-Section 44A confers an independent right on foreign decree holder.-It is fresh cause of action and has no correlation with jurisdictional issues.

Section 44A indicates an independent right, conferred on to a foreign decree-holder for enforcement of its decree in India. It is a fresh cause of action and has no co-relation with jurisdictional issues. The factum of the passing of the decree and the assumption of jurisdiction pertaining thereto, do not really obstruct the full play of provisions of Section 44A. It gives a new cause of action irrespective of its original character and as such it cannot be termed to be emanating from the admiralty jurisdiction as such. The enforcement claimed is of an English decree and the question is whether it comes within the ambit of Section 44A or not. The decree itself need not and does not say that the same pertains to an admiralty matters neither it is required under Section 44A of the Code. Registration in this country, as a decree of a superior foreign Court having reciprocity with this country would by itself be sufficient to bring it within the ambit of Section 44A. The conferment of jurisdiction in terms of Section 44A cannot be attributed to any specific jurisdiction but an independent and an enabling provision being made available to a foreigner in the matter of enforcement of a foreign decree. *M.V.A.L Quamar vs. Tsavliris Salvage (International) Ltd. and others,* AIR 2000 SC 2826 : 2000(5) Andh LD 97 : 2000(8) SCC : 2000(3) Cur CC 294

Section 47.-Appealable Order.- Direction to hand over possession in satisfaction of decree.-Direction of this nature is in the nature of execution subject to appeal. *Balak Singh v. Waqf Alu-Allah Kavamkarda Ahmad Ullah Khan Saheb,* AIR 1969 SC 1270: 1970 (1) SCR 46: 1969(2) SCC 39

Section 47.-Bar to subsequent suit .-Application of.-Earlier suit for partition compromised but no decree passed for want of necessary stamp paper.-Subsequent suit for recovery of possession is not barred. *Brij Kishore Prasad Singh and others v. Jaleshwar Prasad Singh and others,* AIR 1973 SC 1130: 1973 Pat LJR 370: 1973(1) SCC 672: 1973(3) SCR 562

Section 47.-Bar to suit.-Sale of property in execution of decree.- Property of persons not bound by decree sold in execution.-Challenge to attachment and sale by way of suit is not barred. *Ameena Bi v. Kuppuswami Naidu and others,* AIR 1993 SC 1628: 1993(2) SCC 405: 1993(1) Scale 582: 1993(4) JT 68: 1993(1) An LT 68

Section 47.-Decision of Executing Court.--Appeal.-Permissibility.-The decision is in the nature of a decree and therefore, is appealable under the Code. *Shakuntala Devi Jain v. Kuntal Kumari and others,* AIR 1969 SC 575: 1969 (1) SCJ 912: 1969(1) SCR 1006

Section 47.-Equitable set off.- Permissibility.-In certain cases the Court has power to allow a set off even though it may not strictly fall under Rule 18 of Order 21 of the Code. *M/s. Lakshmichand & Balchand v. State of Andhra Pradesh,* AIR 1987 SC 20: 1987(1) SCC 19: 1987(1) SCR 188: 1986(2) Scale 725: 1986 J.T. 785: 1986 APLJ 45 **Section 47.-Eviction of sub-lessee .-Execution against assignee.-Permissibility.-Suit by Manager of Muth to recover possession of property improperly alienated by his predecessor.-The principle has no application.** *Shri Jagadguru Gurushiddaswami Guru Gangadharswami Murusavirmath v. The Dakshina Maharashtra Digambar Jain Sabha,* AIR 1953 SC 514: 1953 SCJ 730: 1954 SCR 235

Section 47.-Excessive execution.- Remedy of.-Sale in execution of decree impugned that it was not warranted in terms of decree.-This question can only be raised by moving an application under the provisions and not by way of a separate suit. *Merla Ramanna v. Nallaparaju and others,* AIR 1956 SC 87: 1956 (SC) SLJ 101: 1955(2) SCR 938

Section 47.-Execution of decree.- ***Bona fide*** **transfer of property.- Property of deceased judgment debtor transferred by legal heirs without knowledge of execution and prior to appointment of receiver.- Subsequent auction sale of properties held to be not valid.** *Amiya Prosad Sanyal and another v. Bank of Commerce Limited (in liquidation) and others,* AIR 1996 SC 1762: 1996(7) SCC 167: 1996(1) Scale 171: 1996(1) JT 148: 1996 BLJR 1174

Section 47.-Execution of decree.- Power of executing Court.-It has no jurisdiction to go behind the decree to implead third parties to it who are not persons claiming right title and interest through decree holder.-It also does it have the power to pass an independent decree in favour of third persons. *Ramesh Singh (Died) by LRs and others v. State of Haryana and others,* AIR 1996 SC 3066: 1996(4) SCC 469: 1996(2) Scale 839: 1996(5) JT 467: 1996 LACC 374

Section 47.-Execution of decree.- Acquiescence.-Failure to challenge the jurisdiction of the court executing the decree.-The judgment debtor cannot raise the plea of lack of jurisdiction after the sale of property in execution. *Mohanlal Goenka v. Benoy Kishna Mukherjee and others,* AIR 1953 SC 65: 1953 SCJ 130: 1953 SCR 377

Section 47.-Execution of decree.- Adjudication of question.- Transferee pendent lite is also entitled to be heard by executing court. Even a transferee pendente lite is representative of his transferor within the meaning of sub-section (3) of Section 47. One who claims to be transferee by operation of law would as well be a representative and if his claim to be a representative is disputed either by the opposite party or by the party under whom he claims, such dispute must also be resolved by the executing Court itself. The word representative used in Section 47 is obviously much wider than the words legal representative as used in Section 50 of the Code. If a person approaches the execution Court claiming that he is the representative of decree-holder's interest in the decree and the decree-holder disputes it, the execution Court has to resolve the dispute for proceeding with the execution of the decree. *Gangabai Gopaldas Mohata v. Fulchand and others,* AIR 1997 SC 1812: 1997(1) Scale 1: 1997(1) JT 343: 1997(10) SCC 387: 1997(2) All. WC 930: 1997(2) Mah. LJ 561

Section 47.-Execution of decree.- Amendment of decree.-Permissibility.-No clerical or arithmetical mistake.-Amendment of decree to grant benefit of additional amount under Section 23(1-A), 23(2) and 28 of Land Acquisition Act, 1894, not permissible.-Such order of executing Court is without jurisdiction. *Bai Shakriben (dead) by Natwar Melsingh and others v. Special Land Acquisition Officer and another,* AIR 1996 SC 3323: 1996(4) SCC 533: 1996(4) Scale 636: 1996(5) JT 597: 1996(2) Ker. LT 280

Section 47.-Execution of decree.- Amendment of decree.-Permissi- bility.-No clerical or arithmetical mistake.-Amendment of decree to grant benefit of additional amount under Section 23(1-A), 23(2) and 28 of Land Acquisition Act, 1894, not permissible.-Such order of executing Court is without jurisdiction. *Bai Shakriben (dead) by Natwar Melsingh and others v. Special Land Acquisition Officer and another,* AIR 1996 SC 3323: 1996(4) SCC 533: 1996(4) Scale 636: 1996(5) JT 597: 1996(2) Ker. LT 280

Section 47.-Execution of decree.- Composite decree.-Decree against mortgaged property as also personally against defendants.-The decree holder cannot be compelled to proceed against mortgaged property first and guarantor later. The decree for money is a simple decree against the judgment-debtors including the guarantor and in no way subject to the execution of the mortgage decree against the judgment- debtor No. 2. If no principle a guarantor could be sued without even suing the

principal debtor there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. It, of course, depends on the facts of each case how the composite decree is drawn up. But if the composite decree is a decree which is both a personal decree as well as mortgage decree, without any limitation on its execution, the decree-holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree. The guarantor in the present suit never took any plea to the effect that his liability is only contingent if remedies against the principal debtors fail to satisfy the dues of the decree-holder. If such a plea had been taken and the Court trying the suit had considered the plea and gave any finding in favour of the guarantor, then it would have been a different position. But in the present case, on the face of the decree, which has become final, the Court cannot construe it otherwise than its tenor. No executing Court can go beyond the decree. All such pleas as to the rights which the guarantor had, had to be taken during trial and not after the decree while execution is being levied. *State Bank of India v. Messrs. Indexport Registered and others,* AIR 1992 SC 1740: 1992(3) SCC 159: 1992(1) Scale 1109: 1992(4) JT 273: 1992(2) APLJ 52

Section 47.-Execution of decree.- Compromise decree.-Decree contrary to statutory provision and therefore claimed as nullity.-The Executing Court can examine the relevant material and pleadings to find out the validity of decree. It is true that a decree for eviction of a tenant cannot be passed solely on the basis of a compromise between the parties. The Court is to be satisfied whether a statutory ground for eviction has been pleaded which the tenant has admitted by the compromise. Thus dispensing with further proof, on account of the compromise, the court is to be satisfied about compliance with the statutory requirement on the totality of facts of a particular case bearing in mind the entire circumstance from the stage of pleadings upto the stage when the compromise is effected. When a compromise decree is challenged as a nullity in the course of its execution the executing court can examine relevant materials to find out whether statutory grounds for eviction existed in law. If the pleadings and other materials on the record make out a prima facie case about the existence of statutory grounds for eviction a compromise decree cannot be held to be invalid and the executing court will have to give effect to it. *Smt. Nai Bahu v. Lala Ramnarayan and others,* AIR 1978 SC 22, 1978(1) SCC 58: 1978(1) SCR 723: 1978(1) RCR 211: 1978 MPLJ 1

Section 47.-Execution of decree.- Compromise decree.-Parties agreeing that the tenant shall be evicted after ten years when he shall hand over the vacant possession to the land lord.-Failure to vacate the premises.-The appropriate course is to seek eviction by appropriate suit .-Execution of compromise decree to seek eviction, not maintainable. *Bibekananda Bhowal (dead) by LRs v. Satindra Mohan Deb (dead) by LRs.,* AIR 1996 SC 1985: 1996(9) SCC 292: 1996(3) Scale 567: 1996(4) JT 597

Section 47.-Execution of decree.- Compromise in execution.- Postponement of execution in lieu of payment of higher rate of interest.- Execution of such compromise by the executing court itself is permissible. The executing Court can determine all questions relating to the agreement postponing the execution of the decree and the incidental term as to payment of the higher rate of interest. The agreement to pay the higher interest is enforceable in execution of the decree.The jurisdiction of the executing Court to enforce such a compromise is not taken away by Order 23, Rule 4 of the Code of Civil Procedure. The effect of Order 23, Rule 4 is that Order 23, Rule 3 does not apply to execution proceedings. Independently of Order 23, Rule 3, the provisions of Order 21, Rule 2 and Section 47 enable the executing Court to record and enforce such a compromise in execution proceedings. Nor does Order 20, Rule 11(2) affect this power of the executing Court. Order 20, Rule 11, enables the Court passing the decree to order postponement of the payment of the decretal amount on such terms as to the payment of interest as it thinks fit on the application of the judgment-debtor and with the consent of the decree-holder. It does not affect the power of the executing Court under Section 47 and Order 21, Rule 2. Order 20, Rule 3 should be read with Order 20, Rule 11 which shows that after the pasing of the decree the Court may order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to payment of interest as it thinks fit. The two provisions read together show that a direction for postponement of payment of the decretal amount upon the term that the judgment-debtor should pay a reasonable rate of interest is not an alteration of or addition to the decree. *Moti Lal Banker v. Maharaj Kumar Mahmood Hasan Khan,* AIR 1968 SC 1087: 1968 (2) Andh LT 220: 1968(3) SCR 158 **Section 47.-Execution of decree.- Conditional decree.-Failure to comply with the condition of payment of court fee.-The decree cannot be executed.** *Assistant Custodian-General of Evacuee Property and another v. Lila Devi and another,* AIR 1980 SC 2080: 1980(4) SCC 224

Section 47.-Execution of decree.- Consent decree.-Agreement between the parties stipulating ascertainment of the same.-Failure of parties to ascertain the same does not effect the right to seek execution of decree. *Ratan Lal Goenka v. Madhab Prasad Goenka,* AIR 1974 SC 2299: 1973(2) SCC 642

Section 47.-Execution of Decree.- Construction of decree.-Duty of executing Court to ascertain true effect of decree.-Consideration of pleadings as well as judgement in the suit.-Permissibility. It is

true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading upto the decree. In order to find out the meaning of the words employed in a decree the Court, often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution Court and if that Court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it. Evidently the execution court in this case thought that its jurisdiction began and ended with merely looking at the decree as it was finally drafted. Despite the fact that the pleadings as well as the earlier judgments rendered by the Board as well as by the appellate Court had been placed before it, the execution Court does not appear to have considered those documents. If one reads the order of that Court, it is clear that it failed to construe the decree though it purported to have construed the decree. In its order there is no reference to the documents to which we have made reference earlier. It appears to have been unduly influenced by the words of the decree under execution. *Bhavan Vaja and others v. Solanki Hanuji Khodaji Mansang and another,* AIR 1972 SC 1371: 1973(2) SCC 40

Section 47.-Execution of decree.- Death of Judgment Debtor.- Subsequent suit seeking declaration against the Estate of deceased can be treated as execution application. The suit could as a measure of ex *debaito justitiae* be treated as an execution petition. There is good authority for converting an execution application into a suit and there could, in our opinion be no valid objection to the counter-process of converting a suit into an execution proceeding, particularly when an ill-advised widow would on account of some procedural error be likely to be deprived of the fruits of an order of maintenance. *Smt. Nandarani Mazumdar v. Indian Airlines and others,* AIR 1983 SC 1201: 1983(4) SCC 461: 1983(2) Scale 173: 1983(2) DMC 395

Section 47.-Execution of decree.- Declaratory Decree.-Meaning of execution. It is never a pre-condition of the executability of a decree that it must provide expressly that the party entitled to a relief under it must file an execution application for obtaining that relief. The tenor of the award shows that the arbitrator did not intend merely to declare the rights of the parties. It is a clear intendment of the award that if the appellants defaulted in discharging their obligations under the award, the respondents would be entitled to apply for and obtain possession of the property. *Parkash Chand Khurana v. Harnam Singh and others,* AIR 1973 SC 2065: 1973(2) SCC 484: 1973(3) SCR 802

Section 47.-Execution of decree.- Decree beyond judgment.-Inconsistency in the judgment viz. a viz. a decree prepared on that basis .-The question could be agitated before the executing Court. *Babusaheb Singh and others v. Parsid Narain Singh and others,* AIR 1991 SC 1731

Section 47.-Execution of decree.- Decree of specific performance.- Properties not delivered in terms of the decree.-Alternate relief of compensation for the property not delivered can not be granted in execution proceedings. *Madhya Pradesh Electricity Board, Rampur v. M/s. Central India Electric Supply Company Ltd. and others,* AIR 1995 SC 1456: 1995(1) SCC 364: 1995(1) Scale 54: 1995(1) JT 312: 1995(1) CCC 216 **Section 47.-Execution of decree.-Detention in civil prison .-Considerations for.-Execution of decree against Partner of a firm who over drew from the account.-Decree passed in suit for dissolution.-No allegation of fraud.-Execution by detention in civil prison is not permissible.** *Prem Ballabh Khulbe v. Mathura Datt Bhatt,* AIR 1967 SC 1342: 1967 All LJ 325: 69 Pun LR 290: 1967 MPLJ 494: 1967(2) SCR 298

Section 47.-Execution of decree.- Discharge of decree.-Out of Court uncertified payment not recorded by Court is liable to be ignored.-The general power of executing Court to decide all questions arising in execution is subject to restriction imposed by Order 21, Rule 2. Section 47 gives full jurisdiction and power to the executing Court to decide all question relating to execution, discharge and satisfaction of the decree. Order XXI, Rule 3, however, places a restraint on the exercise of that power by providing that the executing Court shall not recognise or look into any uncertified payment of money or any adjustment of decree. If any such adjustment or payment is pleaded by the judgment-debtor before the executing Court, the latter, in view of the legislative mandate, has to ignore it if it has not been certified or recorded by the Court. The general power of deciding questions relating to execution, discharge or satisfaction of decree under Section 47 can thus be exercised subject to the restriction placed by Order XXI, Rule 2 including sub-rule (3) which contain special provisions regulating payment of money due under a decree outside the Court or in any other manner adjusting the decree. The general provision under Section 47 has, therefore, to yield to that extent to the special provisions contained in Order XXI, Rule 2 which have been enacted to prevent a judgment-debtor from setting up false, or cooked-up pleas so as to prolong or delay the execution proceedings. If Section 47 and Order XXI, Rule 2 are read together, as has been done by us in this case, the so-called conflict (we say `so-called' as, in fact, there is none) stands dispelled by employing the rule of `harmonious construction' or the other rule that the general provision must yield to the special provision. *Sultana Begum v. Prem Chand Jain,* AIR 1997 SC 1006: 1997(1) SCC 373: 1996(9) Scale 55: 1996(11) JT 1: 1997(1) Raj. LW 53: 1997(2) Mad. LW 521

Section 47.-Execution of decree.- Fraudulent or collusive decree.- Decree against minor.-Negligence or gross negligence of next friend.-It would be permissible for minor to avoid decree without filing another suit. In cases where an inference of fraud or collusion can be drawn from the negligence or gross

negligence of the next friend it would be permissible for a minor to avoid the judgment or decree passed in the earlier proceeding by invoking Section 44, of the Evidence Act without taking resort to a separate suit for setting aside the decree or judgment. *Asharfi Lal v. Smt. Koili (dead) by LRs.,* AIR 1995 SC 1440: 1995(4) SCC 163: 1995(2) Scale 827: 1995(5) JT 496: 1995 Civ. CR (SC) 782: 1995 All LJ 1154

Section 47.-Execution of decree.- Grant of symbolic possession.- Mistake of granting excess land beyond the terms of decree.-The mistake rightly corrected by the Executing Court. *Balwant Singh and others v. Gurbachan Singh and others,* AIR 1993 SC 136: 1993(1) SCC 442: 1992(2) Scale 807: 1992(6) JT 174: 1993(1) Pun LR 720

Section 47.-Execution of decree.- Inexecutable decree.-Change in law divesting decree holder from his title in property.-Execution of decree of pre-emption not possible.-Decree became incapable of execution. All rights and title in that proprietary land ceased to exist and vested to the State, the decree to that extent became devoid of substance inasmuch as the proprietary interests with regard to which alone the decree was passed had vested in the State and nothing survived in favour of the erstwhile proprietors, the appellant or the vendors. The appellant could execute the decree for delivery of possession only on the basis that he had the proprietary right in the land on the basis of which, as a co-sharer therein, he had obtained the decree of pre-emption. Now, since there is vesting of the property under the Act and emergence of a new specifies of property, which was not even the subject-matter of the decree, the present decree becomes incapable of execution. The old property became extinct and the proprietors including the appellant had nothing left with them after the vesting in the State and necessarily, therefore, the decree cannot be executed for that reason. It would have been possible to execute the decree only if the interests in the land as such survived in the proprietors. land can be understood only with reference to the rights in the land and when the old rights give place to the emergence of new rights, a decree with reference of the old rights cannot be executed when that has already lapsed under the Act. *Vidya Sagar v. Smt. Sudesh Kumari and others,* AIR 1975 SC 2295: 1976(1) SCC 115: 1976(2) SCR 193

Section 47.-Execution of decree.-Limitation.-All steps taken to execute the decree.-Case not lying dormant for 12 years.-Decree not fully satisfied despite orders of sale of different properties.-Decree not barred by limitation. *Parbati Debi and others v. Mahadeo Prasad Tibrewalla,* AIR 1979 SC 1915: 1979(4) SCC 761: 1980(1) SCR 156

Section 47.-Execution of decree.- Limitation.-Attachment of decree in execution of another decree resulting in dismissal of execution application .-Subsequent application filed within three years from the date of revocation of order of attachment is not barred by limitation. *Santi Ranjan Dass Gupta v. M/s. Dasuram Mirzamal,* AIR 1976 SC 2486: 1976(2) SCC 188: 1976(3) SCR 625

Section 47.-Execution of decree.- Maintenance.-Charge created over several properties.-Manner of execution. An executory charge-decree for maintenance becomes executable again and again as future sums become due. The executability of the decree keeps the charge alive on the remaining properties originally charged till the future amounts cease. In other words the charge subsists as long as the decree subsists. By the execution the charge is not transferred in its entirety to the properties purchased by the charge-holder. Nor is the charge divided between those properties and those which still remain with the judgment debtor. The whole of the charge continues over all the properties jointly and severally. Nor is any priority established between the properties purchased by the charge- holder and those that remain. It is not permissible to seek an analogy from the cease of a mortgage. A charge is different from a mortgage. A mortgage is a transfer of an interest in property while a charge is merely a right to receive payment out of some specified property. The former is described a *jus in rem* and the latter as only a *jus ad rem.* In the case of a simple mortgage, there is a personal liablity express or implied but in the case of charge there is no such personal liability and the decree, if it seeks to charge the judgment-debtor personally, has to do so in addition to the charge. This being the distinction it appears to us that the appellant's contention that the consequences of a mortgagee acquiring a share of the mortgagor in a portion of the mortgaged property obtain in the case of a charge is ill-founded. The charge can be enforced against all the properties or severally. *Janapareddy Latchan Naidu v. Janapareddy Sanyasamma,* AIR 1963 SC 1556: 1964 Andh WR (SC) 19: 1964(1) Mad LJ (SC) 19: 1964(1) SCR 920

Section 47.-Execution of decree.- Manner of execution.-Composite decree granted against the Principal Debtor, Guarantor and the Mortgaged property.-The decree holder should proceed against the mortgaged property first. The decree in execution is a composite decree, personally against the defendants including the respondent and also against the mortgaged property. We do not pause to consider whether the two portions of the decree are severable or not. We are of the view that since a portion of the decreed amount is covered by the mortgage the decree-holder Bank has to proceed against the mortgaged property first and then proceed against the guarantor. *Union Bank of India v. Manku Narayana,* AIR 1987 SC 1078: 1987(2) SCC 335: 1987(1) Scale 669: 1987(2) J.T. 24: 1987 Pat. L.J.R. 42

Section 47.-Execution of decree.- Money decree.-In the absence of any direction in this regard, the executing court is not entitled to grant interest over the amount of decree. The decree which was put to execution did not contain any order or direction for the payment of any interest on the amount which was payable to the decree holder consequent to the declaration made by the Court decreeing the respondent's suit. There is further no dispute that no relief for interest had been claimed by the

respondent in the suit nor any such claim was discussed or awarded by the Court decreeing the suit. In the absence of pleadings and directions in the judgement or decree which was under execution, it was not open to the executing court to award interest. The Execution Court is bound by the terms of the decree, it cannot add or alter the decree on its notion of fairness or justice. *State of Punjab and others v. Krishan Dayal Sharma,* AIR 1990 SC 2177: 1990(4) SCC 366: 1990(3) SCR 441: 1990(3) JT 267

Section 47.-Execution of decree.- Money decree.-Postponement of liability against surety till the decree is executed against joint family.-Such postponement is not permissible.-Decree amended accordingly. *Joint Family of Mukundas Raja Bhagwandas & Sons and others v. The State of Bank of Hyderabad etc.,* AIR 1971 SC 449: 1971(1) An WR (SC) 110: 1971(1) MLJ (SC) 110: 1970(2) SCC 766: 1971(2) SCR 136

Section 47.-Execution of decree.- Mutual obligation created by decree .-Unless parties seeking execution do not perform its part of obligation, the decree cannot be executed. *Chen Shen Ling v. Nand Kishore Jhajharia,* AIR 1972 SC 726

Section 47.-Execution of decree.- Non-joinder of parties.-Effect on sale in execution of decree.-It does not affect the right of the person entitled to equity of redemption in the property and decree passed is subject to such right. A sale in execution of a decree passed in a defectively constituted mortgage does not affect the rights of redemption of persons interested in the equity of redemption, who have not been impleaded as parties to the action as they should have been under Order 34, Rule 1, C.P.C. but that it is valid and effective as against affirmed even when the person in whom the equity of redemption had vested is the Official Receiver, and he had not been made a party to the proceedings resulting in sale. Even assuming that the equity of redemption in the suit properties vested in the Official Receiver on the adjudication of Keshayananda, his non- joinder in the execution proceedings did not render the purchase by Devamma a nullity, and that under the sale she acquired a good and impeccable title, subject to any right which the Official Receiver might elect to exercise, and it is not open to attack by the transferee *pendente lite. Nagubai Ammal and others v. B. Shama Rao and others,* AIR 1956 SC 593: 1956 And LJ 1029: 1956 SCR 451

Section 47.-Execution of decree.- Null and void decree.-Determination of.-Decree made void by statute with retrospective effect by taking away jurisdiction of civil court and vesting it in Special Tribunal.-The executing court can entertain such objection. An executing court cannot go behind the decree nor can it question its legality or correctness. But there is one exception to this general rule and that is that where the decree sought to be executed is a nullity for lack of inherent jurisdiction in the court passing it, its invalidy can be set up in an execution proceeding. Where there is lack of inherent jurisdiction, it goes to the root of the competence of the court to try the case and a decree which is a nullity is void and can be declared to be void by any court in which it is presented. Its nullity can be set up whenever and wherever it is sought to be enforced or relied upon and even at the stage of execution or even in collateral proceedings. The executing court can, therefore, entertain an objection that the decree is a nullity and can refuse to execute the decree. By doing so, the executing court would not incur the reproach that it is going behind the decree, because the decree being null and void, there would really be no decree at all. *Sunder Dass v. Ram Parkash,* AIR 1977 SC 1201: 1977(2) SCC 662: 1977(3) SCR 60: 1977(1) RCJ 575

Section 47.-Execution of decree.- Nullity.-Decree passed by the Court without jurisdiction.-Such defect of jurisdiction which could not be cured by consent or waiver of party.- Defence of nullity can be set up whenever such decree is sought to be enforced. *Urban Improvement Trust, Jodhpur v. Gokul Narain and another,* AIR 1996 SC 1819: 1996(4) SCC 178: 1996(3) Scale 721: 1996(4) JT 446: 1996(2) Raj. LW 122

Section 47.-Execution of decree.- Objection to decree.-The executing court cannot go behind the decree.- Direction for payment of sum under a provision of Special Act cannot be challenged in execution. *State of Punjab and others v. Mohinder Singh Randhawa and another,* AIR 1992 SC 473: 1993 Supp (1) SCC 49

Section 47.-Execution of decree.- Obstruction on independent title.- Co-owner admitting the title of person in possession.-Occupant not bound by decree.-Execution of decree against such occupant not permissible. The appellant having been found in possession, he is entitled to obstruct execution defending his illegal dispossession in execution proceedings and he is also independently entitled to file application under Order 21, Rule 97 claiming his possession. In view of the fact that he was found to be in possession, the finding recorded by the Executing Court as upheld by the High Court that he is a license on behalf of Harkesh Rai Agarwal is clearly illegal. We, therefore, hold that the appellant cannot be ejected from the premises in his possession except in accordance with law. *Ram Chandra Verma v. Shri Jagat Singh Singhi and others,* AIR 1996 SC 1809: 1996(8) SCC 47: 1996(2) Scale 314: 1996(2) JT 494: 1996(1) Mad LJ 65

Section 47.-Execution of decree.- Obstruction on independent title.- Court is required to determine the question before ordering removal of the obstruction. *Babulal v. Raj Kumar and others,* AIR 1996 SC 2050: 1996(3) SCC 154: 1996(2) Scale 438: 1996(2) JT 716: 1996(2) Raj. LW 23 **Section 47.-Execution of decree.- Omission to implead legal represen- tative.-Effect of.-Error in implead- ing a**

person as representative of estate who did not represent the deceased.-In the absence of fraud or collusion, the Court may hold a decree passed without such representation, to be binding on the estate of the deceased.-The principle is unaffected by the Personal Law or the religious persuasion by the parties. Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognised exceptions. Where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after *bona fide* enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a *bona fide* error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion. *N.K. Mohd. Sulaiman Sahib v. N.C. Mohd. Ismail Saheb and others,* AIR 1966 SC 792: 1966(1) SCWR 331: 1966(1) SCR 937

Section 47.-Execution of decree.- Partnership firm.-The decree passed against the firm only while expressly excluding the Partners of the Firm impleaded as co-defendant in the suit.-Executing court cannot go behind the decree.-Execution of decree against personal property of partners is not permissible. When a personal decree was sought against respondents 2 to 6 on the same grounds that would have been open to the appellant for executing the decree against them under Order XXI, Rule 50, C.P.C., the learned Judge, for specific reasons mentioned by him, refused to give the appellant the said relief and expressly confined it to the assets of the firm to the hands of the partners. It is a well-settled principle that a Court executing a decree cannot go behind the decree: it must take the decree as it stands, for the decree is binding and conclusive between the parties to the suit. If the contention of the appellant were to be accepted, it would contravene the said principle; for, while the decree as contrued by us, has, directed that it should not be executed against the personal properties of the partners, the executing Court would be directing execution against the said partners. While the decree excluded personal liability, the executing Court would be imposing the same. This cannot obviously be done. *Topanmal Chhotamal v. M/s Kundomal Gangaram and others,* AIR 1960 SC 388

Section 47.-Execution of decree.- Personal money decree.-Charge also created on properties.-The question whether the Decree holder could seek personal remedy without first resorting to execution against the charged property, depends on the language of compromise decree. Where a compromise decree provides both for a personal remedy and a charge, the whole question depends on the intention to be gathered from the various terms in the compromise decree. It is true that in one sense, clause (c), (d) and (e) of the compromise indicate certain specified properties as being available to the decree-holder for realisation of any dues either by pursing the charge or by getting a Receiver appointed in respect of the charged properties. But the wording of the three clauses shows clearly that she is not obliged to resort to these two remedies in the first instance. Clause (c) says that the defendant No. 1 will be entitled to realise the amount in default by means of execution of decree. Clause (d) says that the defendant No. 1 will be at liberty to realise the amount in default against the properties charged. Clause (e) says that the defendant No. 1 will, at her option, be further entitled to realise the amount in default by appointment of Receiver for execution of this decree over the charged properties. It is quite clear that clause (c) gives her an unqualified right to obtain payment of the monthly allowance from the plaintiffs. Clauses (d) and (e) give her a liberty or option to pursue the remedies specified therein. There is nothing in these two clauses to limit, in any way, the unqualified right that she was given under clause (c). Our attention is drawn to the statement in clause (j) which says that each of the terms stated is a consideration for the other terms. What exactly is meant thereby is somewhat obscure. But we are unable to see how that clause affects the intention which, in our view, has to be gathered by reading clauses (c), (d) and (e) together. We are, therefore, of the opinion that the contention raised to the effect that the personal remedy is not available in this case before exhausting the charge properties, is not sustainable. *Rajesh Kanta Roy v. Smt. Shanti Debi and another,* AIR 1957 SC 255: 1957 SCR 77: 1955 SCJ 197

Section 47.-Execution of decree.- Power of executing Court.-scope of .-Discharge by satisfaction of decree.-Determination by Executing Court.-Permissibility. There is no doubt that the expression Court whose duty it is to execute the decree means a Court which is under the law competent to, and when requested bound to, execute the decree which is in law enforceable, and where an application is made under Order 21, Rule 1(1) (a) or under Order 21, Rule 2(1) or (2) there need (not?) be substantive application for execution pending. It also appears, from the terms of Clause (3) of Order 21, Rule 2 that the prohibition is against the Court executing the decree. But there is no warrant for the argument that

the expression Court executing the decree as used in Section 47, C.P. Code means a Court which is seized of an application for execution of a decree at the instance of the decree-holder, Section 47 enacts the salutary rule that all questions relating to execution, discharge or satisfaction of the decree shall be determined not by a separate suit, but in execution of the decree. The power so conferred may not be limited by any strained or artificial construction of the words Court executing the decree. The expression Court executing the decree has not been defined, and having regard to the scheme of the Code it cannot have a limited meaning, as argued by counsel for the appellant. The principle of the section is that all satisfaction of a decree and arising between the parties to the suit in which the decree is passed, shall be determined in the execution pro- ceeding, and not by a separate suit: it follows as a corollary that a question relating to execution, discharge or satisfaction of a decree may be raised by the decree-holder or by the judgment-debtor in the execution department and that pendency of an application for execution by the decree-holder is not a condition of its exercise. An application not a condition of its exercise. An application made by the judgment-debtor which raises a question relating to execution, discharge or satisfaction of a decree in a suit to which he, or the person of whom he is a representative, was a party is an application before the Court executing the decree, and must be tried in that Court. *M.P. Shreevastava v. Mrs. Veena,* AIR 1967 SC 1193: 1967 All LJ 423: 1967 BLJR 487: 1967(1) SCR 147 **Section 47.-Execution of decree.- Redemption of mortgage.-Restoration of possession.- Intermingling of land in question with other land in the course of consolidation proceedings.-Denial of decree of possession not proper and this aspect should be left to the executing court.** The owners of the land as recorded got the post consideration holding intermingled with the pre-empted land, which land was in the meantime mortgaged in their favour. the land involved in the instant litigation had to be extricated from that conglomerated holding. The lower appellate Court was wrongly of the view that it could not be carved out in the instant suit. It could at best have left it to the executing Court but not deny the relief of actual possession. In this view of the matter, we allow the appeal and order the delievery of actual possession. *Harnek Singh v. Harbax Singh and others,* AIR 1990 SC 1978: 1990 Supp SCC 698

Section 47.-Execution of decree.- Registration of decree.-Necessity of.-Compromise decree in respect of machinery of an industry.-Finding of High Court that machinery being not embedded to earth, is immovable property hence decree does not require registration.-Execution of decree upheld. The High Court came to the conclusion that from the tenor of the compromise decree, it is clear that those properties are movable properties and therefore there was no need to register the decree. This is essentially a finding of fact. Unless it is shown that the items of machinery mentioned in the decree over which a charge had been created had been permanently embedded to earth, it is not possible to come to the conclusion that those items of machinery are immovable properties. If they are not immovable properties as held by the High Court, then there was no need to register the decree. It was for the judgment-debtor to show that the decree was invalid for the reasons mentioned by him. *K.L. Selected Coal Concern v. S.K. Khanson & Co.,* AIR 1971 SC 437: 1971(3) SCC 965

Section 47.-Execution of decree.- *Res judicata*.-Application of principles of constructive *res judicata* .-Execution of decree barred in terms of Constitution (Schedule Tribes) Order 1950.-Failure to raise the objection during execution proceedings does not bar the objection against sale of property. *Raghunath Pradhani v. Damodra Mahapatra and others,* AIR 1978 SC 1820: 1979(1) SCC 508: 1979(2) SCR 196

Section 47.-Execution of decree.- *Res judicata*.-Application on execution proceedings.-Even if provision does not apply, principles of constructive *res judicata* apply. *Kani Ram and another v. Smt. Kazani and others,* AIR 1972 SC 1427: 1972(2) SCC 192: 1973(1) SCR 254

Section 47.-Execution of decree.- Scope of objections.-Objection to jurisdiction depending upon investigation of facts cannot be made for the first time in execution. A Cour executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties. When the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. *Vasudev Dhanjibhai v. Rajabhai Abdul Rehman and others,* AIR 1970 SC 1475: 1970 (2) SCJ 558: 1970 (2) Mad LJ (SC) 85: 1970(1) SCC_670 **Section 47.-Execution of decree.- Scope of objections.-Execution of preliminary decree.-Objections about knocking out of the decree can be raised in execution proceeding.** At the stage of the preliminary decree there arises no question of the property under mortgage being put to sale in execution of the decree, and if that is so the ultimate auction purchaser cannot be held seemingly to be a party to the suit up to the stage of the preliminary decree. In our opinion, the converse interpretation that the auction purchaser at a sale and execution of the final decree shall be deemed to be a party to the suit at and prior to the stage when preliminary decree is passed, unless

sustaining, would be contrary to the spirit and scheme of Order 34 of the Code of Civil Procedure. And since all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree are required to be determined by the Court executing the decree and not by a separate suit, the objection of the appellant judgment-debtor with regard to the knocking out of the original preliminary decree was to our mind sustainable. In terms of the preliminary appellate decree and fulfilment of the obligations of the defendants on payment of the sum as struck, there remained no occasion for entertaining, maintaining or sustaining the application of the plaintiff mortgagees for sale of the property mortgaged and on that basis the auction sale in favour of the auction purchasers and confirmation of that sale automatically becomes non est. *Kumar Sudhendu Narain Deb v. Mrs. Renuka Biswas and others,* AIR 1992 SC 385: 1992(1) SCC 206: 1991(2) Scale 990: 1991(4) JT 320: 1992 AWC 114

Section 47.-Execution of decree.- Substitution of parties.-Sale of property pending execution proceedings.-No sale deed brought on record.-Claim made on the basis of agreement to sell is not maintainable. Mrs. Dhanlaxmi G. Shah v. Miss Sushila Shiv Prasad Masurakir and others, AIR 1981 SC 478: 1980(1) SCC 596: 1980(1) RCR 106: 1979 Rajdhani LR 540

Section 47.-Execution of decree.- Successor challenged.-Predecessor in interest of objector challenging execution and challenge negatived.- Successor challenged execution not permissible. Section 47 postulates that all question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. Explanation 1 added thereto by Amendment Act, 1976 postulates that for the purposes of this Section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit. The opportunity to object to executability of the decree could be taken only once and repeated applications appear to be unwarranted. It is not in dispute that petitioner's mother had already agitated the right title to the property and claimed that to the extent of her right, the execution was not valid in law. That right having been negatived and become final, the petitioner cannot have any higher right than the mother herself had. Th e petitioner having allowed the orders to become final, it would not be open to the petitioner to raise the contentions thereafter. Even otherwise also, as held by the High Court, the objection as to excess execution has not been raised. Though Order 21, Rule 90(3), CPC may not be strictly construed so as to put a fetter on the Court, due to non-raising of the objection before proclamation of sale and the objection could be raised even at a later stage, but since the title has already been lost and has become final, the petitioner cannot agitate the executability of the decree in the absence of any legal title to question the correctness of the execution. *R.P.A. Valliammal v. R. Palanichami Nadar and others,* AIR 1997 SC 1996: 1997(2) Scale 40: 1997(2) JT 449: 1997(10) SCC 209: 1997(2) Rec. Rev. R 679: 1997(2) Mad LJ 36

Section 47.-Execution of decree.- Territorial jurisdiction.-Objection of lack of territorial jurisdiction does not stand on the same footing as the objection on the ground of competence of the Court to try a case. Execution of decree cannot be resisted on the ground of want of territorial jurisdiction. The objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a Court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure. Having consented to have the controversy between the parties resolved by reference to arbitration through court, the defendant deprived himself of the right to question the authority of the court to refer the matter to arbitration or of the arbitrator to render the award. *Hira Lal Patni v. Sri Kali Nath,* AIR 1962 SC 199: 1961(2) Ker LR 555: 1961(2) Mad LJ (SC) 157: 1962(2) SCR 747.

Section 47.-Execution of decree.- Unexecutable decree.-Decree of specific performance without proof of valid and enforceable contract.- The decree of specific performance cannot be executed. The High Court, in our views, lost sight of the basic principle that no decree for specific performance can be made without proof of a valid and enforceable contract between the plaintiff and the defendant. The Union of India has not appealed against the decree of the High Court. Nevertheless, the decree against the Union of India cannot be executed against the second defendant, the appellant herein, for he cannot be adversely affected by a decree for specific performance when no valid and enforceable contract has been proved between the parties to the suit in respect of the house of which the appellant is the owner in possession. *Sohan Lal (dead) by LRs. v. Union of India and another,* AIR 1991 SC 955: 1991(1) SCC 438: 1990(2) Scale 1260: 1991(5) JT 102

Section 47.-Objection to execution of decree.-Dismissal in default.- Application of principle of *res judicata*. Before a plea can be held to be barred by the principles of *res judicata,* it must be shown that the plea in question had not only been pleaded but it had been heard and finally decided by the Court. A dismissal of a suit for default of the plaintiff, we think, would not operate as *res judicata* against a plaintiff in a subsequent suit on the same cause of action. If it was otherwise there was no need for the legislature to enact Rule 9, Order 9, Civil Procedure Code which in specific terms says that where a suit is wholly or

partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. *Shivashankar Prasad Sah and another v. Baikunth Nath Singh and others,* AIR 1969 SC 971: 1969(3) SCR 908: 1969(1) SCC 718

Section 47.-Scope of.-Execution of decree.-Sale of property.-Purchase of property by decree holder in auction.-The executing court has jurisdiction to deal with all the questions raised by Judgement Debtor, till the delivery of possession, must be decided by Executing Court. If a liberal construction be put upon Section 47 it is difficult to understand why a decree-holder who has been a party to the decree will shed his character as such party merely upon purchasing the property at the execution sale. After all, a decree- holder purchases the property in execution of his decree with the permission of the Court. There is no reason why he should not retain his character of a party to the suit until the delivery of possession to him of the property purchased by him. Having regard to this consideration, if any question is raised by the judgment- debtor at the time of delivery of possession concerning the nature of the rights purchased and if the judgment- debtor offers any resistance to delivery of possession the question must be one which in our view relates to the execution, discharge and satisfaction of the decree and arises between the parties to the suit. All questions arising between the auction-purchaser and the judgment- debtor must in our view be determined by the executing Court and not by a separate suit. *Harnandrai Badridas v. Debidutt Bhagwati Prasad,* AIR 1973 SC 2423: 1973 Pun LJ 502: 1973(2) SCC 467: 1974(1) SCR 210

Section 47.-(Prior to Amendment in 1976).-Applicability.-Eviction order.-Not executed.-Suit property sold during pendency of eviction proceedings.-Fresh suit for eviction filed by purchaser.-Tenant claiming adverse possession in counter-affidavit.-Subsequent suit for possession based on title not barred under Section 47 of CPC on ground that suit was not one for execution of eviction order passed by Rent Controller in first eviction petition.

The High Court observed: "Reading of the entire plaint would show that plaintiff claimed a decree for possession by "virtually" praying to enforce the order of ejectment and on the basis of the plea of defendant being a tenant in the premises by virtue of a fresh contract of tenancy". This view, in our opinion, cannot be accepted.

The defendant admitted in para 8 of his written statement in the present suit as follows:

"Para 8 of the plaint is also emphatically denied except the pendency of the ejectment proceedings and the reply submitted thereto by the replying defendant."

From the aforesaid averments in para 8 of the plaint, it is obvious that the plaintiff referred to the fresh eviction case filed by Mr. Chopra in 1969 the present plaintiff, after the legal notice dated 24-7-1969. It was in that fresh rent control case that the respondent filed a counter stating that he was the owner of these four quarters and that he had prescribed title by adverse possession. This plea of the plaintiff was indeed admitted in para 8 of the present written statement. Thus, the present suit is not one for execution of the eviction order passed in the first rent control case.

In our view, the High Court was, therefore, wrong in treating the present suit as one 'virtually' for execution of the order of eviction passed in the earlier rent control case. Hence the ban under Section 47 cannot apply. *Ajit Chopra vs. Sadhu Ram and others,* AIR 2000 SC 212 : 2000(1) Land LR 281 : 1999(4) Cur CC 341 : 1999(9) ADSC 393 : 2000(1) SCC 114 : 2000(1) Raj LW 53 : 2000(124) Pun LR 19

Section 47.-Award.-Filing of.-Award decree passed by Court lacking jurisdiction.-Non-filing of objections by judgment debtor.-Effect.-Award decree becomes final.-Judgment-debtor neither contested nor raised plea that decree could not be passed.-He cannot contend in execution proceedings that decree be ignored being a nullity.

It is not the case of the respondent that the court which passed the decree was lacking inherent jurisdiction to pass such a decree. This becomes all the more so when the respondent did not think it fit to file objection against the award which was sought to be made rule of the court. But in the present case the award decree has become final and that too when the respondent-judgment debtor did not think it fit to contest the proceedings and did not contend that no decree could be passed. He cannot now, in execution proceedings, contend that the decree should be ignored as being a nullity. *Bhawarlal Bhandari vs. Universal Heavy Mechanical Lifting Enterprises,* AIR 1999 SC 246 : 1998(4) Cur CC 135 : 1999 (1) Cal LJ 92 : 1999(1) SCC 558 : 1999 (1) Mad LW 247 1999(2) All CJ 809

Section 47.-Eviction decree.-Exe-cution.-Question of bona fide requirement for reconstruction of building decided in favour of landlord.-Also no dispute that landlord was in possession on basis of permission granted by municipality.-High Court directions to executing Court to verify about landlord's possession on basis of valid permission before handing over possession.-Executing Court cannot go behind findings of trial Court.-Executing Court committed grave error in dismissing execution petition. What the High Court had really intended was that the executing Court should verify before handing over possession of the suit premises whether the landlord was in possession of valid permit and permission or not. The High Court had not directed that validity of the permit and permission should be examined in the light of the building rules and regulations or the by-laws of the Area Development Authority and the Municipality.

The Appellate Authority, therefore, committed a grave error in dismissing the execution application and the High Court has also committed the same error by dismissing the writ application. *K.N. Karthikeyan*

(dead) vs. M.N. Sreenivasan and others, AIR 1998 SC 2081 : 1998(1) Ker LT 676 : 1998(3) SCC 520 : 1998(2) Scale 219.

Section 47.-Execution of decree.-Consequential relief.-Powers of Executing Court.-Government servant seeking grant of relief of declaration for continuance in service.-Consequential relief as to arrears of salary and interest thereon not claimed.-Executing Court not competent to grant relief not claimed in suit.-Decree relates to legal status of the government servant.-Court bound by terms of decree, cannot add or alter anything in it.

A declaratory decree merely declares the right of the decree holder vis-a-vis the judgment debtor and does not in terms direct the judgment debtor to do or refrain from doing any particular act or thing. Since in the present case decree does not direct reinstatement or payment of arrears of salary the executing Court could not issue any process for the purpose as that would be going outside or beyond the decree. Respondent as a decree holder was free to seek his remedy for arrears of salary in the suit for declaration. The executing Court has no jurisdiction to direct payment of salary or grant any other consequential relief which does not flow directly and necessarily from the declaratory decree.

The provisions of law contained in Section 34 of the Specific Relief Act are specific and in that case even declaration could not have been granted as it could be said that respondent was able to seek further relief than a mere declaration of his legal status and which he omitted to do so. *State of Madhya Pradesh vs. Mangilal Sharma,* AIR 1998 SC 743 : 1998(1) Andh LT 11 : 1998(2) SCC 510 : 1997(7) Scale 781 : 1998(1) Jab LJ 403

Section 47.-Execution of decree.-Manner of execution.-Eviction decree.-High Court passed the execution petition.-In appeal decree subsequently confirmed by the Supreme Court.-On the Confirmation of to decree by appellate Court, execution petition filed for execution of decree does not become not maintainable.-Filing of fresh execution petition is not necessary.

The execution petition No. 179/80 filed in the executing Court to execute the decree passed by the High Court pending. This Court had stayed the said execution proceedings pending disposal of the Civil Appeal No. 1365/80. After the disposal of the appeal, there was no impediment or bar to continue the execution proceedings on the application moved by the appellants to proceed with the execution. The High Court committed a manifest error in taking a view that a fresh execution petition should be filed after the dismissal of the appeal by this Court as the decree passed by the High Court and the execution petition filed earlier which was pending, was not maintainable. As already noticed above, this Court in appeal only confirmed the decree passed by the High Court without any alteration or modification. Even otherwise, in a pending execution case, amendment could be sought if it was needed after dismissal of the appeal by this Court. Under Order XXI Rule 11(2)(d) CPC, in the execution application the particular as to whether any appeal has been preferred from the decree is to be mentioned. If an appeal has been preferred from a decree and after disposal of the appeal. Necessary information can be given by filing an application, if need be seeking an amendment. It is one thing to say that the earlier decree passed gets merged in the decree passed by the appellate Court, yet it is different thing to say that an execution petition filed earlier is not maintainable and that there is a need to file a fresh application for execution after a decree is passed by the appellate Court, particularly in the present case, when this Court had stated the execution proceedings filed earlier, it was obvious that the execution proceedings could be continued after dismissal of the appeal by this Court without any alteration. *Krishna Gopal Chawla vs. State of U.P.*, AIR 2001 SC 3832 : 2001(7) Scale 136 : 2001(8) JT 551 : 2001(10) SRJ 282

Section 47.-Joint decree.-Execution .-One of coparceners assigned his interest in favour of Judgement Debtor.-Where interest of copar-ceners is indeterminate, decree can-not be given effect to before ascer-taining rights of parties.-Executing Court cannot find out shares of decree-holders.-Section 47, Order 21 Rule 15 enables joint decree-holder to execute decree in its entirety.

Where a joint decree for actual possession of immovable property is passed and one of the coparceners assigns or transfers his interest in the subject matter of the decree in favour of the judgment debtor, the decree gets extinguished to the extent of the interest so assigned add execution could lie only to the extent of remaining part of the decree. In case where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties decree can be executed as a whole since it is not divisible and it can be executed in part only where the share of the decree-holders are defined or those shares can be predicted or the share is not in dispute. Otherwise the executing Court cannot find out the shares of the decree-holders and dispute between joint decree-holders is foreign to the provisions of Section 47 C.P.C. *Jagdish Dutt and another vs. Dharam Pal and others,* AIR 1999 SC 1694 : 1999(2) Mad LJ 85 : 1999(2) Land LR 226 : 1999(3) SCC 644 1999(3) Civ LJ 229

Section 47.-Protection of interest of decree holder.-Money suit.-Suit partly decreed with directions to Receiver to attach securities for non-payment of decretal amount.-Appeal by bank on quantum of decree, rate of interest and direction to respondents for payment of decretal amount.-Bank in appeal can seek directions to Receiver to take possession of suit properties to protect its securities.-Bank can also seek such directions in execution of decree.-Appellate Court also not precluded from giving appropriate directions during pendency of appeal to protect interests of

appellant bank.
The claim of the appellant-Bank exceeds the amount for which the decree had been passed by the learned single Judge and the appeal relates to the balance amount of the said claim of the appellant-Bank and the security furnished by the respondents is towards the entire claim, the appellant-Bank, in order to protect its interest as regards the claim in respect of which the appellant-Bank has filed the appeals, could have sought directions from the Appellate Bench of the High Court to direct the Special Officers to take possession of the suit properties which are the securities for the appellant-Bank so that the said securities remain available in the event of the appellant-Bank succeeding in the appeals. The fact that the appellant-Bank could seek such a direction by moving for execution of the decree passed by the learned single Judge could not, in our opinion, preclude the Appellant Bench of the High Court from giving an appropriate direction during the pendency of the appeals in order to protect the interest of the appellant-Bank. *United Bank of India vs. B.T.W. Industries Ltd. and others,* AIR 1998 SC 2354 : 1998(3) BLJR 1726 : 1998(1) Pat LJR 38 : 1998(1) SCC 630 : 1998(1) Rec Civ R 342

Sections 47 and 38.-Execution of decree.-Specific performance.- Requirement of performance of mutual obligations imposed on both sides.-Except where obligations are severable, any attempt to enforce unilateral performance would amount to going behind the decree which is not permissible. There may of course be decrees where the obligations imposed on each side are distinct and severable and in such a case each party might well be left to its own execution. But when the obligations are reciprocal and are interlinked so that they cannot be separated, any attempt to enforce performance unilaterally would be to defeat the directions in the decree and to go behind them which, of course, an executing Court cannot do. It will apply whenever a decree is so conditioned that the right of one party to seek performance from the other is conditional on his readiness and `ability' to perform his own obligation.To hold otherwise would be to permit an executing Court to go behind the decree and vary its terms by splitting up what was fashioned as an indivisible whole into distinct and divisible parts having separate and severable existence without any interrelation between them just as if they had been separate decrees in separate and distinct suits. *Jai Narain Ram Lundia v. Kedar Nath Khetan and others,* AIR 1956 SC 359: 1956 All LJ 345: 1956 BLJR: 1957 Andh LT 81: 1956 SCR 62

Sections 47 and 48.-Execution of decree.-Fraudulent conduct.- Benami transaction.-Inference of fraudulent motive from the circumstances.-Object of preventing execution of decree against the property.-No explanation sought for such conduct .-The benami transaction though otherwise permissible in law can be inferred as fraudulent. There can be no question that the conduct of the respondent was fraudulent within the meaning of Section 48(2), Civil P.C. Though *benami* transactions are common in this country, and there is nothing *per se* wrong in a judgment-debtor purchasing property in another man's name, we have to take into account all the circumstances attending the purchase and his subsequent conduct for finding out whether it was part of a fraudulent scheme on his part to prevent the judgment-creditor from realizing the fruits of his decree. Fraudulent motive or design is not capable of direct proof in most cases; it can only be inferred. The facts before us here leave no room for doubt that the true object of the judgment-debtor was to prevent the execution of the decree against the `Prabhat' newspaper which he had purchased. Even in his answer to the execution application, out of which this appeal has arisen, he had the hardihood to assert that he was not the owner of the paper till April 1944. It should also be remembered that he did not get into the witness-box to explain what other necessity there was for all this camou- flage, except it be to cheat the appellant of his dues under the decree. *Yeshwant Deorao v. Walchand Ramchand,* AIR 1951 SC 16: 1951 ALJ SC 8: 53 Bom. LR 486: 1951 MWN 286: 1951 SCJ 19: 1950 SCR 852

Section 47, 49 and 11.-Execution of decree.-Obstruction to passage.- Injunction to remove the obstruction .-Claim of easementary rights and non compliance of Section 22 of Easement Act.-Such question cannot be raised at the time of execution of decree. The question of section 22 of the easements act would arise only if the question arises for the first time. However, having allowed the perpetual injunction and mandatory injunction granted by the trial court to become final, it would be no defence for the respondent to plead that he has not obstructed the passage etc. or that, as found by the High Court, a part of the property in which the present shop was constructed was not part of the property in the original suit. In other words, if a judgement debtor has suffered the decree, no attempt to circumvent the perpetual injunction and mandatory injunction, can be permitted. If the decree holder makes any construction clubbing the other adjacent property, property which is part of the subject matter in the earlier suit, a party cannot and should not, by his action, be permitted to drive the decree for another round, be permitted to drive the decree for another round of adjudication of the rights in the second suit to be settled afresh. In other words, giving such a liberty will amount to encouraging persons to take the law into their own hands and drive the decree holder to another suit. It can never be facilitated to circumvent the law and relegate the party for tardy process of the civil action. What is needed is an opportunity to obey the injunction. Non compliance is a continuing disobedience entailing penal consequences. A separate fresh suit is barred under Section 49 of the C.P.C. Under these circumstances, the view of the High court is clearly in error and appeal is accordingly allowed. *Jai Dayal & others v. Krishan Lal Garg & another,* AIR 1997 SC 3765 1996(11) SCC 588: 1996(3) Raj. LW 118: 1997(2) Mad. LW

548: 1997(1) Cal. LT 110

Section 47 and 87-B.-Execution of decree.-Immunity to Ex-ruler.- Scope of.-Suit against a firm, a Partner of which is not a capable of being sued without the consent of Central Government.-Suit instituted without consent of the Central Government.-The decree can be passed against the firm and it can be executed against the remaining partners. *Her Highness Maharani Mandalsa Devi and others v. M. Ramnarain Private Ltd. and others,* AIR 1965 SC 1718: 1965(2) SCJ 853: 1965(3) SCR 421

Sections 47, 104 and 115.-Dismissal of execution.-Remedy of.-The order dismissing the execution on account of failure of decree-holder to take steps.-Order is neither appealable nor is revisable.-Petition invoking inherent jurisdiction seeking the court to recall the order, is maintainable.-Appeal against the order restoring the proceedings is not maintainable. *Keshardeo Chamria v. Radha Kissen Chamria and others,* AIR 1953 SC 23: 1952 SCJ 633: 1953 SCR 136

Section 47, Order 41, Rule 27.-Execution proceedings.-Suit for permanent injunction restraining respondent company from raising any construction.-Lease in favour of respondent cancelled as area in a question included in municipal limits by notification.-Subsequent events after passing of decree.-Writ filed by respondent against the order of Collector allowed observing that Municipal Board can check constructions raised in contravention of Municipal Act.-Case remanded back to High Court for considering effect of cancellation of lease and notification including area within municipal limits. *Municipal Board, Kishangarh vs. Chand Mal & Co.,* AIR 2000 SC 3611 : 1999(9) SCC 198

Section 48.-Execution of decree.- Limitation for.-The provision is governed by the provisions of Limitation Act, 1908.-The provision only deal with maximum limit of time provided for execution. The effect of Section 48 of the Code of Civil Procedure is not to supersede the law of limitation with regard to execution of decrees. The Limitation Act prescribes a period of limitation for execution of decrees. Section 48 of the Code of Civil Procedure dealt with the maximum limit of time provided for execution, but it did not prescribe the period within which each application for execution was to be made. An application for execution was to be made within three years from any of the dates mentioned in the third column of Article 182 of the Limitation Act, 1908. An application for execution of a decree would first have to satisfy Article 182 and it would also have to be found out as to whether Section 48 of the Code of Civil Procedure operated as a further bar. *Prem Lata Agarwal v. Lakshman Prasad Gupta and others,* AIR 1970 SC 1525: 1970 Ker LJ 649

Section 48.-Fresh execution.- Meaning of.-Previous application closed by the Court for statistical purpose.-Subsequent application would not constitute a fresh application. It is not necessary to express our opinion on the question whether such procedure is sanctioned by the Code of Civil Procedure or not; but assuming that the court has no such power, the passing of such an order cannot tantamount to an order of dismisal, for the intention of the court in making an order closed for statistical purposes is manifest. It is intended not to finally dispose of the application, but to keep it pending. Whether the order was without jurisdiction or whether it was valid, the legal position would be the same; in one case it would be ignored and in the other, it would mean what it stated. In either case the execution petition would be pending on the file of the court. That apart, it is not the phraseology used by the executing court that really matters, but it is really the substance of the order that is material. Whatever terminology may be used, it is for the court to ascertain, having regard to the circumstances under which the said order was made, whether the court intended to finally terminate the execution proceedings. If it did not intend to do so, it must be held that the execution proceedings were pending on the file of the court.An application made after 12 years from the date of the decree would be a fresh application within the meaning of Section 48 of the Code of Civil Procedure, if the previous application was finally disposed of. It would also be a fresh application if it asked for a relief against parties or properties different from those proceeded against in the previous execution petition or asked for a relief substantially different from that asked for in the earlier petition. The parties are substantially the same in both the proceedings, and the decree-holders are only proceeding against properties included in the previous application. It cannot, therefore, be treated as a fresh application within the meaning of Section 48 of the Code. *Pentapati China Venkanna and others v. Pentapati Bangararaju and others,* AIR 1964 SC 1454: 1964(1) SCWR 515: 1964(6) SCR 251

Section 51.-Execution of decree.- Detention in civil prison.-In the absence of some vice or *mens rea,* on the part of judgement debtor, detention on mere failure to pay the debt is not called for.-Any other interpretation would render the provision unconstitutional. It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of Daridra Narayana (land of poverty) is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay inspite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfair- ness in such a procedure is inferable from Article 11 of the Covenant. But this is precisely the interpretation we have put on the Proviso to Section 51, C.P.C. and the lethal blow of Article 21 cannot strike down the provision, as now interpreted.The words which hurt are or has had since the date of the decree, the means to pay the amount of the decree. This implies,

superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that latter point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of Article 11 (of the Covenant) and Article 21 (of the Constitution). The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. *Jolly George Varghese and another v. The Bank of Cochin,* AIR 1980 SC 470: 1980(2) SCC 360: 1980(2) SCR 913: 1980 Ker. LT 375

Section 51(c).-Execution by detention.-Considerations for.-Execution of decree against Partner of a firm who over drew from the account.-Decree passed in suit for dissolution.-No allegation of fraud .-Execution by detention in civil prison is not permissible. In the present case, the respondent as the managing partner was liable to render accounts of the partnership assets in his hands. On the taking of the accounts it was found that he overdrew the partnership account and a decree for the sum due was passed against him. No fraud or clandestine dealing is alleged or proved. On these facts it is not possible to say that the decree was for a sum for which he has bound to account in a fiduciary capacity. The High Court rightly held that the conditions of Clause (c) of the proviso to Section 51 of the Code of Civil Procedure were not satisfied. *Prem Ballabh Khulbe v. Mathura Datt Bhatt,* AIR 1967 SC 1342: 1967 All LJ 325: 69 Pun LR 290: 1967 MPLJ 494: 1967(2) SCR 298

Section 51(d).-Receiver.-Duration of appointment.-No provision specifying any fixed duration.-In appropriate case the appointment of Receiver can continue even after disposal of the case and passing of the final decree in Suit. *Hiralal Patni, v. Loonkaran Sethiya and others,* AIR 1962 SC 21

Sections 52 and 53.-Liability of ancestral property.-Compromise in respect of property.-Permissibility .-The provision is a procedural law and does not create or take away a substantive right.-The parties are entitled to compromise to execute the decree against a particular property only. When the decree fulfills the conditions of Section 52(1) of the Civil Procedure Code, it would attract all the incidents which attach by law to a decree of that character. Consequently the decree- holder would be entitled to call in aid the provision of Section 53 of the Code; and if any property in the hands of the sons, other than what they received by inheritance from their father, is liable under the Hindu Law to pay the father's debts, such property could be reached by the decree-holder in execution of the decree by virtue of the provision of Section 53 of the C.P.C. Section 53, Civil Procedure Code, it is admitted, being only a rule of procedure cannot create or take away any substantive right. It is only when the liability of the sons to pay the debts of their father in certain circumstances exists under the Hindu Law, is the operation of the section attracted and not otherwise. It is certainly possible for the parties to agree among themselves that the decree should be executed only against a particular property and no other, but when any statutory right is sought to be contracted out, it is necessary that express words of exclusion must be used. Exclusion cannot be inferred merely from the fact that the compromise made no reference to such right. *Pannalal and another v. Mt. Naraini and others,* AIR 1952 SC 170: 1952 SCJ 211: 1952 SCR 544

Section 54.-Execution of partition decree.-Right of transferee *pendente lite*.-Effect on execution.-Allocation of share.-Transferee *pendente lite* is entitled to seek equitable partition as his predecessor in interest could do.Though the said proceedings were styled as execution proceedings, they were strictly final decree proceedings under Section 54 of the Civil P.C. under which the lands in respect of which assessment was payable to the Government had to be divided by the Collector and the parties had to be put in possession of their respective shares.Section 52 of the Tranfer of Property Act no doubt lays down that a transferee pendenate lite of an interest in an immovable property which is the subject matter of a suit from any of the parties to the suit will be bound in so far as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Civil P.C. clearly recognises the right of a transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard. He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate Court where he is not already brought on record. The position of a person on whom any interest had devolved on account of a transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or a proceeding, or an official receiver who takes over the assests of such a party on his insolvency. An heir or a legatee or an official receiver or a transferee can participate in the execution proceedings even though their names may not have been shown in the decree, preliminary or final. If they apply to the Court to be impleaded as parties they cannot be turned out. The Collector who has to effect partition of an estate under Section 54 of the Civil P.C. has no doubt to divide it in accordance with the decree sent to him. But if a party to such a decree dies leaving some heirs about whose interest there is no dispute

should he fold up his hands and return the papers to the Civil Court? He need not so. He may proceed to allot the share of the deceased party to his heirs. Similarly he may, when there is no dispute, allot the share of a deceased party in favour of his legatees. In the case of insolvency of a party, the official receiver may be allotted the share of the insolvent. In the case of transferees pendente lite also, if there is no dispute, the Collector may proceed to make allotment of properties in an equitable manner instead of rejecting their claim for such equitable partition on the ground that they have no *locus standi.* A transferee from a party of a property which is the subject matter of partition can exercise all the rights of the transferor. There is no dispute that a party can ask for an equitable partition. A transferee from him, therefore, can also do so. *Khemchand Shankar Choudhary and another v. Vishnu Hari Patil and others,* AIR 1983 SC 124: 1983(1) SCC 18: 1983(1) SCR 898: 1982(2) Scale 1120: 1983(2) Bom.CR 294

Section 60.-Attachment of equitable assignment.-Permissibility.-Power of Attorney given to Bank to recover the amount of Bills on behalf of Account Holder to appropriate the amount recovered, towards the loan advanced by the Bank.-The direction is not in the nature of pay order but equitable assignment of fund by way of security not subject to attachment in execution of decree. *Bharat Nidhi Ltd, v. Takhatmal and another,* AIR 1969 SC 313: 1969 All LJ 344: 1969 Jab LJ 460: 1969(1) SCR 595 **Section 60.-Attachment of interest in property.-A mere contingent interest though transferable inter vivos, is not attachable.** *Rajes Kanta Roy v. Smt. Shanti Debi and another,* AIR 1957 SC 255: 1957 SCR 77: 1955 SCJ 197

Section 60.-Expression 'debt' has the same meaning as contained in Section 222(1)(a), Schedule 2, Rule 26(1)(a) of Income Tax Act, 1961.-Debt does not include rent due and payable in future.

The word 'debt' was used in the order/notice issued under Income Tax Act in the same meaning in which it is used in Section 60 C.P.C. The word 'debt' in the said prohibitory order was used to cover debt which had become due and was payable at present and debt which had become due but was payable at a future date. In that sense of the word, rent that would become due and payable in future was in the nature of contingent debt and would not be covered by it. *J. Jermons vs. Aliammal and others,* AIR 1999 SC 3041 : 1999(7) ADSC 487 : 1999(7) SCC 382 : 1999(2) Rent LR 320 : 1999(3) Mad L.W. 595

Section 60(1).-Attachment of salary .-Arrears of salary.-The protection available to salary does not extend to arrears of salary. *Union of India v. Smt. Hira Devi and another,* AIR 1952 SC 227: 1952 SCJ 326: 1952 SCR 765

Sections 60(1)(b) and 60(1)(c).- Agriculturist.-Meaning of.-Dependence on agriculture, if sufficient.-Tilling of land personally .-Necessity of. There is no warrant for imposing any qualification on the plain meaning of the word agriculturist in clauses (b) and (c). In my view, an agriculturist contemplated by the clauses is any person who occupies himself with agriculture. A person occupying himself with agriculture would be an agriculturist though he does not cultivate with his own hands and carries on agriculture in a very large scale. He would still be an agriculturist though he has other means of livelilihood besides agriculture. *Shrimant Appasaheb Tuljaram Desai and others v. Bhalchandra Vithalrao Thube,* AIR 1961 SC 589: 63 Bom.L.R. 521: 1961(2) SCR 163

Section 60(1)(c).-Attachment of house.-Granting immunity or attachment.-A part of residential house used for commercial purpose of shop.-The whole house continues to be exempt from attachment. *Ram Lal and others v. M/s. Piara Lal Gobindram and others,* AIR 1973 SC 2124: 1973 Pun LJ 474: 1973(2) SCC 192: 1974(1) SCR 198

Section 60(1)(ccc).-Protection from attachment.-Exemption to residential house.-Sale of house contrary to stay order.-Sale cannot be defended as having been made under compulsion to pay off the debt.-Such conduct cannot deny the benefit of exemption from attachment under the provision. *Kiran Bala v. Surinder Kumar,* AIR 1996 SC 2094: 1996(4) SCC 372: 1996(4) Scale 440: 1996(5) JT 610: 1996(2) RRR 702

Section 60(1)(g) and (k).-Attachment of Provident Fund.-Permissibility.-So long the amount due to employee is not actually paid to him, the amount is not liable for attachment. So long as the amounts are Provident Fund dues then, till they are actually paid to the government servant who is entitled to it on retirement or otherwise, the nature of the dues is not altered. What is more, that case is also authority for the benignant view that the government is a trustee for those sums and has an interest in maintaining the objection in court to attachment. *Union of India v. Jyoti Chit Fund and Finance and others,* AIR 1976 SC 1163: 1976(3) SCC 607: 1976(3) SCR 763

Section 60(g).-Political Pressure.- Meaning of.-Privy Purse to Ex-ruler of former Indian States is in the nature of political pension.-It is not liable in attachment on execution. The periodical payment of money by the Government to a Ruler of a former Indian State as privy purse on political considerations and under political sanctions and not under a right legally enforceable in any municipal court is strictly a political pension within the meaning of Section 69(1)(g) of the Code of Civil Procedure. The use of the expression privy purse instead of the expression pension is due to historical reasons. The privy purse satisfies all the essential characteristics of a political pension, and as such, is protected from execution under Section 60(1)(g), Code of Civil Procedure. Moreover, an amount of the privy purse receivable from the Government cannot be said to be a debt or other property over which or the proceeds of which he has disposing power within the main part of Section 60(1), Code of Civil Procedure. *Nawab Usmanali Khan v.*

Sagar Mal, AIR 1965 SC 1798: 1965 Jab LJ 1028: 1965 MPLJ 864: 1965(3) SCR 201

Section 60(n).-Attachment of maintenance.-Permissibility.-Assignment of property for maintenance .-Amount of maintenance not fixed.-The decree holder may get Receiver appointed over the property to make provision for maintenance and the balance amount be appropriated towards satisfaction of decree. Union of India v. Smt. Hira Devi and another, AIR 1952 SC 227: 1952 SCJ 326: 1952 SCR 765

Section 64.-Attachment of property.-Lease in contravention of attachment.-The lease is voidable at the instance of decree holder. *Om Prakash Garg v. Ganga Sahai and others,* AIR 1988 SC 108: 1987(3) SCC 553: 1987(2) JT 245: 1988(1) Kant LJ 214

Section 66.-Application of.-Sale by Receiver.-The provision has no application.-There is no requirement of certificate by the court that purchase was not made on behalf of the plaintiff. The certificate by the court referred to in Section 66 is a certificate under Order 21, Rule 94. The procedure envisaged for sale generally and sale of immovable property under under Order 21 is sale by a public auction. Sale by a court through the Receiver appointed by court is not contemplated under these provisions. In a sale by a Receiver a certificate to the purchaser under Order 21, Rule 94, is not given by the court. Therefore, the prohibition under Section 66 cannot be invoked in the case of a sale by the Receiver. A Receiver is appointed under Order 40, Rule 1, and a property can be sold by the Receiver on the directions of the Court even by private negotiations. The requirement of Section 66 of the C.P.C. is a certificate by the court as prescribed. *Tarinikamal Pandit and others v. Perfulla Kumar Chatterjee (dead) by LRs.,* AIR 1979 SC 1165: 1979(3) SCC 280: 1979(3) SCR 340: 1979 BBCJ (SC) 89

Section 66.-Benami purchase.-Bar on suit.-Where the contract of sale communicated to the purchaser and terms of the purchase stood substantially complied with, suit against the promisor for execution of deed of conveyance is not barred. *Messrs. Gorakhram Sadhuram v. Laxmibai wife of Inderlal Nandlal,* AIR 1953 SC 443

Section 66.-Protection to Auction Purchaser.-Scope of.-Suit challenging sale against a transferee of auction purchaser is not permissible .-Protection available is not only against auction purchaser but every person claiming under him. That section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Formerly, the opening words were, no suit shall be maintained against a certified purchaser, and the change was made to protect not only the certified purchaser but any person claiming title under a purchase certified by the Court. The protection is thus available not only against the real purchaser but also against anyone claiming through him. In the present case, the appellant as plaintiff was hit by the section and the defendants were protected by it. *S.M. Karim v. Mst. Bibi Sakina,* AIR 1964 SC 1254: 1964 BLJR 581: 1964(2) SCJ 224: 1964(6) SCR 780

Section 66(1).-Application of.-Joint Family Property.-Provision has no application. Transactions which are called `benami' are lawful and are not prohibited. When it is alleged that a person in whose name the property is purchased or entered in the public record is not the real owner, the Court may, if the claim is proved, grant relief upholding the claim of the real owner. But Section 66(1) seeks to oust the jurisdiction of the Court to give effect to real as against benami title. The object of the clause is to prevent claims before the civil Court that the certified purchaser purchased the property benami for another person. Thereby the jurisdiction of the civil Court to give effect to the real as against the nominal title is restricted and the section must be strictly construed. Where a person alleges that a property purchased at a Court auction was purchased on his behalf or on behalf of some one through whom he claims, the suit is clearly barred. *Girijanandini Devi and others v. Bijendra Narain Choudhary,* AIR 1967 SC 1124: 1967 All LJ 475: 1967 BLJR 513: 1967(1) SCR 93 **Section 66(1).-Bar to suit.-Scope of .-Effect of fraud.-Agent fraudu- lently purchasing property in his own name.-Fiduciary relationship existed between principal and agent governed by Section 88 of the Trust Act.-Suit for declaration of title and possession of property by the principal against the agent is not barred.** *P.V. Sankara Kurup v. Leelavathy Nambiar,* AIR 1994 SC 2694: 1994(6) SCC 68: 1994(3) Scale 832: 1994(5) JT 277: 1994(2) Ker. LT 607

Section 73.-Execution of decree.- Distribution of proceeds.-Priority of Government debt.-Application of. The Government of India was entitled to claim priority for arrears of income-tax due to it from a citizen over debts from him to unsecured creditors and that the English Common Law doctrine of the priority of Crown debts has been given judicial recognition in the territory known as British India prior to 1950 in regard to the recovery of tax dues in priority to other private debts of the taxpayer. The English Common Law doctrine having been incorporated into Indian law, was a law in force in the territory of India, and, by virtue of Art. 372(1) of the Constitution of India, it continued to be in force in India until it was validly altered, repealed or amended. *Collector of Aurangabad and another v. Central Bank of India and another,* AIR 1967 SC 1831: 70 Bom LR 146: 1968 MPLJ 149: 1968 Mah LJ 239: 1967(3) SCR 855

Section 73.-Recovery of arrears of revenue.-Procedure.-Priority of State to recover over other debts.-Scope of.-Sale of attached property in execution of money decree.-The State is entitled to recover the amount from the decree holder who took away the sale proceeds. It is a general principle

of law that debts due to the State are entitled to priority over all other debts. If a decree holder brings a judgment-debtor's property to sale and the sale-proceeds are lying in deposit in Court, the State may, even without prior attachment exercise its right to priority by making an application to the executing Court for payment out. If however the State does not choose to apply to the Court for payment of its dues from the amount lying in deposit in the Court but allows the amount to be taken away by some other attaching decree holder, the State cannot thereafter make an application for payment of its dues from the sale proceeds since there is no amount left with the Court to be paid to the State. However, if the State had already effected an attachment of the property which was sold even before its sale, the State would be entitled to recover the sale proceeds from whoever has received the amount from the Court by filing a suit. Section 71(3) read with 73(2) C.P.C. contemp- lates such a relief being granted in a suit. *Union of India v. M/s. Somasundaram Mills (P.) Ltd. and another.,* AIR 1985 SC 407: 1985(2) SCC 40: 1985(1) Scale 188: 1985(1) Andh LT 434

Section 73(3).-Execution of Decree .-Appropriation of assets.-Priority of claims of State.-Order of Court for rateable distribution passed by the Court.-The claim made by the State after the order of the Court for appropriation cannot be entertained at this stage. As soon as the question of reteable distribution between the decree-holders and the State having statutory priority is determined, and the Court passes an order as to how to appropriate the assets of the judgment-debtor, the rights of the parties become crystalised. What then remains is to give effect to the determination made by the court by officials in charge of concerned departments dealing with Accounts and Cash which is a ministerial act. The rights of the respective decree-holders or claimant are covered by the order for rateable distribution passed by the Court as a result of the adjudication and determination made by the Court. Nothing further remains to be done by the Court in the judicial sphere thereafter. The order partakes of the character of a judgment and decree passed by the Court. What the officials of the Accounts and Cash department are required to do thereafter is to carry out the command of the Court by implementing or giving effect to the order. The test which can be usefully applied is to pose the question whether the said officials can refuse to implement the order by refusing to make payment once the COurt has passed the order. Obviously and undoubtedly they cannot. If the State lays its claim after the order for distribution is made by the Court, it will be of no avail as the property would have gone beyond the reach of the State, it having ceased to be the property of the debtor against whom the State had a claim. No question of property can arise in that situation .-the State having missed the bus. *Kotak and Co. v. State of U.P.,* AIR 1987 SC 738: 1987(1) SCC 455: 1987(1) SCR 926: 1987(1) Scale 12: 1987(1) J.T. 124: 1987 Ker. L.J. 136

Section 75.-Commission to examine witnesses.-Permissibility.-The order of trial court issuing commission is a discretionary order not liable for interference. *M/s. Filmistan Private Ltd., Bombay v. M/s. Bhagwandas Santprakash and another,* AIR 1971 SC 61: 1970(3) SCC 258

Sections 75 and 77.-Requisition to examine witnesses.-Exercise of powers.-Examination of witnesses residing in foreign countries.-Power of court is not subject to any reciprocal agreement between the Government of India and Government of such foreign country. Section 77 of the Code of Civil Procedure read with Section 75 empowers the Court to issue a letter of request to any person other than a Court to examine witnesses residing at any place not within India. This power of the Court is not subject to any reciprocal agreement between the Governments. *M/s. Filmistan Private Ltd., Bombay v. M/s. Bhagwandas Santprakash and another,* AIR 1971 SC 61: 1970(3) SCC 258

Sections 79 and 80.-Suit against Railways.-Necessary parties.- Union of India is a necessary party .- Suit by pleading General Manager alone is not maintainable. *The State of Kerala v. The General Manager, Southern Railway, Madras,* AIR 1976 SC 2538: 1976(4) SCC 265: 1977(1) SCR 419

Section 80.-Application of.-Suit instituted in Federal Court.- Provision of Section 80 not specifically incorporated in the rules of the Court.-The provision has no application on the suit instituted in the Federal Court. Rule 5 of the Federal Court Rules framed under Section 214 of the Government of India Act lays down in clear and unambiguous language that none of the provisions of the Code of Civil Procedure shall apply to any proceedings in the Federal Court unless specifically incorporated in these rules. The provisions of Section 80 have not been incorporated in the rules and that being so, Section 80 cannot affect suits instituted in the Federal Court under Section 204 of the Government of India Act, 1935. *State of Seraikella and others v. Union of India and another,* AIR 1951 SC 253: 1951 SCJ 425: 1951 SCR 474

Section 80.-Application of.-The provision is applicable on a suit under Order 21, Rule 63 and the period of notice is liable to be excluded while computing the limitation. The argument that the present suit is outside the purview of Section 80 of the Code because it is a continuation of the attachment proceedings must be rejected. We ought to bear in mind that the scope of the enquiry under Order 21, Rule 58 is very limited and is confined to question of possession as therein indicated while suit brought under Order 21 Rule 68 would be concerned not only with the question of possession, but also with the question of title. Thus the scope of the suit is very different from and wider than that of the different from and wider than that of the investigation under Order 21 Rule 58. In fact, it is the order made in the said investigation that is the cause of action of the suit under Order 21, Rule 63. Therefore, it would be impossible to hold that such a suit is outside the purview of Section 80 of the Code. They also

proceeded on the basis that Section 80 was a rule of procedure and that any construction which may lead to unjustice is one which ought not to be adopted, since it would be repugnant to the notion of Justice. Having noticed these grounds on which an attempt was judicially made to except from the purview of Section 80 suits, for instance, in which injunction was claimed Viscount Summer, who spoke for the Privy Council, observed that the Act. albeit a Procedure Code, must be read in accordance with the natural meaning of its words and he added that section 80 is express, explicit and mandatory, and it admits of no implications or exceptions. That is why it was held that a suit in which an injunction is proved, is still a suit within the words of the section, and to read any qualification into it is in encroachment on the function of legislation. In our opinion, these observations apply with equal force in dealing with the question as to whether a suit under Order 21, Rule 63 is outside the purview of Section 80 of the Code. *Sawai Singhai Nirmal Chand v. The Union of India,* AIR 1966 SC 1068: 1966 Jab LJ 509: 1966 Mah LJ 371: 1966(2) SCR 986

Section 80.-As existed prior to 1976.-Institution of suit.-Notice period.-Institution before expiry of two months is not valid and is liable to be dismissed as not maintainable. Bihari Chowdhary and another v. State of Bihar and others, AIR 1984 SC 1043: 1984(2) SCC 627: 1984(3) SCR 309: 1984(1) Scale 536: 1984 Pat. LJR (SC) 30

Section 80.-As existed prior to 1976.-Notice to sue.-Substantial compliance.-Identity between the cause of action and relief claimed in the notice as well as in the plaint is substantial compliance of the provision. Our laws of procedure are based on the principle that as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities. Section 80 of the Code is but a part of the Procedure Code passed to provide the regulation and machinery, by means of which the Courts may do justice between the parties. It is therefore merely a part of the adjective law and deals with procedure alone and must be interpreted in a manner so as to subserve and advance the cause of justice rather than to defeat it. Ghanshyam Dass and others v. Dominion of India and others, AIR 1984 SC 1004: 1984(3) SCC 46: 1984(3) SCR 229: 1984(1) Scale 528: 1984(1) Land LR 548

Section 80.-Form of notice.-Strict compliance of provision.-Necessity of.-The terms of notice need not be scrutinised in a pedantic manner or a manner completely divorced from common sense. *Dhian Singh Sobha Singh and another v. Union of India,* AIR 1958 SC 274: 1958(1) MLJ 93: 1958 SCJ 363: 1958 SCR 781

Section 80.-Notice.-Form of.- Difference between the notice and plaint.-The difference not found to be substantial.-Notice issued is not invalid. *Union of India v. Jeevan Ram,* AIR 1958 SC 905:

Section 80.-Notice.-Form of.- Interpretation.-Contents of Notice, effect of incidental defect or irregularity. The object of the notice under Section 80, Civil Procedure Code is to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position and if that course is justified to make amends or settle the claim out of court. The section is no doubt imperative; failure to service notice complying with the requirements of the statute will entrail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim. In considering whether the provisions of the statute are complied with, the Court must take into account the following matters in each case (1) whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person serving the notice; (2) whether the cause of action and the relief which the plaintiff claims are set out with sufficient particularity, (3) whether a notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section; and (4) whether the suit is instituted after the expiration of two months next after notice has been served, and the plaint contains a statement that such a notice has been so delivered or left. In construing notice the Court cannot ignore the object of the legislature, viz., to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position. If on a reasonable reading of the notice the plaintiff is shown to have given the information which the statute requires him to give any incidental defects or irregularities should be ignored. *Beohar Rajendra Sinha and others v. The State of Madhya Pradesh and another,* AIR 1969 SC 1256: 1969 (1) SCC 796: 1969(3) SCR 955

Section 80.-Notice.-Form of.- Misdescription of identity of the person sending the notice.-Effect of.-Notice issued in the name of firm of sole proprietorship.-Suit filed by the sole proprietor.-Permissibility. The present suit is analogous to the case of trustees where the suit cannot be filed in the name of the trust it can only be filed in the name of the trustees and the notice therefore has also to be given in the name of all the trustees who have to file a suit. Therefore comparing the notices given in this suit with the plaint, and remembering that Messrs. S.N. Dutt and Co. is not a partnership firm but merely a name and style in which an individual trades, the conclusion is inescapable that the person giving the notices is not the same as the person suing. *S.N. Dutt v. Union of India,* AIR 1961 SC 1449: 1961(1) Ker LR 543: 1962(1) SCR 560

Section 80.-Notice.-Form of.- Necessity of details.-Any incidental defect or omission can be ignored.- Where on reasonable consideration of notice, plaintiff is shown to have given sufficient information about his claim, he should not be non- suited on account of an incidental defect or error. The object of the notice under Section 80 is to give to the Government or the public servant

concerned an opportunity to reconsider its or his legal position and if that course is jutified to make amends or settle the claim out of Court. The section is imperative and must undoubtedly be strictly construed: failure to serve a notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Every venial error or defect cannot be permitted to be treated as a peg to hang a defence to defeat a just claim. In each case in considering whether the imperative provisions of the statute are complied with, the Court must face the following questions: (1) whether the name, description and residence of the plaintiff are given so to enable the authorities to identify the person serving the notice; (2) whether the cause of action and the relief which the plaintiff claims are set out with sufficient particularly; (3) whether the notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section; and (4) whether the suit is instituted after the expiration of two months next after notice has been served, and the plaint contains a statement that such a notice has been so delivered or left. In construing the notice the Court cannot ignore the object of the Legislature to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position. If on a reasonable reading but not so as to make undue assumptions the plaintiff is shown to have given the information which the statute requires him to give, any incidental defects or errors may be ignored. *The State of Andhra Pradesh v. Gundugola Venkata Suryanarayana Garu,* AIR 1965 SC 11: 1964 All LJ 129: 1964(1) Ker LR 246: 1964(4) SCR 945

Section 80.-Notice.-Form of.- Principle of construction of notice.- Contents of notice must be read as a whole in reasonable manner. The object of the contemplated by that section is to give to the concerned Governments and public officers opportunity to reconsider the legal position and to make amends or settle the claim, if so advised without litigation. The legislative intention behind that section in our opinion is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigations. The purpose of law is advancement of justice. The provisions in Section 80, Civil Procedure Code are not intended to be used as booby traps against ignorant and illiterate persons. *Raghunath Das v. Union of India,* AIR 1969 SC 674: 1969 All LJ 570: 1969 BLJR 665: 1969(1) SCR 450

Section 80.-Notice.-Form of.-The notice must give sufficient notice of the case.-The notice must be interpreted in reasonable manner and not in pathetic manner. The object of Section 80 is manifestly to give the Government or the public officer sufficient notice of the case which is proposed to be brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted. In order to enable the Government or the public officer to arrive at a decision it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which the claim is founded and the precise reliefs asked for.The terms of this section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from common sense. *The State of Madras v. C.P. Agencies and another*, AIR 1960 SC 1309

Section 80.-Notice.-Form of.- Variance between the terms of notice and the claim made in the plaint.- No opportunity to the Government to settle the claim for want of particulars.-Change in circumstances between the issuance of notice and filing of suit.-Suit is barred on account of non-compliance of provisions. There is a complete variance between the claim made in the notice and the claim in the plaint. We desire to make it clear that what we have here is not a case where a claim for a definite sum in the notice is later reduced in the plaint, but one where there is no possibility of establishing any relationship between the claim made in the suit and that in the notice which precedes it. In the notice served by the appellant there were several heads of claim, though they all arose out of a single contract and we consider that on a reasonable and proper construction of Section 80, Civil Procedure Code the authority on whom the notice is served has a right to be informed what the claim of the party is in respect of each of the several heads. It is, no doubt, true that a notice under Section 80 is not a pleading and need not be a copy of the plaint and that no particular or technical form is prescribed for such a notice, still having regard to the object for which Section 80 has been enacted we consider that the details which it contains should be sufficient to inform the party on whom it is served of the nature and basis of the claim and the relief sought, and in so stating the position we are merely reproducing the terms of the section. No doubt a notice has to be interpreted not pedantically but in the light of common sense without one being hypercritical about the language but the question is whether in the notice before us there is substantial information conveyed on the basis of which the recipient of the notice could consider the claim of the would-be plaintiff and avert the suit. For the reasons already stated this question can only be answered in the negative. If the notice had gone on to state the amount claimed under each of the several heads of items claimed it would have been possible for the government to have considered whether it was worth their while to settle with the plaintiff by agreeing to pay the sum demanded. Thus they had never an opportunity by reason of the form of the notice, and the manner in which the relief claimed was stated. When one comes to the plaint however, the entire basis or rather the cause of action is changed. By that date the contract had been terminated, the licence having been suspended and afterwards the Collector had taken over the management of the shops under Section 39 of the Punjab

Excise Act. There was, therefore a radical difference between the state of circumstances when the impugned notice was issued and when the plaint was filed which is reflected in the allegations made in the two documents and the reliefs claimed in each. In view of these circumstances we have no hesitation in holding that even on a very narrow and strict view of Section 80 there was no compliance with its terms. *Amar Nath Dogra v. Union of India,* AIR 1963 SC 424: 1963 All LJ 101: 1963(2) MLJ (SC) 67: 1963(2) SCR 702.

Section 80.-Notice.-*Locus standi*.- Representative suit.-Notice issued on behalf of more than one persons .-Suit filed on behalf of one of such persons is not illegal. The right to institute a representative action may be exercised by one or more persons having an interest which is common with the others but it can only be exercised with the permission of the Court. If the Court grants permission to one person to institute such a representative action and if that person had served the notice under Section 80, the circumstance that an other person had joined him in serving the notice but did not effectuate that notice by joining in the suit, would not in our judgment be a sufficient ground for regarding the suit as defective. *The State of Andhra Pradesh v. Gundugola Venkata Suryanarayana Garu,* AIR 1965 SC 11: 1964 All LJ 129: 1964(1) Ker LR 246: 1964(4) SCR 945

Section 80.-Notice.-Locus standi.- Suit in representative capacity.-No previous sanction to institute the suit is required to be taken before issuing the notice in respect of a representative suit. There is nothing in Section 80 of the Code or Order 1, Rule 8 Code of Civil Procedure which supports this submission, and there is inherent indication in Order 1, Rule 8 to the contrary. To enable a person to file a suit in a representative capacity for and on behalf of numerous persons where they have the same interest, the only condition is the permission of the Court. The provision which requires that the Court shall in such a case give, at the plaintiff's expense, notice of the institution of the suit to all persons having the same interest, and the power reserved to the Court to entertain an application from any person on whose behalf or for whose benefit the suit is instituted, indicate that no previous sanction or authority of persons interested in the suit is required to be obtained before institution of the suit. Nor is there anything in Section 80 that notice of a proposed suit in a representative capacity may be served only after expressly obtaining the authority of persons whom he seeks to represent Section 80 requires that the name, description and place of residence of the plaintiff result be set out in the notice and not of persons whom he seeks to represent. A suit filed with permission to sue for and on behalf of numerous persons having the same interest under Order 1, Rule 8 is still a suit filed by the person who is permitted to sue as the plaintiff: the persons represented by him do not in virtue of the permission become plaintiffs in the suit. Such other persons would be bound by the decree in the suit, but that is because they are represented by the plaintiff, not because they are parties to the suit unless by express order of the Court they are permitted to be impleaded. *The State of Andhra Pradesh v. Gundugola Venkata Suryanarayana Garu,* AIR 1965 SC 11: 1964 All LJ 129: 1964(1) Ker LR 246: 1964(4) SCR 945

Section 80.-Notice.-Necessity of.- Suit withdrawn with leave to file fresh suit.-Fresh notice is not necessary if the plaint of the suit meets the requirements of earlier notice. If the plaint which is being considered by the Court has been preceded by a notice which satisfies the requirements of Section 80, Civil Procedure Code then the fact that before the plaint then under consideration, there had been another, plaint which had been filed and withdrawn cannot on any principle, be held to have exhausted or extinguished the vitality of the notice issued. *Amar Nath Dogra v. Union of India,* AIR 1963 SC 424: 1963 All LJ 101: 1963(2) MLJ (SC) 67: 1963(2) SCR 702.

Section 80.-Scope of.-The provision does not define the right of parties nor confer any right on the parties.-It is a mode of procedure for getting relief in respect of a cause of action.-It is a part of machinery for obtaining legal right. *State of Seraikella and others v. Union of India and another,* AIR 1951 SC 253: 1951 SCJ 425: 1951 SCR 474

Section 80.-Statutory notice.- Object of.-Need to reduce litigation expenses by the Government.-Necessity of conciliatory attitude on the part of Government, emphasised. Governments must be made accountable by Parliamentary Social audit for wasteful litigative expenditure inflicted on the community by inaction. A statutory notice of the proposed action under Section 80, C.P.C. is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. Now Section 80 has become a ritual because the administration is often un-responsive and hardly lives up to the Parliament's expectation in continuing Section 80 in the Code despite the Central Law Commission's recommen- dations for its deletion. A litigative policy for the State involves settlement of governmental disputes with citizens in a sense of conciliation rather than in a fighting mood. Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in gourt. *State of Punjab v. M/s. Geeta Iron & Brass Works Ltd.,* AIR 1978 SC 1608: 978(1) SCC 68: 1978(1) SCR 746: 1978 Ker LT 37

Section 80.-Suit against public officer.-Act purporting to be in official capacity.-Meaning of.-It includes act of nonfeasance and misfeasance. The provisions indicate that the Registrar is a Public Officer. The words act purporting to be done in official capacity have been construed to apply to nonfeasance as well as to misfeasance. The word act extends to illegal omissions. No distinction can be made between acts done illegally and in bad faith and acts done *bona fide* in official capacity.Section 80 of

the Code of Civil Procedure therefore is attracted when any suit is filed against a Public Officer in respect of any act purporting to be done by such Public Officer in his official capacity. The language of Section 80 of the Code of Civil Procedure is that a notice is to be given against not only the Government but also against the Public Officer in respect of any act purporting to be done in his official capacity. *State of Maharashtra and another v. Shri Chander Kant,* AIR 1977 SC 148: 1977(1) SCC 257: 1977(1) SCR 993

Section 80.-Notice.-Plea taken in written statement.-Issue framed by trial Court.-Plea not required to be taken in amended written statement.

There can be no dispute to the proposition that a notice under Section 80 can be waived. But the question is whether merely because in the amended written statement such a plea is not taken it amounts to waiver. This contention was argued before the appellant Court. Even otherwise we find that in the suit itself Issue No. 4 had been raised as to whether or not there was a valid and appropriate notice under Section 80. Such a point having been taken in the original written statement and an issue having been raised, it was not necessary that in the amended written statement such a plea be again taken. *Bishandayal and Sons vs. State of Orissa and others,* AIR 2001 SC 544 : 2001(1) SCC 555 : 2001(1) JT 58

Sections 80 and 2(17)(h).-Suit against public officer.-Necessity of notice.-An officer appointed by the Government and performing public duties.-The fact that he received the salary and allowances from the organisation he was presently posted does not change his status as public officer.-Suit without notice is not maintainable. In the present case, the Provident Fund Commissioner holds the office of Commissioner on appointment by Government by virtue of his office. His services are temporarily placed at the disposed of the Board. He does not therefore cease to be an in the service of the Government. The payment of his pay out of the Fund does not alter his status as Government employee. We are, therefore, of the opinion that the courts below have erred in holding that the Coal Mines Provident Fund Commissioner is not a public officer within the meaning of the term in Section 2(17)(h) of the C.P.C. *Coal Mines Provident Fund Commissioner v. Ramesh Chander Jha,* AIR 1990 SC 648: 1990(1) SCC 589: 1990(1) SCR 181: 1990(1) JT 115

Sections 84 and 86.-Suit against foreign ruler.-Cause title of suit.- Form of. Even when the Ruler of a State sues or is sued, the suit has to be in the name of the State: that is the effect of the provision of Section 87, so that it may be legitimate to infer that the effect of reading Sections 84 or is a suit against the Ruler of a foreign State under Section 86. As a matter of procedure, it would not be permissible to draw a sharp distinction between the Ruler of a foreign State and a foreign State of which he is the Ruler. For the purpose of procedure in every case the suit has to be in the name of State. The effect of Section 86(1) is to modify to a certain extent the doctrine of immunity recognised by International Law. This section provides that foreign States can be sued within the municipal Courts of India with the consent of the Central Government and when such consent is granted as required by Section 80(1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the municipal Courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure. In substane, Section 86(1) is not merely procedural; it is in a sense a counter- part of Section 84. Whereas Section 84 confers a right on a foreign State to sue, Section 86(1) is not merely procedural; it is in a sense a counter-part of Section 84. Whereas Section 84 confers a right on a foreign State to sue, Section 86(1) in substance imposes a liability on foreign States to be sued, though this liability is circumscribed and safeguarded by the limitations prescribed by it. That is the effect of Section 86(1). *Mirza Ali Akbar Kashani v. The United Arab Republic and another,* AIR 1966 SC 230: 1966(1) SCR 319

Sections 84 and 86.-Suit against foreign State.-Permissibility.- Consent of the Central Government not obtained before filing the suit for breach of contract claiming it to be a private right, is not maintainable. The effect of Section 86(1) is to modify to a certain extent the doctrine of immunity recognised by International Law. This section provides that foreign States can be sued within the municipal Courts of India with the consent of the Central Government and when such consent is granted as required by Section 80(1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the municipal Courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure. In substance, Section 86(1) is not merely procedural; it is in a sense a counter- part of Section 84.Whereas Section 84 confers a right on a foreign State to sue, Section 86(1) in substance imposes a liability on foreign States to be sued, though this liability is circumscribed and safeguarded by the limitations prescribed by it. That is the effect of Section 86(1). In view of our conclusion that Section 86(1) applies to the present suit, it follows that in the absence of the consent of the Central Government as prescribed by it, the suit cannot be entertained. *Mirza Ali Akbar Kashani v. The United Arab Republic and antother,* AIR 1966 SC 230: 1966(1) SCR 319

Section 86.-Consent of Central Government.-Considerations for.-Necessity of objective examination.-The object of provision is not to protect foreign trader having committed breach of contract thereby causing loss to plaintiff. While considering the question of grant or refusal of such consent, the Central Government if expected to examine that question objectively. Once the Central Government is satisfied that a cause of action has accured to the applicant against any foreign company or corporation, which shall be deemed to be a foreign State, such consent should be given. The immunity and protection extended to the foreign State on the basis of International Law should not be stretched to a

limit, so that a foreign company and corporation, trading within the local limits of the jurisdiction of the Court concerned, may take a plea of Section 86, although *prima facie* it appears that such company or corporation is liable to be sued for any act or omission on their part or for any breach of the terms of the contract entered on their behalf. It is neither the purpose nor the scope of Section 86 to protect such foreign traders, who have committed breach of the terms of the contract, causing loss and injury to the plaintiff. But, if it appears to the Central Government that, any attempt on the part of the plaintiff, to sue a foreign State, including any company or corporation, is just to harass or to drag them in a frivolous litigation, then centrally the Centre Government shall be justified in rejecting any such application for consent, because such motivated action on the part of the plaintiff, may strain the relations of this country with the foreign State. *Veb Deautfracht Seereederei Rostock (D.S.P. Lines) a Department of the German Democratic Republic v. New Central Jute Mills Co. Ltd. and another,* AIR 1994 SC 516: 1994(1) SCC 282: 1993(4) Scale 390: 1993(6) JT 479: 1994(2) Mah. LR 596: 1994(1) Mad. LJ 66

Section 86.-Sanction for prosecution .-Suit against Foreign Consulate.- Denial of permission on account of political grounds.-No particulars of such ground or reasons for refusal communicated.- Direction given to the Central Government to re-consider the request for grant of consent to sue the Consulate. *Shanti Prasad Agarwalla and others v. Union of India and others,* AIR 1991 SC 814: 1991 Supp (2) SCC 296

Section 86.-Suit against foreign State.-Foreign company owned by foreign State.-Suit without consent of Central Government is not maintainable. The appellant had produces the Constitution of the German Democratic Republic, Art. 12 whereof has been reproduced above, which provides that larger industrial enterprises, banks, insurance companies, nationally-owned farms, means of transport of the railways, ocean shipping and civil aviation, post and telecommunication installations, are nationally-owned property private ownership thereof is inadmissible. In view of the aforesaid Art. 12 of the Constitution and the certificate granted by the Counsel General of the German Democratic Republic, the appellant shall be deemed to be a department of the Government of German Democratic Republic. The appellant having been held to be a foreign State within the meaning of Section. 86 and the plaintiff-respondent not having obtained the consent of the Central Government, as required by Section 86, the suit filed on its behalf was not rightly entertained by the trial Court. The question whether a suit should be entertained, cannot be deferred, till the stage of the final disposal of the suit, because that will serve neither the interest of the plaintiff nor of the defendant. The object of Section, 86 is to save foreign suits in which there are hardly any merit. If the foreign State is required to file written statement and to contest the said suit and only at the stage of final disposal, a verdict is given whether in the facts and circumstances of the particular case, such foreign State is entitled to the protection of Section 86 of the Code, the very object and purpose of Section 86 shall be frustrated. The bar of Section 86 can be taken at the earliest opportunity and the Court concerned is expected to examine the same. *Veb Deautfracht Seereederei Rostock (D.S.P. Lines) a Department of the German Democratic Republic v. New Central Jute Mills Co. Ltd. and another,* AIR 1994 SC 516: 1994(1) SCC 282: 1993(4) Scale 390: 1993(6) JT 479: 1994(2) Mah. LR 596: 1994(1) Mad. LJ 66

Sections 86 and 87.-Sanction to sue foreign State.-Consideration for.- Procedure for exercise of powers.- Principles of natural justice are inherent in the nature of power.- Need for objective evaluation.-the concerned authority must pass reasoned order even though it is not required to adjudicate the claim on merits. It is well to bear in mind the two principles sovereign immunity rests. So far as the principle expressed in *maxim par in parem non habet jurisdictionem* is concerned with the status of equality. The other principle on which immunity is based is that of non-intervention in the internal affairs of other states. It is true that these provisions both of Sections 86 and 87 are intended to save the foreign States from harassment which would be caused by the institution of a suit but except in cases where the claim appears to be frivolous patently, the Central Government should normally accord consent or give sanction against foreign States unless there are cogent political and other reasons. Normally, however, it is not the function of the Central Government to attempt to adjudicate upon the merits of the case intended to be made by the litigants in their proposed suits. It is the function of the courts of competent jurisdiction and the Central Government cannot under Section 86 of the Code usurp that function. The power given to the Central Government must be exercised in accordance with the principles of natural justice and in consonance with the principle that reasons must appear from the order. This sanction or lack of sanction may, however, be questioned in the appropriate proceedings in court but inasmuch as there is no provision of appeal, it is necessary that there should be an objective evaluation and examination by the appropriate authority of relevant and material factors in exercising its jurisdiction under Section 86 by the Central Government. There is an implicit requirement of observance of the principles of natural justice and also the implicit requirement that decision must be expressed in such a manner that reasons can be spelled out from such decision. Though this is an administrative order in a case of this nature, there should be reasons. If the administrative authorities are enjoined to decide the rights of the parties, it is essential that such administrative authority should accord fair and proper hearing to the person to be affected by the order and give sufficiently clear and explicit reasons. Such reasons must be on relevant material factors objectively considered. There is no claim of any privilege that

disclosure of reasons would undermine the political or national interest of the country. *Harbhajan Singh Dhalla v. Union of India,* AIR 1987 SC 9: 1986(4) SCC 678: 1987(1) SCR 114: 1986(2) Scale 728: 1986 J.T. 765: 1986(31) DLT 198

Sections 86 and 87-B.-Suit.- Meaning of.-Proceedings under Arbitration Act seeking decree in term of Award is not a suit and therefore, is not barred without the consent of Central Government. A proceeding under Section 14 read with Section 17 of the Indian Arbitration Act, 1940 for the passing of a judgment and decree on an award does not commence with a plaint or a petition in the nature of a plaint, and cannot be regarded as a suit and the parties to whom the notice of the filing of the award is given under Section 14(2) cannot be regarded as sued in any Court otherwise competent to try the suit, within the meaning of Section 86(1) read with Section 87B, Code of Civil Procedure. Accordingly, the institution of this proceeding against the Ruler of a former Indian State is not barred by Section 86(1) read with Section 87B. Section 141, Code of Civil Procedure does not attract the provisions of Section 86(1) read with Section 87B to the proceedings under Section 14 of the Indian Arbitration Act. Section 86(1) read with Section 87B confers upon the Rulers of former Indian States substantive rights of immunity from suits. Section 141 makes applicable to other proceedings only those provision of the Code which deal with procedure and not those which deal with substantive rights. Nor does Section 41(a) of the Indian Arbitration Act 1940 carry the matter any further. By that section, the provisions of the Code of Civil Procedure, 1908 are made applicable to all proceedings before the Court under the Act. Now, by its own language Section 86(1) applies to suits only and Section 141, Code of Civil Procedure does not attract the provisions of Section 86(1) to proceedings other than suits. According, by the conjoint application of Section 41(a) of the Indian Arbitration Act and Section 86(1) and 141 of the Code of Civil Procedure, the provisions of Section 86(1) are not attracted to a proceeding under Section 14 of the Indian Arbitration Act, 1940. It follows that the Court was competent to entertain the proceeding under Section 14 of the Indian Arbitration Act, 1940 and to pass a decree against the appellant in those proceedings, though no consent to the institution of those proceedings had been given by the Central Government. *Nawab Usmanali Khan v. Sagar Mal,* AIR 1965 SC 1798: 1965 Jab LJ 1028: 1965 MPLJ 864: 1965(3) SCR 201

Section 86-B.-Sue.-Meaning of.- The term includes the entire proceedings from its inception and includes its continuation. The word sued means not only the filing of a suit or a civil proceeding but also their pursuit through Courts. A person is sued not only when the plaint is filed, but is sued also when the suit remains pending against him. The word sued covers the entire proceeding in an action, and the person proceed against is sued throughout the duration of the action. It follows that consent is necessary not only for the filing of the suit against the ex-Ruler but also for its continuation from the time consent is required. If the language of Section 86 read with Section 87-B were applicable only to the initiation of a civil suit, these cases might have been helpful; but since the words may sue include not only the initiation of a suit but its continuation also, it is manifest that neither the suit could be filed nor maintained except with the consent of the Central Government. *Mohanlal Jain v. His Highness Maharaja Shri Sawai Man Singhji, Ex-Ruler of Jaipur and others,* AIR 1962 SC 73

Section 87-B.-Consent of Govern- ment.-Considerations for.- Adjudication of the claim on merits is not permissible.-Where the claim discloses justifiable and tribal issues, consent should be granted. The power conferred on the Central Government to accord, or refuse to accord, consent to the proposed suit, must be very carefully exercised. Section 87B is intended substantially to save the Rulers of former Indian States from harassment which would be caused by the institution of frivolous suits; excepting cases where the claims appear to be frivolous prima facie, the Central Government should normally accord consent to the litigants who want to file suits against Rulers of former Indian States whenever it appears that the claims disclosed justifiable and triable issues between them and the Rulers sought to besued. Normally, it is not the function of the Central Government to attempt to adjudicate upon the merits of the claim intented to be made by the litigants in their proposed suits; that is the function of civil courts of competent jurisdiction, and so, the Central Government should not attempt to assume the jurisdiction of a civil court and decide whether a claim is well-founded or not before according consent to the institution of the suit. Just as in the case of suits falling under the purview of Section 80 the legislature requires that notice should be given of the plaint with all the particulars specified by Section 80 and in the manner prescribed for the purpose of avoiding unnecessary litigation, so in the case of applications made under Section 87B government may reasonable and legitimately try to see if the institution of the suits can be avoided by asking the Ruler of a former Indian State to consider the claim and settle it amicably with out litigation. It is, of course true that under Section80 there is no question of any consent or sanction being given as there is in Section 87B; but we have referred to Section 80 in this context to indicate one possible purpose which Section 87B,like Section 80, may serve. *Maharaj Kumar Tokendra Bir Singh v. Secretary, to the Government of India, Ministry of Home Affairs and another,* AIR 1964 SC 1663: 1964(2) SCA 797

Section 87-B.-Discrimination.- Validity of.-Protection given to the ex-rulers of Indian States in accordance with the provisions of the Constitution and therefore is not discriminatory or unconstitutional. *Narottam Kishore Deb Varman and others v. Union of India and another,* AIR 1964 SC 1590: 1964(2) SCA 718: 1964(7) SCR 55

Section 87-B.-Effect on Partnership Firm.-Suit against a firm, a Partner of which is not a capable of

being sued without the consent of Central Government.-Suit instituted without consent of the Central Government.-The decree can be passed against the firm and it can be executed against the remaining partners. The persons who are individually called partners are collectively called a firm, and the name under which their business is carried on is called the firm name, see Section 4 of the Indian Partnership Act, 1932. Order 30, Rule 1 of the Code of Civil Procedure enables two or more persons claiming or being liable as partners and carrying on business in India to sue or be sued in the name of the firm of which they were partners at the time of the accrual of the cause of action. Rule 1 shows that the individual partners sue or are sued in their collective firm name. Rule 2 provides that on disclosure of the names of the partners of the plaintiff firm, the suit proceeds as if they are named as plaintiffs in the plaint. Rule 6 provides that the persons sued in the firm name must appear individually in their own names. A suit by or in the name of a firm is thus really a suit by or in the name of all its partners. The suit so far as it was one against the Maharaja of Sirmur was incompetent and the decree against the firm so far as it is a decree against him was a nullity. But the suit against the firm other than the Maharaja of Sirmur was competent, and a decree could be executed against the partnership property and against the other partners by following the procedure of Order 21, Rule 50 of the Code of Civil Procedure. It is true that respondent No. 1 obtained a decree against the firm of Jagatsons International Corporation simply, but the decree should be suitably amended so as to make it a decree against the firm of Jagatsons International Corporation other than the Maharaja of Sirmur, and the decree so read is a valid decree which may be executed against the partnership property and the other partners of the firm by recourse to the machinery of Order 21, Rule 50 of the Code of Civil Procedure. The application of respondent No. 1 under Order 21, Rule 50(2) for leave to execute the decree against the other partners is, therefore, maintainable. *Her Highness Maharani Mandalsa Devi and others v. M. Ramnarain Private Ltd. and others,* AIR 1965 SC 1718: 1965(2) SCJ 853: 1965(3) SCR 421

Section 87-B.-Validity of.- Discrimination in favour of ex Rulers .-Immunity to Ex-Rulers from being sued is granted in accordance with the constitution and therefore is not invalid. It is easy to see that the ex-Rulers form a class and the special legislation is based upon historical considerations applicable to them as a class. The Princes who were, before integration, sovereign Rulers of Indian States, handed over, after the foundation of the Republic, their States to the Nation in return for an annual Privy Purse and the assurance that their personal rights, privileges and dignities would be respected. The Constitution itself declared that these rights, etc., would receive recognition. A law made as a result of these considerations must be treated as based on a proper classification of such Rulers, who had signed the agreement of the character described above. It is based upon a distinction which can be described as real and substantial, and it bears a just relation to the object sought to be attained. It is further contended that the Article speaks of privileges but not of immunities, and we were referred to certain other Articles of the Constitution where immunities are specifically mentioned. It is not necessary to refer to those articles. Immunity from civil action may be described also as a privilege, because the word privilege is sufficiently wide to include an immunity. The Constitution was not limited to the choice of any particular words, so long as the intention was clearly expressed. In our opinion, the words personal rights and privileges are sufficiently comprehensive to embrace an immunity of this character. It is, therefore, clear that the section cannot be challenged as discriminatory, because it arises from a classification based on historical facts. *Mohanlal Jain v. His Highness Maharaja Shri Sawai Man Singhji, Ex-Ruler of Jaipur and others,* AIR 1962 SC 73: 1962 (1) SCJ 104: 1962 (1) SCR 702.

Section 92.-Administration of trust property.-Administration of scheme .-Power of Court to give directions, reserved in the scheme.-The provision of clause (f) of sub-section (1) of Section 92 has no application relating to selling or otherwise alienating or mortgaging the property of trust. Clause (f) was put in *inter alia* to give power to Court to permit lease, sale, mortgage or exchange of property where, for example, there may be a prohibition in this regard in the trust deed relating to a public trust. There may be other situations where it may be necessary to alienate trust property which might require Court's sanction and that is why there is such a provision in Cluase (f) in Section 92(1). But that clause in our opinion was not meant to limit in any way the power of trustees or managers to manage the trust property to the best advantage of the trust property to the best advantage of the trust and in its interest, and if necessary, even to let, sell, mortgage or exchange such property. Further if Clause (f) cannot be read to limit the powers of trustees or managers to manage the trust-property in the interest of the trust and to deal with it in such manner as would be to the best advantage of the trust, there can be no bar to a provision being made in a scheme for directions by the Court in that behalf. If anything, such a provision would be in the interest of the trust, for the Court would not give directions to let, sell, mortgage or exchange the trust property or any part thereof unless it was clearly in the interest of the trust. Such a direction can certainly be sought by the trustees or managers or even by one manager out of two if they cannot agree, and there is nothing in Clause (f) in our opinion which militates against the provision in the scheme for obtaining such direction. *Chairman Madappa v. M.N. Mahanthadevaru and others,* AIR 1966 SC 878: 1966(1) SCWR 393: 1966(2) SCR 151

Section 92.-Application of.-Suit by idol through worshipper for declaration of title in property.-Such suit is in the nature of private suit on which provision has no application. We do not see any

justification for denying such a right to the worshipper. An idol is in the position of a minor and when the person representing it leaves it in a lurch, a person interested in the worship of the idol can certainly be clothed with an ad hoc power of representation to protect its interest. It is a pragmatic, yet a legal solution to a difficult situation. Should it be held that a Shebait, who transferred the property, can only bring a suit for recovery, in most of the cases it will be an indirect approval of the dereliction of the Shebait's duty, for more often than not he will not admit his default and take steps to recover the property, apart from other technical pleas that may be open to the trnsferee in a suit. Should it be held that a worshipper can file only a suit for the removal of a Shebait and for the appointment of another in order to enable him to take steps to recover the property, such a procedure will be rather a prolonged and a complicated one and the interest of the idol may irreparably suffer. That is why decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol. The suit is for a declaration of the plaintiff's title and for possession thereof and is, therefore, not a suit for one of the reliefs mentioned in Section 92 of the Code of Civil Procedure. In either view, this is a suit outside the purview of Section 92 of the said Code and therefore, the said section is not a bar to its maintainability. *Bishwanath and another v. Sri Thakur Radha Ballabhji and others,* AIR 1967 SC 1044: 1967(2) Andh LT 301: 69 Pun LR 761: 1967(2) SCR 618

Section 92.-Enforcement of Wakf Act.-Effect of.-The suit instituted prior to enforcement of Wakf Act does not abate on coming into force of the said Act.-The said Act only requires the Board to participate in the proceedings or challenge the decree as void if no notice is issued to it.-Challenge to decree by a party other than Board not maintainable. *Mohammed Ghouse Sahib And others v. Muhammad Kuthubudin Sahib and others,* AIR 1985 SC 375: 1985(1) SCC 628: 1984(2) Scale 986: 1985(1) MLJ (SC) 33

Section 92.-Impleadment of trustees .-Necessity of.-No relief asked against certain trustees who were not even impleaded as parties in the suit.-Decree passed against such persons is illegal. *Sheikh Abdul Kayum and others v. Mulla Alibhai and others,* AIR 1963 SC 309: 1963 Mad LJ 49: 1963 MPLJ 57: 1963(3) SCR 623

Section 92.-Investigation into title .-Permissibility.-Suit under the provision for settlement of Scheme of management is permissible.-It is not proper for the court to investigate title of the property in such suit. In our opinion in a suit for the settlement of the scheme for the management of a temple it is not appropriate for the court to investigate questions of title to property about which there is dispute. The bulk of the lands are in the hands of transferees who are not parties to the proceeding under Section 92 of the Code of Civil Procedure and of course are not parties to the appeal either. Their inclusion in the schedules to the scheme as being debutter property will not affect the rights of those persons in any way and the fact that they are debuttar properties will have to be established if and when appropriate proceedings are taken for obtaining their possession. *Sree Kalimata Thakurani of Kalighat v. Jibandhan Mukherjee and others,* AIR 1962 SC 1329

Section 92.-Leave of court.-Object of.-The provision is aimed at preventing undue harassment of public trusts from frivolous litigation. The main purpose of Section 92(1) is to give protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them. That is why it provides that suits under that section can only be filed either by the Advocate General, or two or more persons having an interest in the trust with the consent in writing of the Advocate-General. The object clearly is that before the Advocate-General files a suit or gives his consent for filing a suit under Section 92, he would satisfy himself that there is a*prima facie* case either of breach of trust or of the necessity for obtaining directions of the Court. *Chairman Madappa v. M.N. Mahanthadevaru and others,* AIR 1966 SC 878: 1966(1) SCWR 393: 1966(2) SCR 151

Section 92.-Leave to sue.-Necessity of.-No allegation of breach of trust or necessity of scheme of administration.-Provision has no application. A suit under Section 92 is of a special nature which pre-supposes the existence of a public trust of a religious or charitable character. Such suit can proceed only on the allegation that there is a breach of such trust or that directions from the Court are necessary for the administration of the trust. In the suit, however, there must be a prayer for one or other of the reliefs that are specifically mentioned in the section. Only then the suit has to be filed in conformity with the provisions of Section 92 of the Code of Civil Procedure. *Harendra Nath Bhattacharya and others v. Kaliram Das,* AIR 1972 SC 246: 1972(2) SCR 492: 1972(1) SCC 115

Section 92.-*Locus standi to sue* .-Person interested.-Public trust created to provide property.-Release of right.-Absence of consi- deration.-Intention to effect transfer of property by Release deed .-The document can operate as a conveyance of property. In the present case, the release was without any consideration. But property may be transferred without consideration. Such a transfer is a gift. Under Section 123 of the Transfer of Property Act, 1882, a gift may be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Consequently, a registered instrument relating the right, title and interest of the releasor without consideration may operate as a transfer by way of a gift, if the document clearly shows an intention to effect the transfer and is signed by or on behalf of the releasor and attested by at least two witnesses. *Kuppuswami Chettiar v. A.S.P.A. Arumugam Chettiar and another,* AIR 1967 SC 1395: 1967 (2) Andh WR (SC) 29: 1967 (2) Mad LJ (SC) 29: 1967(1) SCR 275

Section 92.-Management of trust .-Prayer for removal of Trustee and for framing for scheme for Trust.- The trust not found to be religious.- Expenses for Pooja if permissible.- Directions given. In view of our finding that the vesting of B Schedule properties was in favour of the Matam alone with a charge on the properties that the expenses for Puja at the Samadhi should be met out of the income of the property, the vesting will not fail but the direction to meet expenses for the Puja at the Samadhi is unsustainable in law. It is the common case of the parties that due to changed circumstances very few people visit the village on their way to various places of pilgrimage and therefore there are not many visitors to be fed in the choultry. The income from the properties that is allotted to the Karpaka Vinayakar temple under Ex. A-1 will be used in conformity with the directions in the document, Regarding the property which had been allotted to the Annadana choultry the direction is that from the income of the property, the Brahmins that visit the choultry should be fed and the Nanadavanam should be maintained. The direction will be adhered to but if there are not enough Brahmins as envisaged in the document the income will be utilised for feeding the poor boys and girls of the schools of the village even though they may not belong to the Brahmin community. Regarding the properties that are allotted to the Sachidanandaswami Matam, it is seen that there are not enough pilgrims passing through the village due to improved transport facilities. The direction to incur expenses for the Puja in the Samadhikovil has failed. The income from the properties after feeding the Agathies and Paradesies that visit the Matam will be utilised for feeding the poor boys and girls of the schools of the village. *Nagu Reddiar and others v. Banu Reddiar and others,* AIR 1978 SC 1174: 1978(2) SCC 591: 1978(3) SCR 770

Section 92.-Management of trust.-Religious and charitable object.-Disposal of property belonging to trust by private negotiation should not be allowed.-Direction given to sell property by public auction. *R. Venugopala Naidu and others v. Venkatarayulu Naidu Charities and others,* AIR 1990 SC 444: 1989 Supp. (2) SCC 356: 1989 Supp. (1) SCR 760: 1989(2) Scale 902: 1989(4) J.T. 262: 1989 All. WC 1479

Section 92.-Mismanagement of private trust.-Suit for scheme of management.-Permissibility. Even in the case of a private trust a suit can be filed for the removal of the trustee or for settlement of a scheme for the purpose of effectively carrying out the objects of the trust. If there is a breach of trust or mismanagement on the part of the trustee, a suit can be brought in a civil court by any person interested for the removal of the trustee and for the proper administration of the endowment. *Kt. N. Rm. Thenappa Chettiar and others v. N.S. Kr. Karuppan Chettiar and others,* AIR 1968 SC 915: 1968 (2) Andh WR (SC) 95: 1968(2) SCR 897

Section 92.-Necessary parties.- Modification of scheme of administration.-The modification affecting the rights of priest.-On facts it was found that private rights of priest were affected.-Modification of scheme without priest being a party to the proceedings, is not invalid. *Raje Anandrao v. Shamrao and others,* AIR 1961 SC 1206: 1961 Jab LJ 1065: 1961(3) SCR 930

Section 92.-Representative suit.-*Res judicata*.-A decision in such suit constructively operate as *res judicata* against the entire body of the interested persons. *R. Venugopala Naidu and others v. Venkatarayulu Naidu Charities and others,* AIR 1990 SC 444: 1989 Supp. (2) SCC 356: 1989 Supp. (1) SCR 760: 1989(2) Scale 902: 1989(4) J.T. 262: 1989 All. WC 1479

Section 92.-Representative suit.- Grant of leave.-Procedure.-Notice to defendant before granting leave is not necessary but the court may give notice as a rule of caution. As a rule of caution, the court should normally, unless it is impracticable or inconvenient to do so, give a notice to the proposed defendants before granting leave under Section 92 to institute a suit. The defendants could bring to the notice of the court for instance that the allegations made in the plaint are frivolous or reckless. Apart from this, they could, in a given case, point out that the persons who are applying for leave under Section 92 are doing so merely with a view to harass the trust or have such antecedents that it would be undesirable to grant leave to such persons. The desirability of such notice being given to the defendants, however, cannot be regarded as a statutory requirement to be complied with before leave under Section 92 can be granted as that would lead to unnecessary delay and, in a given case, cause considerable loss to the public trust. Such a construction of the provisions of Section 92 of the Code would render it difficult for the beneficiaries of a public trust to obtain urgent interim orders from the court even though the circumstances might warrant such relief being granted. Keeping in mind these considerations, in our opinion, although, as a rule of caution, Court should normally give notice to the defendants before granting leave under the said section to institute a suit, the Court is not bound to do so. *R.M. Narayana Chettiar and another v. N. Lakshmanan Chettiar and others,* AIR 1991 SC 221: 1991(1) SCC 48: 1990 Supp (2) SCR 266: 1990(2) Scale 803: 1991 (5) JT 408

Section 92.-Scheme for manage- ment.-Considerations for.-De facto shebait.-Right of.-Shebait and his predecessors functioning for a long period of time, cannot be altogether excluded from the management. We cannot ignore the fact that the present shebaits and their predecessors have been functioning as shebaits for a very long period and their rights in that regard have not been called in question ever before. In these circumstances we cannot accept the contention of learned counsel that they should be completely excluded from the management of the temple. *Sree Kalimata Thakurani of Kalighat v. Jibandhan Mukherjee and others,* AIR 1962 SC 1329

Section 92.-Scheme for management.-Cypres doctrine.- Application of. The cy pres doctrine applies where a charitable trust is initially impossible or impracticable and the Court applies the property cy pres, *viz.,* to some other charities as nearly as possible, resembling the original trust. In the present case, the maintenance and education expenses are neither charitable trusts nor similar objects of charity. *N.S. Rajabadar Mudaliar v. M.S. Vadivelu Mudaliar and others,* AIR 1970 SC 1839: 1970 (2)) Andh WR (SC) 17: 1970 (2) Mad LJ (SC) 17: 1970(1) SCC 12

Section 92.-Scheme for management.-Modification of.-The provision for modification of scheme for administration of trust, can be made in the scheme itself.-Such modification made by the court is not without jurisdiction. It is open in a suit under Section 92 where a scheme is to be settled to provide in the scheme for modifying it as and when necessity arises, by inserting a clause to that effect. Such a suit for the settlement of a scheme is analogous to an administration suit and so long as the modification in the scheme is for the purposes of administration, such modification can be made by application under the relevant clause of the scheme, without the necessity of a suit under Section 92 of the Code of Civil Procedure. Such a procedure does not violate any provision of Section 92. There is nothing in the fact that the Court can settle a scheme under Section 92(1) to prevent it from making the scheme elastic and provide for its modification in the scheme itself. That does not affect the finality of the decree; all that it provides is that where necessity arises a change may be made in the manner of administration by the modification of the scheme. We cannot agree that if the scheme is amended in pursuance of such a clause in the scheme it will amount to amending the decree. The decree stands as it was, and all that happens is that a part of the decree which provides for management under the scheme is being given effect to. It seems to us both appropriate and convenient that a scheme should contain a provision for its modification, as that would provide a speedier remedy for modification of the manner of administration when circumstances arises calling for such modiciation than through the cumbrous procedure of a suit. *Raje Anandrao v. Shamrao and others,* AIR 1961 SC 1206: 1961 Jab LJ 1065: 1961(3) SCR 930

Section 92.-Scheme for manage- ment of temple.-Eviction of priests occupying the land.-Allotment of a part of land to priests towards their remuneration.-Allotment made without any evidence about the total income or the basis of its apportion- ment.-Order of court below set aside. The suits were based on title and the relief asked for was the eviction of the archakas from the suit property as they according to the plaintiffs, had no title to remain in possession. The archakas raised the plea that the title of the deity was confined only to melvaram in the plaint-schedule lands and that they had title to the kudivaram. Both the courts confirmed the title of the deity to both the interests and negatived the title of the defendant-archakas. In the circumstances the Court has no option but to deliver possession to the plaintiffs who had established their title to the suit properties. In a suit for framing a scheme for a temple a court may, in an appropriate case, put the archaka in possession of a portion of the temple lands towards his remuneration for services to the temple; but these are not suits for framing a scheme. That apart, there is absolutely no material either in the pleadings or in the evidence to make any such apportionment, for the allotment of a particular share to the archaka would depend upon the total income from the lands, the value of the articles required for the worship the amount of reasonable remuneration intended to be provided and other similar circumstances. An allotment cannot possibly be made on the basis of allocations made in the circumstances and facts peculiar to other cases. Long enjoyment of the temple lands by the archakas is not a peculiar feature of this case. The authorities concerned have made suitable arrangements for remuneration in the case of other temples and we have no doubt that they would make a reasonable provision for the archakas in the present case also for their remuneration in accordance with law. *C. Periaswami and others v. Sundaresa Ayyar and others,* AIR 1965 SC 516: 1955(1) An LT 377: 1965(1) Mad LJ 119: 1964(8) SCR 347

Section 92.-Scheme for management of trust.-Effect of Wakf Act.- Decree for scheme passed without considering the effect of Wakf Act .-Matter remanded for reconsideration. *A.P. Wakf Board and others v. Mirza Nizamuddin Baig and others,* AIR 1991 SC 87: 1991(1) SCC 73: 1990(2) Scale 938: 1990(4) JT 327

Section 92.-Scheme for manage- ment of trust.- Modification.- Unless there is a substantial error in it, the scheme framed in such suit cannot be changed. *Ahmad Adam Sait and others v. M.E. Makhri and others,* AIR 1964 SC 107: 1964(2) SCR 647

Section 92.-Suit by Deity.-Suit against person in management.-The provision has no application on such suit. *Ramchand v. Thakur Janki Ballabhji Maharaj and another,* AIR 1970 SC 532: 1970 (1) SCJ 174: 1970 (1) SCR 334: 1969(2) SCC 313

Section 92.-Suit for mismanagement of Trust.-Determination of.-Court must go beyond reliefs sought to ascertain true nature of suit.-In the absence of evidence to substantiate allegation of breach of trust or Mal Administration.-The court must dismiss the suit as not maintainable.A suit under Section 92 is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. Such a suit can proceed only on the allegation that there was a breach of such trust or that the direction of the Court is necessary for the administration of the trust and the plaintiff must pray for one or more of the reliefs that are mentioned in the section. It is, therefore, clear that if the allegation of breach of trust is not substantiated or that the plaintiff had not made out a case

for any direction by the Court for proper administration of the trust, the very foundation of a suit under the section would fail; and, even if all the other ingredients of a suit under Section 92 are made out, if it is clear that the plaintiffs are not suing to vindicate the right of the public but are seeking a declaration of their individual or personal rights or the individual or personal rights of any other person or persons in whom they are interested, then the suit would be outside the scope of Section 92. A suit whose primary object or purpose is to remedy the infringement of an individual right or to vindicate a private right does not fall under the section. It is not every suit claiming the reliefs specified in the section that can be brought under the section but only the suits which, besides claiming any of the reliefs, are brought by individuals as representatives of the public for vindication of public rights, and in deciding whether a suit falls within Section 92 the Court must go beyond the reliefs and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit was brought. If after evidence is taken, it is found that the breach of trust alleged has not been made out and that the prayer for direction of the court is vague and is not based on any solid foundation in facts or reason but is made only with a view to bring the suit under the section, then a suit purporting to be brought under Section 92 must be dismissed. *Swami Parmatmanand Saraswati v. Ramji Tripathi,* AIR 1974 SC 2141: 1975(1) SCR 790: 1974(2) SCC 695

Section 92.-Suit for performance of duties.-Allegation of breach of trust.-Suit is not maintainable. According to the plaintiffs' case one of the objects of the religious trust was the worship of Granth Sahib and its recital in congregations of the public. In the suit a decree declaring what portion of the trust property should be allocated to the said objection could be asked for under clause (e). The plaintiffs could also ask for the settling of a scheme under Clause (g) alleging mismanagement of the religious trust on the part of the trustees. In the settlement of the scheme could be included the worship and recital of Granth Sahib.-the holi Granth. The plaintiffs in their plaint did not in terms ask for the one or the other. They, however, alleged acts of breach of trust, mismanagement, undue interference with the right of the public in the worship of Granth Sahib. They wanted a decree of the Court against the appellant to force him to carry out the objects of the trust and to perform his duties as a Trustee. Reading the plaint as a whole it is not a suit where the plaintiffs wanted a declaration of their right in the religious institution in respect of the Granth Sahib. But it was a suit where they wanted enforcement of due performance of the duties of the trustee in relation to a particular object of the trust. It is well settled that the maintainability of the suit under Section 92 of the Code depends upon the allegations in the plaint and does not fall for decision with reference to the averments in the written statement.In the plaint of the instant case the relief claimed is not primarily for the establishment of the right of the public to the religious institution. It recites the facts as to the right without mentioning any appreciable dispute concerning it, mainly alleges breach of duty on the part of the trustee and the plaintiffs seek the court's aid against the trustee for forcing him to discharge his obligations by due performance of his duties. In our judgment therefore the Courts below were right in taking the view that the present suit was a suit for a decree under Section 92 of the Code and since it was not filed in conformity with the requirement of the said provision of law it was not maintainable. *Charan Singh and another v. Darshan Singh and others,* AIR 1975 SC 371: 1975(3) SCR 48: 1975(4) SCC 298: 1977 PLR 262

Section 92.-Wakf.-Beneficiaries of .-Effect of.-Wakf created in favour of family members of the founder along with public.-Suit for removal of Mutawalli shall be governed by provisions. We are of opinion that from the mere fact that there are certain provisions in favour of the family members of the founder along with some other provisions in favour of the public, the case will not be taken out of the provisions of Section 92, Civil Procedure Code. The reason is that there is a substantial portion of the income of the Wakf properties to be spent for purposes of charitable and religious nature. The proper test for holding whether the Wakf would fall within the purview of Section 92, Civil Procedure Code is to examine whether the Wakf has been created substantially for a public purpose. Applying the test to the present case, we are of opinion that the Wakf created by Haji Elahi Bux on November 18, 1936 falls within the purview of Section 92, Civil Procedure Code. The reliefs prayed for are: (1) removal of the respondent from the office of Mutwalli and appointment of Soleman, appellant's son, as Mutwalli in his place, and (2) till the said Soleman attains majority appointment of a Receiver for the management of the Wakf estate. It is true that the facts that a suit relates to public trust of a religious or charitable nature and the reliefs claimed fall within Clauses (a) to (h) of sub-section (1) of Section 92. Civil Procure Code would not by themselves attract the operation of the section, unless the suit is of a representative character instituted in the interests of the public and not merely for vindication of the individual or personal rights of the plaintiff. *Sugra Bibi v. Hazi Kummu Mia,* AIR 1969 SC 884: 1969 (2) SCJ 365: 1969(3) SCR 83

Sections 92 and 93.-Scope of suit.- Declaration about title of property.- Permissibility.-The suit under the provisisoftline mesne profit can be allowed in a case where alienation cannot be described as absolutely void. *Pragdasji Guru Bhagwandasji v. Ishwarlalbhai Narsibhai and others,* AIR 1952 SC 143: 1952 SCJ 224: 1952 SCR 513

Section 95.-Compensation.-Suit for ejectment.-Decreed.-Landlord obtained possession of premises along with godown.-Goods lying in godown kept in custody of representative of plaintiff by process server.-Defendants along with pledgee bank obtained interim injunction restraining plaintiff from removing goods from godown, but goods not removed.-Injunction preventing plaintiff from utilising

their premises obtained on insufficient and improbable grounds.-Plaintiff suffered by way of rent.-Suit for damages by plaintiff maintainable.-Bank cannot absolve itself of malice arising in the matter.

In justifying claim for damages apart from Section 95, CPC, a distinction has to be drawn between acts done without judicial sanction and the acts done under judicial sanction improperly obtained. Proof of malice is not necessary when the property to a stranger, not a party to the suit, is taken in execution but if the plaintiff bringing a suit for malicious legal process is a party to a suit proof of malice is necessary. The plaintiff must prove special damage. The claim of a person for damages for wrongful attachment of property can fall under two heads.-(1) trespass and (2) malicious legal process. Where property belonging to person, not a party to the suit, is wrongly attached, the action is really one grounded on trespass. But where the act of attachment complained of was done under judicial sanction, though at the instance of a party, the remedy is an action for malicious legal process. In the case of malicious legal process of Court, the plaintiff has to prove absence of probable and reasonable cause. In cases of trespass the plaintiff has only to prove the trespass and it is for the defendant to prove a good cause or excuse. In the former case plaintiff has to prove malice on the part of the defendant while in the latter case it is not necessary.

In the background in which the injunction was obtained and the manner in which the defendants prevented the plaintiffs from utilising their premises, it is clear that the same had been obtained on insufficient and improbable grounds. The intention of the parties is very clear that it is only to deprive the defendants of the possession of the premises that such an order was obtained. The bank was pledgee of the goods and could not claim an independent right in respect of the said premises. The suit premises was not in their possession either under licence or by way of lease. They should not only have ascertained whether the goods belong to the pledgor but also should have known as to whether the premises where the goods were kept belonged to them at the time they obtained the pledge. In those circumstances, even the Bank cannot absolve itself of malice arising in the case. *Bank of India vs. Lakshimani Dass,* AIR 2000 SC 1172 : 2000(2) Mad LJ 185 : 2000(2) Cur CC 18 : 2000(102) Com Cas 350 : 2000(2) Mah LR 121 : 2000(3) SCC 640 : 2000(3) Andh LD 64 : 2000(2) All CJ 881

Section 96.-Appeal.- Maintain- ability.-Determination of .-It is for appellate court to determine the competence of appeal.-A party cannot be prevented from filing an appeal.-Ordinary consequences of filing of appeal follow even if the appeal is not valid or competent. Whether the appeal is valid or competent is a question entirely for the Appellate Court before whom the appeal is filed to determine, and this determination is possible only after the appeal is heard, but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent, e.g., when it is held to be barred by limitation or that it does not lie before that court or is concluded by a finding of fact under Section 100 of the Civil Procedure Code. From the mere fact that such an appeal is held to be unmaintainable or any ground whatsoever, it does not follow that there was no appeal pending before the Court. *Raja Kulkarni v. The State of Bombay,* AIR 1954 SC 73: 1954 SCJ 50: 1954 SCR 384: 1954(1) Mad LJ

Section 96.-Cost on counsel.- Negligence by counsel.-Failure to file Vakalatnama in spite of directions by court.-Dismissal of appeal due to negligence of Counsel is not proper. *Bihar State Electricity Board and others v. Bhowra Kankanee Collieries Ltd. and another,* AIR 1982 SC 60: 1984 Sup. SCC 597: 1982 Pat LJR 22 (SC): 1982 Guj LH 168

Section 96.-Appeal.-Condonation of delay.-Delay of 565 days.-Appeal filed ignoring opinion of District Government Pleader.-No reasonable or satisfactory explanation for inordinate delay in filing appeal.-Discretion exercised by High Court in condoning delay neither proper nor judicious.-Order condoning delay unsustainable and set aside.

The High Court does not appear to have examined the reply filed by the appellant as reference to the same is conspicuous by its absence from the order. We are not satisfied that in the facts and circumstances of this case, any explanation, much less a reasonable or satisfactory one had been offered by the respondent-State for condonation of the inordinately delay of 565 days. The discretion exercised by the High Court was thus neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside. *P.K. Ramachandran vs. State of Kerala and another,* AIR 1998 SC 2276 : 1997(3) Mad LW 428 : 1997(7) SCC 556 : 1997(2) Ker LT 647 : 1997(6) Scale 209

Section 96.-Appeal.-Suit for declaration of title.-Claim made on basis of allotment letter and possession certificate issued by Development Authority.-Defendant a trespasser in suit premises admitting title of plaintiff.-Order of first appellate Court holding that documents clearly establish claim made by plaintiff and declaration had to be given in favour of plaintiff falls within region of appreciation of material on record.-No interference called for with finding of High Court that trial Court ought to have decreed the suit. *Manoji Rao vs. T. Krishna and others,* AIR 2001 SC 623 : 2001(2) SCC 384 : 2001(1) JT 621

Section 96.-Appeal.-Trial Court finding that ownership of suit property vested in plaintiff and negatived plea of adverse possession holding that he forcibly occupied disputed area, reversed by first appellate Court.-High Court dismissed second appeal in limine holding that no substantial question of law arose for determination.-Defendant's plea of adverse possession raised substantial

question of law as plaintiff's suit was barred by limitation under Article 65 of Limitation Act.-High Court order suffered from legal infirmity.-Case remanded back for fresh decision uninfluenced by observations made. *Santosh Hazari vs. Purushottam Tiwari (dead) by LRs,* AIR 2001 SC 965 : 2001(2) SCC 179 : 2001(2) JT 407

Sections 96 and 47.-Appeal from execution.-Maintainability.-Mortgage decree passed.-Failure by mortgagor to carry out the terms of decree.-Mortgagee applying for execution of decree.-Application for execution not properly couched and moved as application in the suit.- The applications in substance found be seeking execution.-Appeal against the order passed on application is maintainable. *Smt. Ashalata Debi and others v. Sri Jadu Nath Roy and others,* AIR 1954 SC 409: 1954 SCA 635: 1954 SCJ 690: 1955(1) SCR 150

Sections 96, 100, 104, 105.- Appeal.-Permissibility.-No appeal lies on a mere finding of the court unless provided under the provisions of the Code. *Smt. Ganga Bai v. Vijay Kumar and others,* AIR 1974 SC 1126: 1974 Mah LJ 602: 1974 MPLJ 629: 1974 (2) SCC 393: 1974 (3) SCR 882

Section 97.-Failure to appeal.- Effect of.-Challenge to preliminary decree along with the final decree is not permissible.

When Section 97 provides that the correctness of the preliminary decree cannot be challenged if no appeal is preferred against it, it clearly provides that if it is not challenged in appeal it would be treated as correct and binding on the parties. In such a case an appeal against the final decree would inevitably be limited to the points arising from proceedings taken subsequent to the preliminary decree and the same would be dealt with on the basis that the preliminary decree was correct and is beyond challenge. The whole object which Section 97 intends to achieve would be frustrated if it is held that only the factual correctness of the decree can not be challenged but its legal validity can be even though an appeal against the preliminary decree has not been filed. *Kaushalya Devi and others v. Baijnath Sayal and others,* AIR 1961 SC 790: 1962(1) SCJ 684: 1961(3) SCR 769

Section 97.-First Appeal.-A valuable right.-Duty of High Court to deal with all issues and evidence led by parties before recording its findings.-Parties have a right to be heard both on questions of law and fact.-High Court order cryptic ignoring relevant aspects set aside.-Case remanded back for fresh disposal according to law.

Sitting as a Court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. It has failed to discharge the obligations placed on a first appellate Court. The judgment under appeal is so cryptic the none of the relevant aspects have been noticed. The appeal has been decided in a very unsatisfactory manner. First appeal is a valuable right and the parties have a right to be heard both on questions of law and facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. *Mudhukar and others vs. Sangram and others,* AIR 2001 SC 2171 : 2001(4) SCC 756 : 2001(S) JT 72

Section 98(2).-Appeal.-Difference of opinion.-The difference in respect of finding of fact.-Reference to third judge permissible only on point of law.-If there is no majority opinion approving or reversing the decree under appeal, it should be confirmed.

Tej Kaur and another v. Kirpal Singh and another, AIR 1995 SC 1681: 1995(5) SCC 119: 1995(3) Scale 596: 1995(5) JT 201

Section 98(2).-Dissenting views of Judges.-Words "consisting of" used in Section 98(2).-Means and has relevance only to sanctioned strength of Judges.-Two Judges constituting Division Bench expressed different views and thought it fit to refer matter to Third Judge.-Matter should await till arrival of third Judge.

The words "consisting of" shall mean and also considered to have relevance only to the sanctioned strength. Therefore, taking to account the fact that for the time being, there were only two Judges in position and that the learned Judges who constituted the Division Bench, expressed different views and at the same time thought fit to refer the matter to the opinion of a third Judge, the matter should await till the arrival of a Third Judge. *Sikkim Subba Associates vs. State of Sikkim,* AIR 2001 SC 2062 : 2001(5) SCC 629 : 2001(S) JT 186

Section 99.-Transposition of parties .-Omission.-Effect of.-Defendant supporting plaintiff, not transposed as co-plaintiff.-Defence raised by other defendant fully considered by Court.-Omission to Transpose is a mere irregularity not affecting the merits of the case. *R.S. Maddanappa v. Chandramma and anothers,* AIR 1965 SC 1812: 1965(2) SCWR 644: 1965(3) SCR 283

Section 100.-Interference with finding of fact.-Finding reached on the basis of additional evidence which could not have been received by the appellate court.-The second appellate court is entitled to interfere with such finding of fact.

We find ourselves in entire agreement with these observations of the learned Judges. It is no doubt true that a finding of fact, however erroneous, cannot be challenged in a second appeal, but a finding reached on the basis of additional evidence which ought not to have been admitted and without any consideration whatever of the intrinsic and palpable defects in the nature of the entries themselves which raise serious doubts about their genuineness, cannot be accepted as a finding that is conclusive in second appeal.

Arjan Singh v. Kartar Singh and others, AIR 1951 SC 193: 1951 ALJ SC 78: 1951(1) MLJ 556: 1951 SCJ 274: 1951 SCR 258

Section 100.-Second Appeal.-Finding of fact.-Finding of genuineness of Will is a question of fact.-Interference in second appeal, is not permissible.

Aparsini (dead) through LRs. v. Atma Ram and others, AIR 1996 SC 1558: 1996(8) SCC 321: 1996(2) Scale 831: 1996(3) JT 645: 1996(2) Raj. LW 82

Section 100.-Appeal.-Letters Patent Appeal.-Dismissal of.-Interference with record.-Objection raised by registry that memo of appeal did not contain for condonation of delay.-Prayer for condonation of delay added afterwards.-High Court accepting unconditional apology but dismissing appeal on ground of interference with record.-Appellant cannot be made to suffer due to fault of Advocate.

When this fact was brought to the notice of the Division Bench of the High Court, the court felt that this course of action was not permissible since the correction had been made in the memo of appeal after it had been made filed without obtaining permission of the court. An unconditional apology was tendered by the Advocate on record of the appellant before the learned Judges. The said unconditional apology had been accepted by the court in the impugned judgment. But at the same time the appeal has been dismissed on the ground of interference of record. We are of the opinion that the High Court should not have dismissed the appeal. As a result of the dismissal of the appeal, the appellant who had no role, has been made to suffer on account of a fault on the part of the Advocate in respect of which the court has accepted the unconditional apology of the Advocate. *Prakash Seshmal Jain vs. Sykhmal & Sons and others,* AIR 1999 SC 2630 : 1999(8) JT 536 : 1998(9) SCC 718 : 1999(35) All LR 294

Section 100.-Concurrent finding of fact.-Licence for construction of building.-Granted by Chief Officer of Town Municipal Council and Secretary of Interim Mandal Panchayat under seal of Chief Officer of Town Municipal Council, but was really a licence issued by Mandal Panchayat.-Mandal Panchayat having been newly formed its seals were not available at the time.-Concurrent finding that licence was issued by Mandal Panchayat.-High Court finding, without examining this aspect, that licence granted to appellant was bad, unjustified. *Padikal Madappa vs. C.B. Kariappa and another,* AIR 2001 SC 2695 : 2001(4) JT 367

Section 100.-Concurrent finding of fact.-On question of title of plaintiff.-Based on sale deed executed by Defendant No. 2 in his favour.-Findings that it was valid sale which properly conveyed title of property to plaintiff.-Setting aside by High Court merely on ground that circumstances considered by lower court suggest some other conclusion from proved facts.-Interference by High Court not permissible. *Vidhyadhar vs. Mankikrao and another* AIR 1999 SC 1441 : 1999(2) Civil CC 91 : 1999(3) Bom CR 564 1999(2) Andh WR 7 : 1999(3) SCC 573 : 1999(3) Mad LW 576 : 1999(3) Andh LT 1

Section 100.-Doctrine of merger.-Not applicable to order refusing special leave to appeal under Article 136 of the Constitution.

An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed. *Kunhayammed and others vs. State of Kerala and another,* AIR 2000 SC 2587 : 2000(3) Ker LT 354 : 2000(4) JT 110 : 2000(6) SCC 359 : 2000(2) Cur LJ (CCR) 626

Section 100.-Doctrine of merger.-Scope of.

The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time. When a decree of order passed by inferior Court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding nevertheless its finality is put in jeopardy. Once the superior Court has disposed of the list before it either way.-Whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior Court, tribunal or authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge laid or which could have been laid shall have to be kept in view. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution, the Supreme Court may reverse, modify or affirm the judgement-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter. *Kunhayammed and others vs. State of Kerala and another,* AIR 2000 SC 2587 : 2000(3) Ker LT 354 : 2000(4) JT 110 : 2000(6) SCC 359 : 2000(2) Cur LJ (CCR) 626

Section 100.-Finding of fact.-Paternity of child born during wedlock.-Finding of first appellate Court that husband had no access to wife for more than 280 days before child was begotten.-Cannot be interfered with in second appeal.-No substantial question of law arises from such a finding.-Appeal dismissed. *Kanti Devi (Smt.) and another vs. Poshi Ram,* AIR 2001 SC 2226 : 2001(5) SCC 311 : 2001(S1) JT 87

Section 100.-Finding of fact.-When can be interfered with.-Eviction petition.-Bona fide

requirement.-Failure of Courts below to consider requirement of statutory provision regarding availability of reasonable accommodation.-Finding that landlord could easily make arrangements for starting a shop for his son and landlord did not make any offer to tenant for alternate shop room.-High Court justified in setting aside concurrent finding holding that landlord had proved his bona fide requirement and was entitled to decree of eviction.

Where the lower Court had failed to consider the requirement of the section regarding availability of reasonable accommodation in occupation of the landlord because at the time of filing the suit for eviction one vacant shop room was in occupation of the landlord and in course of the proceedings one more shop room, on being vacated by the tenant, came in his occupation and the Court found that the landlord could easily make arrangements for starting the shop for his son and that the landlord did not make any offer to tenant for alternate shop room for his occupation, the High Court would be justified in setting aside the concurrent judgment of lower Court holding that bona fide requirement of the landlord was proved and that he was, therefore, entitled to decree of eviction on that ground. *Deena Nath vs. Pooran Lal,* AIR 2001 SC 2655 : 2001(5) SCC 705 : 2001(5) JT 380 : 2002(1) Civ CR 107

Section 100.-New plea.-Suit based on contract.-Plea regarding novation of contract.-Neither any issue framed by trial Court nor by evidence led.-Such a plea cannot be raised for first time in second appeal.

Novation under Section 62 of the Contract Act requires a clear plea, issue and evidence. such a question cannot be raised or accepted under Section 100 C.P.C. for the first time in Second Appeal. There was no such issue in the Courts below and the defendant's evidence was contrary to such a theory. *Babu Ram alias Durga Prasad vs. Indra Pal Singh (dead) by LRs,* AIR 1998 SC 3021 : 1998(2) Guj LH 686 : 1998(3) Cur CC 145 : 1998(6) SCC 358 : 1998(5) Andh LT 13

Section 100.-Question of fact.-Question whether predecessor-in-title were heirs of mortgagor, purely a question of fact.-Concurrent finding that this fact was not proved.-Holding that mere statement in document prepared by interested parties cannot establish facts stated therein, while parties who could establish relationship were available.-They being party defendants had not chosen to step into witness box.-Courts below correctly appreciated evidence.-High Court in re-appreciating evidence and arriving at contrary conclusion erred in law as well as on facts.

The law on the subject is very clear. Even under the unamended Section 100 of the Code of Civil Procedure, the Court could only interfere on a question of law. As admitted by High Court the question, whether the predecessors in title were heirs of Lakshamania was purely a question of fact. Both the Courts below had given concurrent findings that it was not proved that the predecessors in title of the 1st respondent were related to Smt. Lakshamania. The justification sought to be given by the Judge that there was an error of law in excluding documents from consideration is patently wrong. Both the Courts below had not excluded the documents from consideration. Both the Courts below had considered the documents. Both the Courts below had rightly held that mere statements in documents prepared by concerned/interested parties cannot establish proof of acts stated therein. Parties who could establish the relationship were available. They were party defendants to the suit. Both the Courts below had rightly noted that these parties had chosen not to step into the witness box. In our view both the Courts below had correctly appreciated the evidence and arrived at the correct conclusion. The High Court in re-appreciating evidence and arriving at a contrary conclusion erred not only in law but also on facts. *Dilboo (Smt.) (dead) by LRs and others vs. Dhanraji (Smt.) (dead) and others,* AIR 2000 SC 3146 : 2000(4) Cur CC 184 : 2000(4) Rec Civ R 734 : 2000(7) SCC 702 : 2000 All LJ 2481

Section 100.-Second appeal.-Con-current finding of fact.-Interference with.-Suit for ejectment and possession of suit properties filed by widow of owner.-Concurrent finding of trial Court and first appellate Court that plaintiff was not legally wedded wife of owner.-High Court observed that findings were recorded by courts below on conjectures and surmises during wrong inferences from facts proved ignoring material evidence such as judgments of Consolidation Courts brought on record and status of plaintiff as legally wedded wife of owner in previous proceedings was not taken into consideration.-High Court rightly held that plaintiff was legally wedded wife of owner of suit property. *Vishnu Prakash and another vs. Sheela Devi and others,* AIR 2001 SC 1862 : 2001(4) SCC 729 : 2001(4) JT 396

Section 100.-Second appeal.-Con-current finding of fact.-Subletting.-Testimony of witnesses rejected because of lack of detailed pleadings pertaining to period of sub-tenancy.-Mere lack of details in pleading not a ground to set aside concurrent finding of fact.

So far the question of sub-letting the finding was based on the deposition of the witnesses to whom the disputed premises was sub-let. Their testimony was rejected by the High Court mainly on the basis that there was no detailed pleading pertaining to the period of sub-tenancy and even the witnesses have not produced any receipt of payment of rent. It is not in dispute that there is pleading that the disputed premises was sublet. The detail, if any, can be supplemented through evidence. Mere lack of details in the pleading cannot be reason to set aside concurrent finding of facts. *Hari Singh vs. Kanhaiya Lal,* AIR 1999 SC 3325 : 1999(4) Rec Civ R 107 : 1999(8) ADSC 142 : 1999(7) SCC 288 : 1999(3) Raj LW 415 : 1999(2) Rent LR 613

Section 100.-Second appeal.-Disposal of.-High Court to frame substantial questions of law and then dispose of second appeal. *Taherakhatoon (dead) by LRs vs. Salambin Mohammd,* AIR 1999 SC 1104: 1999(2) Land LR 201 : 1999(3) Mad LW 406 : 1999(2) SCC 635 : 1999(4) Andh LD 1 : All Mah LR 404 : 1999(2) Cur CC 1

Section 100.-Second appeal.-Eviction petition.-Bona fide requirement.-Concurrent finding of fact that landlord required ground floor for his growing children and for private coaching to students.-High Court justified in not interfering in second appeal.

The case of the respondent that he needs the room on the ground floor for use by himself and his four growing children (sons) has been accepted by the Courts below. The Courts have also accepted the case that the respondent who is an assistant Teacher in a government middle school is often approached by students for giving private coaching for the purpose of which he needs the room on the ground floor. In view of the concurrent findings recorded by the Courts below the High Court was justified in not interfering with the finding in the second appeal. *Har Narain Daga vs. Heeralal and others,* AIR 2001 SC 341 : 2001(1) SCC 41 : 2000(S3) JT 464

Section 100.-Second appeal.-Eviction suit on ground of bona fide need.-Existence of question of law *sine qua non.*-Concurrent finding recorded by Courts below that need of landlord was not bona fide based on proper appreciation of evidence.-Reversal of finding without reference to question of law set aside.

The existence of a 'substantial question of law' is the *sine qua non* for the exercise of jurisdiction by the High Court under the amended provisions of Section 100 C.P.C. It appears that the learned single Judge overlooked the change brought about to Section 100 C.P.C. by the Amendment made in 1976. The High Court unjustifiably interfered with pure question of fact while exercising jurisdiction under Section 100 C.P.C. It was not proper for the learned single Judge to have reversed the concurrent findings of fact while exercising jurisdiction under Section 100 C.P.C. *Sheel Chand vs. Prakash Chand,* AIR 1998 SC 3063 : 1998 HRR 657 : 1998(6) SCC 683 : 1998(2) Rent Cr 410 : 1998(3) Cur CC 230

Section 100.-Second appeal.-Execution of gift deed.-Objection as to its validity is a mixed question of fact and law.-Such objection cannot be raised in appeal. *Brij Raj Singh (dead) by LRs and others vs. Sewak Ram and another,* AIR 1999 SC 2203 : 1999(3) Mad LJ 117 : 1999(2) Land LR 379 : 1999(122) Pun LR 594 : 1999(2) Rec Civ R 654 : 1999(4) SCC 331 : 1999(3) Raj LW 434 : 1999(2) All CJ 1452

Section 100.-Second appeal.-Existence of substantial question of law.-Sine qua non.-Hearing without formulating question of law illegal and without jurisdiction.

The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal and if it does so it acts illegally and in abnegation or abdication of the duty cast on the Court. The existence of substantial question of law is the sine qua non for the exercise of the jurisdiction under the amended Section 100 of the Code. *Santosh Hazari vs. Purushottam Tiwari (dead) by LRs,* AIR 2001 SC 965 : 2001(2) SCC 179 : 2001(2) JT 407

Section 100.-Second appeal.-Fact finding that property in question was wakf property.-Concurrent finding of Courts below cannot be interfered with in a routine and casual manner by substituting subjective satisfaction.-Judgment and decree of High Court liable to be set aside.

In the instant case the recitals in the documents produced by the plaintiff itself established on their face the facts necessary to settle the question in dispute, without even having to interpret the contents of the documents. The two Courts have correctly understood the same and reached to the finding that the property in question was wakf property. However the High Court after quoting extensively from certain judgments of the Supreme Court and without pointing out how the ratio of those judgments applied to the facts of the present case, reversed the concurrent finding which was wholly unwarranted. If really the High Court had applied its mind to the facts of the case, as understood by the lower Courts, then certainly it should have commented upon the circumstances relied upon by the lower Courts. All these facts show that the High Court has interfered with the concurrent findings of the two Courts below in a routine and causal manner by substituting its subjective satisfaction in the place of the lower Courts. Therefore, the judgment and decree of the High Court under appeal would be liable to be set aside. *Karnataka Board of Wakf vs. Anjuman-E-Ismail Madris-Un-Niswan,* AIR 1999 SC 3067 : 1999(3) Land LR 617 : 1999(2) Hindu LR 398 : 1999(4) All Mah LR 281 : 1999(6) SCC 343 : 1999(3) BLJ 866

Section 100.-Second appeal.-Finding of fact.-Allotment of retail outlet dealership by Indian Oil Corporation.-Applicant fulfilled age requirement and made application after correction of his date of birth in school register supported by certificate of competent authority.-Allot-ment made after verification of parti-culars furnished by appellant, viz., age proof and electoral roll.-Trial Court after perusing evidence and report of handwriting expert found that certificate of competent authority was genuine.-Overwhelming evidence to prove that applicant had attained age of 21 years as on date of application.-Order of first appellate Court holding that certificate must have been fabricated set aside. *Updesh Kumar vs. Prithvi Singh and others,* AIR 2001 SC 703 : 2001(2) SCC 524 : 2001(2) JT 308

Section 100.-Second appeal.-Finding of fact.-Gift deed.-Ancestral property.-Consent by son of deceased in favour of daughter.-Concurrent finding that gift deeds were void lacking consent by

coparceners based on evidence.-High Court cannot reappreciate evidence to arrive at different conclusion.-It could not be held that son had given consent to gift of property.

We have already noted the findings of the trial Court as well as the first appellate Court on the question of consent. These observations clearly show that there was some evidence in support of the finding of the lower Courts. In the circumstances, the High Court was not entitled to reassess the evidence and arrive at a different conclusion. Besides, the onus was on the respondents to prove the fact of the appellant No. 1's consent. When items 3 to 6 were being claimed by the respondents to be the self-acquired property of Hiri, it could hardly be contended in the same breath that the appellant No. 1 had consented to the gift of items 3 to 6 on the basis that it was coparcenary property and the appellant No. 1 the only other coparcener. The High Court also erred in its view on the view of consent on a gift which may otherwise be void. *Thimmaiah and others vs. Ningamma and another,* AIR 2000 SC 3529(2) : 2000(2) Marri LJ 571 : 2000(4) Rec Civ R 609 : 2000(7) SCC 409 : 2000(C) Cur CC 339

Section 100.-Second appeal.-Finding of fact.-Interference with.-Finding by first Appellate Court that agreement to sell was not a genuine document.-High Court rightly pointed out that agreement containing reference to plaintiff's name, but finding was based on rejection of evidence of attestor of agreement and evidence of defendant in relation to agreement.-High Court not entitled to interfere with fact finding of first appellate Court.

It is true that one of the reasons given by the first appellate Court namely that the agreement of 1962 contained a reference to the plaintiff's name (who came into the picture only in 1966) is not factually correct and the High Court was right in pointing out this error. But the finding of the first appellate Court is not based only on the said fact. The finding was based on the rejection of the evidence of the attestor of the agreement and the evidence of the defendant in relation to the said agreement. Other facts relied upon are the long gap of 5½ years between the date of the alleged agreement of sale and the defendant's sale deed and that the agreement is written up on a small piece of paper with a revenue stamp affixed thereon and not upon regular non-judicial stamp papers. These circumstances are all relevant in considering the genuineness of the agreement. As long as there is some material for the rejection of the document, the Second Appellate Court ought not to have interfered with the abovesaid finding of fact. *Taherakhatoon (dead) by LRs vs. Salambin Mohammd,* AIR 1999 SC 1104: 1999(2) Land LR 201 : 1999(3) Mad LW 406 : 1999(2) SCC 635 : 1999(4) Andh LD 1 : All Mah LR 404 : 1999(2) Cur CC 1

Section 100.-Second appeal.-Finding of fact.-Interference with.-Finding recorded by first appellate Court neither perverse or unreasonable nor based on no evidence.-Cannot be interfered with on mere reappreciation of evidence, in absence of valid and acceptable reasons, without framing substantial question of law.

The High Court has upset the finding of fact recorded by the first appellate Court, taking a different view merely on reappreciation of evidence in the absence of valid and acceptable reasons to say that the findings recorded by the first appellate Court could not be sustained either by being perverse or unreasonable or could not be supported by any evidence. The High Court neither framed a substantial question of law nor any such question is indicated in the impugned judgment as required under Section 100 of the Code of Civil Procedure. The approach of the High Court, in our view, is clearly and manifestly erroneous and unsustainable in law. *Hamida and others vs. Mohd. Kahlil*, AIR 2001 SC 2282 : 2001(5) SCC 30 : 2001(S1) JT 173

Section 100.-Second appeal.-Finding of fact.-Scope of interference.-Concurrent findings not only vitiated due to perversity of reasoning but also due to surmises and misreading of materials on record.-Interference with concurrent findings cannot be said to be transgressing the limitations on the jurisdiction under Section 100 CPC.

The judgments of the Trial and First Appellate Courts could be said to be concurrent only in the sense that both the Courts have chosen to reject the suit as well as the First Appeal and on the question as to whether the property in dispute was acquired by Zohra Bibi from out of her income earned as a prostitute. In other respects, namely, the factum of creation of the document of gift, Wakf deed, the conduct of the parties throughout thereafter in acting upon the same and the collusive and void nature of the proceedings before the Court instituted by Haji Mohammed Siddiq and Mubarak Hussain, the conclusions could not be said to be concurrent.

The Second Appellate Judge was able to indicate and highlight the serious infirmities and illegalities committed by the learned Trial Judge as well as the First Appellate Judge and the necessity for his interference to prevent total miscarriage of justice, with convincing reasons. The findings recorded by the Trial Court as well as the First Appellate Court was shown to be not only vitiated due to perversity of reasoning but also due to surmises and misreading of the materials on record. On a careful and critical scaning through of the judgment in the Second Appeal, we are unable to agree with the learned counsel for the appellant at any findings of fact concurrently recorded were mechanically interfered with without justification or by transgressing the limitations on the exercise of jurisdiction under Section 100, C.P.C. The reasons assigned by the learned Judge in the High Court for the conclusions arrived at do not suffer from any infirmity warranting our interference in this appeal. *Hafazat Hussain vs. Abdul Majeed and others*, AIR 2001 SC 3201 : 2001(7) SCC 189 : 2001(5) Scale 104 : 2001(6) JT 591

Section 100.-Second appeal.-Framing substantial question of law.-Mandatory.

It is mandatory to formulate a substantial question of law while entertaining the appeal in absence of which the judgement is to be set aside and the High Court cannot proceed to hear a second appeal without formulating the substantial question of law. *K. Raj and another vs. Muthamma,* AIR 2001 SC 1720 : 2001(6) SCC 279

Section 100.-Second appeal.-Interference with finding of fact.-Suit for permanent injunction restraining defendant from dispossessing plaintiff from suit land.-Decreed.-Question of possession of suit land essentially a question of fact.-Concurrent finding of trial Court and first appellate Court on plaintiff's possession.-No scope for interference within limited parameters of Section 100 C.P.C.

The trial Court recorded a positive finding based on the revenue records and the oral evidence led by the plaintiff that he had come into possession of the land under the lease deed and continued to possess the same all along. The lower appellate Court, which is the final Court of fact confirmed the finding of the trial Court regarding plaintiff's possession over the suit land and upheld the judgment of the trial Court decreeing the suit. Before the High Court the contention that was raised related to the question of possession. There was hardly any scope for the High Court to interfere with the finding of possession concurrently recorded by the Courts below with in the limited parameters of Section 100 of the Civil Procedure Code. As the second appeal did not involve any substantial question of law the High Court rightly dismissed the same. *Mohan Lal vs. Nihal Singh,* AIR 2001 SC 2942 : 2001(8) SCC 584 : 2001(9) JT 58

Section 100.-Second appeal.-Interference with judgement of first Appellate Court.-No ground to interfere that first Appellate Court had not come to grips with reasoning of trial Court.

Section appellate court cannot interfere with the judgment of the first appellate court had not come to close grips with the reasoning of the trial court. It is open to the first appellate court to consider the evidence adduced by the parties and give its own reasons for accepting the evidence on other side. It is not permissible for the second appellate court to interfere with such findings of the first appellate court only on the ground that the first appellate had not come to grips with the reasoning given by the trial Court. *Arumugham (dead) by LRs and others vs. Sundarambal and another,* AIR 1999 SC 2216 : 1999(36) All LR 751 : 1999(3) Mad LJ 127 : 1999(3) All Mah LR 471 : 1999(4) SCC 350 : 1999(4) Civ LJ 460

Section 100.-Second appeal.-Jurisdiction of High Court confined to appeals involving substantial question of law only.

It is to be reiterated that under Section 100 of the C.P.C. jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 C.P.C. *Roop Singh (dead) through LRs vs. Ram Singh (dead) through LRs,* AIR 2000 SC 1485 : 2000(2) Land LR 4 : 2000(1) Jab LJ 368 : 2000(3) SCC 708 : 2000(3) Andh LD 18 : 2000(2) Cur CC 71

Section 100.-Second appeal.-Jurisdiction of High Court to be exercised only on basis of substantial questions of law framed at time of admission of second appeal.-Judgment delivered without following procedure liable to be set aside.

The High Court can exercise its jurisdiction under Section 100 C.P.C. only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. The impugned judgment shows that no such procedure was followed by the High Court. Thus the judgment rendered by the High Court under Section 100 C.P.C. without following the aforesaid procedure cannot be sustained. *Dnyanoba Bhaurao Shemade vs. Maroti Bhaurao Marnor,* AIR 1999 SC 864 : 1999(3) Land LR 307 : ILR (1999) Kant 1705 : 1999(2) Bom LR 436 : 1999(2) SCC 471 : 1999(1) Cur CC 65 : 1999(2) Cir LJ 525

Section 100.-Second appeal.-Matter remanded back calling further finding after giving opportunity to all parties.-Only a tentative conclusion.-Not a ground to reject finding recorded earlier by trial court.

The High Court while calling for further findings after giving opportunity to all parties made it clear that it was only a tentative conclusion to call for findings and would not mean that a finding recorded earlier cannot be accepted. It was in the context of the parties desire for an opportunity to scrutinise the additional records which were sought to be produced in the High Court in the appeal which were sent back to the courts below to submit its findings. Therefore, the entire matter had to be examined again and thus it could not be said that no reliance could have been placed on the findings of the trial court before calling for further findings. *Subramania Reddi (dead) vs. Venkatasubba Reddi (dead) and others,* AIR 1999 SC 1116 : 1999(1) Cur CC 122 : 1999(3) SCC 240 : 1999(2) All Mah LR 447 : 1999(4) Andh LD 10 : 1999(3) Civ LJ 598

Section 100.-Second appeal.-Mixed question of law and fact.-Interference with.-Suit for specific performance of contract.-Question of law as contemplated by Section 100(5) not framed.-Reversal of finding on question of readiness and willingness to perform contract being mixed question of law and fact without discussion on evidence recording basic finding of fact improper.

Under Section 100 of the C.P.C. (as amended in 1976) the jurisdiction of the High Court to interfere with the judgment of the courts below is confined to hearing on substantial question of law. Interference with finding of fact by the High Court is not warranted if it involves re-appreciation of evidence. The High Court did not frame any substantial question of law as contemplated by sub-section (5) of Section 100 of the C.P.C. It has not even discussed any evidence. No basic finding of fact recorded by the courts below has been reversed much less any reason assigned for taking a view to the contrary still the finding on the question of readiness and willingness to perform the contract which is a mixed question of law and fact has been upset. *Ram Kumar Agarwal and another vs. Thawar Das (dead) through LRs* AIR 1999 SC 3248 : 1999(4) Cur CC 97 : 1999(7) SCC 303 : 1999(7) AD SC 670 : 1999(2) All Rent Cas 546 : 1999 All LJ 2088

Section 100.-Second appeal.-Necessity of framing substantial question of law under Section 100 cannot be excluded by Section 41 of Punjab Courts Act.-Section 41 of Punjab Courts Act in conflict with amended provisions of Section 100.-Stands repealed in view of Section 97(1) C.P.C.

Section 100(1) C.P.C. even though after amendment saves local law, it has to be read with Section 97(1). Language of Section 97(1) of the Amendment Act of 1976 clearly spells out that any local law inconsistent goes but what is not inconsistent, it could be said the local law would still continue to occupy its field. But so far the present case, Section 41 of the Punjab Act, it is expressly in conflict with the amending law, viz., Section 100 amended which would be deemed to have been repealed. Therefore, Section 41 of the Punjab Courts Act is not saved on subject of second appeal. More so by reason of the clarification rendered by the legislature in Section 101 of the Code which provides that no second appeal shall be except on the ground mentioned in Section 100 indicating thereby the further reinforcement to the legislative intent to be obtained from Section 100 as regards the issue of substantial question of law. This refers to substantial question of law having regard to the language of Section 103 cannot however be said to even imply a contra note apart from what is stated herein before. This is so, however, by reason of the provisions of Section 97 of the Amending Act. *Kulwant Kaur vs. Gurdial Singh Mann (dead) by LRs and others,* AIR 2001 SC 1273 : 2001(4) SCC 262 : 2001(4) JT 158

Section 100.-Second appeal.-New case.-Suit for partition.-Will executed by ancestor of plaintiff and defendant and sale made thereunder.-Sale deeds neither challenged nor any issues framed by trial Court.-No pleadings in plaint about Will also.-High Court fell in error in deciding legality of sale deeds and validity of Will for first time in appeal.-Prayer for partition in conflict with partition already made.-Impugned judgment of High Court set aside and that of trial Court that suit was barred by previous partition upheld. *Gangajal Kunwar (Smt.) and others vs. Sarju Pandey (dead) by LRs and others,* AIR 2001 SC 2693

Section 100.-Second appeal.-New plea.-Regarding part performance of contract.-Mixed question of law and fact.-Cannot be urged first time at stage of second appeal.

Plea under Section 53-A of the Transfer of property Act raises a mixed question of law and fact and therefore cannot be permitted to be urged for the first time at the stage of second appeal. That apart, performance or willingness to perform his part of the contract is one of the essential ingredients of the plea of part performance. Thawar Das having failed in proving such willingness protection to his possession could not have been claimed by reference to Section 53-A of the Transfer of Property Act. *Ram Kumar Agarwal and another vs. Thawar Das (dead) through LRs* AIR 1999 SC 3248 : 1999(4) Cur CC 97 : 1999(7) SCC 303 : 1999(7) AD SC 670 : 1999(2) All Rent Cas 546 : 1999 All LJ 2088

Section 100.-Second appeal.-Non-mention of substantial question of law in memo of appeal, serious infirmity.-Power of High Court to hear on any other substantial question of law not earlier formulated not taken away if the case involves such question and records reasons for its satisfaction. *Santosh Hazari vs. Purushottam Tiwari (dead) by LRs,* AIR 2001 SC 965 : 2001(2) SCC 179 : 2001(2) JT 407

Section 100.-Second appeal.-Phrase "substantial question of law".-Paramount consideration for.-Need to strike a judicious balance between indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation of lis.

A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation of the life of any lis. *Santosh Hazari vs. Purushottam Tiwari (dead) by LRs,* AIR 2001 SC 965 : 2001(2) SCC 179 : 2001(2) JT 407

Section 100.-Second appeal.-Power of Court.-Finding on issue not pressed in trial Court.-Without jurisdiction and liable to be set aside.

In Second Appeal under Section 100 the High Court has no jurisdiction to give a finding on a issue which was not pressed in the trial Court. So far as the finding as to a new contract is concerned, there was no issue or evidence. The evidence was to the contrary. Accordingly the findings could be liable to be set aside. *Babu Ram alias Durga Prasad vs. Indra Pal Singh (dead) by LRs,* AIR 1998 SC 3021 : 1998(2) Guj LH 686 : 1998(3) Cur CC 145 : 1998(6) SCC 358 : 1998(5) Andh LT 13

Section 100.-Second appeal.-Power of Court.-Plaintiff's claim for adverse possession.-Issue not framed by trial Court as well as first appellate Court.-Second appellate Court cannot give finding for first time that title of defendant stood extinguished. *Tirumala Tirupati Devasthanam vs. K.M. Krishnaiah,* AIR 1998 SC 1132 : 1998(2) Andh LT 22 : 1998(3) SCC 331 : 1998(2) JT 231

Section 100.-Second appeal.-Powers of High Court.-Suit for eviction.-Dismissed.-Finding reversed by first appellate Court on basis of material on record that defendant was in unauthorised occupation of land.-High Court without considering relevant pleadings and findings of lower Courts, after appreciation of evidence set aside the order of first appellate Court, which was based on material on record, cannot be interfered with in second appeal.

A bare perusal of the impugned judgment of the High Court would indicate that the Court has not considered the relevant pleadings and the findings arrived thereon after appreciation of the evidence by the lower Appellate Court and on the other hand, the High Court has straightway by surmises and conjectures, interfered with the conclusions on the question of facts arrived at by the lower Appellate Court. We really fail to understand as to how the High Court would record a finding that the tenancy of the plaintiff was in respect of the structure and not the land and further the lease in favour of the plaintiff was in respect of the land other than the land on which the defendants had the possession. Having considered the judgment of the lower Appellate Court in both these cases, we have no hesitation to come to the conclusion that the said lower Appellate Court has recorded findings on the materials on record and the conclusions arrived thereunder cannot be said to be erroneous in any manner. In this view of the matter, we see no justification for remitting the second appeals to the High Court again for re-disposal. In our view, the High Court committed serious error in interfering with the judgment and decree of the lower Appellate Court in exercise of its jurisdiction under Section 100 of the Code of Civil Procedure. We, accordingly, set aside the impugned judgment of the High Court in the second appeals and affirm the judgments and decrees of the lower Appellate Court and decree the suits. *Sashi Kanta Ruia vs. Indo Minerals and others,* AIR 2000 SC 2745 : 2000(3) Land LR 6 : 2000(2) Orissa LR 442 : 2000(6) SCC 604 : 2000(3) Cur CC 226 : 2000(2) All Rent Cas 413

Section 100.-Second appeal.-Purchase of land in adjacent survey numbers.-Clause in sale deed that parties had right of ingress and egress over open passage.-Suit for declaration that respondent encroached upon land and for possession.-Report of Local Commissioner showed that plaintiff was in possession of land more than what was purchased by him.-Trial Court finding upheld by first appellate Court that any short fall in land occupied by plaintiff than extent stated in sale deed must necessarily be encroachments.-High Court held that trial Court had proceeded in most summary fashion and over-simplified complex question of law and fact and such an approach was unsustainable in law.-Appeal dismissed. *Saraswati and another vs. S. Ganapathy and another,* AIR 2001 SC 1844 : 2001(4) SCC 694

Section 100.-Second appeal.-Question of law.-Question whether fact finding reached by Courts below is against the weight of evidence or not, remains in the realm of appreciation of evidence.-If it does not project any question of law, much less any substantial question of law, decision reached by single Judge in second appeal merely on reappreciation of evidence unsustainable.

Whether a finding of fact reached by Courts below is against the weight of evidence or not is a question which will remain in the realm of appreciation of evidence and does not project any question of law, much less, any substantial question of law, which can enable the High Court in second appeal to upset such a finding of fact. On relevant evidence, both the Courts below had come to the conclusion that the original sale deed (Exhibit-59) dated 29th January, 1973 was a nominal one and was executed by way of security for the loan taken by the appellant from the defendant and similarly the latter two sale deeds Exhibit-52 dated 31-10-75 and Exhibit-53 of even date were exchange transaction. These findings were well sustained on record and could not have been interfered with by the High Court in second appeal. Hence, even on merits of the controversy between the parties, the decision rendered by the learned single Judge and the conclusion of facts to which he reached on re-appreciation of evidence cannot be sustained. The appellant had made out his case on merits and equities were also in his favour. The respondent cannot take advantage of such a nominal sale transaction to defeat plaintiff's claim. *Dnyanoba Bhaurao Shemade vs. Maroti Bhaurao Marnor,* AIR 1999 SC 864 : 1999(3) Land LR 307 : ILR (1999) Kant 1705 : 1999(2) Bom LR 436 : 1999(2) SCC 471 : 1999(1) Cur CC 65 : 1999(2) Cir LJ 525

Section 100.-Second appeal.-Re-appreciation of evidence.-Submission that evidence of witnesses unworthy of reliance.-Neither a case of no evidence nor perverse finding.-All such submissions within realm of appreciation of evidence.-Neither Supreme Court nor High Court can interfere in such case.

The finding recorded on subletting and nuisance by both the Courts below being based on evidence on

record, its setting aside by reappraisal of evidence, and in any case without framing any substantial question of law by the High Court cannot be sustained and further we also do not find any substantial question of law arising therein. Learned counsel for the respondent tried to submit with force by attempting to take us to the evidence of the witnesses to show their unworthiness for reliance. It is neither a case of no evidence nor perverse finding. All these submissions are within the realm of appreciation of evidence which should not have been interfered by the High Court far less for us to examine. *Hari Singh vs. Kanhaiya Lal,* AIR 1999 SC 3325 : 1999(4) Rec Civ R 107 : 1999(8) ADSC 142 : 1999(7) SCC 288 : 1999(3) Raj LW 415 : 1999(2) Rent LR 613

Section 100.-Second appeal.-Substantial question of law.-Concurrent finding on subletting and nuisance.-Setting aside without formulating substantial question of law.-Not permissible. *Hari Singh vs. Kanhaiya Lal,* AIR 1999 SC 3325 : 1999(4) Rec Civ R 107 : 1999(8) ADSC 142 : 1999(7) SCC 288 : 1999(3) Raj LW 415 : 1999(2) Rent LR 613

Section 100.-Second appeal.-Substantial Question of law.-Eviction suit.-Main issue whether tenant is entitled to protection of Land Reforms Act.-Cannot be treated as substantial question of law.-Substantial Question of law is to be resolved for deciding main issue involved in the suit.-Impugned judgment in second appeal decreeing eviction suit set aside.-There was no scope for entertaining second appeal.

The prime question involved in this appeal is whether the first respondent (tenant) is entitled to protection under Section 106 of the Kerala Land Reforms Act. Learned counsel pleaded that the said question was treated by the High Court as substantial question of law. That question appears to be too omnibus in nature as that was the main issue of the suit. Substantial questions of law, if any, shall be resolved for deciding the main issue involved in the suit. At any rate, we cannot treat the above as a substantial question of law to be determined by the High Court in the second appeal.# *K.C. Mathew and Sons and another vs. A. Sulaikha Beevi and others,* AIR 2000 SC 3408 : 2000(4) Cur CC 50 : 2000(2) ICC 651 : 2000(40) All CJ 990

Section 100.-Second appeal.-Substantial question of law.-Meaning of.

Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. *Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and others,* AIR 1999 SC 2213 : 1999(2) Mad LJ 105 : 1999(2) Cur CC 36 : 1999(4) Andh LD 57 : 1999(3) All Mah LR 467 : 1999(3) SCC 732 : 1999(3) Bom LCR 532

Section 100.-Second appeal.-Substantial question of law.-Reversal of judgment of first appellate Court not permissible without formulating substantial question of law.

Under Section 100 C.P.C., after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate Court without doing so. *Ishwar Dass Jain (dead) through LRs vs. Sohan Lal (dead) by LRs,* AIR 2000 SC 426 : 2000(1) Civil Court C 373 : 2000(1) Mad LW 425 : 2000(1) Andh LD 40 : 2000(1) SCC 434 : 2000(1) Raj LW 80 : 2000(125) Pun LR 58 : 2000(1) Cal HN 1

Section 100.-Second appeal.-Substantial question of law not framed.-High Court deciding second appeal without keeping in view limited jurisdiction conferred on it.-Impugned order set aside.-Second appeal restored to file of High Court for redeciding following procedure laid down in Section 100.

A mere look at the impugned order shows that the High Court has allowed the second appeal and remanded the proceedings without strictly following the procedure laid down under Section 100 of the Code of Civil Procedure. Only on this short ground and without expressing any opinion on the merits of the controversy between the parties, this appeal is allowed. The impugned judgment and order of the High Court are set aside. Second Appeal No. 7 of 1998-A is restored to the file of the High Court with a request to redecide the same in accordance with the limited jurisdiction conferred under Section 100 of the Code of Civil Procedure after following the procedure laid down therein. *Manorama Thampuratti vs. C.K. Sujatha Thampuratti and others,* AIR 2000 SC 3400 : 2000(3) Cur CC 31 : 2000(38) All LR 821 : 2000(1) All CJ 481

Section 100.-Second appeal.-Substantial question of law or fact.-Suit for specific performance of agreement to sell.-Issue framed by trial Court "whether the plaintiff was ready and willing to perform his part of contract" was of issue of fact held in favour of plaintiff by concurrent finding.-High Court cannot take a different view in second appeal by reappreciation of evidence treating the issue as substantial question of law. *Veerayee Ammal vs. Seeni Ammal,* AIR 2001 SC 2920 : 2001(9) JT 145 : 2002(1) Civ CR 295

Section 100.-Second appeal.-Substantial Questions of law.-Claim to property.-Construction of

document for.-Raises substantial question of law.

The second Appellate Court has categorically stated that there is a substantial question of law between the parties inasmuch as the construction of the documents under which the claim to property is made is a substantial question of law. That construction of documents would be a substantial question of law is now a well settled proposition. This proposition has been settled as far back as the judgment of the Privy Council in the case of *Guran Ditta vs. T. Ram Ditta* reported in AIR 1928 P.C. 172. It has since been reaffirmed by this Court in the case of *Kochukakkada Aboobacher vs. Attam Kasim* reported in AIR 1996 S.C. 3111 and the case of *Neelu Narayani vs. Lakshmanan* reported in (1999) 9 SCC 237. *Santakumari and others vs. Lakshmi Amma Janaki Amma (dead) by LRs and others,* AIR 2000 SC 3009 : 2000(3) mad LJ 188 : 2000(4) All Mah LR 702 : 2000(7) SCC 60 : 2000(41) All LR 36 : 2000(4) Rec Civ R 281

Section 100.-Second appeal.-Suit for ejectment.-Need for personal use and occupation is a question of fact.-Lower appellate Court after extensively discussing evidence on record opined that property not required for personal use and occupation.-High Court rightly refused to interfere with finding of fact.

The lower appellate Court has extensively discussed the evidence on record and has come to the finding that the property in question was not required for the use and occupation of the landlord inasmuch as she has got sufficient accommodation. We hold that the High Court rightly refused to interfere with the findings on this point of the lower Appellate Court. We may state here that learned Counsel for the appellant has drawn our attention to the judgment of the High Court wherein it has been recorded that nine rooms were in occupation of the landlady which was not a fact and therefore, High Court has misdirected itself. This contention has no force as High Court dismissed the appeal on the ground that there was no substantial question of law involved. *Labanya Neogi (through LRs) vs. W.B. Engineering Co.,* AIR 1999 SC 3331 : 1999(8) ADSC 181 : 1999(7) SCC 431 : 1999(2) Rent LR 628 : 1999(5) Scale 378

Section 100.-Second appeal.-Suit for permanent injunction.-Against forcible dispossession.-Suit partially decreed.-Single Judge overlooking earlier order of remand travelled outside scope of suit went on to record findings based on alleged title of plaintiffs to suit property and dismissed suit.-Judgement of Single Judge of High Court falls within scope of clause 15 of Letters patent.-Letters patent appeal maintainable.-However second appeal is not maintainable.

The learned counsel contended that the remedy of the respondent was to file a second appeal under Section 100, C.P.C. against the judgment of the learned single Judge. However, he realised his folly when he read out Section 100, C.P.C. and found that it applied only to decrees passed in appeal by a Court subordinate to the High Court. There can be no doubt whatever that the judgment of the learned single Judge of the High Court fell within the scope of clause 15 of the Letters Patent and the appeal was maintainable. *Prataprai N. Kothari vs. John Braganza,* AIR 1999 SC 1666 : 1999(2) Land LR 585 : 1999(2) Cur CC 138 : 1999(3) Pun LR 55 : 1999(2) Raj LW 292 : 1999(2) All Mah LR 566 : 1999(4) SCC 403

Section 100.-Second appeal.-Suit for permanent injunction.-Restrain-ing defendants from interfering in suit land.-Finding by first appellate Court that sale deed was invalid without any issue and without impleading vendees in whose favour sale deed was executed.-No finding that plaintiff was in possession of land or jamabandi was forged without any evidence or plea raised by plaintiff.-Whole approach of first appellate Court based on mere suspicion and bias against second defendant.-Case based on substantial error or defect in procedure.-High Court justified in entertaining second appeal.

The whole approach of the first appellate Court was based mere on suspicion and his possible bias against the second respondent then an evidence of which there was none and when there was no issue as well to support his findings. It was certainly the case where there was a substantial error or defect in the procedure as prescribed by the Code and the High Court was justified in entertaining the second appeal. Once having held that the second appeal was maintainable, the High Court was right in setting aside the judgment of the first appellate Court as it was based on no evidence; was against the record; and was against the procedure prescribed by law. No doubt procedure is meant to advance justice but when law prescribes as to how jurisdiction is to be exercised and power is conferred for the purpose, it has to be exercised that way. For a second appeal to the maintainable, it has to satisfy the parameters as laid in Section 41 of the Punjab Courts Act or Section 100 of the Code as the case may be. *Banarsi Dass vs. Brig. Maharaja Sukhjit Singh and another*, AIR 1998 SC 179 : 1998(4) Andh LT 1 : 1998(1) Rec Civ R 84 : 1998(2) SCC 81

Section 100.-Second appeal.-Suit for recovery of excess demurrage charged by railways.-Decreed.-Absence of pleading that rule relied upon was ultra vires Railways Act, 1890.-No issue framed by trial Court.-High Court on its own considered validity of rule holding the rule was ultra vires Railways Act.-Pleadings comprising of averments and defence put up in written statement relating to validity of rule did not relate to validity of rule.-High Court travelled beyond pleadings in declaring rule to be ultra vires.-Judgement of High Court cannot be sustained.

There was no pleading that the Rule upon which the reliance was placed by the respondent was ultra vires the Railways Act, 1890. In the absence of the pleading to that effect, the trial Court did not frame any issue on that question. The High Court of its own proceeded to consider the validity of the Rule and

ultimately held that it was not in consonance with the relevant provisions of the Railways Act, 1890 and consequently held that it was ultra vires. This view is contrary to the settled law that a question, which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject matter of any issue, could not be decided by the Court. The scope of the suit was limited. The pleading comprising of the averments set out in the plaint and the defence put up by the present appellant in their written statement did not relate to the validity of the Rule struck down by the High Court. The High Court, therefore, travelled beyond the pleadings in declaring the Rule to be ultra vires. The judgment of the High Court, therefore, on this question cannot be sustained. *Union of India vs. E.I.D. Parry (India) Ltd.,* AIR 2000 SC 831 : 2000(1) Andh WR 137 : 2000(2) Mad LJ 39 : 2000(125) Pun LR 64 : 2000(2) SCC 223 : 2000(1) Cur CC 210 : 2000(2) BLJ 366

Section 100.-Second appeal.-Suit for redemption of mortgage.-Property vested in State by escheat.-Trial Court dismissed suit holding that remaining land could not be redeemed.-High Court reversed finding of courts below holding that mortgage deed was not admissible and application moved by State did not conform to requirements of Section 65 of Evidence Act.-Dispute before High Court was not about admissibility of document, but mode of proof only.-High Court ignored cumulative effect of material produced and fact that none of plaintiffs chose to go to witness box to substantiate their claims, nor challenged admissibility of document before lower Courts.-Matter remanded back granting opportunity to both sides to lead evidence in the light of evidence on record.

The High Court appears to have done what is not permissible for it in a second appeal, be it one even filed under the amendment Section 100, CPC, by re-appreciating the evidence, adopting a process of elimination by being merely critical of the materials produced on behalf of the State without taking into account the cumulative effect of those materials and completely ignoring the fact that none of the plaintiffs have chosen to go into the box to substantiate their claims. The overwhelming materials of which due notice has been taken and consideration made by the Courts below seem to have escaped the attention of the High Court in upsetting the concurrent findings of fact, recorded by the Courts below.

All the more so, when there was no challenge or dispute with reference to the admissibility of the said document by the plaintiffs at the appropriate stage before the trial Court or the first appellate Court. Even the grievance before the High Court seems to be not that the document is per se an admissible one but about the mode or method of proof only. *State of H.P. and another vs. Akshara Nand (dead) by LRs and others,* AIR 2000 SC 1828 : 2000(2) Mad LJ 87 : 2000(3) Land LR 24 : 2000(3) SCC 661 : 2000(2) All Mah LR 694 : 2000(2) Cur CC 1 : 2000(2) All CJ 899

Section 100.-Second appeal.-Suit for specific performance of agreement to repurchase property.-Concurrent finding that appellant was ready and willing to buy back.-Purchaser merely claiming credit for certain amount does not mean that he was seeking variation in sale consideration.

The appellant has proved the agreement made and the parties were not at issue as to its existence. The appellant had expressed his readiness and willingness to perform the agreement by paying the consideration fixed not once but repeatedly in several paragraphs of the plaint. The High Court erred in overlooking the fact that the appellant had never said that the consideration for reconveyance under the agreement was less than what was stated. Conceding that the appellant had merely claimed credit for certain amounts, this could not mean that he was seeking a variation in the agreement itself. *V. Pechimuthu vs. Gowrammal,* AIR 2001 SC 2446 : 2002(1) Civ CR 9 : 2001(7) SCC 617 : 2001(6) JT 162

Section 100.-Second appeal.-Trial Court finding that ownership of suit property vested in plaintiff and negatived plea of adverse possession holding that he forcibly occupied disputed area, reversed by first appellate Court.-High Court dismissed second appeal in limine holding that no substantial question of law arose for determination.-Defendant's plea of adverse possession raised substantial question of law as plaintiff's suit was barred by limitation under Article 65 of Limitation Act.-High Court order suffered from legal infirmity.-Case remanded back for fresh decision uninfluenced by observations made. *Santosh Hazari vs. Purushottam Tiwari (dead) by LRs,* AIR 2001 SC 965 : 2001(2) SCC 179 : 2001(2) JT 407

Section 100.-Second appeal.-Whether can be decided merely on equitable grounds.-No ground to interfere with concurrent finding of facts, though erroneous, in second appeal.

The right of appeal is neither a natural not an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the Section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be disturbed by the High Court in exercise of the powers under this Section. The substantial question of law has to be distinguished from a substantial question of fact. *Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and others,* AIR 1999 SC 2213 : 1999(2) Mad LJ 105 : 1999(2) Cur CC 36 : 1999(4) Andh LD 57 : 1999(3) All Mah LR 467 : 1999(3) SCC 732 : 1999(3) Bom LCR 532

Section 100.-Section appeal.-Finding of fact.-Interference with.-When permissible.-(1) When material or relevant evidence not considered, or (2) When finding arrived at by appellate Court relying upon inadmissible evidence.-Substantial question of law is necessary to interfere with

judgment of first appellate Court in both situations.

There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered would have led to an opposite conclusion. This principle has been laid down in a series of judgments of this Court in relation to Section 100, CPC after the 1976 amendment.

The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate Court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible.

In either of the above situations, a substantial question of law can arise. The substantial question of law that arises for consideration in this appeal is : "whether the Courts below had failed to consider vital pieces of evidence and whether the Courts relied upon inadmissible evidence while arriving at the conclusion that the mortgage was sham and that there was no relationship between the plaintiff and the defendant as mortgagor and mortgagee but the real relationship was as landlord and tenant? *Ishwar Dass Jain (dead) through LRs vs. Sohan Lal (dead) by LRs,* AIR 2000 SC 426 : 2000(1) Civil Court C 373 : 2000(1) Mad LW 425 : 2000(1) Andh LD 40 : 2000(1) SCC 434 : 2000(1) Raj LW 80 : 2000(125) Pun LR 58 : 2000(1) Cal HN 1

Section 100.-Specific Relief Act, 1963, Section 16(c).-Second appeal.-Specific performance of contract.-Concurrent finding that plaintiff made no effort to pay sale consideration price to defendant.-Fact finding by lower Court binding on plaintiff in second appeal.

In the present case before us there is no proof that any attitude of the defendant towards the plaintiff was the cause for the plaintiff not being able to pay the amount to the defendant. As already stated, the finding of fact arrived at by the Courts below that no effort has been made by the plaintiff to pay the sale consideration to the defendant are findings of fact, binding in second appeal. *Bismillah Begum (Smt.) (dead) by LRs vs. Rahmatullah Khan (dead) by LRs.,* AIR 1998 SC 970 : 1998(1) Andh LT 24 : 1998(1) Mad LW 825 : 1998(2) SCC 226

Section 100 (as amended by Act of 1976).-Second appeal.-Perversity itself a substantial question of law.-Worth adjudication.-Interference with finding on perversity permissible.

While it is true that in a second appeal a finding of fact even if erroneous will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumption and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say, however, that perversity itself is a substantial question worth adjudication.-What is required is a categorical finding on the part of the High Court as to perversity. The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. *Kulwant Kaur vs. Gurdial Singh Mann (dead) by LRs and others,* AIR 2001 SC 1273 : 2001(4) SCC 262 : 2001(4) JT 158

Section 100 and 54.-Second appeal.-Maintainability.-Decree passed in partition suit.-Revision against order not maintainable.-Summary dismissal of second appeal on ground that no substantial question of law was involved.-Order set aside.-Matter remanded back to High Court for disposal on merits.

It is apparent that there was an important and substantial question of law involved in this case, which required a decision from the High Court. Since the second appeal filed by the appellant was summarily dismissed on the ground that no substantial question of law was involved, we allow this appeal, set aside the order passed by the Gujarat High Court and remand the case back to the High Court so that the second appeal which shall be treated as "admitted" may be disposed of on merits after notice to the parties. *Damjibhai Bijibhai Vasava vs. Ranchhedbhai Zinabhai and others,* AIR 2000 SC 1000 : 2000(2) Land LR 363 : 2000(2) Guj LR 1763 : 2000(2) Raj LW 232 : 2000(3) SCC 22 : 2000(2) Mah LR 160 : 2000(2) Cur CC 36 : 2000(2) All CJ 1370

Section 100(4).-Second appeal.-Framing of substantial question of law.-Necessary.-To exercise jurisdiction to decide second appeal.-Allowing appeal without framing of substantial question of law is sufficient ground to set aside judgment under appeal.

The High Court without formulating any substantial question of law, as required under sub-section (4) of Section 100 of the Code of Civil Procedure allowed the second appeal and decreed the suit. It is against the said judgment the defendant/respondent is in appeal. This Court on more than one occasion has said that under sub-section (4) of Section 100 of Code of Civil Procedure is required to frame substantial question of law and only then it acquired jurisdiction to decide a Second Appeal on merits. In this case the High Court without framing any substantial question of law has allowed the appeal and this in itself is a sufficient ground to set aside the judgment under appeal. *Ramavilason Grandhasala vs. N.S.S Karayogam,* AIR 2000 SC 2058 : 2001(1) Ker LJ 91 : 2000(3) Mad LW 10 : 2000(5) SCC 64 : 2000(3) Raj LW 423 : 2000(2) Orissa LR 158 : 2000(2) Cur CC 225

Section 100(4)(5).-Second Appeal.-Disposal of.-Legality.-Second appeal disposed of without framing

substantial questions of law.-Plea not raised before High Court.-Matter remanded back to High Court for deciding effect of amendment introduced in 1976 on pre-existing Section 100(1)(d) as applicable to State of Kerala in view of local amendment.

In our opinion, the plea which is sought to be raised on behalf of the respondents before us was not raised before the High Court and, therefore, it will be appropriate if the matter is remitted back to the High Court leaving it open to the parties to raise their respective contentions before the High Court and the High Court forming and expressing its opinion on the effect of amendment in Section 100 of the C.P.C. introduced by Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) on the pre-existing Section 100(1)(d) as applicable to the State of Kerala in view of local amendment. *Ellangallur and others vs. Gopalan and others,* AIR 2000 SC 533 : 2000(2) Land LR 22 : 2000(1) Cur CC 155 : 2000(1) Mah LR 669 : 2000(124) Pun LR 768 : 2000(2) SCC 11 : 2000(3) Raj LW 468 : 2000(3) Cal LT 28 : 2000(1) BLJ 827

Section 103(b).-Second appeal.- Procedure for disposal.-Inter- ference with finding of fact.-Where the second appellate court chooses to interfere with the decision of first appellate Court on account of non-consideration of admissible evidence and in-stead of remanding the case chooses to decide itself, it must reappraise entire evidence. *Shri Bhagwan Sharma v. Smt. Bani Ghosh,* AIR 1993 SC 398: 1993 Supp (3) SCC 497: 1993(1) APLJ 55

Section 104.-Letters Patent Appeal .-Effect of.-Trial of suit by the Single Judge of the High Court.-Appeal to Larger Bench of High Court against such order is not affected by the provision of the Code. Our conclusions are: (1) That there is no inconsistency between Section 104 read with Order 43, Rule 1 and the appeals under the Letters Patent and there is nothing to show that the Letters Patent in any way excludes or oversides the application of Section 104 read with Order 43, Rule 1 or to show that these provisions would not apply to internal appeals within the High Court. (2) That even if it be assumed that Order 43, Rule 1 does not apply to Letters Patent appeals, the principles governing these provisions would apply by process of analogy. (3) That having regard to the nature of the orders contemplated in the various clauses of Order 43, Rule 1, there can be no doubt that these orders purport to decide valuable rights of the parties in ancillary proceedings even rough the suit is kept alive and that these orders do possess the attributes or character of finality so as to be judgements within the meaning of Cl. 15 of the Letters Patent and hence, appealable to a larger Bench. (4) The concept of the Letters Patent governing only the internal appeals in the High Court and the Code of Civil Procedure houring no application to such appeals is based on a serious misconception of the legal posititon. *Shah Babulal Khimji v. Jayaben D. Kania and another,* AIR 1981 SC 1786: 1981(4) SCC 8: 1982(1) SCR 187: 1981(3) Scale 1169: 1981 Rajdhani LR 624

Sections 104 and 2(9), Order 39, Rules 1 and Order 43, Rule 1(r).- Letter Patent.-Clause 10.-LPA against order of Single Judge.- Maintainability.-Appellant filed a suit for injunction under Order 39, Rule 1.-Trial Court granted status quo of the suit premises.-On appeal filed by the respondents, the learned Single Judge vacated the injunction .-Thereafter Appellant filed Letters Patent Appeal.-Held, not valid.- LPA would not lie against an order of the learned Single Judge. *M/s. New Kenilworth Hotel (P) Ltd. v. Orissa State Finance Corporation and others,* AIR 1997 SC 978: 1997(3) SCC 462: 1997(1) Scale 472: 1997(1) JT 712: 1997(2) Mad LJ 52: 1997(2) Rec. Civ. R 294

Section 105(2).-Appeal against the order of remand.-Failure to file appeal.-Effect of.-The aggrieved party cannot, subsequently file appeal against such order, after disposal of the suit remanded for re-consideration. Under Order 43, Rule 1 Clause (u) C.P.C. an appeal lies against an order remanding a case where an appeal would lie from the decree of the appellate court. From the fact that the respondent has filed Second Appeal, which is the subject of attack before us against the decision in an appeal of the District Court in the same proceedings, it is clear that the respondent should have filed an appeal against the order of remand. The consequence of an omission to file an appeal against the order of remand, under such circumstances, is indicated in Section 105, sub-section (2) C.P.C. *Sita Ram Goel v. Sukhnandi Dayal and another,* AIR 1972 SC 1612: 1972(1) SCR 836: 1971(3) SCC 488 **Section 105(2).-Remand order.-Failure to appeal.-Effect of.- Subsequently remand order cannot be challenged even under inherent powers of the court.** *Nainsingh v. Koonwarjee and others,* AIR 1970 SC 997: 1970 Jab LJ 544: 1970 MPLJ 568: 1971(1) SCR 207: 1970(1) SCC 732

Section 107.-Interference with finding of fact.-Considerations for .-The rule of practice is that where the evidence is conflicting and decision hinges upon the credibility of witnesses, the appellate court should not interfere with finding of civil Court on question of fact.

In such cases, the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is.-and it is nothing more than a rule of practice.-that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact. The High Court was wrong in thinking

that it would detract from the value to be attached to a trial Judge's finding of fact if the Judge does not expressly base his conclusion upon the impressions he gathers from the demeanour of witnesses. The duty of the appellate Court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial Court arrived at or whether there is an element of improbability arising from proved circumstances which in the opinion of the Court, outweighs such finding. Applying this principle to the present case, we do not think that the High Court was justified in reversing the finding of the trial Judge on the question of attestation of the document. *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh and others,* AIR 1951 SC 120: 1951 ALJ 1: 64 MLW 373: 1950 SCJ 583: 1950 SCR 781

Section 107.-Appeal.-Categorical finding of fact that proper opportunity of hearing was not afforded in departmental proceedings.-Lower Appellate Court confirmed finding that period of unauthorised absence from duty regularised.-Charge did not survive.-No finding about opportunity of hearing to delinquent.-It was not open to lower appellate court to remand case for fresh order of punishment.-Judgment and decree passed by trial court setting aside dismissal upheld.

The appellate Court cannot, in the garb of exercising power under Order XLI, Rule 33, enlarge the scope of the appeal. Whether this power would be exercised or not would depend upon the nature and facts of each case.

The powers of the appellate Court are also indicated in Section 107 of the Code of Civil Procedure which provides that the appellate Court shall have the same powers as are conferred on the original Court. If the trial Court could dispose of a case finally, the appellate Court could also, by virtue of clause (a) of sub-section (1) of Section 107, determine a case finally.

The lower appellate Court confirmed the finding that since the period of unauthorised absence from duty was regularised, the charge did not survive but it did not say a word about the finding relating to the opportunity of hearing in the departmental proceedings. Since those findings were not specifically set aside and the lower appellate Court was silent about them, the same shall be treated to have been affirmed. In the face of these findings, it was not open to the lower appellate Court to remand the case of the punishing authority for passing a fresh order of punishment. The High Court, before which the second appeal was filed by the State of Punjab, did not advert itself to this inconsistency as it dismissed the appeal summarily, which indirectly reflects that it allowed an inconsistent judgment to pass through its scrutiny.

State of Punjab vs. Bakshish Singh, AIR 1999 SC 2626 : 1999(1) Lab LJ 1208 : 1998(8) AD SC 73 : 1998(8) SCC 222 : 1999(1) All WC 245

Sections 109 and 112.-Concurrent finding of fact.-Interference.- Permissibility.-The question relating to proper inference of law to be deducted on the basis of the facts of the case.-Interference by Supreme Court is permissible. *Bejoy Gopal Mukherji v. Pratul Chandra Ghose,* AIR 1953 SC 153: 1953 SCJ 195: 1953 SCR 930

Section 110.-New pleas.- Permissibility.-Appellant is entitled to support the certificate of appeal on the grounds other than on which the certificate was given. *Deputy Commissioner, Hardoi, in charge Court of Wards, Bharawan Estate v. Rama Krishna Narain and others,* AIR 1953 SC 521: 1953 SCJ 664: 1954 SCR 506

Section 112.-Interference with concurrent finding of fact.- Considerations for.-Unless there are exceptional circumstances, the Supreme Court should not interfere with concurrent finding of fact.-The interference could be justified where there is violation of any rule of law, procedure by the court below which materially affected finding of fact. *Firm Sriniwas Ram Kumar v. Mahabir Prasad and others,* AIR 1951 SC 177: 1951 ALJ SC 64: 64 MLW 544: 1951 SCJ 261: 1951 SCR 277

Section 113.-Effect of.-Validity of provision.-Necessity of deter- mination.-The decision of the question relating to validity of the provision necessary for disposal of the case.-Direction given for reference of case for the opinion of the High Court. The question of the validity of the definition in so far as it excluded certain debts having been raised and pressed by the appellant, it had to be decided by the court. Without a decision of that question the case could not be disposed of. The fact that in the view of the court the impugned part of the definition was not severable from the rest and therefore in any view of the question as to the validity of the impugned part, the appellant would not get any relief, did not alter the position. The question as to the severability of the impugned part of the definition from the rest would arise only after it had been decided that the impugned part was invalid and so to be able to say that the impugned part of the definition was not severable from the rest, it had first to be held that that part was invalid. It could not be said that as the impugned part was not severable from the rest it was not necessary for the disposal of the case to decide the question of the validity of the impugned part. We, therefore, hold that it is necessary to decide the question of the validity of the impugned part of the definition to dispose of the case. *Raja Ganga Pratap Singh v. Allahabad Bank Ltd., Lucknow,* AIR 1958 SC 293: 1958(1) And WR (SC) 156: 1958(1) Mad LJ 156: 1958 SCJ 431: 1958 SCR 1150

Section 113, Order 46, Rule 3.-Reference to High Court.-Question of vires of Section 212 and 213 of Bombay Provincial Municipal Corporation Act for not affording opportunity of hearing to tenant or occupant of premises likely to be demolished.-Reference rejected by High Court.-Plaintiffs given

alternative accommodation by Municipal Corporation.-Reference after rejection does not survive for consideration.

Once the High Court had answered the questions referred to it by rejecting the references, nothing further survived for the High Court to decide. Consequently, it must be held that on the combined operation of Section 113 and order 46, Rule 3 C.P.C. and also in the light of peculiar facts and circumstances of these cases as seen earlier, the impugned observations are found to be unnecessary for decision in respondents' suits as they had no legal effect on the result of the suits in connection with which they were made. We are , therefore, not called upon to pronounce on the correctness and legality of these impugned observations. *Municipal Corporation of City vs. Shivshanker Gaurishanker Mehta and another,* AIR 1999 SC 2874 : 1998(7) JT 469 : 1998(9) SCC 197

Section 114.-Review.-Delay and Laches.-Review sought after 4 years.-Impugned judgment became final and also acted upon.-Review petition rightly rejected. *Sardar Narender Singh v. IVth Addl. Distt. Judge and others,* AIR 1994 SC 1245: 1995(1) Rent. LR 384: 1994(2) APLJ 39

Section 114.-Review.-Quasi Judicial Tribunal.-Power to review.-Principles of review under the provisions of Code are applicable to the orders of Quasi Judicial Tribunals also.

The same Judge who disposes of a matter, if available, must "review" the earlier order passed by him inasmuch as he is best suited to remove any mistake or error apparent on the face of his own order. Again he alone will be able to remember what was earlier argued before him or what was not argued. Therefore the Board of Revenue which never heard the case cannot review the order of the Commissioner. *State of Orissa and others vs. Commissioner of Land Records and Settlement, Cuttack and others*, AIR 1998 SC 3067 : 1998(5) JT 662 : 1998(4) Scale 682 : 1998(7) SCC 162 : 1998(6) AD SC 559

Sections 114, 11.-Review petition filed before High Court.-Special Leave Petition against main judgment filed subsequently before Supreme Court dismissed without assigning any reason.-Review petition dismissed thereafter.-Second S.L.P. against order rejecting review petition not barred by principle of *res judicata.* *K. Rajamouli vs A.V.K.N. Swamy,* AIR 2001 SC 2316 : 2001(5) SCC 37 : 2001(S1) JT 168

Section 115.-Delay and laches.- Effect of.-Delay of about 10 years in approaching the High Court.-Refusal to entertain revision.- Refusal is not vitiated by any error of jurisdiction or material error in exercise of its jurisdiction.

Mirza Majid Hussain v. State of M.P. and another, AIR 1995 SC 2243: 1995(2) SCC 422: 1995(1) Scale 409: 1995(2) JT 93: 1995(1) CCC 656

Section 115.-Interference with interlocutory order.-Permissibility .-Expression `case'.-Meaning of.-Impugned order allowing a question put to witness.-Scope of revision.

The expression case is not limited in its import to the entirety of the matter in dispute in an action. The expression case is a word of comprehensive import; it includes a civil proceeding and is not restricted by anything contained in Section 115 of the Code to the entirety of the proceeding in a civil Court. To interpret the expression case as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of Section 115 of the Code of Civil Procedure. *Baldevdas Shivlal and another v. Filmistan Distributors (India) Pvt. Ltd. and others,* AIR 1970 SC 406: 11 Guj LR 150: 1970(1) SCR 435: 1969(2) SCC 201

Section 115.-Interference with question of fact.-Sale certificate.- Confirmation of sale by Court.-Discrepancy in defining the boundaries of property.-The question as to what was sold in execution of the decree is a question of fact.-Interference with such question of fact, in exercise of revisional jurisdiction is not proper.

P. Udayani Devi v. V.V. Rajeshwara Prasad Rao and another, AIR 1995 SC 1357: 1995(3) SCC 252: 1995(2) Scale 43: 1995(3) JT 523: 1995 Civ. CR (SC)_549

Section 115.-Revision.-Case decided.-Meaning of.-Decision on preliminary issue disposing off the case itself as the suit held to be not maintainable.-Such order must be regarded as case which has been decided.

The expression case is a word of comprehensive import: it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression case as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice. The Subordinate Judge in the present case held by an interlocutory order that the suit filed by Dillon for recovery of the amounts advanced to Khanna was not maintainable. That was manifestly a decision having a direct bearing on the rights of Dillon to a decree for recovery of the loan alleged to have been advanced by him, which he says Khanna agreed to repay; and if the expression case includes a part of the case, the

order of the Subordinate Judge must be regarded as a case which has been decided. *Major S.S. Khanna v. Brig. F.J. Dillon,* AIR 1964 SC 497: 1963 All LJ 1068: 66 Pun LR 115: 1964(4) SCR 409

Section 115.-Revision.-Conversion into appeal.-Permissibility.-When the court below has illegally exercised its jurisdiction, conversion of appeal into revision affirmed.

A.J. Pinto and another v. Smt. Sahebbi Kom Muktum Saheb, AIR 1971 SC 2070: 1972 (4) SCC 238

Section 115.-Revision.-Decision without trial.-Permissibility.- Question of fact decided by the Trial Court without any evidence.-It is exercised of jurisdiction with material irregularity liable to interference by High Court.

In any event the decision of the Court clearly attracted clause (c) of Section 115 Code of Civil Procedure, for the Court in deciding that the suit was not maintainable as alleged in paragraphs 15, 16, 17 and 18 of the written statement purported to decide what in substance was an issue of fact without a trial of the suit on evidence. All these contentions raised substantial issues of fact which had to be decided on evidence, and Dillon could not be non-suited on the assumption that the pleas raised were correct. *Major S.S. Khanna v. Brig. F.J. Dillon,* AIR 1964 SC 497: 1963 All LJ 1068: 66 Pun LR 115: 1964(4) SCR 409

Section 115.-Revision.-Dismissal in default.-Application for restoration taken up in chamber and dismissed without opportunity of hearing.- Revision application restore and directed to be disposed of on merits.

Jawala Prasad v. Ajodhya Prasad, AIR 1983 SC 304: 1983(1) Scale 716: 1983 BLJR 234: 1983 All. L.J. 247

Section 115.-Revision.-Dismissal in default.-Non-appearance of counsel due to occupation in another court.- It constitutes sufficient cause.-The application should have been re-heard by the court.

It is obvious that the appellant could not appear at the hearing of the revision application preferred by the fire respondent because the Advocate engaged by him was occupied in another court and this fact was stated by the learned Advocate in the affidavit made by him in support of the application for rehearing. We are, therefore, of the view that on the facts and circumstances of the present case, the appellant had sufficient cause for not being present at the hearing of the revision application and the learned single Judge of the High Court ought, in the circumstances, to have allowed the application and re- heard the civil revision petition applying the principle underlying Order XLI, Rule 21 of the Code of Civil Procedure. *Savithri Amma Seethamma v. Aratha Karthy and others,* AIR 1983 SC 318: 1983(1) SCC 401: 1983(1) Scale 706: 1983 Ker.L.T. 379: 1982 TLNJ 1

Section 115.-Revision.-Distinction with appeal.-Effect of each of the proceedings.-Review of evidence.- Permissibility.

The State of Kerala v. K.M. Charia Abdulla and Co, AIR 1965 SC 1585: 1965 Ker LJ 903: 1965(2) SCR 837

Section 115.-Revision.-Effect of admission.-Revision petition once admitted has to be disposed of on merits.-Dismissal of revision petition on account of failure of petitioner to deposit some rent due to the other party, is not proper. *Hukumchand Amolikchand Longde and others v. Madhava Balaji Potdar and another,* AIR 1983 SC 540: 1984 Supp. SCC 600: 1983(1) Scale 707

Section 115.-Revision.-Execution contrary to stay order.-The executing Court has inherent powers to stay the action taken in ignorance of stay order passed by the superior Court.

We are of opinion that Section 151 of the Code of Civil Procedure would always be available to the court executing the decree, for in such a case, when the stay order is brought to its notice, it can always act under Section 151, and set aside steps taken between the time the stay order was passed and the time it was brought to its notice, if that is necessary in the ends of justice and the party concerned asks it to do so. Though, therefore, the court executing the decree cannot in our opinion be deprived of its jurisdiction to carry on execution till it has knowledge of the stay order, the Court has the power in our view to set aside the proceedings taken between the time when the stay order was passed and the time when it was brought to its notice, if it is asked to do so and it considers that it is necessary in the interests of justice that the interim proceedings should be set aside. But that can only be done by the Court which has taken the interim proceedings in the interest of justice under Section 151 of the Code of Civil Procedure provided the order is brought to its knowledge and a prayer is made to set aside the interim proceedings within a reasonable time.

Mulraj v. Murti Raghunath Maharaj, AIR 1967 SC 1386: 1967 All WR (HC) 594: 1967 BLJR 665: 1967(3) SCR 84

Section 115.-Revision.-Exercise of powers.-Considerations for.- Interference with the orders of First appellate court.-It is only when the orders suffers from material irregularity that the interference by High court is justified.

The order of the first appellate court may be right or wrong; may be in accordance with law or may not be in accordance with law; but one thing is clear that it had jurisdiction to make that order. It is not the case that the first appellate court exercised its jurisdiction either illegally or with material irregularity. That being so, the High Court could not have invoked its jurisdiction under Section 115 of the Civil Procedure Code. *Hindustan Aeronautics v. Ajit Prasad,* AIR 1973 SC 76: 1972(3) SCC 195: 1972(1) LLJ 170

Section 115.-Revision.-Exercise of powers.-Considerations for.-Challenge to allowing amendment of

plaint.-Amendment not causing injustice to the other party.- Amendment not barred by limitation.-Interference by the High Court, in absence of jurisdictional infirmity, is not proper.
Maitreyee Banerjee v. Prabir Kumar Mukherjee, AIR 1982 SC 17: 1982(3) SCC 217

Section 115.-Revision.-Failure to exercise jurisdiction.-In the absence of expression discretion conferred upon an authority, refusal to exercise the jurisdiction while relegating the claimant to ordinary civil court is failure to exercise the jurisdiction.
Kasturi and Sons (Private) Ltd. v. N. Salivateswaran and another, AIR 1958 SC 507: 1958(1) Lab LJ 527: 1958(2) MLJ (SC) 130: 1958 SCJ 844: 1959 SCR 1

Section 115.-Revision.-Failure to exercise jurisdiction.-The court below refusing to entertain the petition holding it to be barred by limitation and thus not exercising jurisdiction vested in it.-Revision against such order is maintainable. *Smt. Prativa Bose v. Kumar Rupendra Deb Raikat and others,* AIR 1965 SC 540: 1964(1) SCA 1: 1965(1) SCJ 167: 1964(4) SCR 69

Section 115.-Revision.-Infructuous .-Disposal of suit in which the impugned order declining impleadment to third party was passed.-Impleadment could not be permitted.-Revision should only have been dismissed as infructuous.
Anokhe Lal v. Radhamohan Bansal and others, AIR 1997 SC 257: 1996(6) SCC 730: 1996(8) Scale 121: 1996(10) JT 266: 1997 Har RR 70: 1997(1) Jab. LJ 252

Section 115.-Revision.-Interference with discretion of trial court.-Permissibility.-Condonation of delay.-Interference on a highly technical view of the matter is not permissible. *Muktajivandas v. Devendraprasadji,* AIR 1973 SC 582: 1973(3) SCC 726

Section 115.-Revision.-Interference with discretionary order.- Permissibility.-Held that High Court erred in ignoring the balance of convenience and granting interim injunction. *The Municipal Corporation of Delhi v. Suresh Chandra Jaipuria and another,* AIR 1976 SC 2621: 1977(2) SCR 10: 1976(4) SCC 719

Section 115.-Revision.-Interference with discretionary order.-Permissibility.-The High Court even though agreeing with the finding of fact of the trial Court, granting injunction.-In the absence of illegality or material irregularity, interference is not justified. The grant or refusal of temporary injunction was in the discretion of the City Civil Court. No doubt that discretion was a judicial one to be exercised in accordance with reason and on sound judicial principles. It was not satisfied that the plaintiff had any *prima facie* case to justify the grant of such temporary injunction or that the balance of convenience required it. The City Civil Court on a careful consideration of the evidence came to a respondent No. 1 was not in possession of any portion of the suit premises on the date of the institution of the suit. Even the learned single Judge has not come to a different conclusion as he observes that the plaintiff was not in `khas' possession. There was no occasion for the High Court to have granted temporary injunction. It is not the case that the City Civil Court acted either illegally or with material irregularity in dismissing the plaintiff's application for temporary injunction. That being so, the High Court could not have invoked its jurisdiction under Section 115 of the Code. *Terene Traders v. Rameshchandra Jamnadas & Co. and another,* AIR 1987 SC 1492: 1986(88) Bom. LR 584

Section 115.-Revision.-Interference with interlocutory order.-Decision of first Appellate Court permitting additional evidence.-The order appealable in second appeal.- Exercise of revisional jurisdiction not proper. The approach of the High Court in revision at that interim stage when the appeal was pending for final hearing before the learned Additional District Judge was not justified and the High Court should not have interfered with the order which was within the jurisdiction of the Appellate Court. The reason is obvious. The Appellate Court hearing the matter finally could exercise jurisdiction one way or the other under Order XLI, Rule 27 specially clause (b). If the order was wrong on merits, it would always be open for the respondent to challenge the same in accordance with law if an occasion arises to carry the matter in Second Appeal, after an appellate decree is passed. But at this interim stage, the High Court should not have felt itself convinced that the order was without jurisdiction. *Gurdev Singh and others v. Mehnga Ram and another,* AIR 1997 SC 3572: 1997(6) SCC 507: 1997(7) JT 56: 1997(3) Mad LW 154: 1997(5) Scale 222: 1997 RD 530

Section 115.-Revision.-Inter- pretation with erroneous construction.-Permissibility.-The view taken by the trial Court found to be not in accord with the decision of the Supreme Court.-It is a wrong decision but within the exercise of jurisdiction by the Court below.- Interference by the High Court is not permissible. *Ratilal Balabhai Nazar v. Ranchhodbhai Shankarbha Patel and another,* AIR 1966 SC 439: 1966(1) SCJ 212

Section 115.-Revision.-Limitation .-Confusion about the correct period of limitation.-Registry of High Court not taking objection about limitation.-Opportunity to seek condonation of delay should have been granted to the party concerned. *Udai Bhan Gupta v. Hari Shankar Bansal and others,* AIR 1984 SC 1469: 1984 Supp. SCC 602: 1984 All. LJ 664: 1983 All RC 711

Section 115.-Revision.-Nature of.- It is a separate and distinct proceedings from a petition under Article 227 of the Constitution and one cannot be identified with another.-Prayer to treat the revision as petition under Article 227, is not maintainable. *Vishesh Kumar v. Shanti Prasad,* AIR 1980 SC 892: 980(2) SCC 378: 1980(3) SCR 32: 1980(1) Rent LR 661

Section 115.-Revision.-Order passed in review.-Appeal against such order maintainable before District Court and not to High Court .-Revision before High Court is maintainable. The words of limitation used in Section 115 are in which no appeal lies thereto and these words clearly mean that no appeal must lie to the High Court from the order sought to be revised, because an appeal is a much larger remedy than a revision application and if an appeal lies, that would afford sufficient relief and there would be no reason or justification for invoking the revisional jurisdiction. The question, therefore, here is whether an appeal against the order made by the learned Sub-Judge allowing the review application lay to the High Court. If it did, the revision application would be clearly incompetent. Now Order XLIII, Rule 1, Clause (w) undoubtedly provides an appeal against an order allowing the review application in the present case was made by the learned Sub-judge, and hence an appeal against it lay to the District Court and not to the High Court, the revision application could not be rejected as incompetent. *Smt. Vidya Vati v. Shri Devi Das,* AIR 1977 SC 397: 1977(1) SCC 293: 1977(2) SCR 182

Section 115.-Revision.-Re-appre- ciation of evidence.- Permissibility .-The power conferred on High Court by Local Rent Law found to be akin to revision.-The High Court in exercise of powers cannot sit in appeal over the original order and re-appreciation of evidence. *Shaik Jaffar Shaikh Mahmood and others v. Mohd. Pasha Hakkani Saheb and others,* AIR 1975 SC 794: 1975(1) SCC 25: 1975(2) SCR 890

Section 115.-Revision.-Re- appreciation of evidence.-Inter- ference with finding of facts is permissible only if the findings are perverse. Under Section 115 of the Code of Civil Procedure the High Court cannot reappreciate the evidence and cannot set aside the concurrent findings of the Courts below by taking a different view of the evidence. The High Court is empowered only to interfere with the findings of fact if the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record by the Courts below. simply because another view of the evidence may be taken is no ground by the High Court to interfere in its revisional jurisdiction. *Masjid Kacha Tank, Nahan v. Tuffail Mohammed,* AIR 1991 SC 455: 1991 Supp (2) SCC 270: 1991(1) LJR 790

Section 115.-Revision.-Scope of interference.-Possibility of different view is no ground to interfere in exercise of revisional jurisdiction. *M/s. Bhojraj Kunwarji Oil Mill and Ginning Factory and another v. Yograjsinha Shankersinha Parihar and others,* AIR 1984 SC 1894: 1985(1) SCC 149: 1984(2) Scale 511

Section 115.-Revision.-Scope of.- Correction of error of Law.- Permissibility.-The error must have relation to jurisdiction of court to justify interference in revision. While exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. The words illegally and with material irregularity as used in this clause (c) do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under Section 115 of the Code when there was no illegality or material irregularity. *M/s. D.L.F. Housing and Construction Co. (P) Ltd. v. Sarup Singh and others,* AIR 1971 SC 2324: 1971 (73) Pun LR (D) 92: 1969(3) SCC 807: 1970(2) SCR 368

Section 115.-Revision.-Scope of.- Distinction with appeal.-Inter- ference with finding based on evidence in exercise of revisional jurisdiction is not proper. The exercise of revisional jurisdiction is thus confined to questions of jurisdiction. While in a first appeal the Court is free to decide all questions of law and fact which arise in the case, in the exercise of its revisional jurisdiction the High Court is not entitled to re-examine or re-assess the evidence on record and substitute its own findings on facts for those of the subordinate Court. In the instant case, the respondents had raised a plea that the Appellant's application under Rule 13 of Order IX was barred by limitation. Now, a plea of limitation concerns the jurisdiction of the Court which tries a proceeding, for a finding on this plea in favour of the party raising it would oust the jurisdiction of the Court. In determining the correctness of the decision reached by the subordinate Couort on such a plea, the High Court may at times have to go into a jurisdictional question of law or fact, that is, it may have to decide collateral questions upon the ascertainment of which the decision as to jurisdiction depends. For the purpose of ascertaining whether the subordinate Court has decided such a collateral question rightly, the High Court cannot, however, function as a Court of first appeal so far as the assessment of evidence is concerned and substitute its own findings for those arrived at by the subordinate Court unless any such finding is not in anyway borne out by the evidence on the record or is manifestly contrary to evidence or so palpably wrong that if allowed to stand, would result in grave injustice to a party. *Manick Chandra Nandy v. Debdas Nandy and others,* AIR 1986 SC 446: 1986(1) SCC 512: 1985(2) Scale 1478: 1986(2) Land LR 54

Section 115.-Revision.-Scope of.- Error on question of law.-The error not affecting the jurisdiction of the court below.-The High Court is not competent to correct the error of law or fact in exercise of its revisional jurisdiction. While exercising its jurisdiction under Section 115, it is not competent to

the High Court to correct errors of fact, however, gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As Claues (a), (b) and (c) of Section 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate Courts which are related to questions of jurisdiction. It is well-settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate Court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under Section 115. Pandurang Dhondi Chougule and others v. Maruti Hari Jadhav and others, AIR 1966 SC 153: 1966 Andh LT 124: 68 Bom LR 41: 1965 MPLJ 852: 1965 Mah LJ 764: 1966(1) SCR 102

Section 115.-Revision.-Scope of.-Interference.-Directions by trial court in excess of jurisdiction.-Interference by High Court is permissible. *Maganlal Chhotabhai Desai v. Chandrakant Motilal,* AIR 1969 SC 37: 71 Bom LR 89: 10 Guj LR 175: 1969 Mah LJ 870: 1969(1) SCR 58

Section 115.-Revision.-Scope of.-Interference with finding of facts arrived at by the Trial Court.-Trial Court setting aside abatement after finding sufficient ground for the same.-Interference by the High Court in exercise of its powers of revision held to be not proper. It is not open to the High Court to question the findings of fact recorded by a subordinate Court in the exercise of its revisional jurisdiction under Section 115 of the Code which, it is well-settled, applies to cases involving questions of jurisdiction, i.e., questions regarding the irregular exercise or non-exercise of jurisdiction or the illegal assumption of jurisdiction by a Court and is not directed against conclusion of law or fact in which questions of jurisdiction are not involved. *Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee and others,* AIR 1964 SC 1336: 1963(2) SCWR 263: 1964(3) SCR 495

Section 115.-Revision.-Scope of.- Revision against an order passed by District court in exercise of revisional jurisdiction, is not permissible. *Vishesh Kumar v. Shanti Prasad,* AIR 1980 SC 892: 1980(2) SCC 378: 1980(3) SCR 32: 1980(1) Rent LR 661

Section 115.-Revision.-Scope of.-Subordinate Court wrongly assuming jurisdiction not vested in it.-The High Court may in exercise of its revisional jurisdiction interfere with such order. Section 115, Civil Procedure Code, empowers the High Court, in cases where no appeal lies, to satisfy itself on three matters: (a) that the order made by the subordinate Court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise its jurisdiction; (c) that in exercising the jurisdiction the Court has not acted illegally, that is, in breach of some provision of law or with material irregularity that is by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. Therefore if an erroneous decision of a sub-ordinate Court resulted in its exercising jurisdiction not vested in it by law or failing to exercise the jurisdiction so vested or acting with material irregularity or illegality in the exercise of its jurisdiction the case for the exercise of powers of revision by the High Court is made out. *Chaube Jagdish Prasad and another v. Ganga Prasad Chaturvedi,* AIR 1959 SC 492: 1959 All WR (HC) 287: 1959 SCJ 495: 1959 Supp (1) SCR 733

Section 115.-Revision.-Valuation of suit.-Dispute about court fee.-It is the matter between the Court and the State.-The defendant who may believe even honestly that proper court fee has not been paid by the plaintiff, he has no right to move the superior court by appeal or revision against the order adjudging the court fee. *Sri Rathnavarmaraja v. Smt. Vimla,* AIR 1961 SC 1299: 1962(1) Andh WR (SC) 36: 1961 Ker LT (SC) 67: 1962(1) Mad LJ 36: 1961(3) SCR 1015

Section 115.-Revision.-Dismissal of eviction petition containing three grounds 'wilful default', 'bona fide requirement for self-occupation' and 'subletting' upheld by appellate Authority.-Interference with concurrent finding of appellate Authority as well as Rent Controller without discussing evidence on which findings were based.-Mere statement that there was no evidence to prove bona fides of landlord insufficient.-Case remanded back for disposal. *K. Urmila and others vs. Ram Kumar Verma,* AIR 1998 SC 1188 : 1998(2) Andh LT 31 : 1998(2) Mad LJ 121 : 1998(3) SCC 57

Section 115.-Revision.-Duty of High Court.-Suit for possession.-High Court referring to evidence led by tenant.-Not choosing to consider evidence adduced by landlord/owner in the light of finding given by trial Court that tenant had not proved his case of tenancy as pleaded by him.-High Court failed to do its duty.

While the High Court has taken the trouble of referring to the evidence of the respondent as DW-1, it does not choose to consider the evidence adduced on the side of the appellant in the light of the finding given by the trial Court that the respondent has not proved the case of tenancy as pleaded by him. We are sorry to point out that the High Court has failed to do its duty. *Mahabir Prasad Jain vs. Ganga Singh,* AIR 1999 SC 3873 : 1999(82) DLT 38 : 1999(3) Pat LJR 189 : 1999(8) SCC 274 : 1999(4) Cur CC 263

Section 115.-Revision.-Judgment.-When can be said not according to law.

The revisional jurisdiction exercisable by the High Court under Rent Control Act is not so limited as is under Section 115 C.P.C., nor so wide as that of an Appellate Court. The High Court cannot enter into appreciation or re-appreciation of evidence merely because it is inclined to take a different view of the facts as if it were a court of facts. However, the High Court is obliged to test the order of the Rent Controller on the touchstone of 'whether it is according to law'. For that limited purpose of ascertaining whether the conclusion arrived at by the Rent Controller is wholly unreasonable or is one that no reasonable person with objectivity could have reached that conclusion on the material available. Ignoring the weight of evidence, proceeding on wrong premise of law or deriving such conclusion from the established facts as betray the lack of reason and/or objectivity would render the finding of the controller 'not according to law' calling for an interference under the Rent Control Act. *Shiv Sarup Gupta vs. Dr. Mahesh Chand Gupta,* AIR 1999 SC 2507 : 1999 HRR 396 : 1999(2) Guj LH 891 : 1999(6) SCC 222 : 1999(2) Rent LR 211 : 1999(80) DLT 731 : 1999(3) Cur CC 181

Section 115.-Revision.-Lack of jurisdiction.-Eviction petition.-Finding of fact as to bona fide need of landlord.-Revision.-Scope of re-appreciation of evidence limited whether fact-finding given by trial Court is wholly unreasonable.-High Court exercising revisional jurisdiction reaching different conclusion over-stepped its powers.-Impugned order vitiated by jurisdictional deficiency. *Sarla Ahuja vs. United India Insurance Co. Ltd.,* AIR 1999 SC 100 : 1998(76) DLT 1 : 1999(1) Mad LW 698 : 1998(8) SCC 119 : 1999(121) Pun LR 805 : 1999(1) APLJ 18

Section 115.-Revision.-Loan advanced by Financial Corporation for construction of hotel building.-Respondent committing breach of terms of agreement in repayment of loan.-Trial Court order for recovery of amount together with future interest passed in proceedings under Section 31 of Financial Corporations Act.-Order for sale of mortgaged properties passed by executing court.-High Court in revision not justified to work out amount payable by debtor and reduce rate of interest.

The order of recovery has become final. The revision petition which was filed before the High Court by the respondent arose not out of the said order of recovery but out of the order staying sale of mortgaged properties passed in the execution proceedings of the said order. Therefore, it was not open to the High Court to work out the amount of loan due and payable by the respondent as Rs. 15,75,000/- as against the figure mentioned in the order of recovery. So also the High Court was not justified in reducing the rate of interest to 13 ½ per cent from 17 ½ per cent mentioned in the order of recovery for the period (1) from July 16, 1982 to March 20, 1986, (2) from March 22 1993 to June 30, 1994 and July 1, 1994 to November 30, 1995, and (3) to waive the interest for the period from March 21, 1986 to March 22, 1993, the date of re-scheduling of the interest. *Delhi Financial Corporation vs. B.B. Behel,* AIR 1999 SC 2358 : 1999(2) Cur CC 41 : 1999(1) Bank Cas 574 : 1999(4) Andh LD 116 : 1999(3) SCC 298

Section 115.-Revision.-Petition dismissed *in limine* without giving any reasons.-Sufficient ground to set aside imugned order passed in revision.-Case remanded back to High Court.

The Supreme Court on more than one occasion has held that the High Courts are required to give reasons while dismissing the petition summarily. In this case we find that no reason has been recorded by the High Court while dismissing the revision petition and this is itself is sufficient ground to set aside the judgment under appeal. We accordingly set aside the judgment under appeal and send the case back to the High Court for deciding the revision in accordance with law. *Dev Raj Kashyap (dead) through LRs vs. Ranjit Singh and others,* AIR 2000 SC 3546(1) : 2000(3) Mad LJ 87 : 2000(3) Land LR 636 : 2000(3) ICC 746 : 2000(4) Cur CC 47

Section 115.-Revision.-Powers of Court.-Eviction suit.-Default in payment of rent.-Concurrent finding that landlord failed to respond to reply sent by tenant about enhancement of rent.-Enhanced rent claimed only in amended petition.-Appellate authority opined that evidence produced by landlord was concocted for eviction of tenant.-Tenant paid rent at original rate.-Single Judge committed error of jurisdiction in upsetting concurrent finding of courts below.

Rent Controller has considered the evidence on record regarding that dispute in detail. The reasoning of the Rent Controller that if there was enhancement of monthly rent to Rs. 650/- from 1-11-1985 the landlord would have mentioned that fact in the Ext. R-73 reply which they sent to the appellant on 6-5-1988. The absence of such a fact in the said reply notice when taken along with the fact that landlord amended the original petition claiming rent at the enhanced rate only after a lapse of one year from the date of institution thereof persuaded the Rent Controller Court to conclude that it was an afterthought. The counterfoils (P-1 to P-5) produced by the landlords did not give a good impression as to its genuineness on both the authorities. The appellate authority felt that they were concocted for the purpose of evicting the tenants. The learned Single Judge has committed a jurisdictional error in upsetting the concurrent finding in such a manner as it has been done. *Rafat Ali vs. Sugni Bai and others,* AIR 1999 SC 283 : 1999 HRR 176 : 1998(2) Rent LR 555 : 1999(1) SCC 133 : 1999(123) Pun LR 437 : 1998(4) Cur CC 111

Section 115.-Revision.-Powers of High Court.-High Court can re-appreciate evidence to find out correctness of order of lower Court.

Once the Act has enabled the High Court to look into the 'correctness' of the orders sought to be revised, it cannot be said that the High Court would be disabled from considering the question whether the findings

of fact reached by the Court of Small Causes were correct or not in the light of the evidence on record. It is axiomatic that revisional power cannot be equated with the power of consideration of all questions of fact as court of First Appeal. Still the nature of the revisonal jurisdiction of the High Court will have to be considered in the light of the express provisions of the statute conferring such power. It cannot be said that the High Court had no jurisdiction to go into the question of correctness of findings of fact reached by the court of small causes on relevant evidence. *M.S. Zahed vs. K. Raghavan,* AIR 1999 SC 219 : 1999 (1) SCC 439 : 1998(2) Ren CJ 266 : ILR (1999) Kant 1945

Section 115.-Revision.-Powers of High Court.-Whether High Court can interfere with finding of fact.-Question of subletting a question of law.-High Court has power to satisfy itself whether that question was properly decided by the Courts below.

The High Court is empowered either on an application or on its own motion to call for an examination of the record for the purpose of satisfying itself as to the legality and propriety of such orders or proceedings. The High Court while exercising powers under the Rent Act has got the powers to satisfy itself as to whether the question of subletting which was a question of law was properly decided by the Courts below. From the impugned judgment of the High Court we find that the High Court did not rightly find ingredients of subletting. We, therefore, hold that the High Court was justified in setting aside the judgments of Courts below. *Resham Singh vs. Raghbir Singh,* AIR 1999 SC 3087 : 1999(2) Rent LR 266 : 1999(3) Mad LW 320 : 1999(7) SCC 263 : 1999(123) Pun LR 527 : 1999(7) SCC 263 : 1999(123) Pun LR 527 : 1999 HRR 581

Section 115.-Revision.-Respondent's objections about plea of tenancy.-No particulars relating to tenancy given by respondents.-Mere statement by respondents in absence of material particulars claiming tenancy not enough.-Objections rejected by executing Court as well as by appellate Court.-High Court in revision ought not have interfered with concurrent finding in absence of any factual basis in support of plea of tenancy.-High Court order handing over possession of trust properties to respondents set aside.

The Executing Court rightly rejected the objections of the respondents and handed over the possession of the trust lands to the to the trust on 15-6-1985. The District Judge has also dismissed the appeal in a lengthy Judgement. The High Court in revision, in these circumstances ought not to have interfered in the absence of the plea of tenancy raised by the first respondent.# *D.M. Deshpande and others vs. Janardhan Kashinath Kadam (dead) by LRS,* AIR 1999 SC 1464 : 1999(1) Guj LH 330 : 1998(2) Rent LR 547 : 1998(8) SCC 315 : 1999(1) Mad LJ 363 : 1999(2) Bom LR 499

Section 115.-Revision.-Scope.-Demised premises unfit for human habitation.-Question of fact.-Interference permissible when revealed from report of Local Commissioner.

Where fresh evidence was permitted to be brought on the record, reversing of the finding of fact by the High Court while exercising revisional jurisdiction, cannot be said to be beyond its jurisdiction.-Where the revision against the order of the appellate Court holding that disputed premises was not unfit for human habitation remained pending for 18 years and the High Court on an application made by the Landlord alleging that premises has further deteriorated during the long pendency of revision, appointed a Local Commissioner to have a fresh assessment of condition of the premises, it was incumbent on the High Court to have considered, the Local Commissioner's report as part of evidence show the subsequent event or condition of building, and if in doing so an inference was drawn, that the disputed accommodation is not fit for human habitation, it is not such which calls for interference. Normally, as revisional Court, it could not have embarked upon recording finding of facts but where any subsequent fact was legally brought on record, it could enter and decide the question, which could inevitably include recording finding of fact. *Lekh Raj vs. Muni Lal and others,* AIR 2001 SC 996 : 2001(2) SCC 762 : 2001(2) JT 317

Section 115.-Revision.-Scope.-Mortgage of leased accommodation .-Suit for redemption.-Decreed.-Finding of trial Court that respondent was in possession as mortgagee and not as lessee.-Decree for redemption of mortgage became final.-Question of leasehold right does not survive.

It was not open to the High Court to consider at this stage, whether Ex. P-1 did not come into force or whether the earlier lease survived the transaction covered by the said document. Those were the points hotly disputed during trial stage of the same litigation and definite findings have been made thereon by the trial Court. Those findings were against the first respondent which were confirmed in appeal and they have become final. However, learned counsel for the first respondent contended that Section 12(1) of the Kerala Land Reforms Act enabled the parties to re-agitate such issues notwithstanding any finding made in the judgment.

Section 12 enables any person interested in the land to prove that a transaction purporting to be a mortgage is, in substance, a transaction by way of lease. The non obstante limb of the Section insulates a transaction which purports to be a mortgage, from any other law or judgment or decree. What is saved thereby is “the transaction purporting to be a mortgage.” But that saving clause is not a carte blanche for ignoring the transaction altogether. Section 12 of the Act does not permit the Court to supersede the findings made by the Court to the effect that the earlier lease came to an end with the execution of the transaction which purports to be a mortgage. In other words, what Section 12 entitled a person is to prove the real substance of the transaction covered by Ex. P-1 albeit the ostensible tenor of the document.

Hence the finding of the High Court in the impugned order cannot be salvaged with the aid of Section 12 of the Act. *Narayanaru Thiruvikranaru vs. Madhavan Potty and others,* AIR 2000 SC 904 : 2000(2) Land LR 12: 2000(2) SCC 422 : 2000(2) Ker LT 33 : 2000(1) Cur CC 229

Section 115.-Revision.-Subsequent events or fact whether can be taken into consideration.-Question that demised premises has become unfit for human habitation.-Allowing report of Local Commissioner, High Court does not exceed its revisional jurisdiction.

In the instant case eviction suit was filed by the landlord inter alia on ground that the demised premises in question has become unfit for human habitation. Civil revision arising out of the suit remained pending in the High Court for more than 18 years. The landlord made an application for the appointment of a Local Commissioner Landlord in his application stated that the roof of the shop has since also fallen down and its condition further deteriorated was allowed by the revisional Court. Held, when question whether accommodation in question is fit for human habitation was in issue and with the long passage of eighteen years, if fresh assessment was ought through a Local Commissioner, it cannot be said, in allowing such Commission the High Court exceeded its revisional jurisdiction. *Lekh Raj vs. Muni Lal and others,* AIR 2001 SC 996 : 2001(2) SCC 762 : 2001(2) JT 317

Section 115.-Revision.-Suit for recovery of possession.-Counsel not appearing in view of boycott call given by Bar Association.-Transfer petition dismissed because there is no provision under Section 151 C.P.C. for transfer of case.-High Court committed grave error in entertaining revision petition.

Delhi Bar Association had passed resolution and boycotted member to appear before Court of Additional District Judge in which civil suit for recovery of possession was filed by the appellant. Counsel for respondent being member of Bar Association filed transfer petition in view of boycott call given by Bar Association. The counsel for the respondent who filed the said petition did not himself appear in the court for addressing arguments nor did he depute any other Advocate on his behalf. Additional District Judge dismissed transfer petition on grounds that there is no provision under Section 151 C.P.C. for transfer of case. The order passed by the Additional District Judge has no legal order passed by the Additional District Judge has no legal infirmity, much less nay scope for occasioning failure of justice. Question of that order causing any irreparable injury does not arise particularly because the said order was by-product of the unwholesome strategy adopted by the respondent's counsel abstaining from the court and reporting that he would not attend that court in future. The party who brought about such a situation cannot be heard to complain that an order was passed consequently. A revision petition was filed challenging order dismissing transfer petition. The revisional court entertained revision and posted it to a far off date. Held, High Court has committed grave error in entertaining the revision petition and passing the impugned order. *Mahabir Prasad Singh vs. Jacks Aviation Pvt. Ltd.,* AIR 1999 SC 287 : 1999(1) Ker LJ 530 : 1998(2) Guj Lh 923 : 1999(1) Civ CC 367 : 1999 (121) Pun LR 680 : 1999(1) SCC 37 : 1999(1) Andh LT 27

Sections 115 and 24.-Revision.- Scope of.-Trial of other issues arising in the case.-The High Court cannot travel beyond the scope of revision arising out of an interlocutory order by trying an issue pending disposal before trial court. Section 24 C.P.C. *inter alia*, provides that the High Court may withdraw any suit, appeal or other proceeding pending in any court subordinate to it and try and dispose of the same. We are unable to appreciate how the order of the learned Judge can be justified under Section 24. He has not purported to withdraw any suit and try the same. What he has done is to try an issue arising in a suit in a revision arising out of an interlocutory order. It seems to us that the High Court, even if the parties conceded, had no power to decide the issue. *Khushro S. Gandhi and others v. N.A. Guzder (dead) by his legal representative and others,* AIR 1970 SC 1468: 1970 (2) SCJ 413: 1969 (2) SCR 959: 1969(1) SCC 358

Section 115(c).-Revision.-Scope of.-Grant of relief by court which a party was not entitled.-Interference by High Court is permissible. It is manifest that in holding that the appellant was entitled in the alternative to ask for the relief of specific performance, the trial court had committed an error of law and so had acted with material irregularity or illegality in the exercise of its jurisdiction within the meaning of Section 115(c) of the Civil Procedure Code. It was therefore competent to the High Court to interfere, in revision with the order of the trial court on this point. To put it differently the decision of the trial court on this question was not a decision on a mere question of law but it was a decision on a question of law upon which the jurisdiction of the trial court to grant the particular relief depended. The question was therefore one which involved the jurisdiction of the trial court; the trial court could not, by an erroneous finding upon that question, confer upon itself a jurisdiction which it did not possess and its order was therefore liable to be set aside by the High Court in revision. *Prem Raj v. The D.L.F. Housing and Construction (Private) Ltd. and another,* AIR 1968 SC 1355: 1968 (2) SCWR 482: 1968(3) SCR 648

Section 119.-*Res judicata*.- Application of.-The order passed in claim proceedings operate as bar to the suit for the limited purpose of rule 63 of Order 21 of the Code.- The principle of *res judicata* has no application. *Mangru Mahto and others v. Thakur Taraknathji Tarkeshwar Math and others,* AIR 1967 SC 1390: 1968 All LJ 417: 1968 BLJR 322: 1968 MPWR 326: 1967(3) SCR 125

Sections 120, 20.-Original civil jurisdiction of High Court.-Arbit-ration between parties at Bombay.-

Award filed in Bombay High Court.-Original civil jurisdiction on High Court determined by Clause 12 of Letters Patent of Bombay High Court read with Section 120 C.P.C..-Section 20 C.P.C. not applicable.

Under Section 120 of the Civil Procedure Code, Sections 16, 17 and 20 of the Civil Procedure Code do not apply to a High Court in the exercise of its original civil jurisdiction. Jurisdiction of the Bombay High Court to entertain a suit under its ordinary original civil jurisdiction is determined by clause 12 of the Letters patent of the Bombay High Court. Under Clause 12 of the Letters patent a place where the defendant, or each of the defendants where there are more than one, at the commencement of the suit, carry on business would be a place where the court would have jurisdiction. Therefore, under clause 12 of the Letters patent of the Bombay High Court, the Bombay High Court would have jurisdiction over the subject matter of the dispute in the present case because the appellant does carry on business in Bombay. *Food Corporation of India vs. Evdomen Corporation,* AIR 1999 SC 2352 : 1999(2) Civ LJ 530 : 1999(2) Arbi LR 220 : 1999(2) Bom LR 356 : 1999(2) SCC 446 : 1999(35) All LR 569

Section 122, 126 and 127.-Rules framed by High Court.-Scope of.-The provisions provide that the Rules amended by the High Court become part of the court for all purposes. The rules made by a High Court altering the rules contained in the first schedule as originally enacted by the legislature shall have the same force and effect as if they had been contained in the first schedule and therefore, necessarily became part of the Code for all purposes. That is the clear effect of the definition of the expressions `Code' and `Rules' and Sections 121, 122 and 127. *State of Uttar Pradesh v. Chandra Bhushan Misra,* AIR 1980 SC 591: 1980(1) SCC 198: 1980(1) SCR 1131: 1980 Rev. LR 301

Section 136, Order 38, Rule 5.-Attachment before judgment.-Property to be attached situate outside local limits of Civil Court.-Order containing mode of attachment has to be sent to District Court within whose local limits attachment is to be made.-Failure of Court in sending attachment order and connected papers to concerned District Court would not invalidate attachment order.

Section 136 of the Code of Civil Procedure lays down the procedure to be followed where the person to be arrested or property to be attached is outside the District Court which passes the order of arrest or attachment. Section 136 only lays down the procedure in case the property is situate outside the territorial jurisdiction or the Court. The mode prescribed is that the order of attachment shall be sent to the District Court within the local limits of whose jurisdiction the property is situate and the District Court thereafter shall send the order of attachment to the subordinate Court within whose jurisdiction the property is situate for effecting the attachment. *Rajender Singh vs. Ramdhar Singh and others,* AIR 2001 SC 2220 : 2001(6) SCC 213 : 2001(S1) JT 95 : 2001(2) Civ CR 584

Section 142.-Notice.-Neither signed, nor dated nor bearing requisite seal.-Not a valid notice.

The High Court based its order on a notice which, as it has itself found, was neither signed nor dated nor bore the requisite seal. The rules required that the notice must be issued as provided in the Code of Civil Procedure. Clearly, that was not done. No notice of such a kind cannot all be considered valid. *Ankush Keshav Bowlekar vs. State of Maharashtra and others,* AIR 2000 SC 3511(2) : 2000 HRR 558 : 2000(2) ICC 669 : 2000(39) All LR 589 : 2000(2) All CJ 912

Section 144.-Restitution.-Auction sale in execution of decree.-Suit seeking to set aside sale.-Execution against joint family property in execution of decree against a member of family.-Decree not binding on other members.-Suit for restitution of property is maintainable. *Bhanwar Lal v. Smt. Prem Lata and others,* AIR 1990 SC 623: 1990(1) SCC 353: 1990(1) SCR 25: 1990(1) J.T. 26

Section 144.-Restitution.- Competent Court.-Court of first instance.-Meaning of.-Only the Court which decreed the suit is the Court of first instance to entertain the application for restitution.-The transferee executing Court is not Court of first instance. The court of first instance would, therefore, mean the court which passed the decree or order. The transferee executing court is not the court that passed the decree or order, but the decree was transmitted to facilitate execution of that decree or order since the property sought to be executed or the person who is liable for execution is situated or residing within the jurisdiction of that executing court. Therefore, the court which is competent to entertain the application for restitution is the court of first instance i.e. Administrator's Court (Subordinate Judge) that decreed the suit, and not the court to which the decree was transmitted for execution. *Neelathupara Kummi Seethi Koya Phangal (dead) by LRs. v. Montharapalla Padippua Attakoya and others,* AIR 1994 SC 1591: 1994 Supp (3) SCC 760: 1994(2) Land LR 351

Section 144.-Restitution.-Dismissal of suit.-Interim orders restraining interference with disposal of disputed goods by one party.- Dismissal of suit itself as not maintainable.-Even the provision is not applicable the jurisdiction for restitution is inherent in every Court and should have been exercised in the circumstances. *Mrs. Kavita Trehan and another v. Balsara Hygiene Products Ltd.,* AIR 1995 SC 441: 1994(5) SCC 380: 1994(3) Scale 168: 1994(4) JT 519: 1994 Civ. CR (SC) 870

Section 144.-Restitution.- Execution of decree.-Auction sale of property in execution.-Decree set aside in appeal after confirmation of sale.-Judgement debtor is entitled to restitution of property. There is a distinction maintained between the decree holder who purchases the property in execution of his own decree which is afterwards modified or reversed, and an auction purchaser who is not party to the decree. Where the purchaser is the decree holder, he is bound to restore the property to the judgment

debtor by way of restitution but not a stranger auction purchaser. The latter remains unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The Courts have held that he could retain the property since he is a *bona fide* purchaser. This principle is also based on the premise that he is not bound to enquire into correctness of the judgment or decree sought to be executed. He is thus distinguished from an eo nomine party to the litigation. If a person ventures to purchase the propertybeing fully aware of the controversy between the decree holder and judgment debtor, it is difficult to regard him as a *bona fide* purchaser. The true question in each case, therefore, is whether the stranger auction purchaser had knowledge of the pending litigation about the decree under execution. If the evidence indicates that he had no such knowledge he would be entitled to retain the property purchased being a *bona fide* purchaser and his title to the property remains unaffected by subsequent reversal of the decree. The Court by all means should protect his purchase. But if it is shown by evidence that he was aware of the pending appeal against the decree when he purchased the property, it would be inappropriate to term him as a *bona fide* purchaser. In such a case the Court also cannot assume that he was a *bona fide* or innocent purchaser for giving him protection against restitution. No assumption could be made contrary to the facts and circumstances of the case and any such assumption would be wrong and uncalled for. The Code of Civil Procedure is a body of procedural law designed to facilitate justice and it should not be treated as an enactment providing for punishments and penalties. The laws of procedure should be so construed as to render justice wherever reasonable possible. It is, in our opinion, not unreasonable to demand restitution from a person who has purchased the property in court auction being aware of the pending appeal against the decree. *Chinnamal and others v. P. Arumugham and another,* AIR 1990 SC 1828: 1990(1) SCC 513: 1990(1) SCR 78: 1990(1) JT 51

Section 144.-Restitution .- Limitation.-Application for restitution is in the nature of application for execution of a decree and therefore is governed by same period of limitation. Whether an application is one for execution of a decree or is an original application depends upon the nature of the application and the relief asked for. When a party, who lost his property in execution of a decree seeks to recover the same by reason of the apellate decree in his favour, he is not initiating any original proceeding, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enables him to obtain that relief, either expressly or by necessary implication. He is recovering the fruits of the appellate decree. *Prima facie,* therefore, having regard to the history of the section, there is no reason why such an application shall not be treated as one for the execution of the appellate decree. The placing of a particular section in a Part of the Code dealing with a specific subject-matter may support the contention that that section deals with a part of the subject dealt with by that Part, but that cannot be said when a particular section appears under a Part dealing with miscellaneous matters. The Part under the heading Miscellaneous indicates that the sections in that Part cannot be allocated wholly to a Part dealing with a specific subject, for the reason that the sections entirely fall outside the other Parts or for the reason that they cannot entirely fall within a particular Part. They may have a wide scope cutting across different parts dealing with specific subjects. Section 144 may have been placed in Part XI, as relief of restitution may cover cases other than those arising in execution of a decree of an appellate Court setting aside the decree of a Court under appeal. The fact that a section has been placed in a particular Part for convenience of arrangement cannot affect the question if in reality the application is one for execution: at the most it is only one of the circumstances relevant to the present enquiry; it is not decisive of the question one way or other. *Mahijibhai Mohanbhai Barot v. Patel Manibhai Gokalbhai and others,* AIR 1965 SC 1477: 1965 All LJ 525: 1965 BLJR 542: 1965(6) Guj LR 901: 1965(2) SCR 436

Section 144.-Restitution.-Setting aside of decree.-Subsequent decree passed by the Court does not affect the right of restitution accrued to the judgment debtor on ac-count of erroneous act of the court. The appellant is entitled to restitution notwithstanding anything which happened subsequently as the right to claim restitution is based upon the existence or otherwise of a decree in favour of the plaintiff at the time when the application for restitution was made. The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroenous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the Court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from. *Binayak Swain v. Ramesh Chandra Panigrahi and another,* AIR 1966 SC 948: 32 Cut LT 609: 1966(3) SCR 24

Section 144.-Restitution.-Status quo ante.-Entitlement of.-On reversal of a decree the party who had the benefit of erroneous decree is under obligation to restore the benefit of the same to the party entitled to it.-Sale of property in execution of decree.-Sale is not liable to be set aside except upon showing that the sale was in consequence of the error in the reverse decree. An order of restitution in the manner asked for in the circumstances of this case would be contrary to the principles of the doctrine of restitution which is that on the reversal of a judgment the law raises an obligation on the

party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case. The judgment-debtor is not entitled to recover the properties except upon showing that the sale was in substance and truth a consequence of the error in the reversed decree. The sale being inevitable under the amended decree, the judgment-debtor was clearly not entitled to restitution. *Lal Bhagwant Singh v. Sri Kishen Das,* AIR 1953 SC 136: 1953 SCJ 188: 1953 SCR 559

Section 144.-Application for restitution.-Indivisible decree.-Decree passed in favour of many judgment-debtors.-In the absence of some of the judgment-debtors variance of decree passed in restitution proceedings is not permissible.

The question of claim and counter-claim of the parties need not be considered on merit because the impugned decree passed in the restitution proceedings has been made in favour of the judgment-debtors whose appeals were allowed by the High Court. Therefore, any variation of the said decree is not possible in the absence of some of the judgment-debtors in whose favour impugned decree was passed by the High Court. *Tasaddug Hussain Khan, vs. Shiv Nath Sahu (deceased) through L.Rs. and another*, AIR 1998 SC 1976 : 1998 All LJ 1330 : 1998(3) Land LR 196 : 1998(2) Cur CC 69 : 1998(9) SCC 634 : 1998(2) Scale 645

Sections 144 and 11.-Restitution.- *Res judicata*.-Application of.-The restitution is in the nature of execution of decree.-Principles of *res judicata* are applicable on such proceedings. Maqbool Alam Khan v. Mst. Khodaija and others, AIR 1966 SC 1194: 1966 BLJR 566: 1966(3) SCR 479

Sections 144 and 34.-Restitution.-Contract for supply of gas.-Supplier's proposal for renewal on enhanced price.-Challenge to escalation in price.-Interim direction to supply gas at old rates.-Escalation in price by ONGC finally found valid by Court.-Purchaser liable to pay difference in price and interest for delayed payment on principle of restitution.

Agreement for supply of natural gas were entered into between ONGC and different industries. The agreement stipulated the price, mode of payment and also the interest payable in case of delay in payment. After the expiry of the term of these agreement, ONGC the supplier proposed that the contract should be renewed but at the enhanced price. The purchaser thereon challenged the increase in the price of gas as fixed. By an interim order the Court directed the supplier to supply gas at the old rate. The escalation in price made by ONGC was finally found to be valid by Court. ONGC the seller thereupon demanded from the purchasers the different in price and also interest for delayed payment at the rate stipulated in the agreement. The claim made for interest was disputed by the purchasers. Held, ONGC was entitled to claim interest from the purchasers for the delayed payment of the principal amount. *O.N.G.C. and another vs. Association of Natural Gas Consuming Industries,* AIR 2001 SC 2796 : 2001(6) SCC 627 : 2001(6) JT 156

Section 145.-Surety for performance of decree.- Compromise between the decree holder and the judgment debtor without consent of surety.-The guarantor or surety, stood discharged. Full satisfaction recorded in that behalf relieves the guarantor or surety from the obligation with the decree-holder and the decree-holder cannot seek any further remedy against the surety. The liability of the guarantor or surety is co-extensive with the judgment-debtor. The compromise entered by the decree-holder binds himself by his conduct and releases the guarantor or surety from the liability undertaken in the guarantee or surety bond for due performance of the decree. In case the compromise was with the consent of the guarantor or surety compromise with the principal judgment-debtor is for other liability other than the extent of the liability undertaken by the guarantor or surety, in that event the guarantor or surety is not relieved from his liability for due performance of the decree. *Amar Chand v. Bhano and another,* AIR 1995 SC 871: 1995 Supp (1) SCC 550: 1994(5) Scale 287: 1995(2) Pun LR (SC) 493

Section 145.-Applicability.-Under-taking given before Court.-Enforce-ment of.-Provisions of Section 145 ensure to benefit court as well as custodian to proceed against defaulter judgment debtor failing to pay decretal amount within stipulated period.

Shown of all these unnecessary controversies now raised, we are also of the view that in a case where an item of property is referred to in an undertaking given to the Court as one which can be proceeded against in the event of the judgment debtor failing to pay the decretal amount within the stipulated time, the immovable property does not get ipso facto affected or suffer in any one of the manner envisaged under Section 17(1) of the Registration Act so as to require compulsory registration. That apart, the provisions contained in Section 145 C.P.C. also would ensure to the benefit of the Court as well as the custodian to proceed against the appellant in enforcement of the undertaking given to the Court. *Western Press Pvt. Ltd. Mumbai vs. The Custodian and others,* AIR 2001 SC 450

Section 145(c).-Liability of surety.-Decree of damages against surety.-Permissibility. By the surety bond, the appellant rendered itself liable as a surety for the fulfilment of the conditions imposed on the Receiver under the orders passed by the court. Therefore, the order for the recovery of damages obtained by the respondent against the Receiver can be executed against the appellant to the extent to which it rendered itself personally liable under the terms of the bond. *M/s. Howrah Insurance Co. Ltd. v. Shri*

Sochindra Mohan Das Gupta, AIR 1975 SC 2051: 1975(2) SCC 523: 1976(1) SCR 356

Section 145(c).-Liability of Surety.- Effect of negligence.-Destruction of goods on account loss by fire.- Receiver who executed surety bond is liable for damages. The fire having been caused due to the Receiver's negligence in the performance of his duties, the appellant is liable to make good the loss caused to the tea garden by the fire. The surety bond has undoubtedly to be construed strictly but it is impossible to accept the contention that the Receiver owed no duty or obligation in respect of the tea garden. He was put in possession of the tea garden in his capacity as a Receiver and indeed parties had made contentions from time to time as to whether the tea garden was managed by the Receiver economically and efficiently. The surety bond would therefore cover the loss occasioned to the tea garden due to the Receiver's default. It is significant that though the bond was executed six months after the tea garden was damaged by the fire, it was given retrospective operation with effect from January 22, 1950 being the date on which the Receiver had taken possession of the mortgaged property including the tea garden. *M/s. Howrah Insurance Co. Ltd. v. Shri Sochindra Mohan Das Gupta,* AIR 1975 SC 2051: 1975(2) SCC 523: 1976(1) SCR 356

Section 146.-Assignment of pre- emption decree.-The assignee is entitled to execute the decree subject to deposit of purchase money in terms of decree. Section 146, which was introduced for the first time in the 1908 Code, lays down that where any proceeding is taken or application is made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him, unless otherwise provided by the Code or any other extant law. Then comes Order 20, Rule 14 which specifically deals with pre-emption decrees. It provides that where the Court decrees a claim to pre-emption in respect of a particular sale of property, the Court shall specify a day on or before which the purchase money shall be paid (if not paid earlier) and direct that on payment into Court of such purchase money on or before the specified day, the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment. The words `whose title thereto shall be deemed to have accrued from the date of payment' make it clear that immediately on payment of the purchase money on or before the specified date, the title to the property would vest in the pre-emptor without any further documentation. There can, therefore, be no doubt that as soon as Shanti Devi deposited the purchase money i.e., the balance four-fifth amount in court on November 19, 1968 the title to the pre-emptional land accrued to her by the fiction of law and she became the owner of the said land and the judgment-debtor was under an obligation to deliver possession thereof to her by the thrust of the words `the defendant shall deliver possession of the property to the plaintiff' in Clause (b) of sub-rule (1) of Rule 14 of Order 20, C.P.C. When Shanti Devi executed the document, described as a deed of assignment, she clearly transferred her interest in the said pre-emptional land to Matadin. Order 21, Rule 16 next provides that where a decree or the interest of a decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it, and the decree may be executed as if the application were made by the decree-holder. The newly added Explanation to the said rule makes it clear that the rule shall not affect the provisions in Section 146 of the Code not shall it affect a transferee of rights in property, which is the subject-matter of the suit, from applying for execution of the decree without there being a separate assignment of the decree. A transferee of the pre-emptor's right in the land which has vested in him by virtue of Order 20, Rule 14 on compliance of the requirement of payment of the purchase money by the specified date can maintain an application for execution under Section 146 or Order 21, Rule 16, C.P.C. In other words it was said that if the transferee of the decree cannot avail of the latter provision he can certainly resort to the former. *Bhoop alleged S/o Sheo v. Matadin Bhardwaj S/o Lakmi Chand,* AIR 1991 SC 373: 1991(2) SCC 128: 1990 Supp (3) SCR 410: 1990(2) Scale 1204: 1990(4) JT 594

Section 146.-Proceedings.-Meaning of.-Right to file an appeal carried with it right to continue an appeal.- Successor in interest is entitled to pursue the appeal. *Shew Bux Mohata and another v. Bengal Breweries Ltd. and others,* AIR 1961 SC 137: 1961(1) SCR 680: 1961(1) SCJ 322

Section 146.-Right of legal heirs.- Right to appeal.-The appeal is covered by the provision and right to file an appeal includes the right to continue to pursue an appeal.- Legal heir of a deceased party has a right to continue an appeal. Section 146 was introduced for the first time in the Civil Procedure Code, 1908 with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficient provision should be construed liberally and so as to advance justice and not in a restricted or technical sense. An appeal is a proceeding for the purpose of this section, and that further the expression claiming under is wide enough to include cases of devolution and assignment mentioned in Order 22, Rule 10. Whoever is entitled to be but has not been brought on record under Order 22, Rule 10 in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no prohibition against it in the Code, and that accordingly the appellant as an assignee of the second respondent of the mortgaged properties would have been entitled to prefer an appeal.The right to file an appeal must therefore be held to carry with it the right to continue an appeal which had been filed by the person under whom the applicant claims. *Smt. Saila Bala Dassi v. Sm. Nirmala Sundari Dassi and another,* AIR 1958 SC 394: 1958 MPLJ 473: 1958 SCJ 743: 1958 SCR 1287

Section 148.-Enlargement of time.- Consent decree.-Time fixed by compromise between the parties.- The Court may in appropriate case may extend the time. The time for deposit stipulated by the parties became the time allowed by the Court and this gave the Court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in the rare cases to prevent manifest injustice. True, the Court would not rewrite a contract between the parties but the Court would relieve against a forfeiture clause; And, where the contract of the parties has merged in the order of the Court, the Court's freedom to act to further the ends of justice would surely not stand curtailed. *Smt. Periyakkal and others v. Smt. Dakshyani,* AIR 1983 SC 428: 1983(2) SCC 127: 1983(2) SCR 467: 1983(1) Scale 213: 1983 All. W.C. 297

Section 148.-Extension of time .-Considerations for.-Dismissal of application under Order 21, Rule 90 while granting the time to the judgement debtor to deposit the decretal amount.-Failure to deposit the amount.-Duty of Court to confirm the sale.-Opposition by decree holder to extension of time.-The Court had no jurisdiction to extend time. The Application under Order XXI, Rule 90 had been dismised on October 7, 1958 and thereafter, the court was bound to confirm the sale but for the compromise between the parties giving time upto November 21, 1958. There is no power under Order XXXIV, Rule 5 to extend time and all that it does is to permit the mortgagor judgment-debtor to deposit the amount before confirmation of sale. It does not give any right to the mortgagor judgment-debtor to ask for postponement of confirmation of sale in order to enable him to deposit the amount. We have to interpret Order XXXIV, Rule 5 and Order XXI, Rule 92 harmoniously and on a harmonious interpretation of the two provisions. It is clear that though the mortgagor has the right to deposit the amount due at any time before confirmation of sale, there is no question of his being granted time under Order XXXIV, Rule 5 and if the provisions of Order XXI, Rule 92(I) apply the sale must be confirmed unless before the confirmation the mortgagor judgment- debtor has deposited the amount as permitted by Order XXXIV, Rule 5. Section 148 of the Code of Civil Procedure would not apply in these circumstances, and the executing court was right in holding that it could not extend time. Thereafter it rightly confirmed the sale as required under Order XXI, Rule 92 there being no question of the application of Order XXXIV, Rule 5 for the money had not been deposited on November 22, 1958 before the order of confirmation was passed. In this view of the matter, we are of opinion that the order of the executing court refusing grant of time and confirming the sale was correct. *Hukumchand v. Bansilal and others,* AIR 1968 SC 86: 1968 (1) Andh LT 147: 1968 MPLJ 187: 1967(3) SCR 695

Section 148.-Extension of time.- Deficiency in court fee.-Prayer to seek extension of time denied.-Request reasonable.-Denial improper. *Prem Narain v. M/s. Vishnu Exchange Charitable Trust and Others,* AIR 1984 SC 1896: 1984(4) SCC 375

Section 148.-Extension of time.- Deposit in terms of decree.-Non- deposit of small fraction of purchase money due to inadvertent mistake.- Sufficient cause made out for extension of time. *Johri Singh v. Sukh Pal Singh and others,* AIR 1989 SC 2073: 1989(4) SCC 403: 1989 Supp. (1) SCR 117: 1989(2) Scale 518: 1989(3) JT 582

Sections 148 and 100.-Appeal.- Certified copy of the impugned order.-Necessity of filing alongwith Memo of Appeal under the Rules.- Certified copy not filed alongwith Memo of Appeal but subsequently alongwith application seeking condonation of delay.-Court should have exercise its discretion to secure the end of justice and should have heard the appeal on merits. *Jogdhayan v. Babu Ram and others,* AIR 1983 SC 57: 1983(1) SCC 26: 1983(1) SCR 844: 1982(2) Scale 1061: 1983 BLJR 93

Sections 148, 149 and 151.-Extension of time.-Deficiency in court fee.-Failure to make good deficiency in terms of conditional decree.-The Court has ample power to extend the time. Section 148 of the Code, in terms, allows extension of time, even if the original period fixed has expired, and Section 149 is equally liberal. A fortiori, those sections could be invoked by the applicant, when the time had not actually expired. Such procedural orders, though peremptory (conditional decrees apart) are in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. *Mahanth Ram Das v. Ganga Das,* AIR 1961 SC 882: 1961 BLJR 495: 1961(1) Ker LR 379: 1961(3) SCR 763

Section 149.-Deficiency of court fee.-Extension of time.-Mere poverty or ignorance to pay court fees is not a sufficient ground.- Exercise of discretion is not called for except on the ground of *bona fide* mistake.-Necessity of certainty of claim.-Practice.-Unhealthy practice of payment of Court fees on the basis of mood of the Court.-It would become a game of chess and matter of chance. The aid of Section 149, could be taken only when the party was not able to pay Court-fee in circumstances beyond his control or under enavoidable circumstances and the Court would be justified in an appropriate case to exercise the discretionary power under Section. 149, after giving due notice to the affected party. But that was not the situation in this case. Under the relevant provisions of the Court-fee Act applicable to appeals filed in the High Court of the Punjab & Haryana, the claimants are required to value the appeals in the

MOAs and need to pay the required Court-fee. Thereafter the appeal would be admitted and the notice would go to the respondents. The respondents would be put on notice of the amount, the appellant would be claiming so as to properly canvass the correctness of the claim or entitlement. The claim cannot be kept in uncertainty. If in appeal under Section 54 of the Land Acquisition Act the amount is initially kept low and then depending upon the mood of the appellate Court, payment of deficit Court-fee is sought to be made, it would create unhealthy practice and would become a game of chess and a matter of chance. That practice would not be conducive and proper for orderly conduct of litigation. Buta Singh (Dead) by LRs. v. Union of India, AIR 1995 SC 1945: 1995(5) SCC 284: 1995(3) Scale 392: 1995 Civ. CR (SC) 803

Sections 149 and 107(2).- Insufficient court fees.-Opportunity to make goods deficiency.-Dismissal of appeal without granting opportunity to make good deficiency is not proper. *Mohammad Mahibulla and another v. Seth Chaman lal (dead) by LRs and others,* AIR 1993 SC 1241: 1991(4) SCC 529: 1991 Supp. (1) SCR 179: 1991(2) Scale 661: 1991(4) JT 1: 1992(1) Pun LR 344

Section 150.-Power of transferee Court.-Enforcement of surety bond executed by interim Receiver.-Successor Court to whom the proceedings are transferred is entitled to exercise same powers as enjoyed by the earlier court. *M/s. Howrah Insurance Co. Ltd. v. Shri Sochindra Mohan Das Gupta,* AIR 1975 SC 2051: 1975(2) SCC 523: 1976(1) SCR 356

Section 151.-Appointment of Commissioner.-Permissibility.-Existence of specific provision for exercise of such power.-The appointment made to collect evidence for one of the parties.- Exercise of inherent powers for the purpose is not called for. It is no business of the Court to collect evidence for a party from the evil consequences of making forged entries in those account books. if the plaintiff does forge entries and uses forged entries as evidence in the case, the defendants would have ample opportunity to dispute those entries and to prove them forgeries. The provisions of Rule 5 of Order XXXVIII are to prevent a decree that may be passed being rendered infructuous and Rule 1(b) of Order XXXIX is applicable where the defendant threatens to dispose of his property to defraud creditors. None of these provisions has any application to the facts of the present case. Rule 7 of Order XXXIX empowers the Court, on the application of any party to a suit, to make an order for the detention, preservation or inspection of any property which is the subject matter of such suit or as to which any question may arise therein. The account books of the plaintiffs were not `property' which were the subject matter of the suit nor such that about them a question could arise in the suit. The account books could, at best, have been piece of evidence, if the plaintiff or the defendant had cared to rely on them. We therefore hold that the Additional Munsif Commissioner for seizing the plaintiff's books of account. *Padam Sen and another v. The State of Uttar Pradesh,* AIR 1961 SC 218: 1961 All.L.J. 56: 1961 Andh.L.J. 84: 1961(2) Mad.L.J. (SC) 22: 1961(1) SCJ 884

Section 151.-Correction of judgment.-Permissibility.-The Court has inherent power to correct errors arising out of accidental slip or omission in the judgment. Now, it is well settled that there is an inherent power in the Court which passed the judgment to correct a clerical mistake or an error arising from an accidental slip or omission and to vary its judgment so as to give effect to its meaning and intention. Under Section 152, clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either on its own motion or on an application by any of the parties. It is thus manifest that error arising from an accidental slip can be corrected subsequently not only in a decree drawn up by a ministerial officer of the court but even in a judgment pronounced and signed by the court. *Samarendra Nath Sinha and another v. Krishna Kumar Nag,* AIR 1967 SC 1440: 1968 (1) SCJ 68: 1967(2) SCR 18

Section 151.-Impleadment of legal representative.-Inherent powers.- The inherent powers of the court to do full justice to the parties cannot be invoked if the suit is abated on account of the failure of the party to implead legal representative. The Court is not to invoke its inherent powers under Section 151, C.P.C. for the purposes of impleading the legal representatives of a deceased respondent, if the suit had abated on account of the appellant not taking appropriate steps within time to bring the legal representatives of the deceased party on the record and when its application for setting aside the abatement is not allowed on account of its failure to satisfy the Court that there was sufficient cause for not impleading the legal representatives of the deceased in time and for not applying for the setting aside of the abatement within time. *Union of India v. Ram Charan (deceased) through his Legal Representatives,* AIR 1964 SC 215: 1964(2) SCJ 324: 1964(3) SCR 467

Section 151.-In camera trial.- Permissibility.-High Court has inherent jurisdiction to hold trial of a case in camera, to make ends of justice to meet. It would be unreasonable to hold that a court must hear every case in public even though it is satisfied that the ends of justice themselves would be defeated by such public trial. The overriding consideration which must determine the conduct of proceedings before a court is fair administration of justice. Indeed, the principle that all cases must be tried in public is really and ultimately based on the view that it is such public trial of cases that assists the fair and impartial administration of justice. The administration of justice is thus the primary object of the work done in courts; and so, if there is a conflict between the claims of administration of justice itself and those of public trial, public trial must yield to administration of justice. If the High Court thus had inherent power to hold the trial of a case in camera, provided, of course, it was satisfied that the ends of justice required

such a course to be adopted, it would not be difficult to accept the argument urged by the learned Attorney-General that the power to hold a trial in camera must include the power to hold a part of the trial in camera, or to prohibit excessive publication of a part of the proceedings at such trial. What would meet the ends of justice will always depend upon the facts of each case and the requirements of justice. *Naresh Shridhar Mirajkar v. State of Maharashtra and another,* AIR 1967 SC 1: 1966(3) SCR 744

Section 151.-Inherent power of the Court.-Scope of.-It cannot over ride specific provisions of the Code. It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates. *Arjun Singh v. Mohindra Kumar and others,* AIR 1964 SC 993: 1964(2) An LT 341: 1964(5) SCR 946

Section 151.-Inherent powers.- Consideration for exercise of.- Exercise likely to circumvent the mandatory provisions of the Code.-Failure on the part of auction purchaser to deposit the purchase money.-The inherent powers cannot be invoked to relieve the purchasers of their obligation to make deposit. *Manilal Mohanlal Shah and others v. Sardar Ahmed Sayed Mahmad and another,* AIR 1954 SC 349

Section 151.-Inherent powers.- Exercise for restitution.-The jurisdiction for restitution is inherent in every Court.-Dismissal of suit.-Interim orders restraining interference with disposal of disputed goods by one party.-Dismissal of suit itself as not maintainable.-Even the provision of section 144 is not applicable the jurisdiction for restitution being inherent in every Court, should have been exercised in the circumstances. The Law of Restitution encompasses all claims founded upon the principle of unjust enrichment. `Restitutionary claims are to be found in equity as well as at law'. Restitutionary law has many branches. the law of quasi-contract is that part of restitution which stems from the common indebitatus counts for money had and received and for money paid, and from quantum meruit and quantum valebat claims. The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demans. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose..... The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court. *Mrs. Kavita Trehan and another v. Balsara Hygiene Products Ltd.,* AIR 1995 SC 441: 1994(5) SCC 380: 1994(3) Scale 168: 1994(4) JT 519: 1994 Civ. CR (SC) 870

Section 151.-Inherent powers.- Exercise of.-Existence of specific provision.-Effect of. The order in question was made under Rul3 23, Order 1, Civil Procedure Code. That order was appealable under Order 43 of that Code. As the same was not appealed against, its correctness was no more open to examination in view of Section 105(2) of the Code which lays down that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness. The High Court has misconceived the scope of its inherent powers. Under the inherent power of Courts recognised by Section 151, C.P.C., a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the Court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided else where in the Code and he neglected to avail himself of the same. Further the power under Section 151 of the Code cannot be exercised as an appellate power. *Nainsingh v. Koonwarjee and others,* AIR 1970 SC 997: 1970 Jab LJ 544: 1970 MPLJ 568: 1971(1) SCR 207: 1970(1) SCC 732

Section 151.-Inherent powers.- Express provision.-Effect of.- Decree passed in summary proceedings.-Express provision existing under Order 37 Rule 4 of the Code for setting aside of decree .- Resort to inherent powers is not permissible. *Ramkarandas Radhavallabh v. Bhagwandas Dwarkadas,* AIR 1965 SC 1144: 67 Bom LR 779: 1965 MPLJ 1005: 1965(2) SCR 186

Section 151.-Inherent powers.-Non-joinder.-Effect of.-Improper representation of estate.-Objection taken for the first time by way of interlocutory application in the course of regular first appeal.-The objection which do not go to the root of the matter cannot be raised by invoking inherent powers. This contention, even if accepted, is not one going to the root accepted, is not one going to the root of the jurisdiction of the High Court to entertain the appeal so as to make the decree in appeal a nullity as claimed by the appellant. On the other hand, this is really a matter relating to merits which should have been raised during the hearing of the appeal. If the appeal was not maintainable, on any ground available in law, the appellant who was a party to the said appeal before the Mysore High Court, should have raised it at the proper stage and invited a decision on the same. The said question requires investigation into

various facts. *R. Viswanathan v. R. Narayanaswamy,* AIR 1972 SC 414: 1972(4) SCC 822

Section 151.-Inherent powers.- Prevention of abuse of process.- Collusion.-Disobedience by a director of the company to directions under Section 29 Rule 3 to appear in court.-The company cannot be made liable on account of the default on the part of the director. The inherent power of a Court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercised if its exercise is inconsistnt with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of Section 151 of the Code, they do not control the undoubted power of the Court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the Court. There is nothing in Order XXIX of the Code, which, expressly or by necessary implication, precludes the exercise of the inherent power of the Court under Section 151 of the Code. We are, therefore, of the opinion that in a case of default made by a director who failed to appear in Court when he was so required under Order XXIX, Rule 3 of the Code, the Court can make a suitable consequential order under Section 151 of the Code as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It is not possible to hold that the director in refusing to respond to the notice given by the Court was acting within the scope the powers conferred on him. He is only liable for his acts and not the company. If it was establsihed that the company was guilty of abuse of the process of the Court by preventing the director from attending the Court, the Court would have been justified in striking off the defence. But no such finding was given by the Courts below. M/s. Ram Chand and Sons Sugar Mills Private Ltd. Barabanki (U.P.) v. Kanhayalal Bhargava and others, AIR 1966 SC 1899: 1966(2) SCJ 731: 1966(3) SCR 856

Section 151.-Inherent powers.- Scope of.-Interim order to protect the interest of the parties can be passed, even in the absence of specific provision in the statute. Interim orders are granted by the Court as they are necessary to protect the interest of the petitioner till the rights are finally adjudicated upon. Even where it is not provided in the statute this Court has held that the courts have inherent power to grant it. In admission matters, however, such orders once obtained create vested interest of avoiding final adjudication. *State of Maharashtra and others v. Admane Anita Moti and others,* AIR 1995 SC 350: 1994(6) SCC 109: 1994(3) Scale 891: 1994(5) JT 398

Section 151.-Inherent Powers.- Temporary injunction.-The court has inherent powers to issue order in respect of the case falling under Order 39 of the code. The Court have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order XXXIX, C.P.C. There is no such expression in Section 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order XXXIX or by any rules made under the Code. It is well-settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression `if it is so prescribed' is only this that when the rules prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could not that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power. *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal,* AIR 1962 SC 527: 1963 AllLJ 169: 1962 Supp. (1) SCR 450

Section 151.-Recall of order.- Dismissal of execution.-Remedy of .-The order dismissing the execution on account of failure of decree holder to take steps.-Order is neither appealable nor is revisable.-Petition invoking inherent jurisdiction seeking the court to recall the order, is maintainable.-Appeal against the order restoring the proceedings is not maintainable. The High Court had no jurisdiction in the exercise of its appellate jurisdiction to reverse this decision. In the remand order itself, it was held that it was difficult to say that the order by itself amounted to a final determination of any question relating to execution, discharge or satisfaction of a decree and that being so, it did not fall within the ambit of Section 47, Civil P.C. We are in entire agreement with this observation. The proceedings that commenced with the decree-holder's application for restoration of the execution and terminated with the order of revival can in no sense be said to relate to the determination of any question concerning the execution, discharge or satisfaction of the decree. Such proceedings are in their nature collateral to the execution and are independent of it. It was not contended and could not be seriously urged, that an order under Section 151 simpliciter is appealable. Under the Code of Civil Procedure, certain specific orders mentioned in Section 104 and Order 43, Rule 1 only are appealable and no appeal lies from any other orders (vide Section 105, Civil P.C.). An order made under Section 150 is not included

in the category of appealable orders. It is plain that the order of the Subordinate Judge dated 25-4-1945 was one that he had jurisdiction to make, that in making that order he neither acted in excess of his jurisdiction nor did he assume jurisdiction which he did not possess. It could not be said that in the exercise of it he acted with material irregularity or committed any breach of the procedure laid down for reaching the result. All that happened was that he felt that he had committed an error in dismissing the main execution while he was merely dealing with an adjournment application. It cannot be said that his omission in not taking into consideration what the decree-holder's pleader would have done had he been given the opportunity to make his submission amounts to material irregularity in the exercise of jurisdiction. This speculation was hardly relevant in the view of the case that he took. The Judge had jurisdiction to correct his own error without entering into a discussion of the grounds taken by the decree-holder or the objections raised by the judgment- debtors. We are satisfied therefore that the High Court acted in excess of its jurisdiction when it entertained an application in revision against the order of the Subordinate Judge. *Keshardeo Chamria v. Radha Kissen Chamria and others,* AIR 1953 SC 23: 1952 SCJ 633: 1953 SCR 136

Section 151.-Remand of case.- Nature of order.-Case remanded for *de novo* trial holding that there was no proper trial.-Such order is not a final order so as to be entitled to certificate of fitness of appeal to Supreme Court. *M/s. Jethanand and Sons v. State of Uttar Pradesh,* AIR 1961 SC 794: 1961 Andh LT 354: 1961(3) SCR 754

Section 151.-Stay of proceedings .-Suit filed during the pendency of the arbitration proceedings .-Refusal by court to stay arbitration proceedings.-Interference with discretionary order in appeal, is not proper. There is a valid arbitration agreement between the parties. In view of the direction of this court, the continuation of the arbitration proceedings in respect of the filing of the suit would not be bad. In those circumstances if the court declined to exercise its jurisdiction under Section 151 of the Code of Civil Procedure to grant stay of the proceedings of arbitration in London, the court, in our opinion, has not acted in excess of jurisdiction or has not exercised its jurisdiction improperly. In such a situation the Appellate Court should not normally interfere. In the premises, it would have been improper to exercise any jurisdiction to interfere. *National Agricultural Co-operative Marketing Federation of India Ltd. v. Alimenta S.A.,* AIR 1989 SC 818: 1989 Supp. (1) SCC 308: 1988 Supp. (3) SCR 548: 1988(2) Scale 1612: 1988(4) JT 721: 1989(103) Mad. LW 474

Section 151.-Stay of suit.-Considerations for.-Existence of arbitration agreement.-Principles for exercise of discretion, indicated. Granting of stay of the suit is within the discretion of the Court. The expression such authority may make an order staying the proceedings' clearly indicates that the court has a discretion whether to grant the stay and thereby compel the parties to abide by the contract or the Court may refuse to lend its assistance by undertaking to adjudicate the dispute by refusing the stay. If the application is under Section 151, C.P.C., undoubtedly the Court will still have a discretion in exercise of its inherent jurisdiction to grant stay of the suit or refuse the same but the approach of the Court would be different. If Section 34 of the Arbitration Act, 1940, is attracted, ordinarily the approach of the Court would be to see that people are held to their bargain. Therefore, the party who in breach of arbitration agreement institutes an action before the Court, the burden would be on such party to prove why the stay should be refused. On the other hand, if the application is under Section 151, C.P.C., invoking inherent jurisdiction of the Court to grant stay, the burden will be on the party seeking stay to establish facts for exercise of discretion in favour of such party. *Ramji Dayawala & Sons (P) Ltd. v. Invest Import,* AIR 1981 SC 2085: 1981 Mah LR (SC) 95: 1981(1) SCC 80: 1981(1) SCR 899

Section 151.-Amendment of plaint.-Considerations for.-Institution of suit must be before applying provisions of Order 6, Rule 17.-Any application filed under different statutes cannot be treated as a suit or plaint unless otherwise provided in the Act.-Amendment cannot be allowed if it introduces totally new cause of action or a totally different case inconsistent with prayer made.-Such amendment, *prima facie*, would cause serious prejudice to appellant.-Section 151 has no application in such cases.

Before applying provisions of Order 6, Rule 17, there must be institution of the suit. Any application filed under provisions of different statutes cannot be treated as a suit or plaint unless otherwise provided in the said Act. In any case, the amendment would introduce totally new cause of action and change the nature of suit. It would also introduce a totally different case which is inconsistent with the prayer made in the application for referring the dispute to the arbitrator. Prima facie, such amendment would cause serious prejudice to the contention of the appellant that the claim of the respondent to recover the alleged amount was barred by the period of limitation as it was pointed out that cause of action for recovery of the said amount arose in the year 1975 and the amendment application was filed on 30-3-1986. Lastly, it is to be stated that in such cases, there is no question of invoking inherent jurisdiction of the Court under Section 151 of the C.P.C. as it would nullify the procedure prescribed under the Code. *P.A. Ahammed Ibrahim vs. Food Corporation of India,* AIR 1999 SC 3033 : 1999(4) Cur CC 34 : 2000(1) Mad LW 58 : 1999(3) Arbi LR 263 : 1999(7) SCC 39 : 1999(5) Andh LT 10

Section 151.-Power to recall order.-Accident claim.-Order obtained by fraud.-Insurance company can approach Tribunal to recall its own order.

When the Insurance Company after the passing of the award by Motor Accidents Claims Tribunal, discovers that the award has been passed on a fake claim, it would be fully justified in approaching the Claims Tribunal for recall of the award. The Insurance Company when it comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation after the award has already been passed, it would not be possible for the company to file a statutory appeal against the award. Not only because of bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then. The remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree cannot be foreclosed in such a situation. *United India Insurance Co. Ltd. vs. Rajendra Singh and others*, AIR 2000 SC 1165 : 2000(2) Mad LJ 181 : 2000(3) Land LR 89 : 2000(2) Cur CC 12 : 2000(125) Pun LR 455 : 2000(3) SCC 581 : 2000(3) Civ LJ 647 : 2000 All LJ 849

Section 151.-Recalling order.-Powers of Estate Abolition Collector.-Public Notice not served in locality in prescribed manner.-A mere irregularity but does not strike at jurisdiction of authority.-Order cannot be recalled.

No review or recall of the order from the O.E.A. Collector can be sought solely by alleging that the notice which was required to be published in the locality before settling the land in favour of the applicant was not served in accordance with the manner prescribed by law. More so, non-service of the notice was not pleaded but objection was raised only with regard to the manner of service of the notice. The O.E.A. collector was satisfied of the notice having been published. Assuming that the notice was not published in the manner contemplated by law, it will at best be a case of irregularity in the proceedings but certainly not a fact striking at the very jurisdiction of the authority passing the order. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed therein unless set as in the manner known to law by laying a challenge subject to the law of limitation. *Budhia Swain and others vs. Gopinath Deb and others,* AIR 1999 SC 2089 : 1999(3) Mah LJ 132 : 1999(88) Cut LT 673 : 1999(2) Orissa LR 15 : 1999(4) SCC 396

Sections 151 and 10.-Restrain on suit.-Permissibility.-Specific provision of prohibition.-Stay order passed by the court in subsequent suit restraining the plaintiff to proceeds with the earlier suit.-The order is not permissible. The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. The suit at Indore which had been instituted later, could be stayed in view of Section 10 of the Code. The provisions of that section are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two such suit being instituted, recourse to the inherent powers under Section 151 is not justified. The provisions of Section 10 do not become inapplicable on a Court holding that the previously instituted suit is a vexatious suit or has been instituted in violation of the terms of the contract. It does not appear correct to say. The provisions of Section 35A indicate that the Legislature was aware of false or vexatious claims or defences being made in suits, and accordingly provided for compensatory costs. The Legislature could have therefore provided for the non-application of the provisions of Section 10 in those circumstances, but it did not. Further, Section 22 of the Code provides for the transfer of a suit to another Court when a suit which could be instituted in any one of two or more Courts is instituted in one of such Courts. In view of the provisions of this section, it was open to the respondent to apply for the transfer of the suit at Assansol to the Indore Court and, if the suit had been transferred to the Indore Court, the two suits could have been tried together. It is clear, therefore, that the Legislature had contemplated the contingency of two suits with respect to similar reliefs being instituted and of the institution of a suit in one Court when it could also be instituted in another Court and it be preferable, for certain reasons, that the suit be tried in that other Court. *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal,* AIR 1962 SC 527: 1963 All LJ 169: 1962 Supp. (1) SCR 450

Section 152.-Amendment of decree .-Scope of.-Decree passed in terms of the judgment of the Court.- Application for amendment of decree is not maintainable. *Bhikhi Lal and others v. Tribeni and others,* AIR 1965 SC 1935

Section 152.-Amendment proceedings.-Nature of.-Such proceedings are independent proceedings and not a continuation of the suit or proceedings.-Such proceedings are governed by the law prevailing on the date of its initiation and not the law prevailing on the date on which the earlier proceedings were initiated. *Messrs. Ganpat Rai Hiralal and another v. The Aggarwal Chamber of Commerce Ltd.,* AIR 1952 SC 409: 1952 SCJ 564: 1953 SCR 752

Section 152.-Correction of error.-Limitation of.-Merely because exercise of power after decree is drawn, causes some difficulty, a period of limitation for exercise of power must not be inferred. *Tulsipur Sugar Co. Ltd. v. The State of U.P. and others,* AIR 1970 SC 70: 1970 (1) SCJ 137: 1970(1) SCR 35: 1969(2) SCC 100

Section 152.-Correction of judgment.-Permissibility.-The Court may correct errors arising out of accidental slip or omission in the judgment. Now, it is well settled that there is an inherent power in the court which passed the judgment to correct a clerical mistake or an error arising from an accidental slip or omission and to vary its judgment so as to give effect to its meaning and intention. Under Section 152, clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either on its own motion or on an application by any of the parties. It is thus manifest that errors arising from an accidental slip can be corrected subsequently not only in a decree drawn up by a ministerial officer of the court but even in a judgment pronounced and signed by the court. *Samarendra Nath Sinha and another v. Krishna Kumar Nag,* AIR 1967 SC 1440: 1968 (1) SCJ 68: 1967(2) SCR 18

Section 152.-Amendment of decree.-Suit by bank for recovery.-Decree granted without specifying the decretal amount and rate of interest.-Such of the prayers as were not granted would be deemed to have been refused.-More than after two years the Court should not have on a mere notice of motion, substituted almost a new decree in place of old one.-Amended decree set aside. *M/s. Plasto Pack, Mumbai and another vs. Ratnakar Bank Ltd.*, AIR 2001 SC 3651 : 2001(6) SCC 683 : 2001(5) Scale 145 : 2001(6) JT 598

Section 152.-Rectification of decree.-Petition for dissolution of marriage by mutual consent.-Amicable settlement as to matrimonial flat and custody of child etc..-Averment that agreement be treated as part and parcel of petition.-Prayer for decree of divorce only.-Absence of prayer that agreement be made part of decree is not an accidental omission.-Application for modification of decree for grant of mandatory injunction and to incorporate terms and conditions of agreement in decree.-Order of Family Court allowing application for rectification/modifi-cation of decree set aside. *Jaya-lakshmi Coelho vs. Oswald Joseph Coelho,* AIR 2001 SC 1084 : 2001(4) SCC 181 : 2001(3) JT 356 : 2001(2) Civ CR 51

Section 152.-Rectification of decree.-Power confined to something initially intended but left out or added against such intention.

Before exercise of such power the Court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits something which was intended to be otherwise that is to say while passing the decree the Court must have in its mind that the order or the decree should be passed in a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The facts and circumstances may provide clue to the fact as to what was intended by the Court but unintentionally the same does mention in the order or the judgment or something which was intended to be there stands added to it. The power of rectification of clerical, arithmetical errors or accidental slip does not empower the Court to have a second thought over the matter and to find that a better order or decree could or should be passed. It is to be confined to something initially intended but left out or added against such intention. *Jayalakshmi Coelho vs. Oswald Joseph Coelho,* AIR 2001 SC 1084 : 2001(4) SCC 181 : 2001(3) JT 356 : 2001(2) Civ CR 51

Section 152 and 151.-Accidental omission.-Breach of contract.-Suit for damages.-Decreed.-Trial Court awarded future interest only as against claim for grant of interest for alleged breach of contract.-Rejection of claim for *pendente lite* interest could not be held to be accidental omission or mistake.

In the instant case the trial court had specifically held that the respondent-state liable to pay future interest only despite the prayer of the appellant for grant of interest with effect from the date of alleged breach which impliedly meant that the court had rejected the claim of the appellant in so far as pendente lite interest was concerned. The omission in not granting the *pendente lite* interest could not be held to be accidental omission or mistake as was wrongly done by the trial court. *Dwarka Das vs. State of Madhya Pradesh and another,* AIR 1999 SC 1031 : 1999(2) Mad LJ 49 : 1999(1) Orissa LR 388 : 1999(3) Raj LW 379 : 1999(1) SCC 500 : 1999(121) Pun LR 820 : 1999(1) Cur CC 116

Section 153.-Extension of time. *Sulleh Singh and others v. Sohan Lal and another,* AIR 1975 SC 1957: 1975 Pun LJ 400: 1975(2) SCC 505: 1976(1) SCR 598

Section 153.-Mis-description of parties.-Amendment of plaint.-The court may allow the amendment. The provisions of Order XXX, Rule 1 and Rule 2 are enabling provisions to permit several persons who are doing business as partners to sue or be sued in the name of the firm. Rule 2 would not have been in the form it is if the suit instituted in the name of the firm was not regarded as, in fact, a suit by the partners of the firm. The provisions of these rules of Order XXX, being enabling provisions, do not prevent the partners of a firm from suing or being sued in their individual names. These rules also do not prohibit the partners of a firm suing in India in their names individually although they may be doing business outside India. Indeed, this was not disputed on behalf of the appellant. Since, however, a firm is not a legal entity the privilege of suing in the name of a firm is permissible only to those persons who, as partners, are doing business in India. Such privilege is not extended to persons who are doing business as partners outside India. In their case they still have to sue in their individual names. If, however, under some misapprehension, persons doing business as partners outside India do file a plaint in the name of their firm they are mis- describing themselves, as the suit instituted is by them, they being known

collectively as a firm. It seems, therefore, that a plaint filed in a court in India in the name of a firm doing business outside India is not by itself a nullity. It is a plaint by all the partners of the firm with a defective description of themselves for the purposes of the Code of Civil Procedure. in these circumstances, a civil court could permit, under the provisions of Section 153 of the Code (or possibly under Order VI, Rule 17, about which we say nothing), an amendment of the plaint to enable a proper description of the plaintiffs to appear in it in order to assist the court in determining the real question or issue between the parties. Strictly speaking O.I.R. 10(1) has no application to a case of this kind because the suit has not been instituted in the name of a wrong person, nor is it a case of there being a doubt whether it has been instituted in the name of the right plaintiff. The provisions of O.I.R. 10(2) also do not apply because it is not a case of any party having been improperly joined whose name has to be struck out or a case of adding a person or a party who ought to have been joined or whose presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The suit has been from its very inception a suit by the partners of the firm and no question of adding or substituting any person arises, the partners collectively being described as a firm with a particular name. *Purushottam Umedbhai and Co. v. M/s. Manilal and Sons,* AIR 1961 SC 325: 1961(1) Mad.L.J. (SC) 38: 1961(1) SCA 293: 1961(1) SCR 982

Section 154.-Extension of time for compliance.-No case of manifest injustice made out.- Reprehensible conduct of judgement debtor in non-compliance with directions despite repeated extensions.- Extension of time for compliance is not called for. *Smt. Sova Ray and another v. Gostha Gopal Dey and others,* AIR 1988 SC 981: 1988(2) SCC 134: 1988(3) SCR 287: 1988(1) Scale 534: 1988(1) JT 583

Order 1, Rule 1.-Suit by joint promisee.-Refusal by other joint promisee to join in the suit.-The proper procedure is to join him as pro forma defendant. This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promisee and the other promisee refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a pro forma defendant. *Jahar Roy (dead) by L.R's. and another v. Premji Bhimji Mansata and another,* AIR 1977 SC 2439: 1977(4) SCC 562: 1978(1) SCR 770

Order 1, Rule 1.-*Locus standi*.- Damages from Railways.-Suit by consignor.-Permissibility.-The consignee is not necessarily the owner of the goods.-Merely because consignee is different, the goods cannot be presumed to have been passed to the consignee. Ordinarily, it is the consignor who can sue if there is damage to the consign- ment, for the contract of carriage is between the consignor and the railway administration. Where the property in the goods carried has passed from the consignor to some- one-else, that other person may be able to sue. It is true that a railway receipt is a document of title to goods covered by it, but from that alone it does not follow, where the consignor and consignee are different, that the consignee is necessarily the owner of goods and the consignor in such circumstances can never be the owner of the goods. The mere fact that the consignee is different from the consignor does not necessarily pass title to the goods from the consignor to the consignee, and the question whether title to goods has passed to the consignee will have to be decided on other evidence. It is quite possible for the consignor to retain title in the goods himself while the consignment is booked in the name of another person. The Union of India v. The West Punjab Factories, Ltd., AIR 1966 SC 395: 1966(2) An LT 269: 1966(1) SCR 580

Order 1, Rule 3.-Proper party.- Non-joinder.-Suit for redemption of mortgage.-Deposit of redemption money by son of Mortgagor.- Transfer of property by mortgagor to other person.-Suit challenging transfer of property.-Non impleadment of son of mortgagor while impleading transferee.-Suit is not properly framed and is liable to fail. *Jugraj Singh and another v. Jaswant Singh and others,* AIR 1971 SC 761: 75 Pun LR 314: 1970(2) SCC 386: 1971(1) SCR 38

Order 1, Rule 3.-Necessary parties.-Suit challenging auction sale.-Impleadment of judgement debtor whose rights were transferred to auction purchaser is necessary. *Vishnu Mahadeo Pendse v. The Rajen Textile Mills (P) Ltd.,* AIR 1975 SC 2079: 1975(2) SCC 144

Order 1, Rule 8.-Effect of.- Representative suit.-Notice of intention to sue.-No previous sanction to institute the suit is required to be taken before issuing the notice in respect of a representative suit. *The State of Andhra Pradesh v. Gundugola Venkata Suryanarayana Garu,* AIR 1965 SC 11: 1964 All LJ 129: 1964(1) Ker LR 246: 1964(4) SCR 945

Order 1, Rule 8.-Representative suit.-Leave of Court.-Necessity of.-Suit by a member of community for protection of property of the community from encroachment.- This by itself does not render it a representative suit. *Kalyan Singh v. Smt. Chhoti and others,* AIR 1990 SC 396: 1990(1) SCC 266: 1989 Supp (2) SCR 356: 1989(2) Scale 1238: 1989(4) JT 439

Order 1, Rule 8.-Representative suit.-Scope of provision.-The object of provision is to reduce multiplicity of litigation and therefore must receive a liberal construction.-Its scope cannot be

limited to any particular category of cases. The provisions of Order 1 Rule 8 have been included in the Code in the public interest so as to avoid multiplicity of litigation. The condition necessary for application of the provisions is that the persons on whose behalf the suit is being brought must have the same interest. In other words either the interest must be common or they must have a common grievance which they seek to get redressed. The Court, while considering whether leave under the Rule should be granted or not, should examine whether there is sufficient community of interest to justify the adoption of the procedure provided under the Rule. The object for which this provision is enacted is really to faclilitate the decision of questions, in which a large number of persons are interested, without recourse to the ordinary procedure. The provision must, therefore, receive an inter- pretation which will subserve the object for its enactment. There are no words in the Rule to limit its scope to any particular category of suits or to exclude a suit in regard to a claim for money or for injunction, as the present one. *The Chairman, Tamil Nadu Housing Board, Madras v. T.N. Ganapathy,* AIR 1990 SC 642: 1990(1) SCC 608: 1990(1) SCR 272: 1990(1) Scale 134: 1990(1) J.T. 172

Order 1, Rule 9.-Necessary parties.-Trust property.-Suit by trustees seeking possession of a part of property in the possession of shebait.-Suit without impleading all the shebaits, is liable for dismissal on account of non joinder. Shebaitship of the family deity remained solely with the descendants of the founder; and the defendant.- respondent who is admittedly a grandson of the founder, had been regarded as one of the Shebaits, and as such, entitled to reside in the disputed rooms. All the Shebaits were therefore, necessary parties; but all of them have not been impleaded. The trustees by themselves, have no right to maintain the suit in respect of the debutter property, the legal title to which vests in the idol, and not in the Trustees. The right to sue on behalf of the deity vests in the Shebaits. All the Shebaits of the deity not having been made parties, the suit was not properly constituted, and was liable to be dismissed on this score alone. *Profulla Chorone Requitte and others v. Satya Choron Requitte,* AIR 1979 SC 1682: 1979(3) SCC 409: 1979(3) SCR 431: 1979 BLJR 257

Order 1, Rule 9.-Non-joinder of necessary parties.-Suit for recovery of possession on the basis of ownership.-Vague plea of non- joinder of co-owner in the suit.- Dismissal of suit for non-joinder not called for. There is no clear averment as to who are the co-owners and what exactly is the nature of right claimed by them. A vague statement of this character, in our considered opinion, could hardly be sufficient to non-suit the appellant on the ground of non-joinder of parties. We are unable to comprehend as to how the trial Court had come to the conclusion that the executants of the sale deed dated 12-2-1968 could not pass a full title when itself points out that the shares of the other co-owners were not known. Therefore, the Courts should have insisted on some material on record as to the existence of other co-owners and their rights pertaining to suit properties. In juxtaposition to revenue record, there must be some worthwhile evidence for the Court to conclude that there are other co-owners. Genealogical tree filed along with the written statement cannot point to the existence of co-owners without specific evidence in this regard. *Lakshmishankar Harishankar Bhatt v. Yashram Vasta (dead) by LRs.,* AIR 1993 SC 1587: 1993(3) SCC 49: 1993(1) Scale 726: 1993(2) Andh. LT 9

Order 1, Rules 9 and 10.-Non- joinder of necessary parties.-Effect of.-Suit seeking succession.-Failure to implead other legal heirs.-The suit is liable to be dismissed for want of impleadment of necessary parties. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1, Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit in bound to be fatal. Even in such cases, the Court can under Order 1, Rule 10, sub-rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the charater of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. *Kanakarathanammal v. V.S. Loganatha Mudaliar and another,* AIR 1965 SC 271: 1964(1) SCWR 565: 1964(6) SCR_1

Order 1, Rules 9, 10 and 13.-Joinder of parties.-Election petition.-The non-compliance with the provisions of law relating to impleading the parties is not fatal and the Tribunal is entitled to deal with it under the provisions of the Code. *Jagan Nath v. Jaswant Singh and others,* AIR 1954 SC 210: 1954 SCA 1111: 1954 SCJ 257: 1954 SCR 892

Order 1, Rule 10.-Addition of parties.-Considerations for.-It is not a question of jurisdiction but one of discretion which has to be exercised judicially. (1) That the question of addition of parties under Rule 10 of Order 1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of the court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case; but in some cases, it may raise controversies as to the power of the court, in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in Section 115 of the Code; (2) That in a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in

the subject-matter of the litigation. (3) Where the subject-matter of a litigation, is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy; (4) The cases contemplated in the last proposition, have to be determined in accordance with the statutory provisions of Sections 42 and 43 of the Specific Relief Act; (5) In cases covered by those statutory provisions, the court is not bound to grant the declaration prayed for, on a mere admission of the claim by the defendant, if the court has reasons to insist upon a clear proof apart from the admission; (6) The result of a declaratory decree on the question of status, such as in controversy in the instant case, affects not only the parties actually before the Court, but generations to come, and in view of that considerations to come, and in view of that consideration, the rule of `present interest', as evolved by case law relating to disputes about property does not apply with full force; and (7) The rule laid down in Section 43 of the Specific Relief Act, is not exactly a rule of *res judicata*. It is narrower in one sense and wider in another. *Razia Begum v. Sahebzadi Anwar Begum and others,* AIR 1958 SC 886: 1958(2) Mad LJ (SC) 193: 1958 SCJ 1214: 1959 SCR 1111

Order 1, Rule 10.-Addition of parties.-Powers of statutory Tribunal.-Tribunal though vested with the several powers of Civil Court, the power to add a party not expressly vested in it.-Such power to add parties cannot be exercised impliedly by Tribunal as incidental to its powers to summons and adjudication.-Though in exercise of its powers to summon to third parties, it may summon them and any decision thereafter may be binding on such person as well. *Hochtief Gammon v. Industrial Tribunal, Bhubaneshwar, Orissa and others,* AIR 1964 SC 1746: 1964(2) LabLJ 460: 1964(7) SCR 596

Order 1, Rule 10.-Application of.-Proceedings under special statute.-Provision inconsistent with the scheme of Land Acquisition Act, 1894.-Impleadment of co-owner not permissible. *Smt. Ambey Devi v. State of Bihar and another,* AIR 1996 SC 1513: 1996(9) SCC 84: 1996(3) Scale 121: 1996(3) JT 674

Order 1, Rule 10.-Impleadment of parties.-Considerations for.-Third party seeking impleadment not a necessary party.-Impleadment opposed by plaintiff which was likely to result in de novo trial.-Impleadment should be disallowed. The Court should have been very circumspcet in dealing with the application of a third party seeking leave to become party in the suit, when the plaintiff, who is the *dominus litis* of the suit, is opposed to it. If the consequence of such addition would involve a *de novo* trial, the Court should normally have disallowed the application. *Anokhe Lal v. Radhamohan Bansal and others,* AIR 1997 SC 257: 1996(6) SCC 730: 1996(8) Scale 121: 1996(10) JT 266: 1997 Har RR 70: 1997(1) Jab. LJ 252

Order 1, Rule 10.-Impleadment of parties.-Disposed off suit.-Permissibility.-Suit stood disposed of during pendency of revision against the order declining impleadment to third party.-Impleadment could not be permitted.-Revision should only have been dismissed as infructuous. *Anokhe Lal v. Radhamohan Bansal and others,* AIR 1997 SC 257: 1996(6) SCC 730: 1996(8) Scale 121: 1996(10) JT 266: 1997 Har RR 70: 1997(1) Jab. LJ 252

Order 1, Rule 10.-Impleadment of parties.-Effect on limitation.-Suit became barred against the persons impleaded.-Addition of parties is not permissible. Sub-rule (2) of Order 1, Rule 10 permits the addition of both plaintiffs and defendants in certain circumstances. The order however was not sought to be justified under that provision and there was good reason for it. It was conceded.-and in my opinion rightly.-that in view of Section 22 of the Limitation Act, the suit as regards the parties added under this sub-rule had to be deemed to have been instituted when they were added.It is not in dispute that a suit filed on the date when the three sisters were added, to enforce the mortgage would have been barred. Therefore, it would have been futile to add any of the parties under this sub-rule. In view of the bar of limitation, such addition would not have resulted in any decree being passed and, therefore, the addition should not have been ordered. I am, however, not to be understood as holding that apart from the difficulty created by Section 22 the order could have been properly passed under the sub-rule. I have the gravest doubts if it could. *Ramprasad Dagaduram v. Vijaykumar Motilal Hirakhanwala and others,* AIR 1969 SC : 69 Bom LJ 20: 1966 Supp. SCR 188

Order 1, Rule 10.-Impleadment of party.-Necessary party.-Omission to implead a party due to *bona fide* mistake.-Delay in seeking amendment is of no consequence .-Impleadment necessary to effectually and completely adjudicate all the question involved in the suit.-The suit shall be deemed to have been filed from the date of original plaint under Law of Limitation.- Impleadment allowed. *Munshi Ram v. Narsi Ram and another,* AIR 1983 SC 271: 1983 (2) SCC 8: 1983(2) SCR 233: 1983(1) Scale 11: 1983 Pun.L.J. 166

Order 1, Rule 10.-Impleadment .-Necessity of.-Legal representative asserting an independent right, title or interest or to resist the claim made by the plaintiff in personal capacity.-Impleadment in individual capacity is necessary. *Vidyawati v. Man Mohan and others,* AIR 1995 SC 1653: 1995(5) SCC 431: 1995(3) Scale 680: 1996(1) RCR 7

Order 1, Rule 10.-Necessary parties .-Lessee of mortgager.-Lessee introduced in the ordinary course of management is though not binding on mortgagee but acquire an interest in the equity of redemption.-Such Lessee must be joined as party to the suit. A lease granted by the mortgagor, out of the ordinary course of management, though not binding on the mortgagee, is binding as between the

mortgagor and the lessee. Such a lessee acquires an interest in the right of redemption and is entitled to redeem. If such a lease is created before the institution of a suit relating to the mortgage, the lessee must be joined as a party to the suit under Order 34, Rule 1, C.P.C., otherwise he will not be bound by the decree passed in the suit and will continue to retain his right of redemption. But in view of Section 52 of the Transfer of Property Act, if the mortgagor grants such a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the litigation. If the property is sold in execution of the decree passed in the suit, the lessee cannot resist a claim for possession by the auction-purchaser. The lessee could apply for being joined as a party to the suit and ask for an opportunity to redeem the property. But if he allows the property to be sold in execution of the decree, he loses his right of redemption. *Mangru Mahto and others v. Thakur Taraknathji Tarkeshwar Math and others,* AIR 1967 SC 1390: 1968 All LJ 417: 1968 BLJR 322: 1968 MPWR 326: 1967(3) SCR 125

Order 1, Rule 10.-Necessary parties .-Sub-lessee.-Suit against Lessee for possession of land on the basis of the valid notice to quit.-Sub- lessee is not a necessary party. The law does not require that the sub-lessee need be made a party. It has been rightly pointed out by the High Court that in all cases where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and does not implead the sub-lessee as a party to the suit, the object of the landlord is to eject the sub-lessee from the land in execution of the decree and such an object is quite legitimate. The decree in such a suit would bind the sub-lessee. This may act harshly on the sub-lessee; but this is a position well understood by him when he took the sub-lease. The law allows this and so the omission cannot be said to be an improper act. *Rupchand Gupta v. Raghuvanshi (Private) Ltd. and another,* AIR 1964 SC 1889: 1964(2) SCWR 95: 1964(7) SCR 760

Order 1, Rule 10.-Necessary party.-Meaning of.-It is the party without whose presence no effective and complete adjudication of the dispute could be made and no relief granted. *M/s. Aliji Monoji & Co. v. Lalji Mavji and others,* AIR 1997 SC 64: 1996(5) SCC 379: 1996(5) Scale 485: 1996(7) JT 53: 1997(1) Bom. CR 464

Order 1, Rule 10.-Necessary party .-Prejudice by non-impleadment .-Consideration of.-Benamidar impleaded as party.-Benamidar protecting the interest of the real owner by admitting to be Benamidar .-On death of Benamidar his legal heirs also accepted the title of real owner.-Application by real owner to be impleaded as party.- Non-joinder of real owner caused no prejudice to him.-Application for impleadment rightly rejected by the court.-the real owner is bound by the decree. In any litigation with a third party, the benamidar can sufficiently represent the real owner. The decision in any proceeding brought by or against the benamidar will bind the real owner though he is not joined as a party unless it is shown that the benamidar could not or did not in fact represent the interest of the real owner in that proceeding. *Ragho Prasad Gupta v. Shri Krishna Poddar,* AIR 1969 SC 316: 1969 (1) SCR 834

Order 1, Rule 10.-Necessary party .-Suit for specific performance.- Purchaser under notice of prior agreement of sale.-The party to prior agreement is a necessary party in the suit. *R. Ramamurthi Aiyar v. Raja V. Rajeswararao,* AIR 1973 SC 643: 1973(1) SCR 904: 1972(9) SCWR 540: 1972(2) SCC 721

Order 1, Rule 10.-Non-joinder of parties.-Suit by Manager of joint family.-Objections about non-impleadment.-The adult co-sharers of the family, not raised earlier, stand waived by the parties.-Limitation Act, 1908.-Section 22.-Application of.-Scope of. Failure to join a person who is a proper but not a necessary party does not affect the maintainability of the suit nor does affect the maintainability of the suit nor does it invite the application of Section 22 of the Indian Limitation Act. The rule that a person who ought to have been joined as a plaintiff to the suit and is not made a party will entail dismissal of the suit, if the suit as regards him be barred by limitation when he is joined, has no application to non-joinder of proper parties. *Devidas and others v. Shrichailappa and others,* AIR 1961 SC 1277: 1962 Nag LJ 191: 1961(3) SCR 896

Order 1, Rule 10.-Proper party.- Beneficiary of acquisition.- Impleadment as party.-Partici- pation in proceedings for deter- mination of compensation.-The beneficiary has limited right of adducing evidence for the purpose of determining compen-sation but it no right to seek reference.-Though beneficiary for whose benefit land is acquired, as an interest person and is also a proper party, if not a necessary party but he has a right to be heard by the collector or the court. *M/s. Neyvely Lignite Corpn. Ltd. v, Special Tahsildar (Land Acquisition), Neyveli and others,* AIR 1995 SC 1004: 1995(1) SCC 221: 1994(4) Scale 1129: 1995(1) JT 221

Order 1, Rule 10.-Proper party.- Where the presence of a party is necessary for complete and effectual adjudication of the dispute, though no relief is sought, it is a proper party. *M/s. Aliji Monoji & Co. v. Lalji Mavji and others,* AIR 1997 SC 64: 1996(5) SCC 379: 1996(5) Scale 485: 1996(7) JT 53: 1997(1) Bom. CR 464

Order 1, Rule 13.-Non-joinder of parties.-Effect on sale in execution of decree.-It does not affect the right of the person entitled to equity of redemption in the property and decree passed is subject to such right. *Nagubai Ammal and others v. B. Shama Rao and others,* AIR 1956 SC 593: 1956 An LT 1029: 1956 SCR 451

Orders 1, 3 and 10.-Joinder of parties.-Impleadment of deity.-Suit claiming property of Temple to

be a private property.-It is necessary that the Plaintiff should join deity as a proper party. The appellant seeks to cover up his default by saying that the suit was one under O.1, R. 8 of the Code of Civil Procedure, and that the Hindu public was joined and the deity was adequately represented. In a suit of this character, it is incumbent to have all necessary parties, so that the declaration may be effective and binding. It is obvious enough that a declaration given against the interests of the deity will not bind the deity, even though the Hindu Community as such may be bound. The appellant would have avoided circuity of action, if he had acceded to be very proper request of the respondents to bring on record the deity be joined. *Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi and others,* AIR 1960 SC 100: (1960) 1 SCR 773: 1960 SCJ 263

Order 2, Rule 2.-Application of.-Scope of.-Bar is not applicable on writ petition under Article 226 of the Constitution. *Devendra Pratap Narain Rai Sharma v. State of Uttar Pradesh and others,* AIR 1962 SC 1334: 1962 ALL LJ 437: 1962(2) SCJ 282: 1962 Supp. (1) SCR 315

Order 2, Rule 2.-Application of different cause of action.-Effect of.-where the cause of action between two suits was different, the provision has no application. *Arjun Lal Gupta and others v. Mriganka Mohan Sur and others,* AIR 1975 SC 207: 1974(2) SCC 586

Order 2, Rule 2.-Bar to sue.-Proof of.-The plea of similar claim must be proved satisfactorily and not by drawing inference. In order that a plea of a bar under Order 2, Rule 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2, Rule 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. Just as in the case of a plea of *res judicata* which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel, we consider that a plea under Order 2, Rule 2, Civil Procedure Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. As the plea is basically founded on the identity of the cause of action in the two suits the defence which raises the bar has necessarily to establish the cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. It is not impossible that reliefs were claimed without the necessary averment to justify their grant. *Gurbux Singh v. Bhooralal,* AIR 1964 SC 1810: 1964(1) SCWR 668: 1964(7) SCR 831

Order 2, Rule 2.-Constructive *res judicata*.-Different cause of action.-The subsequent cause of action arising on account of amendment of law.-Relinquishment previous claim does not affect subsequent proceedings. A perusal of Order 2, Rule 2 would clearly reveal that this provision applies to cases where a plaintiff omits to sue a portion of the cause of action on which the suit is based either by relinquishing the cause of action or by omitting a part of it. The provision has, therefore, no application to cases where the plaintiff bases his suit on separate and distinct causes of action and chooses to relinquish one or the other of them. In such cases, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have so relinquished. *Kewal Singh v. Mt. Lajwanti,* AIR 1980 SC 161: 1980(1) SCC 290: 1980(1) SCR 854: 1980 Rajdhani LR 74

Order 2, Rule 2.-Constructive *res judicata*.-Application of.-Dismissal of suit.-Technical ground for dismissal.-Lack of *locus standi* to seek injunction for want of possession resulting in dismissal of suit.-Subsequent suit seeking declaration and recovery of possession is not barred by *res judicata*. The first suit was for an injunction and not for possession of the demised property. The first suit was dismissed on the technical ground that since the plaintiff was not in de facto possession no injunction could be granted and a suit for a mere declaration of status without seeking the consequential relief for possession could not lie. Once it was found that the plaintiff was not in actual physical possession of the demised property, the suit had become infructuous. The cause of action for the former suit was not based on the allegation that the possession of the plaintiff was forcibly taken. The cause of action for the former suit was based on an apprehension that the defendants were likely to forcibly dispossess the plaintiff. The cause of action for that suit was not on the premise that he had in fact been illegally and forcibly dispossessed and needed the court's assistance to be restored to possession. Therefore, the subsequent suit was based on a distinct cause of action not found in the former suit and hence we do not think that

the High Court was right in concluding that the suit was barred by Order 2, Rule 2(3) of the Code of Civil Procedure. *Shri Inacio Martins, deceased through LRs. v. Narayan Hari Naik and others,* AIR 1993 SC 1756: 1993(3) SCC 123: 1993(2) SCR 1015: 1993(2) JT 723: 1993(2) LW 1

Order 2, Rule 2.-Decree.-Multiple decrees in suit.-Permissibility.- There can be more than one decree in a suit. Rule 3 of Order XIII, C.P.C., clearly envisages a decree being passed in respect of part of the subject-matter of the suit on a compromise, and Rule 6 of Order XII, C.P.C., permits the passing of a judgment, at any stage without waiting for determination of other questions. Thus, it is clear that, in the same suit, there can be more than one decree passed at different stages. *Bal Chanchal and others v. Syed Jalaluddin and others,* AIR 1971 SC 1081: 1970 (3) SCC 124: 1971 (2) SCR 171

Order 2, Rule 2.-Omission to sue.-Subsequent suit.-Distinct causes of action.-The relief sought in the subsequent suit based on a distinct cause of action.-Subsequent suit is not barred.-The earlier suit for enforcement of bank guarantee held not to bar the subsequent suit claiming damages for breach of the main contract. *State of Maharashtra and another v. M/s. National Construction Company, Bombay and another,* AIR 1996 SC 2367: 1996(1) SCC 735: 1996(1) Scale 176: 1996(1) JT 156: 1996(2) RLW 27

Order 2, Rule 2.-Subsequent suit.-Scope of.-Failure of plaintiff to include whole claim.-Subsequent suit seeking the relief which could be claimed in earlier suit is barred. The requirement of Order 2, Rule 2, Code of Civil Procedure is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. `Cause of action' means the `cause of action for which the suit was brought'.Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. *Sidramappa v. Rajashetty and others,* AIR 1970 SC 1059: 1970 (1) SCJ 857: 1970(3) SCR 319: 1970(1) SCC 186

Order 2, Rule 2.-Successive appeal.-Permissibility.-The earlier appeal filed against the order directing payment of decretal amount in instalments, withdrawn.- Subsequent appeal on merits is not barred. Appeal No. 36 of 1981 had been filed soon after the pronouncement of the judgment, before the decree incoroporating the order regarding the instalments had been drawn up. The direction regarding payment of the decretal amount is an order which is required to be incorporated in the decree, and it can only be incorporated in the decree, when the decree is drawn up. It retains the character of an order till it is so incorporated in the decree. As at the time of filing the earlier appeal No. 36 of 1981 the order regarding instalments had not been incorporated in the decree, the order retained its character of an order. The earlier appeal No. 36 of 1981 at the time when it was filed, should therefore be regarded as an appeal against an order. The precipe filed for the drawing up of the ordered, the letter to the Prothonotary and Senior Master of the High Court by the Advocates for the defendant-appellant, the memorandum appeal filed and the amount of stamp furnished on the memorandum are facts which go to indicate that the earlier appeal had been filed against an order regarding instalments treating the same to be an order. Unless a certified copy of the decree is filed, the appeal does not become competent and the appeal is liable to be dismissed as incompetent and invalid for not filing the certified copy of the decree within the period of limitation. So long as the certified copy of the decree is not filed there is no valid appeal in the eye of law. It cannot be said that any party who in view of the provisions contained in Order 20, Rule 11 (1) makes a prayer for postponement of payment of the decretal amount and asks for payment of the same in instalments makes any representation that he will accept any decree that may be passed against him and will not prefer any appeal against the same. A mere prayer for postponement of payment of thereof in instalments on the basis of the provisions contained in Order 10, Rule 11 (1) of the Code at a time when the decision in the suit is yet to be announced can never be considered to amount to such conduct of the party as to deprive him of his right to prefer an appeal against any decree, if ultimately passed, and to disentitle him from filing an appeal against the decree. *M/s. M. Ramnarain Pvt. Ltd. and another v. The State Trading Corporation of India Ltd.,* AIR 1983 SC 786: 1983(3) SCC 75: 1983(3) SCR 25: 1983(1) Scale 548: 1983(2) Bom. C.R. 343

Order 2, Rule 2(3).-Bar on subsequent suit.-Similarity in suits .-Necessity of.-The issues involved and relief sought in both the suits must be same.-Pleadings of earlier suit not produced.-The plea of bar against subsequent suit can not be permitted to be raised. *M/s. Bengal Waterproof Limited v. M/s. Bombay Waterproof Manufacturing Company and another,* AIR 1997 SC 1398: 1997(1) SCC 99: 1996(8) Scale 369: 1996(10) JT 822: 1997(1) AWC 324

Order 2, Rule 2(3).-Bar on subsequent suit.-Similarity in suits .-Period of relief.-Continuous cause of action.-Earlier suit in respect of alleged infringement of trade mark as also passing off.-Subsequent suit alleging passing off the goods subsequent to the period involved in earlier suit but based on a continuous and recurring infringement of trade mark.- Subsequent suit is not barred by dismissal of earlier suit. The grievance regarding passing off of the defendants' goods as if they were plaintiff's goods was also confined to the situation prevailing on the date of the earlier Suit No. 238 of 1980. That suit failed as the plaintiff had not claimed proper relief. Consequently for the alleged acts of infringement of plaintiff's trade mark or the alleged passing off actions on the part of the defendants till

the date of the earlier suit no subsequent grievance could be ventilated by the plaintiff's by filing a fresh suit. It is also pertinent to note that in the realier suit, that is, the first suit the plaintiff had claimed Rs. 25,000/- by way of damages for the alleged illegal acts of the defendants which were brought on the anvil of scrutiny in the 1980 suit. So far as that cause of action is concerned no subsequent suit lies as it would be barred under Order 2, Rule 2, sub-rule (3). But we are concerned in the second suit with entirely a different grievance of the plaintiff. In the second suit, namely, the present suit the grievance is not based on any acts of infringement or passing off alleged to have been committed by the defendants in 1980 but plaintiff's grievance is regarding the continuous acts of infringement of its trade mark `DUCK BACK' and the continuous passing off action on the part of the defendants subsequent to the filing of the earlier suit and which had continued on the date of the second suit of 1982. It is difficult to agree how in such a case when in historical past earlier suit was disposed of as technically not maintainable in absence of proper reliefs, for all times to come in future defendant of such a suit should be armed with a licence to go on committing fresh acts of infringement and passing off with impunity without being subjected to any legal action against such future acts. In cases of continuous causes of action or recurring causes of action bar of Order 2, Rule 2, sub-rule (3) cannot be invoked. In this connection it is profitable to have a look at Section 22 of the Limitation Act, 1963. It lays down that `in the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues'. As act of passing off is an act of deceit and tort every time when such tortius act or deceit is committed by the defendant the plaintiff gets a fresh cause of action to come to the Court by appropriate proceedings. Similarly infringement of a registered trade mark would also be a continuing wrong so long as infringement continues. *M/s. Bengal Waterproof Limited v. M/s. Bombay Waterproof Manufacturing Company and another,* AIR 1997 SC 1398: 1997(1) SCC 99: 1996(8) Scale 369: 1996(10) JT 822: 1997(1) AWC 324

Order 2, Rule 2(3).-Omission to sue.-Effect of.-Suit for partition of joint family property compromised .- Omission in respect of one of the businesses of joint family.-Subsequent suit claiming right in respect of such business is barred. The plaintiff's claim is barred by the provisions of Order II, Rule 2(3) of the Code of Civil Procedure. The plaintiff by confirming his claim to account up to March 31, 1946, only implicity if not explicitly, relinquished his claim to the account for the subsequent period. Sub-rule 3 clearly lays down that if a person omits, except with the leave of the court, to sue for all reliefs to which he is entitled, he shall not afterwards sue for any relief so omitted. We do not agree with the High Court that the cause of action in the first suit was the desire of the plaintiff to separate from his brothers and to divide the joint family property. That suit embraced the entire property without any reservation and was compromised, the plaintiff having abandoned his claim to account in respect of the motor business subsequent to March 31, 1946. His subsequent suit to enforce a part of the claim is founded on the same cause of action which he deliberately relinquished. We are clear, therefore, that the cause of action in the two suits being the same, the suit is barred under Order II, Rule 2(3) of the Civil Procedure Code. *Shankar Sitaram Sontakke and another v. Balkrishna Sitaram Sontakke and others,* AIR 1954 SC 352: 57 Bom LR 1: 1954 SCA 914: 1954 SCJ 552: 1955 SCR 99

Order 2, Rule 4.-Joinder of issues.- Considerations for.-Suit for possession and partition by one co-mortgagor against another who subrogated after the redemption of mortgaged property.-No issue of limitation involved.-One suit joining all the issues, Is maintainable. *Ganeshi Lal v. Joti Pershad,* AIR 1953 SC 1: 1952 SCJ 649: 1953 SCR 243

Order 3, Rule 1.-Concession by Advocate General.-Effect of.- Concession on a question of law does not bind State Government. *Commissioner of Hindu Religious and Charitable Endowments, Mysore v. U. Krishna Rao and others,* AIR 1970 SC 1114: 1969 SCD 1056: 1970(2) SCR 917: 1969(3) SCC 451

Order 3, Rules 1 and 4.-Pleader.- Scope of powers.-Right to enter into compromise.-Held on facts that the Pleader acted on the basis of the instructions of the clients. We must uphold the actual, though implied, authority of a pleader (which is a generic expression including all legal practitioners as indicated in Section 2(15), C.P.C.) to act by way of compromising a case in which he is engaged even without specific consent from his client, subject undoubtedly to two overriding, considerations: (i) He must act in good faith and for the benefit of his client; otherwise the power fails (ii) it is prudent and proper to consult his client and take his consent if there is time and opportunity. In any case, if there is any instruction to the contrary or withdrawal of authority, the implicit power to compromise in the pleader will fall to the ground. We need hardly emphasize that the Bar must sternly screen to extirpate the black-sheep among them, for Caesar's wife must be above suspicion, if the profession is to command the confidence of the community and the Court. Nevertheless, it is right to stree that counsel should not rush in with a razi where due care will make them fear to tread, that a junior should rarely consent on his own when there is a senior in the brief, that a party may validly impugn an act of compromise by his pleader if he is available for consultation but is bypassed. The lawyer must be above board, especially if he is to agree to an adverse verdict. As for classes of legal practitioners, we are equally clear that the tidal swell of unification and equalisation has swept away all professional sub-castes. Anyway, that is the law. Such artificial segregations as persist are mere proof of partial survival after death and will wither away in good time. Anyway, that is our hope. *Smt. Jamilabai Abdul Kadar v. Shankarlal Gulabchand and others,* AIR

1975 SC 2202: 1975(2) SCC 609: 1975 Supp. SCR 336 **Order 3, Rule 4.-Concession by Counsel.-Effect of.-Concession in one case cannot be extended to other cases.** As the stand taken by the learned Attorney-General before the High Court was confined to the group of cases which were disposed of in Civil Appeal Nos. 1438 and 1446 of 1967 and not in the other petitions before the High Court, the latter will have to be examined by the High Court individually on their own mertis. *Union of India v. S.R. Dhareshwar and others,* AIR 1971 SC 1753: 1972 (4) SCC 703

Order 5, Rules 12, 15 and 17.- Substituted service.-Procedure.- Court must be satisfied that service could not be effected by ordinary process before passing order for substituted service. The Trial Court could not have almost automatically granted the application for substituted services without taking steps for serving the respondent by ordinary procedure as laid down by Order V, Rules 12, 15 and 17 C.P.C. It must be kept in view that substituted service has to be restored as the last resort when the defendant cannot be served in the ordinary way and the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. *Smt. Yallawwa v. Smt. Shantavva,* AIR 1997 SC 35: 1996(7) Scale 484: 1996(9) JT 218: 1996(2) DMC 579: 1997(2) Mad. LJ 4

Order 5, Rule 20.-Substituted service.-Meaning of.-Provision conferring discretion on the Court to adopt such manner of service as it may found most expeditious.- Failure to effect notice on the notice board of the Court room held to be not fatal. The last ten words in sub-rule (1) of Rule 20, do confer a discretion on the Court to adopt any other manner of service. The sub-rule prescribes one manner which the Court may follow and this manner consists of two acts; (1) affixing a copy of the summons in the Court house, and (2) affixing it in some conspicuous part of the residential house or the business premises of the defendant. If the High Court were right we would expect that the word also would be repeated and inserted between the word or and in in the last ten words. The alternative manner which the Court decides to adopt for serving must of course be such as gives notice to the person to be served. It seems to us that the object of the Legislature in giving a discretion to the Court is to enable the Court to see that unnecessary steps are not taken and the service is effected in the most expeditious and best manner. *The Commissioner of Income-tax, Punjab, Jammu and Kashmir and Himachal Pradesh v. Daulat Ram Khanna,* AIR 1967 SC 1552: 1967 (2) SCWR 417: 1969(3) SCR 298

Order 5.-Service of summons.-Suit for recovery of bank loan.-Death of defendant guarantor.-Application for substitution of legal representatives of deceased.-Notice of application sent on incorrect address.-Effect.-Suit decreed ex parte.-Application for setting aside ex-parte decree rejected.-No finding given about service of notice on legal representatives of deceased nor any enquiry made.-Applicant's share in estate of his deceased father bound to be affected by execution of ex-parte decree.-Court cannot presume that notice of application was served on LRs.-Application for setting aside ex-parte decree allowed.-Impugned judgment set aside.-Applicant given opportunity to contest suit in accordance with law. *Naresh Chandra Agarwal vs. Bank of Baroda and others,* AIR 2001 SC 1253 : 2000(3) SCC 163 : 2001(2) JT 392 : 2001(2) Civ CR 61

Order 6, Rule 1.-Amendment of plaint.-Successive attempt.- Permissibility.-Consequential relief .-Addition of.-Contract claimed to be void.-Performance of void contract not permissible.-Amendment sought to incorporate relief of performance by successive attempts.-Amendment cannot be allowed. *D.L.F. United Private Ltd. v. Pt. Prem Raj and others,* AIR 1981 SC 805: 1981(1) SCC 433: 1980 Land LR 387

Order 6, Rule 1.-Impleading.- Inconsistent pleas.-Permissibility.- No person can be permitted to approbate or reprobate. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. We are, therefore, of the opinion that the petitioner, having given an undertaking in pursuance to the directions given by the High Court in the judgment dated March 6, 1992, and having availed the protection from eviction on the basis of the said undertaking, cannot be permitted to invoke the jurisdiction of this Court under Article 136 of the Constitution and assail the said judgment of the High Court. *R.N. Gosain, v. Yashpal Dhir,* AIR 1993 SC 352: 1992(4) SCC 683: 1992(2) Scale 913: 1992 Supp. JT 770: 1993(1) Pun. LR 184

Order 6, Rule 1.-Pleadings.- Construction of.-Absence of plea.-The substance of pleadings should be ascertained to determine the question of absence of pleading. In the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities, sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the

substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal. *Ram Sarup Gupta (dead) by LRs. v. Bishun Narain Inter College and others,* AIR 1987 SC 1242: 1987(2) SCC 555: 1987(2) SCR 805: 1987(1) Scale 700: 1987(2) J.T. 76

Order 6, Rule 2.-Inconsistent pleas.-Permissibility.-A party is entitled to take alternative pleas in support of its case.-Where the alternative pleas arose from the admitted position of the defendant, such plea is not impermissible merely because it is inconsistent with other pleas.-The court may grant relief on the basis of such alternative plea even if the defendant was not granted an opportunity to meet such plea because it was the stand of defendant himself. *Firm Sriniwas Ram Kumar v. Mahabir Prasad and others,* AIR 1951 SC 177: 1951 ALJ (SC) 64: 64 MLW 544: 1951 SCJ 261: 1951 SCR 277

Order 6, Rule 2.-Legal plea.- Maintainability of suit.-Necessity of pleading.-It is a legal plea and therefore, can be accepted without a specific pleading or specific issue. *The State of Rajasthan v. Rao Raja Kalyan Singh,* AIR 1971 SC 2018: 1972(4) SCC 165

Order 6, Rule 2.-Pleadings .-Absence of.-Effect of.-Parties going to trial with full knowledge of the issue.-Absence of specific pleading is a mere irregularity which caused no prejudice. *Nagubai Ammal and others v. B. Shama Rao and others,* AIR 1956 SC 593: 1956 An LT 1029: 1956 SCR 451

Order 6, Rule 2.-Pleadings.-Construction of.-Effect of illiteracy of masses. Pleadings have to be interpreted not with formalistic rigour but with latitude or awareness of low legal literacy of poor people. *Smt. Manjushri Raha and others etc. v. B.L. Gupta and others etc.,* AIR 1977 SC 1158: 1977(2) SCC 174: 1977(2) SCR 944

Order 6, Rule 2.-Pleadings.- Construction of.-Necessity to look into.-Substance and together real intention of parties. In this country, the court should not look merely to its form, or pick out from it isolated words or sentences; it must read the petition as a whole, gather the real intention of the party and reach at the substance of the matter. *Katikara Chintamani Dora v. Guatreddi Annamanaidu,* AIR 1974 SC 1069: 1974 (1) SCC 567: 1974 (2) SCR 655

Order 6, Rule 2.-Pleadings.- Contingent Contract.-Necessity of specific pleadings.-The matter otherwise contested between the parties.-Findings of the court on such plea is improper. *P.V. Ayyappa Reddiar v. Ayyappan Pillai Janardhanan Pillai and another,* AIR 1971 SC 2092: 1972(4) SCC 246

Order 6, Rule 2.-Pleadings.- Contradiction in evidence.-Such evidence cannot be relied by the Court. The ordinary rule of law is that evidence is to be given only on a plea properly raised and not in contradiction of the plea. Here the pleas were made on two different occasions and contradicted each other. The evidence which was tendered contradicted both the pleas. The source of the information was not attempted to be proved and the witnesses who were brought were found to be thoroughly unreliable. In these circumstances we do not propose to refer to the evidence in this judgment any more. *Mrs. Om Prabha Jain v. Abnash Chand Jain and another,* AIR 1968 SC 1083: 1968 (2) SCJ 807: 1968(3) SCR 111

Order 6, Rule 2.-Pleadings.- Necessity of.-Both the parties understood the facts in issue.-Absence of formally framed issue is not sufficient to vitiate decision. *Kunju Kesavan v. M.M. Philip and others,* AIR 1964 SC 164: 1963 Ker LJ 962: 1963(2) SCWR 275: 1964(3) SCR 634

Order 6, Rule 2.-Pleadings.- Necessity of.-Suit for recovery of amount due under mortgage.-Deduction of the value of the mortgaged goods on the ground that such goods were not returned.-Absence of pleading of this effect.- Order of the High Court being beyond pleading, modified. We are unable to comprehend how the High Court, in the absence of any plea or issue, examined the question whether the goods of the value of Rs. 1,04,840/- which are stated to have been damaged by floods remained with the Bank and were not delivered to the defendants. We have referred in detail to the documents which fully establish that the defendants had taken delivery of the goods. In the High Court is was not disputed that the amount of Rupees 1,16,309.37 due to the Bank had been correctly calculated. The High Court, however, deducted a sum of Rupees 1,04,840/- from that amount on the ground that the damaged goods had not been delivered to the defendants. As according to our decision those goods had been delivered to the defendants this amount cannot be deducted from the sum of Rs. 1,16,309.37. The appeal is consequently allowed and a mortgage decree is granted in that amount with interest pendente lite and future interest at 6% per annum from the date of the decree of the trial court to the date of realisation. *The Central Bank of India Ltd. v. Hari Prasad Jalan and others,* AIR 1972 SC 1274: 1972(4) SCC (N) 37

Order 6, Rule 2.-Pleadings.- Departure from.-Permissibility.- Pleadings form the foundation of the case.-The party cannot give up its case and set up a new case. *Vinod Kumar Arora v. Smt. Surjit Kaur,* AIR 1987 SC 2179: 1987(3) SCC 711: 1987(3) SCR 552: 1987(2) Scale 60: 1987(3) J.T. 106

Order 6, Rule 2.-Pleadings.- Estoppel.-Variation between pleadings and conduct in suit.-A party cannot be permitted to beyond its pleadings. The plaintiffs themselves contend that some of these

matters are *res judicata* against the defendants in this suit by reason of the conditions subject to which their application for review was admitted. On the pleadings as they stand and on the issues as they have been framed, it is now impossible to permit the plaintiff-respondent to go outside the pleadings and set up a new case that the supremacy of the Patriarch has been taken away by the mere fact of the adoption of the new constitution (Ex. A.M.) or by any particular clause thereof other than those relating to matters specifically referred to in the pleadings. The issues cannot be permitted to be stretched to cover matters which are not, on a reasonable construction, within the pleadings on which they were founded. *Moran Mar Basselios Catholicos v. Thukalan Paulo Avira and others,* AIR 1959 SC 31: 1958 Andh LT 834: 1958 Andh L.T. 834

Order 6, Rule 2.-Pleadings.-Inconsistency with evidence.-Effect of.-Plaintiff is not entitled to relief on the basis of evidence inconsistent with pleadings. *S.N. Ranade v. Union of India and another,* AIR 1964 SC 24: 66 Bom LR 137: 1964 Mah LJ 240

Order 6, Rule 2.-Pleadings.-Inconsistency with arguments.-Permissibility.-The suit property claimed to be private property before the court below.-It cannot be argued in Supreme Court that the property was partly private and partly trust property. *Goswami Shri Mahalaxmi Vahuji v. Shah Ranchhoddas Kalidas and others,* AIR 1970 SC 2025: 1970 (2) SCR 275: 1969(2) SCC 853

Order 6, Rule 2.-Pleadings.- Material facts.-Omission to mention material facts in the plaint is sufficient to dismiss the suit as failure to disclose the cause of action. *Shri H.D. Vashishta v. M/s. Glaxo Laboratories (I.) (P.) Ltd.,* AIR 1979 SC 134: 1978(1) SCC 170

Order 6, Rule 2.-Pleadings.-Necessity of.-Entertainment of new plea by appellate court about the question as to whether time was essence of contract or not, is not proper. *Govind Prasad Chaturvedi v. Hari Dutt Shastri and another,* AIR 1977 SC 1005: 1977(2) SCC 539: 1977(2) SCR 877

Order 6, Rule 2.-Pleadings.-Necessity of.-Notice to quit issued by Landlord.-Plea of waiver of notice not taken by tenant in his written statement.-Such plea cannot be entertained. *Mangal Sen v. Kanchhid Mal,* AIR 1981 SC 1726: 1981(4) SCC 117: 1982(1) SCR 331: 1981(3) Scale 1242

Order 6, Rule 2.-Pleadings.- Necessity of.-The appellate court cannot make out an entirely a new case not pleaded by the parties and not the subject matter of the judgement of trial court. *Siddu Venkappa Devadiga v. Smt. Rangu S. Devadiga and others,* AIR 1977 SC 890: 1977(3) SCC 532: 1977(1) Rent LR 877

Order 6, Rule 2.-Pleadings.- Necessity of specific plea.-Pleading of estoppel.-No proper foundation laid in the pleadings.-Plea of estoppel cannot be allowed to be raised. *K.C. Kapoor v. Smt. Radhika Devi (dead) by LRs and others,* AIR 1981 SC 2128: 1981(4) SCC 487: 1982(1) SCR 902: 1981(3) Scale 1565

Order 6, Rule 2.-Pleading of claim .-Necessity of.-The Court should not refuse a claim on mere technicality when in substance the pleading to this effect exist and no prejudice is caused to the other party. I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or in artistically the plaint may be worded. In any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs. *Kedar Lal Seal and another v. Hari Lal Seal,* AIR 1952 SC 47: 1952 SCJ 37: 1952 SCR 179

Order 6, Rule 2 and 4.-Pleadings .-Specific denial.-Existence of custom specifically pleaded.-Facts not specifically denied.-In the circumstances denial held to be sufficient to put the plaintiff to prove the fact of custom by cogent and reliable evidence. *Munshi Dass v. R. Mal Singh (dead) by L.Rs. and another,* AIR 1977 SC 2002: 1977(4) SCC 65

Order 6, Rule 4.-Fraud.-Pleading of.-Full particulars of fraud, undue influence and coercion not stated.-The Court is not ought to take notice of the allegations stated without such particulars. The allegations of undue influence and coercion have not been separately pleaded. It is true that they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. . . General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6, Rule 4, Civil_P.C. The facts set out in paras 8 to 12 about the ferocious appearance of Firangi Rai and his allegedly high-handed and criminal activities and his character, are only there to lend colour to the genuineness of the belief said to have been engendered in Ghughuli Rai's mind that the threat of death administered to him was real and imminent. But as regards the threat itself, there is not a single particular. We do not know the nature of the threat. We do not know the date, time and place in which it was administered. We do not know the circumstances. We do not even know who did the threatening. Now when a Court is asked to find that a person was threatened with death, it is necessary to know these particulars, otherwise, it is impossible to reach a proper conclusion. *Bishundeo Narain and another v. Seogeni Rai and others,* AIR 1951 SC 280

Order 6, Rule 4.-Pleadings.- Necessity of.-Question of construction of contract.-Defect in the plea taken in pleadings cannot affect the construction of a contract which has to be done by reading the document as a whole. The question raised by the appellant relates to the construction of the contract and we do not see how the construction of a document can be prejudicially affected by the failure of the party to make a more specific and more precise plea in his written statement. We have no doubt that, if the contract is considered as a whole, it would show that the appellant had executed it as the Mukhiya of the Village Panchayat and this conclusion cannot be affected by the alleged defect in the plea taken by him in the written statement. *Bhagwan Singh v. Rameshwar Prasad Shastri and others,* AIR 1959 SC 876: (1959) 2 Andh WR (SC) 111: (1959) 2 MLJ (SC) 111: 1959 Supp (2) SCR 535

Order 6, Rule 4.-Pleadings.-Mixed question of law and fact.- Enforcement of lien by the agent against the principal property is a mixed question of law and fact and therefore cannot be gone into without proper pleadings. *Ram Prasad v. The State of Madhya Pradesh and another,* AIR 1970 SC 1818: 1970 All LJ 1022: 1970 BLJR 1078: 1970 Mah LJ 696: 1969(3) SCC 24

Order 6, Rule 4.-Pleadings.-Undue influence.-The party claiming undue influence in a transaction must plead all particulars about the undue influence. A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with a view to narrow the issue and protected the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up. *Ladli Parshad Jaiswal v. The Karnal Distillery Co., Ltd. Karnal and others,* AIR 1963 SC 1279: 1963(2) Andh LT 228: 1964(1) SCR 270

Order 6, Rule 4.-Pleading of collusion.-Necessity of particulars .-Averments in general terms alleging collusion without making specific allegations against any person, cannot be considered. *Varanasaya Sanskrit Vishwavidyalaya and another v. Dr. Rajkishore Tripathi and another,* AIR 1977 SC 615: 1977(1) SCC 279: 1977(2) SCR 213

Order 6, Rule 4.-Pleading of fraud .-Necessity of.-No plea raised about ante dating of documents.-Such plea cannot be raised for the first time in arguments. *Mohan Lal v. Anandibai and others,* AIR 1971 SC 2177: 1971(1) SCC 813: 1971(3) SCR 929

Order 6, Rule 4.-Specific pleading .-Necessity of.-General allegation in the plaint denied by way of general denial in written statement.- The allegation cannot be deemed to have been admitted. *Rani Purnima Debi and another v. Kumar Khagenda Narayan Deb and another,* AIR 1962 SC 567: 1961(2) Ker LR 620: 1962(2) MLJ (SC) 27: 1962(3) SCR 195

Order 6, Rules 4 and 2.-Pleading of fraud.-General allegation that executant of a document was an old man under the influence of defendant, is not sufficient. While it is true that `undue influence', `fraud', `misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, Rule 2 of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court. *Afsar Shaikh and another v. Soleman Bibi and others,* AIR 1976 SC 163: 1976(2) SCC 142: 1976(2) SCR 327

Order 6, Rule 6.-Pleadings.-Necessity of.-Plea of negligence raised in defence to a suit for recovery of price of goods.-Such plea cannot be raised in suit without appropriate pleading more so at appellate stage. Negligence in popular language and in common sense means failure to exercise that care and diligence which the circumstances require. Naturally what amounts to negligence would always depend upon the circumstances and facts in any particular case. The nature of the contract, the circumstances in which the performance of the contract by the one party or the other was expected, the degree of diligence, care and attention which, in ordinary course, was expected to be shown by the parties to the contract, the circumstances under which and the reason for which failure to show due diligence occurred are all facts which would be relevant before a judicial finding can be made on the plea of negligence. Since a plea of negligence was not raised by the respondent in the trial Court, the appellant is entitled to contend that it had no opportunity to meet this plea and dealing with it in appeal has, therefore, been unfair to it. *New Marine Coal Co. (Bengal) Private Ltd. v. The Union of India,* AIR 1964 SC 152: 1964(1) SCA

491: 1964(2) SCR 859

Order 6, Rule 7.-Pleadings.- Evidence beyond pleadings.- Permissibility.-A plea not specifically raised but parties leading evidence thereon cannot be ignored on purely formal and technical view. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? *Bhim Singh (dead) by LRs. and another v. Kan Singh,* AIR 1980 SC 727: 1980(3) SCC 72: 1980(2) SCR 628

Order 6, Rule 8.-Denial of contract .-Effect of.-A party denying the factum of contract and not alleging its unenforcibility, cannot plead the question relating to legality or validity of the contract. *Kalyanpur Lime Works Ltd. v. State of Bihar and another,* AIR 1954 SC 165: 1954 SCJ 99: 1954 SCR 958: 1954(1) Mad LJ

Order 6, Rule 8.-Pleading.-Evasive denial.-Effect of.-Denial of contract pleaded.-In the absence of specific denial.-It shall be construed only as denial of fact and not legality of sufficiency of such contract, in law. *Union of India v. Surjit Singh Atwal,* AIR 1979 SC 1701: 1979(1) SCC 520: 1979(2) SCR 1002

Order 6, Rule 14.-Signing of pleadings.-Power of attorney.- Necessity of.-Pleadings singed on behalf of public corporation i.e. Bank.-Prior resolution giving authorisation or power of attorney not necessary.-Corporation can ratify the act of its Officer subsequently as well.-Public interest should not be defeated on such technical plea as it shall be travesty of justice. In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the Courts, under the Code of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable. It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6, Rule 14 of the Code of Civil Procedure a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the company. Order 29, Rule 1 of the Code of Civil Procedure, therefore, provides that in a suit by or against a corporation the Secretary or any director or other Principal Officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6, Rule 14 together with Order 29, Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and dehors Order 29, Rule 1 of the Code of Civil Procedure, as a company is a juristic entry, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6, Rule 14 of the Code of Civil Procedure. a person may be expressly authorised to sign the pleadings on behalf of the company, for example, by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officer in signing the pleadings. Such ratification can be express or implied. The Court can on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer. *United Bank of India v. Naresh Kumar and others,* AIR 1997 SC 3: 1996(6) SCC 660: 1996(6) Scale 764: 1996(7) AD (SC) 208: 1997 Civ. CR (SC) 53: 1997(1) Orissa LR 108

Order 6, Rule 16.-Striking off.- Pleadings.-Directions for.-No finding that the paragraph to be deleted were unnecessary frivolous or vexatious or that they may tend to prejudice embarrass or delay the fair trial.-Directions to strike off the paragraphs are without jurisdiction. *Roop Lal Sathi v. Nachhattar Singh,* AIR 1982 SC 1559: 1982(2) SCC 487: 1983(1) SCR 702: 1982(2) Scale 976

Order 6, Rule 17.-Amendment in appeal.-Addition of Prayer.-No new case made out.-No party was taken by surprise by proposed amendment.-Adding prayer in the prayer clause rightly allowed. The question of amendment, in our opinion, was rightly decided by the High Court. As held by that court all the necessary allegations had been made in the plaint and the requisite pleas had been raised by the appellants; an issue was framed on the question and the parties were fully cognizant of the points in controversy and the necessary evidence was led by the parties. In this view of the matter the High Court was right in allowing the amendment by the addition of a prayer in the prayer clause. Nanduri Yogananda Lakshminara- simhachari and others v. Sri Agastheswara- swamivaru, AIR 1960 SC 622: 1960 Mad LJ

(SC) 61: 1960(2) SCR 768

Order 6, Rule 17.-Amendment of memo of Appeal.-Enhancement of claim.-Effect of delay.-Amendment sought to increase the amount of claim of compensation for land acquisition on the basis of previous decisions.-Rejection of amendment only on the ground of delay is not proper.-Amendment allowed. Order VI, Rule 17 in terms provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be necessary for the purpose of determining the real questions in controversy between the parties. To effectively and finally adjudicate this, controversy necessary pleadings ought to be available. To highlight this real controversy it may become necessary to amend the pleadings. When an appeal is preferred the memorandum of appeal has the same position like the plaint in a suit because plaintiff is held to the case pleaded in the plaint. In the case of memorandum of appeal same situation obtains in view of order XLI, Rule 3. The appellant sought amendment relying upon the decisions of the High Court itself and the decisions provided a comparable yardstick for effectively disposing of the real controversy before the High Court and the amendment was sought before the High Court proceeded to dispose of the appeal. *Harcharan v. State of Haryana,* AIR 1983 SC 43: 1982(3) SCC 408: 1982(2) Scale 1075: 1983 BBCJ 11: 1983(1) Land LR 307

Order 6, Rule 17.-Amendment of plaint.-Addition of party.-Failure to implead necessary party.-Dismissal of suit.-The court having no jurisdiction against such party.- Application for amendment moved before Appellate court rightly disallowed. *The State of Kerala v. The General Manager, Southern Railway, Madras,* AIR 1976 SC 2538: 1976(4) SCC 265: 1977(1) SCR 419

Order 6, Rule 17.-Amendment of plaint.-Addition of facts.-No new cause of action or new case sought to be incorporated.-Addition to the facts already on record can be allowed even after expiry of limitation.-Amendments seeking to avail the benefit of new legislation, allowed. *Vineet Kumar v. Mangal Sain Wadhera,* AIR 1985 SC 817: 1984(3) SCC 352: 1984(2) SCR 333: 1984(1) Scale 31: 1984 Har RR 294

Order 6, Rule 17.-Amendment of plaint.-Additional relief.-Suit for partition.-Relief of dissolution of partnership alongwith rendition of account sought to be added by amendment.-The nature of suit is entirely changed.-Defendant can be compensated for delay by imposing heavy cost for delay on account of negligence or indifference.- Amendment rightly allowed. *Suraj Prakash Bhasin v. Smt. Raj Rani Bhasin and others,* AIR 1981 SC 485: 1981(3) SCC 652: 1980 BBCJ 102 (SC)

Order 6, Rule 17.-Amendment of plaint.-Consequential amendment .-Denial of.-Amendment allowed, with direction for disposal in accordance with law. *Bikram Singh and others v. Ram Baboo and others,* AIR 1981 SC 2036: 1982(1) SCC 485

Order 6, Rule 17.-Amendment of plaint.-Considerations for.- Multiplicity of proceedings.-The plaint should be interpreted by reading the same as a whole.- Amendment sought to remove doubts in the plaint and seeking consequential relief of partition by mates and bounds in addition to suit for severance of joint family status .-To avoid multiplicity of proceedings.-Amendment, allowed. On the question of interpretation of the plaint it is important to consider all the averments made by the plaintiff in paragraph 3 together and the other connected paragraphs and it is not possible to draw an inference from any isolated sentence in the 3rd paragraph without regard to its context. It is a well-known canon of interpretation that it is the duty of the Court not to confine itself to the force of a particular expression but to collect the intention from the whole instrument taken together. Having, therefore, regard to the statement of the plaintiff in all the paragraphs of the plaint and interpreting the plaint as a whole we are satisfied that the High Court was right in holding that the suit was not a suit brought for severance of joint family status but was a suit merely for partition by metes and bounds. We are of opinion that the words Ane Chee (any have) Ame Chhiye in paragraph 2 and the words (i.e. `and are')" in paragraph 3 of the plaint have been inserted on account of some mistake or misapprehension on the part of the plaintiff and it was, therefore a proper, case in which the Court allowed the plaint to be amended. The reason is that if the amendment is refused the plaintiff may have to bring another suit and the object of the rule for allowing amendments to the plaint is to avoid multiplicity of suits. *Nichhalbhai Vallabhai and others v. Jaswantlal Zinabhai and others,* AIR 1966 SC 997: 1996 SCWR 199

Order 6, Rule 17.-Amendment of plaint.-Considerations for.- Amendment is ordinarily allowed except where it seeks to take away accrued rights of a party on account of bar of limitation, in which case the amendment should be refused. *Radhika Devi v. Bajrangi Singh and others,* AIR 1996 SC 2358: 1996(7) SCC 486: 1996(1) Scale 750: 1996(2) JT 238: 1996(2) AWC 724

Order 6, Rule 17.-Amendment of plaint.-Delay.-Bar of limitation.- Relief of specific performance sought to be incorporated by way of amendment in a suit for injunction restraining the vendor of property from alienating the property.- Application after about 7 years.- Amendment if allowed, shall destroy the valuable right of limitation accrued to the defendant.-Amendment rightly denied. *K. Raheja Constructions Ltd. v. Aliance Ministries and others,* AIR 1995 SC 1768: 1995 Supp (3) SCC 17: 1995(3) Scale 692

Order 6, Rule 17.-Amendment of plaint.-Effect of.-Limitation.- Relief of specific performance sought by way of amendment in plaint after expiry of three years from the date fixed for

performance of contract.- Amendment barred by limitation rightly declined. *T.L. Muddukrishana and another v. Smt. Lalitha Ramchandra Rao,* AIR 1997 SC 772: 1997(2) SCC 611: 1997(1) Scale 321: 1997(1) JT 540: 1997 Civ. CR (SC) 414

Order 6, Rule 17.-Amendment of plaint.-Exercise of discretion.- Consideration for.-Refusal to amend on technical grounds is not permissible. Rules or procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting *mala fide*, or that by his blunder, he had caused injury to his opponent which may not be compensed for by an order of costs. However, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side. The observations made by the High Court that the application for amendment of the plaint could not be granted, because there was no averment therein that the misdescription was on account of a *bona fide* mistake, and on that account the suit must fail, cannot be accepted. In our view, there is no rule that unless in an application for amendment of the plaint it is expressly averred that the error, omission or misdescription is due to a *bona fide* mistake, the Court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations. Since the name in which the action was instituted was merely a misdescription of the original plaintiff, no question of limitation arises; the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff, on the date on which it was originally instituted. *Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon,* AIR 1969 SC 1267: 1970(1) SCR 22: 1969(1) SCC 869

Order 6, Rule 17.-Amendment of plaint.-Exercise of discretion.- Court should be extremely liberal in permitting amendment unless serious injustice or irreparable is caused to other side.- Interference of High Court in revision with the order permitting amendment of plaint is not called for. *Haridas Aildas Thadani and others v. Godrej Rustom Kermani,* AIR 1983 SC 319: 1984(1) SCC 668: 1982 All.W.C. 201

Order 6, Rule 17.-Amendment of plaint.-Interference with discretion .- Amendment not causing injustice to the other party.-Amendment not barred by limitation.-Interference by the High Court, in absence of jurisdictional infirmity, is not proper. *Maitreyee Banerjee v. Prabir Kumar Mukherjee,* AIR 1982 SC 17: 1982(3) SCC 217

Order 6, Rule 17.-Amendment of plaint.-Mis-description of plaintiff .-Provision has no application as plaint can be amended under Section 153 of the Code. *Purushottam Umedbhai and Co. v. M/s. Manilal and Sons,* AIR 1961 SC 325: 1961(1) Mad.L.J. (SC) 38: 1961(1) SCA 293: 1961(1) SCR 982

Order 6, Rule 17.-Amendment of plaint.-Mis-description of cause title.-Amendment can be allowed at any time to show correct description of plaintiff. The High Court has observed that even assuming that it would have been more appropriate for the Receiver to show in the cause title that it was the firm which was the real plaintiff and that the firm was suing through him it was merely a case of misdeserption and that the plaint could be amended at any time for the purpose of showing the correct description of the plaintiff. We agree with the High Court that where there is a case of misdescription of parties it is open to the court to allow an amendment of the plaint at any time and the question of limitation would not arise in such a case. *Kurapati Venkata Mallayya and another v. Thondepu Ramaswami and Co. and another,* AIR 1964 SC 818

Order 6, Rule 17.-Amendment of plaint.-Mis-description of property.-Amendment sought at the stage of first appeal whereby description of property sought to be corrected.-Amendment rightly allowed by High Court to give correct particulars of property. *C. M. Vereekutty v. C. M. Mathukutty,* AIR 1981 SC 1533: 1980(1) SCC 537

Order 6, Rule 17.-Amendment of plaint.-Status of plaintiff.-Amend- ment sought whereby the plaintiff sought to change his status from a partner of a firm to partner of a dissolved firm.-The amendment sought only to correctly bring out the capacity in which the plaintiff was suing.- Amendment allowed. It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce indirectly, through an amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there the Court will refuse to permit it if it amounts to depriving the party against which a suit is pending of any right which may have accrued in its favour due to lapse of time. But mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometime be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation to be put on every defective state of pleadings. Defective pleading are generally curable if the cause of action sought to be brought out was not*ab initio* completely absent. Even very defective pleadings

may be permitted to be cured, so as to constitute a cause of action where there was none, provided necessary conditions, such as payment of either any additional court fees, which may be payable, or of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings. The suit having been instituted by one of the partners of a dissolved firm the mere specification of the capacity in which the suit was filed could not change the character of the suit or the case. It made no difference to the rest of the pleadings or to the cause of action. In deed, the amendment only sought to give notice to the defendant of facts which the plaintiff would and could have tried to prove in any case. This notice was being given, out of abundant caution, so that no technical objection may be taken that what was sought to be proved was outside the pleadings. *M/s. Ganesh Trading Co. v. Moji Ram,* AIR 1978 SC 484: 1978(2) SCC 91: 1978(2) SCR 614: 80 Pun. LR 458

Order 6, Rule 17.-Amendment of plaint.-Unnecessary amendment.- Benami transaction.-Pleading of.- Necessity of.-A party can always press its arguments on the plea of benami transaction.-No express averment in pleading is required for the purpose.-Amendment of plaint not called for. *Manoj Beharilal Mathur and another v. Dr. Shanti Mathur and others,* AIR 1997 SC 2153: 1997(1) SCC 553: 1996(9) Scale 237: 1996(11) JT 601

Order 6, Rule 17.-Amendment of plaint.-Valuation of suit.-Omission in stating the value of suit.-The court should be liberal in permitting the amendment of plaint to incorporate the valuation. The plaintiff's failure to state the amount at which he values the relief sought is often due to the fact that in suits for partition the plaintiff attempts to obtain the benefit of Article 17-B of Schedule II in the matter of payment of court-fees. Where the plaintiff seeks to pay the fixed court-fee as required by the said article, he and his advisers are apt to take the view that it is unnecessary to state the amount for which relief is sought to be claimed for the purposes of court-fees and the valuation for jurisdiction purposes alone is, therefore, mentioned. Often enough, it turns out that the plaint does not strictly attract the provisions of Article 17-B of Schedule II and that the court-fee has to be paid either under Section 7(iv)(b) or under Section 7(v) of the Act. If the court comes to the conclusion that the case falls under Section 7(iv)(b) or Section 7(iv)(c) ordinarily liberty should be given to the plaintiff to amend his plaint and set out specifically the amount at which he seeks to value has claim for the payment of court-fees. It would not be reasonable or proper in such a case to hold the plaintiff bound by the valuation made by him for the purposes of jurisdiction and to infer that the said valuation should be also taken as the valuation for the payment of court- fees. *S. Rm. Ar. S. Sp. Sathappa Chettiar v. S. Rm. Ar. Rm. Ramanathan Chettiar,* AIR 1958 SC 245: 1958(1) And WR 148: 1958 SCJ 407: 1958 SCR 1021

Order 6, Rule 17.-Amendment of plaint.-Withdrawal of admission.- Finding of trial Court that amendment is necessary for effective adjudication.-Interference with discretionary order of trial court, in revision, is not permissible. *Panchdeo Narain Srivastava v. Km. Jyoti Sahay and another,* AIR 1983 SC 462: 1984 Supp. SCC 594: 1983(1) Scale 719

Order 6, Rule 17.-Amendment of pleadings.-Amendment sought in plaint to claim relief in proper form at the stage of appeal.-Amendment to claim relief in proper form found to be purely of formal character.- The court must determine by itself if any notice to the defendants is necessary.-In the circumstances remand of case for the purposes of notice to the defendant held unnecessary. *Gopal Krishnaji, Ketkar v. Mahomed Jaffar Mohamed Hussein & another,* AIR 1954 SC 5: 1953 SCJ 621

Order 6, Rule 17.-Amendment of pleadings.-Considerations for.-Suit for partition.-Omission to take plea that the properties are joint properties.-Rejection of plea that partial partition is not permissible on the ground that no such issue was framed.-Serious prejudice caused on account of hyper-technical view.-Amendment allowed by Supreme Court in special leave to appeal against the decree. *Mohammad Mustafa v. Sri Abu Bakar and others,* AIR 1971 SC 361: 1970(3) SCC 891

Order 6, Rule 17.-Amendment of pleadings.-Effect on plaint.- Amendment taking away the right accrued to other party on account of limitation.-The amendment not introducing new case and not taking the other party by surprise.-Amendment, allowed. What happened in the present case was that there was a defect in the plaint which stood in the way of the plaintiff asking for the reliefs he asked for; that defect was removed by the amendments. The quality and quantity of the reliefs sought remained the same; whether the reliefs should be granted or not is a different matter as to which we are not called upon to express any opinion at this stage. All amendments ought to be allowed which satisfy the two conditions (a) of net working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. . . . but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice

to the other side, or can it not? The same principles, we hold, should apply in the present case. The amendments do not really introduce a new case, and the application filed by the appellant himself showed that he was not taken by surprise; nor did he have to meet a *new* claim set up for the first time after the expiry of the period of limitation. *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and others,* AIR 1957 SC 363: 59 Bom LR 401: 1957 SCR 595

Order 6, Rule 17.-Amendment of pleadings.-Effect of delay.-Plaintiff limiting its right to sue, mesne profits to three years before the date of amendment application.-The opposite party cannot object to amendment. *Haridas Girdharidas and others v. Varadaraja Pillai and another,* AIR 1971 SC 2366: 1971(2) SCC 601: 1972(1) SCR 299

Order 6, Rule 17.-Amendment of pleadings.-Incorporation of subsequent event.-Amendment of written statement sought at the stage of appeal can be allowed to shorten litigation. Ordinarily, a suit is tried in all its, stages on the cause of action as it existed on the date of its institution. But it is open to a Court including a Court of appeal to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances where it is shown that the relief claimed originally has (1) by reason of subsequent change of circumstances become inappropriate; or (2) where it is necessary to take notice of the changed circumstances in order to shorten the litigation, or (3) to do complete justice between the parties. Even if the assertions made in the application for amendment of the written statement are found to be ture, the appellant could not have non-suited the respondent during the lifetime of Smt. Rajrani. The gift was valid during her lifetime. Her death gives a fresh cause of action to the appellant who claims to be her next reversioner. It appears to us that it will be just and proper to allow the amendment sought for. It will shorten litigation. *Shikharchand Jain v. Digamber Jain Praband Karini Sabha and others,* AIR 1974 SC 1178: 1974(1) SCC 675: 1974(3) SCR 101

Order 6, Rule 17.-Amendment of pleadings.-Memorandum of appeal.-Consideration for exercise of discretion.-Effect of undue delay in seeking amendment. The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court. *Smt. Ganga Bai v. Vijay Kumar and others,* AIR 1974 SC 1126: 1974 Mah LJ 602: 1974 MPLJ 629: 1974 (2) SCC 393: 1974 (3) SCR 882

Order 6, Rule 17.-Amendment of pleadings.-New case.-Permissibility .- Amendment not constituting new cause of action but merely a different approach to the same facts.- Amendment should be allowed. Where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation. The principal reasons that have led to the rule last mentioned are first, that the object of Courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes. A party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended. The expression cause of action in the present context does not mean every fact which it is material to be proved to entitle the plaintiff to succeed. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time. *A.K. Gupta and Sons Ltd. v. Damodar Valley Corporation,* AIR 1967 SC 96: 1966 BLJR 340: 1966(1) SCR 796

Order 6, Rule 17.-Amendment of pleadings.-New plea.-Amendment in written statement sought to incorporate new plea before the appellate court.-If sufficient material exist on record on which such plea could be raised, amendment could be allowed. All that is necessary is that the Appellate Court should observe the well known principles subject to which amendments of pleadings are usually granted. Naturally one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking such amendment and, if made at the Appellate stage, the reason why it was not sought in the trial Court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise. But, there is no prohibition against an Appellate Court permitting an amendment at the appellate stage merely because the necessary material is not already before the Court. *Ishwardas v. The State of Madhya Pradesh and others,* AIR 1979 SC 551: 1979(4) SCC 163

Order 6, Rule 17.-Amendment of pleadings.-Permissibility.-Considerations for allowing an amendment. If an amendment merely allows the plaintiff to state a new cause of action or to ask a new relief or to include a new ground of relief all that happens is that it is possible for the plaintiff to raise further contentions in the suit, but it is not decided whether the contentions are right. Such an amendment does noting more than regulate the procedure applicable to the suit. It does not decide any question which touches the merits of the controversy between the parties. Where, on the other hand an amendment takes away from the defendant the defence of immunity form any liability by reason of limitation, it is a judgment within the meaning of clause 15 of the Letters Patent. The reason why it becomes a judgment is that it is a decision affecting the merits of the question between the parties by determining the right or liability based on limitation. It is the final decision as far as the trial Court is

concerned. The amendment order is not purely of discretion. Even with regard to discretionary orders the appellate Court can interfere where the order is insupportable in law or is unjust. *Shanti Kumar R. Chanji v. The House Insurance Co. of New York,* AIR 1974 SC 1719: 1975(1) SCR 550: 1974(2) SCC 387

Order 6, Rule 17.-Amendment of written statement.-Entirely different case sought to be introduced by way of amendment.-likely prejudice to the other parties.-Order rejecting amendment application affirmed. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial Court. *M/s. Modi Spinning & Weaving Mills Co. Ltd. and another v. M/s. Ladha Ram & Co.,* AIR 1977 SC 680: 1977(1) SCR 728

Order 6, Rule 17.-Amendment of written statement.-Permissibility.- The amendment sought in appeal whereby an entirely new plea sought to be raised which was likely to change the nature of original defence.-Amendment disallowed. *Haji Mohammed Ishaq Wd. S.K. Mohammed and others v. Mohamed Iqbal and Mohamed Ali and Co.,* AIR 1978 SC 798: 1978(2) SCC 493: 1978(3) SCR 571

Order 6, Rule 17.-Amendment of written statement.-Necessary amendment.-Amendment partly allowed and partly rejected whereby creating contradiction.-Amendment relating to necessary fact of ascertaining comparative hardship in eviction proceedings against tenant.-Amendment allowed. *Mulk Raj Batra and others v. The Distt. Judge, Dehradun and others,* AIR 1982 SC 24: 1982(3) SCC 233: 1982 All. RC 218

Order 7, Rule 1.-Pleadings.-Legal pleas.-Challenge to validity of statutory notice.-Other legal ground of challenge need not be stated in the plaint itself.

The State of Uttar Pradesh v. Satya Narain Prasad, AIR 1970 SC 1199: 1970 (2) SCJ 284: 1970(3) SCR 198: 1969(3) SCC 679

Order 7, Rule 7.-Change in circumstances.-Effect on relief.- The appellate court is entitled to take into consideration the change in law.

Gummalapura Taggina Matada Kotturuswami, v. Setra Veeravva and others, AIR 1959 SC 577: 1959 Mad LJ (SC) 158: 1959 Nag LJ 299: 1959 Pat LR (SC) 31: 1959 Supp. (1) SCR 768

Order 7, Rule 7.-Inconsistent pleas .-Permissibility.-A party is entitled to take alternative pleas in support of its case.-Where the alternative pleas arose from the admitted position of the defendant, such plea is not impermissible merely because it is inconsistent with other pleas .-The court may grant relief on the basis of such alternative plea even if the defendant was not granted an opportunity to meet such plea because it was the stand of defendant himself.

Firm Sriniwas Ram Kumar v. Mahabir Prasad and others, AIR 1951 SC 177: 1951 ALJ (SC) 64: 64 MLW 544: 1951 SCJ 261: 1951 SCR 277

Order 7, Rule 7.-Inconsistent pleas .-Permissibility.-A party is entitled to take alternative pleas in support of its case.-Where the alternative pleas arose from the admitted position of the defendant, such plea is not impermissible merely because it is inconsistent with other pleas .-Contract Act, Section 2(a) and 2(b).-Counter offer.-Distinction with offer.-Invitation to offer.- Counter offer made stating the lowest price of the goods.-On facts, held that the offer made stating the lowest price of goods was an invitation to offer and not a counter offer, acceptance of which may conclude the contract.

The plaintiff in his letter of 14th August addressed to Youngman, stated that he confirmed his oral offer of ten thousand for the bungalow, and he did not say in so many words that he accepted the `counter-offer' of defendant 1. Similarly, in the cable which Youngman sent to defendant 1 on 28th August, he did not state that the latter's offer had been accepted, but stated that he had been offered Rs. 40,000 for the bungalow and concluded with the words May I sell? Neither party thus treated defendant 1's cable as containing a counter-offer. On the other hand, they proceeded on the footing that the plaintiff had made an offer of Rs. 10,000 which was subject to acceptance by defendant 1. Apparently, defendant 1 was in communication not only with Youngman but also White, and both of them rightly thought that no translation could be concluded without obtaining defendant 1's express assent to it. In these circumstances, it would be difficult to hold that Youngman had deliberately misdescribed the plaintiff's acceptance of the counter- offer as his offer in the cable which he sent on 26th August to defendant 1. *D.I. Mac Pherson (Col.) v. M.N. Appanna and another,* AIR 1951 SC 184: 1951 ALJ (SC) 67: 64 MLW 535: 1951 SCJ 257: 1951 SCR 161

Order 7, Rule 7.-Inconsistent relief.-Right to seek.-Though the plaintiff is entitled to seek inconsistent relief, he must show that he is entitled to each of the relief. *Prem Raj v. The D.L.F. Housing and Construction (Private) Ltd. and another,* AIR 1968 SC 1355: 1968 (2) SCWR 482: 1968(3) SCR 648

Order 7, Rule 7.-Pleading.- Construction of.-Court must have regard to all the allegations made in the plaint and substance of the matter and not of form.

I.L. Janakirama Iyer and others v. P.M. Nilakanta Iyer and others, AIR 1962 SC 633: 1962 Supp. (1) SCR

206

Order 7, Rule 7.-Relief.- Determination of.-The right to relief must be judged on the date of institution of suit.-Procedural delays in court cannot deny the right of a party which may be required to be moulded due to change in circumstances.

The right of a party is determinded by the facts as they exist on the date the action is instituted. Granting the presence of such facts, then he is entitled to its enforcement. Later developments cannot defeat his right because, as explained earlier, had the court found his facts to be true the day he sued he would have got his decree. The Court's procedural delays cannot deprive his of legal justice or rights crystallised in the initial cause of action. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts. Subsequent events in the course of the case cannot be constitutive of substantive rights enforceable in that very litigation except in a narrow category (later spelt out) but may influence the equitable jurisdiction to mould reliefs. Conversely, where rights have already vested in a party. They cannot be nullified or negated by subsequent events save where there is a change in the law and it is made applicable at any stage. *Rameshwar and others v. Jot Ram and others,* AIR 1976 SC 49: 1976(1) SCC 194: 1976(1) SCR 847: 1975 Pun LJ 454

Order 7, Rule 7.-Subsequent event .- Consideration of.- Subsequent event brought promptly to the notice of Court must be considered.

It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the hand-maid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice.-subject, of course, to the absence of other disentitling factors or just circum- stances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. *Pasupuleti Venkateswarlu v. The Motor & General Traders,* AIR 1975 SC 1409: 1975(2) APLJ (SC) 11: 1975(1) SCC 770: 1975(3) SCR 958

Order 7, Rule 7.-Scope of.-Relief of specific performance without complying with the requirement of Section 16 of Specific Relief Act, 1963.-Decree of specific performance stayed and matter remanded for reconsideration.

Smt. Thakamma Mathew v. M. Azamathulla Khan and others, AIR 1993 SC 1120: 1992(3) Scale 454: 1992 Supp. JT 35: 1993 Supp (4) SCC 492: 1993 CNCR (SC) 732: 1993 (1) RRR 323

Order 7, Rule 10.-Dismissal of suit .-Want of territorial jurisdiction.- The proper course is to return the plaint for presentation to the proper Court.

R.S.D.V. Finance Co. Pvt. Ltd. v. Shree Vallabh Glass Works Ltd., AIR 1993 SC 2094: 1993(2) SCC 130: 1993(1) SCR 455: 1993(1) JT 617: 1993(1) Scale 262: 1993(2) LJR 631

Order 7, Rule 10.-Return of plaint.-Valuation of suit.-Mesne profit claimed within the pecuniary jurisdiction of the court.-The claim not fanciful to bring the suit within pecuniary jurisdiction.-Return of plaint by the Court not justified.

The claim for mesne profits/damages is neither palpably absurd nor imaginary. It needs judicial consideration. The acceptance of the put forward by the respondent may lead to encouraging a tenant who has forfeited his right to the tenancy to carry on a dilatory litigation without compensating the landlady suitably for the loss suffered by him on account of the unreasonable deprivation of the possession of his premises over a long period until he is able to get possession of the premises through the Court. We cannot, therefore, state at this stage that the claim for mense profits/damages had been made without good faith and with the sole object of instituting the said suit before the High Court of Calcutta even though it had no jurisdiction to try it. We do not agree with the submission made on behalf of the respondent that the appellant had dishonesty and intentionally inflated the value of the suit in order to invite the jurisdiction otherwise. If mesne profits/damages are found to be payable then the claim made at the rate of Rs. 7,800/- per month for a premises of the nature in question which is situated in Calcutta does not appear to be fanciful having regard to the prevailing situation. We however express no opinion on the actual amount that may be awarded as mesne profits/damages in the event of the liability to pay it being established. *Smt. Nandita Bose v. Ratanlal Nahata,* AIR 1987 SC 1947: 1987(3) SCC 705: 1987(3) SCR 792: 1987(2) Scale 215: 1987(3) J.T. 217

Order 7, Rule 10-A.-Return of plaint.-Representation of plaint to proper Court.-Changes made in the plaint.-Leave of the Court under Order 6, Rule 17, to seek amendment of plaint, not required.-At best the plaint can be treated as fresh plaint.

Hanamanthappa and another v. Chandrashekharappa and others, AIR 1997 SC 1307: 1997(9) SCC 688: 1997(2) Scale 59: 1997(2) JT 528: 1997(2) APLJ 55: 1997(2) Mad LW 6

Order 7, Rule 11.-Rejection of plaint.-Non-disclosure of cause of action.-The power can be exercised

even after filing of written statement or framing of issues.

Samar Singh v. Kedar Nath and others, AIR 1987 SC 1926: 1987 Supp. SCC 663: 1987(2) Scale 135: 1987(3) J.T. 165

Order 7, Rule 11.-Rejection of plaint.-Under valuation of suit for accounts.-Difficulty in valuation of relief in suits of such nature.- Ordinarily the Court has no option but to accept the valuation of the plaintiff.

M/s. Commercial Aviation and Travel Company and others v. Mrs. Vimla Pannalal, AIR 1988 SC 1636: 1988(3) SCC 423: 1988 Supp. (1) SCR 431: 1988(3) JT 41

Order 7, Rule 11.-Rejection of plaint.-Vexatious or meritless case .-Absence of cause to sue.-The court must exercise its powers to shoot down the bogus litigation at the earliest stage.

If on a meaningful.-not formal .-reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII, Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clear drafting has created the illusion of a cause of action, nip it is the bud at the first hearing by examining the party searchingly under Order X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Ch. XI) and must be triggered against them. *T. Arivandandam v. T. V. Satyapal and another,* AIR 1977 SC 2421: 1977(4) SCC 467: 1978(1) SCR 742: 1978(1) RCJ 33

Order 7, Rule 11(b).-Rejection of plaint.-Unreasonable valuation.- Permissibility.-Suit for accounts.-Exact amount need not be mentioned but the amount at which relief is sought, must be reasonable.-In the absence of reasonable valuation, the Court may reject the plaint.

Order 7, Rule 11(b) casts a duty on the Court to reject the plaint when the relief claimed is undervalued. If on the materials available before it the Court is satisfied that the value of relief as estimated by the plaintiff in a suit for accounts is undervalued the plaint is liable to be rejected. It is therefore necessary that the plaintiff should take care that the valuation is adequate and reasonable taking into account the circumstances of the case. In coming to the conclusion that the suit is under- valued the court will have to take into account that in a suit for accounts the plaintiff is not obliged to state the exact amount which would result after the taking of the accounts. If he cannot estimate the exact amount he can put a tentative valuation upon the suit for accounts which is adequate and reasonable. The plaintiff cannot arbitrarily and deliberately undervalued the relief.

A.KA.CT. V.CT . Meenakshisundaram Chettiar v. A.KA.CT. V.CT. Venkatachalam Chettiar, AIR 1979 SC 989: 1980(1) SCC 616: 1979(3) SCR 385: 1979(2) MLJ (SC) 19

Order 8, Rule 1.-Written statement .-Delay in filing.-Last opportunity to file written statement granted on condition of deposit of Rs. 2,00,000/- with liberty to the other party to withdraw the same.

Ramesh Chand and another v. Punjab National Bank and others, AIR 1990 SC 1147:

Order 8, Rule 2.-Denial of contract .-Effect of.-A party denying the factum of contract and not alleging its unenforcibility, cannot plead the question relating to legality or validity of the contract.

Kalyanpur Lime Works Ltd. v. State of Bihar and another, AIR 1954 SC 165: 1954 SCJ 99: 1954 SCR 958: 1954(1) Mad LJ

Order 8, Rule 2.-Illegality.- Necessity of pleading.-Contract not ex facie illegal but facts in evidence disclosing illegality.-The court is bound to take notice of illegality.

Where a contract or transaction ex facie is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of the nature of the contract or transaction and mould its relief according to the circumstances.

Smt. Surasaibalini Debi v. Phanindra Mohan Majumdar, AIR 1965 SC 1364: 1965(1) SCJ 586: 1965(1) SCR 861

Order 8, Rule 2.-Pleading.-Specific plea.-Necessity of.-Objection about maintainability of suit.-All matter which show that the suit is not maintainable or that the transaction is either void or voidable in point of law, must be raised in the pleading.

Union of India v. Surjit Singh Atwal, AIR 1979 SC 1701: 1979(1) SCC 520: 1979(2) SCR 1002

Order 8, Rules 2 and 5.-Pleadings.- Specific denial.-Necessity of.- Absence of specific denial and any specific pleas, issues or evidence, the question cannot be raised again in appeal.

The plaintiff alleged in the plaint that he, along with the appellant and respondent No. 2, were brothers and belonged to the same joint family centering round their common mother. There was no specific denial that the brothers did not form a joint family. What was specifically denied was that the mother was the head of the family as alleged or that the properties were acquired by the family in the name of the defendant. In view of the absence of any such specific pleas, issues and evidence, we are not prepared to accept the contentions for the appellant that respondent No. 1 could not have been a member of the family consisting of the appellant, his brother and mother merely on the ground that he was the appellant's uterine brother. *Tek Bahadur Bhujil v. Debi Singh Bhujil and others,* AIR 1966 SC 292: 1966(2) SCJ 290

Order 8, Rule 4.-Evasive denial.- General allegations in the plaint.- General denial in written

statement does not result in admission of allegation.

If a pleading is considered sufficient where it is merely stated that there has been arbitratry discrimination, it is impossible for the other side to meet it adequately unless he knows in what manner the discrimination is said to have been made. Thus if the discrimination had been because between A and B who were similarly situated, and A had been preferred, then that should have been stated. It would then be possible for the other side to say either that A and B were not similarly situated or that the act complained of did not amount to a discrimination for any other reason. In the absence of the particulars all that the opposite side could do would be simply to deny that there had been discrimination and this is what the appellant had done in its written statement in this case. A plaintiff cannot complain if general allegations made by him in the plaint are answered by equally general allegations in the written statement. If the respondent, therefore, was allowed to make the case of hostile discrimination, it would have been the Court's duty to read the written statement as containing a denial of this allegation and to see that the respondent established by evidence such discrimination. *I.L. Janakirama Iyer and others v. P.M. Nilakanta Iyer and others,* AIR 1962 SC 633: 1962 Supp. (1) SCR 206

Order 8, Rule 4.-Specific denial.-Procedure.-Denial by way of additional pleas.-Effect of impropriety in drafting.-In the circumstances denial held to be sufficient. *Sheikh Abdual Sattar v. Union of India,* AIR 1970 SC 479: 1970 SCD 131: 1970(3) SCC 845

Order 8, Rule 5.-Specific denial .-Necessity of.-Defendant claiming no knowledge of facts pleaded.-It cannot amount to denial of existence of facts or even implied denial of the same. *Jahuri Sah and others v. Dwarika Prasad Jhunjhunwala and others,* AIR 1967 SC 109: 1966 BLJR 781

Order 8, Rule 5(1).-Specific denial .-Necessity of.-Communication of order of blacklisting of a firm disputed.-Court is empowered in its discretion to hold a fact admitted on the ground of non-traverse, to be proved otherwise than by such admission.-Failure to ascertain the receipt or non-receipt of impugned order, before entertaining the petition the order is not proper.

Patna Regional Development Authority and others v. M/s. Rashtriya Pariyojana Nirman Nigam and others, AIR 1996 SC 2074: 1996(4) SCC 529: 1996(4) Scale 488: 1996(6) JT 113: 1996(2) Pat. LJR 99

Order 8, Rule 6.-Counter claim.- Scope of.-The right to make counter claim is a statutory right and a counter claim not made in accordance with the provision of Rule 6 is not admissible.-Court may treat a counter claim as a plaint in cross suit.

No doubt, the Civil Procedure Code prescribes the contents of a plaint and it might very well be that a counter-claim which is to be treated as a cross-suit might not conform to all these requirements but this by itself is not sufficient to deny to the Court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a plaint in a cross-suit is made part of a Written Statement either by being made an annexure to it or as part and parcel thereof, though described as a counter-claim, there could be no legal objection to the Court treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint. Mr. Desai had to concede that in such a case the Court was not prevented from separating the Written Statement proper from what was described as a counter-claim and treating the latter as a cross-suit. If so much is conceded it would then become merely a matter of degree as to whether the counter-claim contains all the necessary requisites sufficient to be treated as a plaint making a claim for the relief sought and if it did it would seem proper to hold that it would be open to a Court to convert or treat the counter-claim as a plaint in a cross-suit. To hold otherwise would be to erect what in substance is a mere defect in the form of pleading into an instrument for denying what justice manifestly demands. We need only add that it was not suggested that there was anything in Order VIII, Rule 6 or in any other provision of the Code which laid an embargo on a Court adopting such a course. *Laxmidas Dayabhai Kabrawala v. Nanabhai Chunilal Kabrawala and others,* AIR 1964 SC 11: 1964(1) SCA 529: 1964(2) SCR 567

Order 8, Rule 6.-Counter claim.- Limitation.-It is governed by Article 120 of Limitation Act, 1908.

Mohinder Singh Jaggi v. Data Ram Jagannath, AIR 1972 SC 1048: 1972(2) SCJ 491: 1972(4) SCC 495

Order 8, Rule 6.-Equitable set-off .-Permissibility.-Where the cross demands do not arise out of the same transaction and the claim is uncertain about the subject-matter, plea in the nature of equitable set-off is not available. A plea in the nature of equitable set-off is not available when the cross-demands do not arise out of the same transaction. Mesne profits due to the plaintiff relate to the period during which the appellant was in wrongful possession of the lands and the amounts claimed by the defendant relate to a period when he was no longer in possession and had ceased to be a trespasser. No mesne profits are claimable for that period. The right of the appellant to recover additional rents from the plaintiff arises out of a different cause of action and independently of the claim for mesne profits. The transaction which led to the plaintiff's demand resulted from the defendant's wrongful act as a trespasser, while the transaction giving rise to the appellant's demand arises out of the relationship of landlord and tenant and the obligations resulting therefrom. A wrongdoer who has wrongfully withheld moneys belonging to another cannot invoke any principles of equity in his favour and seek to deduct therefrom the amounts that during this period have fallen due to him. There is nothing improper or unjust in telling the wrongdoer to undo his wrong, and not to take advantage of it. Such a person cannot be helped on any principles of equity to recovery amounts for the recovery of which he could have taken action in due

course of law and which for some unexplained reason he failed to take and which claim may have by now become barred by limitation. *Bhupendra Narain Singha Bahadur v. Bahadur Singh and others,* AIR 1952 SC 201: 1952 SCJ 269: 1952 SCR 782

Order 8, Rule 6.-Form of.-Written Statement in the nature of claim from the plaintiff can be treated as counter claim.

Mohinder Singh Jaggi v. Data Ram Jagannath, AIR 1972 SC 1048: 1972(2) SCJ 491: 1972(4) SCC 495

Order 8, Rule 6.-Set off.-Equitable set off.-Absence of pleading.- Earlier suit seeking substantive relief of same nature stood dismissed.- Re-agitation of same plea is not permissible. *V.R. Subramanyam v. B. Thayappa and others,* AIR 1966 SC 1034: 1961 Ker LT (SC) 37: 1961 Mad WN 794

Order 8, Rule 6-A.-Counter claim.- Stage of.-Counter claim after filing of written statement.-Permissibility .-If the cause of action for filing of counter claim is not barred by limitation, it can be filed after filing of written statement. *Shanti Rani Das Dewanjee v. Dinesh Chandra Day (dead) by LRs,* AIR 1997 SC 3985: 1997(8) SCC 174: 1997(8) Scale 260: 1997(8) JT 228: 1997(3) Rec. Civ.R. 222

Order 8, Rule 6-A.-Counter claim.- Stage of filing.-The provision does not bar for filing the counter claim after filing of written statement is not barred if otherwise within limitation. Rule 6A(1) does not, on the face of it, bar the filing of a counter claim by the defendant after he had filed the written statement. What is laid down under Rule 6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not. *Mahendra Kumar and another v. State of Madhya Pradesh and others,* AIR 1987 SC 1395: 1987(3) SCC 265: 1987(3) SCR 155: 1987(1) Scale 1257: 1987(2) J.T. 524: 1987 Jab. L.J. 593

Order 8, Rules 6-A to 6-G.-Counter claim of injunction.-Permissibility .-Relief of injunction in respect of property other than suit property, sought by the defendant as counter claim.-The provision is wide enough to permit counter claim on any independent cause of action which may not be of same nature as that of original action by the plaintiff. In sub-rule (1) of Rule 6A, the language is so couched with words of wide width as to enable the parties to bring his own independent cause of action in respect of any claim that would be the subject matter of an independent suit. Thereby, it is no longer confined to money claim or to cause of action of the same nature as original action of the plaintiff. It need not relate to or be connected with the original cause of action or matter pleaded by the plaintiff. The words any right of claim in respect of a cause of action accruing with the defendant would show that the cause of action from which the counter-claim arises need not necessarily arise from or have any nexus with the cause of action of the plaintiff that occasioned to lay the suit. The only limitation is that the cause of action should arise before the time fixed for filing the written statement expires.

Jag Mohan Chawala and another v. Dera Radha Swami Satsang and others, AIR 1996 SC: 1996(4) SCC 699: 1996(4) Scale 585: 1996(5) JT 428: 1996 Civ. CR (SC) 747: 1996(114) Pun. LR 308

Order 9, Rules 6, 7 and 13.-Ex-parte order.-Remedy of.

Opening words of that rule, `Where the Court has adjourned the hearing of the suit ex parte'. Now, what do these words mean? Obviously they assume that there is to be a hearing on the date to which the suit stands adjourned. If the entirety of the hearing of the suit has been completed and the Court being competent to pronounce the judgment then and there, adjourns the suit merely for the purpose of pronouncing judgment under Order XX, Rule 1, there is clearly no adjournment of the hearing of the suit, for, there is nothing more to be heard in the suit. It was precisely this idea that was expressed by the learned Civil Judge when he stated that having regard to the stage which the suit had reached the only proceeding in which the appellant could participate was to hear the judgment pronouncement and that on the terms of Rules 6 and 7 he would permit him to do that. If, therefore, the hearing was completed and the suit was not adjourned for hearing, Order IX, Rule 7 could have no application and the matter would stand at the stage of Order IX, Rule 6 to be followed up by the passing of an ex parte decree making Rule 13 the only provision in Order IX applicable.

Arjun Singh v. Mohindra Kumar and others, AIR 1964 SC 993: 1964(2) An LT 341: 1964(5) SCR 946

Order 9, Rules 6, 7 and 13.-Ex parte order.-Scope and effect of.-It is merely a statement of fact recorded by the court while proceeding further.-It does no stop the party concerned from participating in the proceedings from the next stage of hearing.

Our laws of procedure are based on the principle that, as far as possible, no proceeding in a Court of law should be conducted to the detriment of a person in his absence. There are of course exceptions, and this is one of them. When the defendant has been served and has been afforded an opportunity of appearing then, if he does not appears, the Court may proceed in his absence. But, be it noted, the Court is not directed to make an `ex parte' order. Of course the fact that it is proceeding `ex parte' will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an `ex parte' decree or other `ex parte' order which the Court is authorised to make. All that R. 6 (1)(a) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, namely to proceed in the absence of one of the parties. The contrast in language between Rule 7 and Rule 13 emphasises this. The first hearing is either for the settlement of issues or for final hearing. If it is only for the settlement of issues, then the Court

cannot pass an `ex parte' decree on that date. On the other hand, if it is for final hearing, an `ex parte' decree can be passed, and if it is passed, then Order 9, Rule 13 comes into play and before the decree is set aside the Court is required to `make an order to set it aside'. Contrast this with Rule 7 which does not require the setting aside of what is commonly, though erroneously, known as the `ex parte' order. No order is contemplated by the Code and therefore no order to set aside the order is contemplated either. But a decree is command or order of the Court and so can only be set aside by another order made and recorded with due formality. Rule 7 cannot be read to mean that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared. It is not a mortgaging of the future but only applies to the particular hearing at which a party was afforded the chance to appear and did not avail himself of it. Therefore, if a party does appear on the day to which the hearing of the suit is adjourned, he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing. *Sangram Singh v. Election Tribunal Kotah and another,* AIR 1955 SC 425: 69 Mad LW 1: 1955 SCJ 431: 1955(2) SCR 1

Order 9, Rules 7 and 13.-*Res judicata*.-Application of.-Dismissal of an application under Rule 7 does not operate as *res judicata* against an application under Rule 13.

A decision or direction in an interlocutory proceeding of the type provided for by Order IX, Rule 7, is not of the kind which can operate as *res judicata* so as to bar the hearing on the merits of an application under Order IX, Rule 13. The latter is a specific statutory remedy provided by the Code for the setting aside of ex parte decrees, and it is not without significance that under Order XLIII, Rule 1 (d) an appeal lies not against order setting aside a decree passed ex parte but against orders rejecting such an application unmistakably pointing to the policy of the Code being that subject to securing due diligence on the part of the parties to the suit, the Code as far as possible makes provision for decisions in suits after a hearing afforded to the parties. *Arjun Singh v. Mohindra Kumar and others,* AIR 1964 SC 993: 1964(2) An LT 341: 1964(5) SCR 946

Order 9, Rules 7 and 13.-Set-aside of decree.-Considerations for.- Expression good case and sufficient cause is not materially different.-If no sufficient cause is found under Rule 7, the party may not be entitled to restoration under Section 13.

We do not see any material difference between the facts to be established for satisfying the two tests of good cause and sufficient cause. We are unable to conceive of a good cause which is not sufficient as affording an explanation for non-appearance, nor conversely of a sufficient cause which is not a good one and we would add that either of these is not different from good and sufficient cause which is used enthuse context in other statutes. If, on the other hand, there is any difference between the two it can only be that the requirement of a good cause is complied with on a lesser degree of proof than that of sufficient cause and if so, this cannot help the appellant, since assuming the applicability of the principle of *res judicata* to the decision in the two proceedings, if the Court finds in the first proceeding, the lighter burden not discharged, it must a fortiori bar the consideration of the same matter in the later where the standard of proof of that matter is, if anything, higher.

Arjun Singh v. Mohindra Kumar and others, AIR 1964 SC 993: 1964(2) An LT 341: 1964(5) SCR 946

Order 9, Rule 8.-Admission of defendant.-Non- appearance of plaintiff.-The suit should have been disposed off on the admission of defendant and not dismissed for non-prosecution.

Calcutta Port Trust v. Shalimar Tar Products Ltd., AIR 1991 SC 6854: 1991 Supp (2) SCC 513: 1991 (5) JT 416: 1991(1) LJR 929

Order 9, Rule 9.-Dismissal in default.-Refusal to pass over the matter on the ground.-Counsel was busy in another court.-No fault of client who appointed a Counsel to represent him who failed to appear.-Dismissal of matter after 7 years of issuing rule *nisi*.-Order set aside with directions for disposal on merits.

Smt. Lachi Tewari and others v. Director of Land Records and others, AIR 1984 SC 41: 1984 Supp. SCC 431: 1983(2) Scale 1016.

Order 9, Rule 9.-Plaintiff.- Meaning of.-It includes assignees and legal representatives of the plaintiff.

Beyond the absence in Order IX, Rule 9 of the words referring to those claiming under the plaintiff there is nothing to warrant this argument. It has neither principle, nor logic to commend it. It is not easy to comprehend how A who had no right to bring a suit or rather who was debarred from bringing a suit for the recovery of property could effect a transfer of his right to that property and confer on the transfers a right which he was precluded by law from asserting. To say that an heir of the plaintiff is in a better position than himself and that the bar lapses on a plaintiff's death, does not appeal to us as capable of being justified by any principle or line of reasoning. In our opinion, the word `plaintiff' in the rule should obviously, in order that the bar may be effective, include his assigns and legal represen- tatives.

Suraj Rattan Thirani and others v. Azamabad Tea Co. Ltd. and others, AIR 1965 SC 295: 1965(1) An LT 82: 1964(6) SCR 192

Order 9, Rule 9.-Same cause of action.-Determination of.-The term should be construed with reference to the substance rather than the form of action. The term `cause of action' is to be construed with reference rather to the substance than to the form of action.No doubt, the plaintiff set up

his purchases as the source of his title to sue, but if as we have held the bar under Order IX, Rule 9, applies, equally to the plaintiff in the first suit and those claiming under him, the allegations regarding the transmission of title to the plaintiffs in the present suit ceases to be material. The only new allegation was about the plaintiffs getting into possession by virtue of purchase and their dispossession. Their addition, however, does not wipe out the identity otherwise of the cause of action. It would, of course, have made a difference if, without reference to the antecedent want of full title in Ismail which was common to the case set up in the two plaints.

Suraj Rattan Thirani and others v. Azamabad Tea Co. Ltd. and others, AIR 1965 SC 295: 1965(1) An LT 82: 1964(6) SCR 192

Order 9, Rule 13.-Application to set aside ex-parte decree.-Effect of appeal.-Disposal of appeal on merits or on the ground of bar of limitation .-Application thereafter seeking to set aside exparte decree is not maintainable.

By enacting the Explanation, Parliament left it open to the defendant to apply under R. 13 of O. 9 for setting aside an ex parte decree only if the defendant had opted not to appeal against the ex parte decree or, in the case where he had preferred an appeal, the appeal was tantamount to effacting it. It obliged the defendant to decide whether he would prefer an adjudication by the appellate court on the merits of the decree or have the decree set aside by the trail court under R. 13 of O. 9. The legislative attempt incorporated in the Explanation was to discourage a two-pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal to be disposed of on any other ground, he was denied the right to apply under R. 13 of O. 9. The disposal of the appeal on any ground whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation. *Rani Choudhury v. Lt. Col. Suraj Jit Choudhary,* AIR 1982 SC 1397: 1982(2) SCC 596: 1983(1) SCR 372: 1982(1) Scale 657: 1982 Marr LJ 574

Order 9, Rule 13.-Ex parte decree.- Conditions for setting aside.- Direction to deposit of mesne profits for being in occupation of property .- Suit by mother in law against her daughter in law.-Close relationship between the parties.-Imposition of condition of deposit of mesne profits is onerous.-Order, set aside and matter remanded for fresh consideration.

Kundan Lata Das v. Indu Prasad, AIR 1997 SC 34: 1996(11) SCC 195: 1996(7) Scale 410: 1997(1) Hindu LR 565: 1997(1) Rec. Civ.R. 583

Order 9, Rule 13.-Ex parte decree .-Deliberate non-appearance.- Wife present in Court precincts but not taking steps to move the Court.- No steps taken to diligently pursue to proceedings and prevent passing of ex-parte decree.-Deliberate attempt to protract litigation.-No interference with ex parte decree called for.

Adhyaatmam Bhaamini v. Jagdish Ambalal Shah, AIR 1997 SC 1180: 1997(2) Scale 46: 1997(2) JT 640: 1997(9) SCC 471: 1997 Marr. LJ 294: 1997(116) Pun. LR 670

Order 9, Rule 13.-Ex parte decree.- Refusal to accept notice.-Report of Process Server accepted by court below which is finding of fact cannot be interfered.

Mst. Bhabia Devi v. Permanand Pd. Yadav, AIR 1997 SC 1919: 1997(3) SCC 631: 1997(2) Scale 353: 1997(3) JT 452: 1997(2) Pat LJR 91: 1997 RD 409

Order 9, Rule 13.-Seting aside of decree.-Confirma-tion in appeal.-Effect of.-The parties who were neither served in the suit nor in appeal seeking to set aside the ex parte decree.-In law there is no bar against such application.

When a decree of the trial Court is either confirmed, modified or reversed by the appellate decree, except when the decree is passed without notice to the parties, the trial Court degree gets merged in the appellate decree. But when the decree is passed without notice to a party, that decree will not, in law, be a decree to which he is a party. Equally so in the case of an appellate decree. In this case these two persons were not served in the suit. A decree was passed ex parte against them without giving them notice of the suit. In law, therefore, there is no decree against them. In the appeal also they were not served. If they had been served in the appeal, things would have been different. They could have put forward their case in appeal and got appropriate orders passed. But that is not the case here. That being so, there is no trial Court under Order IX, Rule 13, to set aside the ex parte decree against them. *Kewal Ram v. Smt. Ram Lubhai and others,* AIR 1987 SC 1304: 1987(2) SCC 344: 1987(2) SCR 685: 1987(1) Scale 595: 1987(2) J.T. 16: 1987 Pat. LJR 60

Order 10, Rule 1.-First hearing of the suit.-Meaning of.-It can never be earlier than the date fixed for preliminary examination of the parties and the settlement of the issues. *Ved Prakash Wadhwa v. Vishwa Mohan,* AIR 1982 SC 816: 1981(3) SCC 667: 1980 Cur.LJ (Civ.) 357: 1982 All LJ 202

Order 10, Rule 1.-Witnesses.-Examination of.-Suit for recovery.-Amount claimed from both defendants.-Agreement to sell property entered through Defendant No. 2.-Breach of agreement.-Defendant No. 1 denying signatures on agreement, written statement as well as Vakalatnama.-Dismissal of suit on ground of absence of privity of contract after protracted trial.-Illegal.-Judgment of trial court as well as High Court set aside.

Where in a suit for recovery of amount alleged to be paid by plaintiff to the two defendants as a sale

consideration of property, the plaintiff claimed that there was a document signed by Defendant No. 1 in favour of Defendant No. 2 authorising him to sell the property on his behalf and the Defendant No. 1 denied his signatures on the document and also on written statement and
Vakalatnama, the trial court could have decreed the suit at the stage of examination of witnesses instead of going into protracted trial and then dismissing the suit on the ground of absence of privity of contract between Defendant No. 1 and plaintiff. Trial Court should have immediately probed into the matter. It should have recorded statement of the Counsel for the first defendant to find out if Vakalatnama in his favour and written statement were not signed by the first defendant whom he represented. It was apparent that the first defendant was trying to get out of the situation when confronted with his signatures on the Vakalatnama and the written statement and his having denied his signatures on the document in order to defeat the claim of the plaintiff. False of the claim of the first defendant was writ large on the face of it. Trial Court could have also compared the signatures of the first defendant as provided in Section 73 of the Evidence Act. *K.S. Satyanarayana vs. V.R. Narayana Rao,* AIR 1999 SC 2544 : 1999(3) Land LR 404 : 1999(3) Pun LR 297 : 1999(3) Rec Civ R 621 : 1999(5) Andh LD 7 : 1999(6) SCC 104 : 1999(37) All LR 93

Order 11, Rule 1.-Interrogatory.- Relevance of.-Considerations to determine relevancy.-Interrogatory not relating to subject matter in issue should not be allowed.
We have carefully examined those interrogatories. None of them touch the core of the allegations relating to commission of the corrupt practice which is the subject matter of Issue No. 1. They merely touch the fringe of the matter. Questions that may be relevant during cross-examination are not necessarily relevant as interrogatories. The only questions that are relevant as interrogatories are those relating to any matters in question. The interrogatories served must have reasonably close connection with matters in question. Viewed thus, interrogatories 1 to 18 as well as 31 must be held to be irrelevant. *Raj Narain v. Smt. Indira Nehru Gandhi and another,* AIR 1972 SC 1302: 1972(2) SCA 413: 1972

Order 11, Rule 12.-Summoning of documents.-Relevancy of documents.-Suit on the basis of equitable mortgage.-Validity of documents sought to be assailed by summoning the papers relating to Disciplinary Proceedings initiated against the bank employee in respect of the mortgage.-No direct relevancy to the suit.-The defence could be established by leading evidence and cross-examination of witnesses.-Order of summoning, set aside.
Central Bank of India v. M/s. Shivam Udyog and others, AIR 1995 SC 711: 1995(2) SCC 74: 1995(1) Scale 142: 1995(1) JT 361: 1995 All LJ 360

Order 11 Rule 19(2).-Production of document.-Claim of privilege.-The provision is section 162 of Evidence Act, 1872.
Where a privilege is claimed at the stage of inspection and the Court is required to adjudicate upon its validity, the relevant provisions of the Act under which the privilege is claimed as well as the provisions of Section 162 which deal with the manner in which the said privilege has to be considered are equally applicable; and if the Court is precluded from inspecting the privileged document under the second clause of Section 162 the said prohibition would apply as much to a privilege claimed by the State through its witness at the trial as a privilege similarly claimed by it at the stage of inspection. In our opinion, the provisions of Order 11, Rule 13, sub-rule (2) must, therefore, be read subject to Section 162 of the Act. The State of Punjab, Sodhi Sukhdev Singh, AIR 1961 SC 493: 1961 Mad.L.J. (Cri) 731: 1961(2) SCJ 691: 1961(2) SCR 371

Order 11, Rule 21.-Production of documents.-Non-compliance of.-Effect of.-Order striking out defence or dismissal of suit should not been lightly made unless there is contumacy on the part of the concerned party.-Non production of the books of accounts in the case in question, held to be not contumacious. Even assuming that in certain circumstances the provisions of Order XI, Rule 21 must be strictly enforced, it does not follow that a suit can be lightly thrown out or a defence struck out, without adequate reasons. The test laid down is whether the default is wilful. In the case of a plaintiff, it entails in the dismissal of the suit and, therefore, an order for dismissal ought not be made under Order XI, Rule 21, unless the court is satisfied that the plaintiff was wilfully withholding information refusing to answer interrogatories or by withholding the documents which he ought to discover. In such an event, the plaintiff must take the consequence of having his claim dismissed due to his default, i.e. by suppression of information which he was bound to give. In the case of the defendant, he is visited with the penalty that his defence is liable to be struck out and to be placed in the same position as if he had not defended the suit. The power for dismissal of a suit or striking out of the defence under Order XI, Rule 21, should be exercised only where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party. An order striking out the defence under Order XI, Rule 21 of the Code should, therefore, not be made unless there has been obstinacy or contumacy on the part of the defendant or wilful attempt to disregard the order of the court. The rule must be worked with caution, and may be made use of as a last resort.
M/s. Babbar Sewing Machine Co. v. Tirlok Nath Mahajan, AIR 1978 SC 1436: 1978(4) SCC 188: 1978(1) SCR 57: 1978 Pun LJ 238: 1978 Rev LR 542

Order 11, Rule 21.-Non-prosecution .-Uncontested suit.-Appearance of defendant.-The suit should

have been disposed off on the admission of defendant and not dismissed. There was no option for the Court other than this. Order IX, Rule 8 of the Code of Civil Procedure enjoins the Court that where the defendant appears, and the plaintiff does not appear when the suit is called on for hearing the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder. On the uncontested part the trial Court was obliged to pass a partial decree in favour of the plaintiff even though he and his counsel were absent on the date when action was taken under Order XI Rule 21 of the Civil Procedure Code. The Order of the trial Court in dismissing the entire plaint for non-prosecution was thus an error of jurisdiction and was correctable by the High Court, even when not appealed against, under the provisions of Section 115 of the Civil Procedure Code on its own motion.

Calcutta Port Trust v. Shalimar Tar Products Ltd., AIR 1991 SC 684: 1991 Supp (2) SCC 513: 1991 (5) JT 416: 1991(1) LJR 929

Order 12, Rule 1.-Admission.- Reliance on.-It is not permissible to rely upon a part of admission while ignoring the other.-The admission must be taken as a whole.

Dudh Nath Pandey (dead) by L.Rs. v. Suresh Chandra Bhattasali (dead) by R.Ls., AIR 1986 SC 1509: 1986(3) SCC 360: 1986(1) Scale 1259: 1986 BLJ 689

Order 12, Rule 6.-Decree on admission.-Permissibility.-The fact that the courts ordinarily do not pass decree in divorce cases on the basis of admission is a rule of prudence and not a rule of law and in appropriate case, the court is not precluded from passing of decree on the basis of admission of the party.

Section 58 of the Evidence Act *inter alia* provides that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleading. Rule 5 of Order VIII, C.P.C., provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under disability. Both these provisions, however, vest discretion in the Court to require any fact so admitted to be proved otherwise than by such admission. Rule 6 of Order XII of the Code allows a party to apply to the Court at any stage of a suit for such judgment or order as upon the admissions of fact made either on the pleadings or otherwise he may be entitled to, and empowers the Court to make such order or give such judgment on the application as it may think just. There is therefore no good reason for the view that the Court cannot act upon the admissions of the parties in proceedings under the Act. *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati,* AIR 1965 SC 364: 66 Bom LR 681: 1965 MPLJ 509: 1964(7) SCR 267

Order 12, Rule 6.-Admission.- Suspicious circumstances.-Dispute about title of property claimed by either express grant or by adverse possession.-Though admission made at the end of trial, the written statement not formally amended .-Title cannot pass on mere admission.

Ambika Prasad Thakur and others etc., v. Ram Ekbal Rai, AIR 1966 SC 605: 1966 BLJR 147: 1966(1) SCR 758

Order 13, Rule 1.-Production of document.-Duty of the party.- Where the government is a party, a higher duly is cast on it to produce the documents.

The Government, being the defendant in this case, should have produced the documents relevant to the question raised. While it is the duty of a private party to a litigation to place all the relevant matters before the Court, a higher responsibility rests upon the Government not to withhold such documents from the court. *Karamshi Jethabhai Somayya v. State of Bombay,* AIR 1964 SC 1714: 1964(6) SCR 984

Order 13, Rule 2.-Production of documents.-Stage of.-The documents produced before the start of evidence.-Other party not taken by surprise.-The delay in production of documents should have been condoned.

All this was done even before the evidence had started and in these circumstances it cannot be said that the defendants were taken by surprise or that they suffered any prejudice by the production of those documents or by the order of the Court allowing these documents to be produced. Order 13, Rule 2 of the Code of Civil Procedure does not provide for any particular ritualistic formula in which the order of the Court has to be passed. The object of Order 13, Rule 2 is merely to prevent belated production of documents, so that it may not work injustice to the defendant. The entries contained in the Nakal Bahis were merely reproduction of the entries mentioned in Ext. 30. Therefore the question of the entries in Nakal Bahis being fabricated or spurious could not arise. The Nakal Bahis merely give further particulars or details of the entries already mentioned in the Ledger or the Khata. If in these circumstances therefore, the Court exercised its discretion under Order 13, Rule 2 Civil Procedure Code to condone the delay and allowed the plaintiff to produce the documents we do not see any error at all which could have been committed by the trial Court. *Madan Gopal Kanodia v. Mamraj Maniram and others,* AIR 1976 SC 461: 1977 (1) SCC 669

Order 13, Rule 5.-Proof of documents.-Necessity of.-Mere marking of exhibits can not be the proof of docu-ments.

The plaintiffs did not prove these books. There is no reference to these books in the judgments. The mere marking of an exhibit does not dispense with the proof of documents. It is common place to say that the negative cannot be proved. The proof of the plaintiffs' books of account became important because the plaintiffs' accounts were impeached and falsified by the defendants' case of larger payments than those admitted by the plaintiffs. The irresistible inference arises that the plaintiff's books would not have supported the plaintiffs.

Sait Tarajee Khimchand and others v. Yelamarti Satyam and others, AIR 1971 SC 1865: 1972(4) SCC 562

Order 14, Rule 1.-Framing of issues.-Necessity of.-The parties leading evidence all the contentions raised by the parties.-Dismissal of suit not permissible on a narrow ground that an issue was not framed before the trial.

No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Nedunuri Kameswaramma v. Sampati Subba Rao, AIR 1963 SC 884: 1963(2) Mad LJ (SC) 49: 1963(2) SCR 208.

Order 14, Rule 1.-Framing of issues .-Procedure.-Likelihood of confusion by single issue involving different facts.-No prejudice caused as the defendant understood points was required to meet.-Trial not vitiated.

Shaikh Mahamad Umarsaheb v. Kadalaskar Hasham Karimsab and others, AIR 1970 SC 61: 1978 Maha LJ 289: 1969(3) SCR 966: 1969(1) SCC 741

Order 14, Rule 1(5).-First hearing of the suit.-Meaning of.-It can never be earlier than the date fixed for preliminary examination of the parties and the settlement of the issues.

Ved Prakash Wadhwa v. Vishwa Mohan, AIR 1982 SC 816: 1981(3) SCC 667: 1980 Cur.LJ (Civ.) 357: 1982 All LJ 202

Order 14, Rule 2.-Preliminary Issues.-Procedure for disposal.- Where suit can be disposed of on pure question of law, it can try those issues, first.-It does not entitle a court to try the issues involving mixed question of fact and Law.

Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497: 1963 All LJ 1068: 66 Pun LR 115: 1964(4) SCR 409

Order 15, Rule 1.-First hearing of the suit.-Meaning of.-It can never be earlier than the date fixed for preliminary examination of the parties and the settlement of the issues.

Ved Prakash Wadhwa v. Vishwa Mohan, AIR 1982 SC 816: 1981(3) SCC 667: 1980 Cur.LJ (Civ.) 357: 1982 All LJ 202

Order 15, Rule 5(2).-As amended by U.P. Act of 1972.-Striking off defence.-Considerations for.-Exercise of discretion.-The provision caste a discretion on the court and does not oblige the court to pass an order of striking off defence in every case.

In other words the defendant has been vested with a statutory right to make a representaion to the court against his defence being struck off. If a representation is made the Court must consider it on its merits and then decade whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occured there is good reason for it. Now it is not impossible that the record may contain such material already. In that event, can it be said that sub-rule (1) obliges the court to strike off the dedefence? We must remember that an order under sub-rule (1) striking off the defence is in the nature of a penalty. A serious responsibility rests on the court in the matter and the power is not to be exercised machanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so. It will always be a matter for the judgement of the court to decide whether on the material before it. Notwithstanding the absence of a representation under sub-rule (2), the defence should or should not be struck off. The word may in sub-rule (1) merely vests power in the court to strike off the defence. It does not oblige it to do so in every case of default.

Bimal Chand Jain v. Gopal Agarwal, AIR 1981 SC 1657: 1981(3) SCC 486: 1982(1) SCR 124: 1981(3) Scale 1099

Order 16, Rule 1 and 1-A.-Examination of witness.-Inclusion in name of list is not necessary.-If witness is present on the day of trial, the party would be entitled to examine such witness. Where the party wants the assistance of the Court to procure presence of a witness on being summoned through the Court, it is obligatory on the party to file the list with the gist of evidence of witness in the Court as directed by sub- rule (1) of Rule 1 and make an application as provided by sub- rule (2) of Rule 1. But where the party would be in position to produce its witnesses without the assistance of the Court, it can do so under Rule 1A of Order XVI irrespective of the fact whether the name of such witness is mentioned in the list or not. If on the date fixed for recording the evidence the party is able to keep his witnesses present despite the fact that the names of the witnesses are not shown in the list filed under sub-rule (1)

of Rule 1, the party would be entitled to examine these witnesses and to produce documents through the witnesses who are called to produce documents under Rule 1A. *Mange Ram v. Brij Mohan and others,* AIR 1983 SC 925: 1983(4) SCC 36: 1983(3) SCR 525: 1983(2) Scale 63

Order 16, Rule 1(A).-List of witnesses.-Delay in filing.- Necessity to explain reasons for delay .-It is only when a party seeks assistance of the Court for production of witness that, it is required to give reasons for non- filling of application within stipulated time.-It is at liberty to have the witnesses brought without the assistance of the Court. *Lalitha J. Rai v. Aithappa Rai,* AIR 1995 SC 1984: 1995(4) SCC 244: 1995(3) Scale 698: 1995(3) Pun LR (SC) 273

Order 16, Rule 14.-Summoning of witness.-Exercise of powers.- Failure of parties to summon a witness who could depose about validity of documents.-Summoning of such witness as Court witness after close of evidence, rightly disallowed. *Bishwanath Rai v. Sachhidanand Singh,* AIR 1971 SC 1949: 1972 (4) SCC 707

Order 17, Rules 1 and 2.-Expeditious trial.-Duty of court .-The provision enjoins the Court to try the suit as expeditiously as possible.-Non-availability of Counsel on account of sudden illness.-The party did not have sufficient time to make alternative arrangements.- Refusal by the Court to adjourn the matter even for next day.-Grave error of law committed by the Court below.-Order, set aside. *Bashir Ahmed v. Mehmood Hussain Shah,* AIR 1995 SC 1857: 1995(3) SCC 529: 1995(2) Scale 566

Order 17, Rules 1 and 2.-Ex parte hearing.-Exercise of power.-Considerations for.-Ex parte order is merely a statement of fact recorded by the Court while proceeding further.-It does no stop the party concerned from participating in the proceedings from the next stage of hearing. If the defendant does not appear at the adjourned hearing (irrespective of whether or not he appeared at the first hearing) Order 17, Rule 2 applies and the Court is given the widest possible discretion either.- to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit. The Court has a discretion which it must exercise. Its hands are not tied by the so-called `ex parte' order; and if it thinks they are tied by Order 9, Rule 7 then it is not exercising the discretion which the law says it should and, in a given case, interference may be called for. The order sheet, or minutes of the proceedings, has to show which of the parties were present and if a party is absent the Court records that fact and then records whether it will proceed `ex parte' against him, that is to say, proceed in his absence, or whether it will adjourn the hearing; and it must necessarily record this fact at every subsequent hearing because it has to record the presence and absence of the parties at each hearing. *Sangram Singh v. Election Tribunal Kotah and another,* AIR 1955 SC 425: 69 Mad LW 1: 1955 SCJ 431: 1955(2) SCR 1

Order 17, Rules 2 and 3.-Absence of parties.-Procedures.-Absence of one of the parties.-After the amendment of 1976, if a party remains absent and no evidence has been recorded.-The Court has no option but to proceed in accordance Order 9 of the Code. It is clear that in cases where a party is absent only course is as mentioned in Order 17(3)(b) to proceed under Rule 2. It is therefore clear that in absence of the defendant, the Court had no option but to proceed under Rule 2. Similarly the language of Rule 2 as now stands also clearly lays down that if any one of the parties fails to appear, the Court has to proceed to dispose of the suit in one of the modes directed under Order 9. The explanation to Rule 2 gives a discretion to the Court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the Court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9, Civil P.C. It is therefore clear that after this amendment in Order 17, Rules 2 and 3. Civil P.C. there remains no doubt and therefore there is no possibility of any controversy. It is also clear that Order 17 Rule 3 as it stands was not applicable to the facts of this case as admittedly on the date when the evidence of defendant was closed nobody appeared for the defendant. In this view of the matter it could not be disputed that the Court when proceeded to dispose of the suit on merits had committed an error. *Prakash Chander Manchanda and another v. Smt. Janki Manchanda,* AIR 1987 SC 42: 1986(4) SCC 699: 1987(1) SCR 288: 1986(2) Scale 844: 1986 J.T. 889: 1987 Rev. LR 26.

Order 18, Rule 17.-Examination of witnesses.-Power of court.-It cannot compel any party to examine any particular witness. Just as it is not open to a Court to compel a party to make a particular kind of pleading or to amend his pleading so also it is beyond its competence to virtually oblige a party to examine any particular witness. No doubt, what the High Court has said is not a terms a peremptory order but the parties could possibly not take the risk of treating it otherwise. While, therefore, it is the duty of a court of law not only to do justice but to ensure that justice is done it should bear in mind that it must act only according to law, not otherwise. *The Municipal Corporation of Greater Bombay v. Lala Pancham and others,* AIR 1965 SC 1008: 67 Bom LR 782: 1965(1) SCR 542

Order 19, Rule 1.-Affidavit.-Form of.-Application with the affidavit sworn at the foot of the application is sufficient compliance. *M.M. Quasim v. Manohar Lal Sharma and others,* AIR 1981 SC 1113: 1981(3) SCC 36: 1981(3) SCR 367: 1981(1) Scale 747

Order 19, Rule 1.-Affidavit.-Form of.-Necessity of verification.- Object of.-Absence of proper verification.-Effect of. The reasons for verification of affidavits are to enable the Court to find out which facts

can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to knowledge or allegations may be true to information received from persons or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the present case, the affidavits of all the parties suffer from the mischief of lack of proper verification with the result that the affidavits should not be admissible in evidence. *A.K.K. Nambiar v. Union of India and another,* AIR 1970 SC 652: 1970 Lab LC 566: 1970(3) SCR 121: 1969(3) SCC 864

Order 19, Rules 1 and 2.-Affidavits.-Evidentiary value.- Affidavits are not included in the definition of evidence and can be used as evidence only if, for sufficient reasons passes an order. *Smt. Sudha Devi v. M.P. Narayanan and others,* AIR 1988 SC 1381: 1988(3) SCC 366: 1988(3) SCR 756: 1988(1) Scale 952: 1988(2) JT 217

Order 19, Rule 3.-Affidavit.-Form of.-Proceedings under Article 136 of Constitution.-The provisions of Code even if does not apply in terms, the affidavit must be modelled on the lines provided under the Code.-The deponent must state the source of information where the matter deposed is not based on personal knowledge. *State of Bombay v. Purushottam Jog Naik,* AIR 1952 SC 317: 1952 SCJ 503: 1952 SCR 674

Order 20, Rule 1.-Pronouncement of judgement.-Absence of time limit.-Need to maintain confidence in litigants.-Except in extraordinary circumstances, a judgement must be pronounced without delay. The Civil Procedure Code does not provide a time limit for the period between the hearing of arguments and the delivery of a judgment. Nevertheless, we think that an unreasonable delay between hearing of arguments and delivery of a judgment, unless explained by exceptional or extra-ordinary circumstances is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is that litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay between hearing of arguments and delivery of judgments. Justice, as we have often observed, must not only be done but must manifestly appear to be done. *R.C. Sharma v. Union of India and others,* AIR 1976 SC 2037: 1976(3) SCC 574: 1976 Supp. SCR 580

Order 20, Rule 3.-Appeal.-Erroneous statement of fact.- Challenge by way of appeal is not permissible except with the consent of the other party.-The proper remedy is by way of review before the same Court. *Bank of Bihar v. Mahabir Lal and others,* AIR 1964 SC 377: 1964 BLJR 1: 1964(2) SCJ 611: 1964(1) SCR 842

Order 20, Rule 3.-Alteration in judgement.-Exercise of power.-The judgement pronounced but not signed.-At such stage the power of altering the judgement should be exercised only in exceptional cases. The provision in Order 20, Rule 3 of the Civil permits alterations or additions to a judgement so long as it is not signed. It is only after the judgement is both pronounced and signed that alterations or additions are not permissible, except under the provisions of Section 152 or Section 114 of the Civil P.C. or, in very exceptional cases, under Section 151 of the Civil P.C. But, while the Court has undoubted power to alter or modify a judgement, delivered but not signed, such power should be exercised judicially, sparingly and for adequate reasons. When a judgement is pronounced in open court, parties act on the basis that it is the judgement of the Court and that the signing is a formality to follow.When the judgement is pronounced, parties present in the court know the conclusion in the matter and often on the basis of such pronouncement, they proceed to conduct their affairs. If what is pronounced in court is not acted upon, certainly litigants would be prejudiced. Confidence of the litigants in the judicial process would be shaken. A judgement pronounced in open court should be acted upon unless there be some exceptional feature and if there be any such, the same should appear from the record of the case. *Vinod Kumar Singh v. Banaras Hindu University and others,* AIR 1988 SC 371: 1988(1) SCC 80: 1988(1) SCR 941: 1987(2) Scale 1046: 1987(4) JT 304: 1985 Rev. Dec. 107

Order 20, Rule 3.-Consent decree .-Appeal.-Permissibility.-Lawful compromise agreement is a consent decree and therefore is not appealable. Order 23, Rule 3, Code of Civil Procedure, not only permits a partial compromise and adjustment of a suit by a lawful agreement, but further gives a mandate to the court to record it and pass a decree in terms of such compromise or adjustment in so far as it relates to the suit. If the compromise agreement was lawful.-and as we shall presently discuss it was so.-the decree to the extent it was a consent decree, was not appealable because of the express bar in Section 96(3) of the Code. The bar to an appeal against a consent decree, in sub-section (3) of Section 96 of the Code is based on the broad principle of estoppel. It presupposes that the parties to an action can, expressly or by implication, waive or forgo their right of appeal by any lawful agreement or compromise, or even by conduct. Therefore, as soon as the parties made the agreement to abide by the determination in the appeal (A.S. 668) and induced the court to pass a decree in terms of that agreement, the principle of estoppel underlying Section 96(3) became operative and the decree to the extent if was in terms of that agrement, became final and binding between the parties. And, it was an effective in creating an estoppel between the parties as a judgment on contest. *Katikara Chintamani Dora v. Guatreddi Annamanaidu,* AIR 1974 SC 1069: 1974 (1) SCC 567: 1974 (2) SCR 655

Order 20, Rules 3 and 11.- Compromise in execution.-Enforce- ment of.-Postponement of execution in lieu of payment of higher rate of interest.-Execution of such com- promise by the executing court itself is permissible. *Moti Lal Banker v. Maharaj Kumar Mahmood Hasan Khan,* AIR 1968 SC 1087: 1968 (2) Andh LT 220: 1968(3) SCR 158

Order 20, Rule 4.-Judgement.- Form of.-Criticism of other judg- ments.-Necessity to exercise restraint. It is necessary to emphasise that judicial decorum has to be maintained at all times and even where criticism is justified it must be in language of utmost restraint, keeping always in view that the person making the comment is also falliable. Even when there is justification for criticism, the language should be dignified and restrained. *Alok Kumar Roy v. Dr. S.N. Sarma and another,* AIR 1968 SC 453: 70 Bom LR 198: 1968 Cant LJ 292: 1968 Mah LJ 500: 1968(1) SCR 813

Order 20, Rule 4.-Judgement.- Form of.-Unbalanced language is out of place in judicial adjudication. *D. Macropollo and Co. (Private) Ltd. v. D. Macropollo and Co. (Private) Ltd., Employees' Union and others,* AIR 1958 SC 1012: 1958(2) Lab LJ 492

Order 20, Rule 5.-Judgment.-Form of.-where several factual and legal contentions are urged and there is a scope of an Appeal, the Court should dispose of all the points and should not rest with its decision on one single point. *M/s. Fomento Resorts and Hotels Ltd. v. Gustavo Ranato da Cruz Pinto and others,* AIR 1985 SC 736: 1985(2) SCC 152: 1985(2) SCR 937: 1985(1) Scale 394: 1985 Mah LJ 606

Order 20, Rule 11.-Postponement of decretal amount.-Effect on right of appeal.-Prayer for decretal amount in instalments does not affect the right of the party making such prayer, to challenge the decree on merits in appeal. *M/s. M. Ramnarain Pvt. Ltd. and another v. The State Trading Corporation of India Ltd.,* AIR 1983 SC 786: 1983(3) SCC 75: 1983(3) SCR 25: 1983(1) Scale 548: 1983(2) Bom. C.R. 343

Order 20, Rule 11.-Postponement of execution.-Permissibility.-Postponement of liability against surety till the remedy against Principal Debtor existed.-Permissibility.-Directions to this effect must be on the basis of reasons.-In the instant case such directions held to be not required for the ends of justice. The solvency of the principal is not a sufficient ground for restraining execution of the decree against the surety. It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down. The impugned direction cannot be justified under Order 20, Rule 11(1). Assuming that apart from Order 20, Rule 11(1) the Court had the inherent power under Section 151 to direct postponement of execution of the decree, the ends of justice did not require such postponement. *The Bank of Bihar Ltd v. Dr. Damodar Prasad and another,* AIR 1969 SC 297: 1969 All LJ 475: 1969(1) SCR 620

Order 20, Rule 12.-Enquiry into mesne profit.-Limitation.-The provision does not empower a court to direct an enquiry for a period preceding beyond 3 years from the date of decree. *Chittoori Subbanna v. Kudappa Subbanna and others,* AIR 1965 SC 1325: 1965(2) SCWR 202: 1965(2) SCR 661

Order 20, Rule 12.-Interest on mesne profit.-Effect of delay.-Inquiry for ascertainment of mesne profit unduly prolonged for over 14 years.-Plaintiff not asking for inquiry into the question of mesne profit for a period of about 12 years.-Plaintiff is not entitled to interest at the rate of 6%.-Interest allowed at the rate of 4%. *Bhupendra Narain Singha Bahadur v. Bahadur Singh and others,* AIR 1952 SC 201: 1952 SCJ 269: 1952 SCR 782

Order 20, Rule 12.-Interest on mesne profit.-Permissibility.-Long drawn litigation ensuing the possession to the plaintiff.-Interest on mesne profit granted. *Lucy Kochuvareed v. P. Mariappa Gounder and others,* AIR 1979 SC 1214: 1979(3) SCC 150: 1979(3) SCR 58: 1979(3) Mah LR 229

Order 20, Rule 12.-Mesne profit .-Considerations for.-Suit for recovery of possession of property alienated by a Hindu widow in favour of stranger.-The reversioners have a right to seek recover possession of property.-The reversioners are also entitled to mesne profit even though the alienation is not *ipso facto* void on the death of widow but is voidable at the election of reversioner.-There is no rule of law that no mesne profit can be allowed in a case where alienation cannot be described as absolutely void. *Mummareddi Nagi Reddi and others v. Pitti Durairaja Naidu and others,* AIR 1952 SC 109: 1952 SCJ 192: 1951 SCR 655

Order 20, Rule 12.-Mesne profit.- Computation of.-Damages for use of property.-Computation without giving an opportunity to lead evidence, is improper. The trial Court went wrong in denying the plaintiff an opportunity to prove the amount of mesne profits from the date of the institution of the suit until delivery of possession. The High Court did not correct the error while examining the plaintiff's appeal, and laboured under the mistaken impression that the plaintiff did not make any attempt to give evidence on the point during the course of the trial. That was obviously a mistake as the High Court failed to notice that the plaintiff had in fact been prevented from proving its claim for mesne profits at the present rental value. *Dalhousie Properties Ltd. v. Sooraj Mull Nagar Mull,* AIR 1977 SC 223: 1977(1) SCC 367: 1977(1) RCJ 440

Order 20, Rule 12.-Mesne profit.- Directions for.-Decree of ejectment granted to the plaintiff.-The

decree must be accompanied by a direction for payment of future mesne profits. Once it is held that the plaintiff is entitled to eject the defendant, it follows that from the date of the decree granting the relief of ejectment to the plaintiff, the defendant who remains in possession of the property despite the decree, must pay mesne profits or damages for use and occupation of the said property until it is delivered to the plaintiff. A decree for ejectment in such a case must be accompanied by a direction for payment of the future mesne profits or damages. *Bhagwati Prasad v. Chandramaul,* AIR 1966 SC 735: 1966 All LJ 799: 1966 All WR 609: 1966(2) SCR 286

Order 20, Rule 12.-Mesne profit.- Discretion of Court.-Future mesne profits.-Court has discretionary power to pass a decree directing an enquiry into future mesne profits without any specific pleadings in this regard. Order 20, Rule 12 enables the Court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for the enforcement of the two claims. With regard to past mesne profits, a plaintiff has an existing cause of action on the date of the institution of the suit. In view of Order 7, Rules 1 and 2 and Order 7, Rule 7 of the Code of Civil Procedure and Section 7(1) of the Court Fees Act, the plaintiff must plead this cause of action, specifically claim a decree for the past mesne profits, value the claim approximately and pay court-fees thereon. With regard to future mesne profits the plaintiff has no cause of action on the date of the institution of the suit, and it is not possible for him to plead this cause of action or to value it or to pay court-fees thereon at the time of the institution of the suit. Moreover, he can obtain relief in respect of this future cause of action only in a suit to which the provisions of Order 20, Rule 12 apply. But in a suit to which the provisions of Order 20, Rule 12 apply, the Court has a discretionary power to pass a decree directing an enquiry into the future mesne profits, and the Court may grant this general relief, though it is not specially asked for in the plaint. *Gopalkrishna Pillai and others v. Meenakshi Ayal and others,* AIR 1967 SC 155: 1967 All LJ 239: 1967 BLJR 222: 1967 (1) Mad LJ (SC) 89: 1966 Supp SCR 128

Order 20, Rule 12.-Mesne profit.- Liability of.-Joint possession of pro- perty.-Liability of joint trespasser .-Individual liability of trespassers could be decided if sufficient material is existed on record. Wrongful possession of the defendant is the very essence of a claim for mesne profits and the very foundation of the defendant's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immoveable property is liable for mesne profits. But, where the plaintiff's dispossession, or, his being kept out of possession can be regarded as a joint or concerted act of several persons, each of them who participates in the commission of that act would be liable for mesne profits even though he was not in actual possession and the profits were received not by him but by some of his confederates. In such a case where the claim for mesne profits is against several trespassers who combined to keep the plaintiff out of possession, it is open to the Court to adopt either of the two courses. It may by its decree hold all such trespassers jointly and severally liable for mesne profits, leaving them to have their respective rights adjusted in a separate suit for contribution; or, it may, if there is proper material before it, ascertain and apportion the liability of each of them on a proper application made by the defendant during the same proceedings. *Lucy Kochuvareed v. P. Mariappa Gounder and others,* AIR 1979 SC 1214: 1979(3) SCC 150: 1979(3) SCR 58: 1979(3) Mah LR 229

Order 20, Rule 12.-Mesne Profit.- Necessity of pleading.-Mesne profit prior to suit cannot be awarded in the absence of claim in this respect.-The future mesne profit, *i.e.*, subsequent to date of institution of suit is governed by the provision and therefore, may be ordered by the Court, *suo motu*. *R.S. Maddanappa v. Chandramma and anothers,* AIR 1965 SC 1812: 1965(2) SCWR 644: 1965(3) SCR 283

Order 20, Rule 12.-Mesne Profit.-Suit for possession.-Decree for possession not granted as the property stood vested in State Government.-Decree for mesne profit from the date of filing of suit till the date of vesting granted as the defendant was in wrongful possession of property, during this period. *Sita Ram Lakshmanji v. Dipnarain Mandal etc.,* AIR 1977 SC 1877: 1977(4) SCC 601

Order 20, Rule 12.-Mesne profit.-Scope of.-Suit for possession on the basis of termination of tenancy.-The plaintiff has right to receive damages from the date of termination of tenancy till the date on which vacant possession was handed over to him. *Shyam Charan v. Sheoji Bhai and another,* AIR 1977 SC 2270: 1977(4) SCC 393: 1978(1) SCR 710: 1978(1) Rent LR 45

Order 20, Rule 12(1)(c).- Compu- tation of mesne profit.-Challenge to directions.-Permissibility.-Direction for enquiry about mesne profit by way of Preliminary Decree.-Failure to appeal from such decree does preclude challenge to the direction along with the final decree. The preliminary decree directed an inquiry about the mesne profits from the date of the institution of the suit upto the date of delivery of possession to the decree-holder. The decree-holder could not have felt aggrieved against this order. The judgment-debtor could not have insisted for detailing all the various alternatives mentioned in Order 20, Rule 12(1)(c) and he could not have expected that possession would not be taken within three years of the decree. The direction about the enquiry with respect to future mesne profits does not amount to an adjudication and certainly does not amount to an adjudication of any controversy between the parties in the suit. It has no reference to any cause of action which had arisen in favour of the plaintiff-decree-holder before the institution of the suit. The direction was given on account of a special power given

to the Court under Order 20, Rule 12(1)(c) of the Code to make the direction or not. The Court does not decide, when making such a direction, the period for which the decree-holder would be entitled to get mesne profits. No such point can be raised before it. The judgment-debtor's liability to mesne profits arose under the ordinary law and a suit for realizing mesne profits could be separately filed by the decree-holder. The provisions of Order 20, Rule 12(1)(c), are just to avoid multiplicity of suits with consequent harassment to the parties. The mere fact that the direction for an enquiry into mesne profits is contained in a preliminary decree does not make it such a part of the decree against which alone appeal could have been filed. The appeal could be filed only after a final decree is passed decreeing certain amount for mesne profits to the decree-holder. It follows that the question about the proper period for which mesne profits was to be decreed really comes up for decision at the time of passing the final decree by which time the parties in the suit would be in a position to know the exact period for which future mesne profits could be decree in view of the provision of Order 20, Rule 12(1)(c).

Order 20, Rule 12(1)(c).-Directions for mesne profit.-Effect of preli- minary decree.-The preliminary decree passed earlier does not operate as *res judicata* to the directions for computation of mesne profit. The direction in the preliminary decree cannot operate, in terms of Section 11, C.P.C. or on general principles, as *res judicata*, for the simple reason, that the direction is not based on the decision of any matter in controversy between the parties and is given in the exercise of the power vested in the Court under Order 20, Rule 12 (1)(c). Again, for similar reasons, the principle that a Court can decide a question within its jurisdiction wrongly as well as rightly and, if the decision said to be wrong had become final, the Courts have to respect it, will not apply to these cases. *Chittoori Subbanna v. Kudappa Subbanna and others,* AIR 1965 SC 1325: 1965(2) SCWR 202: 1965(2) SCR 661

Order 20, Rule 12(1)(c).-Future mesne profit.-Limitation.-The period of 3 years has to be counted from the date of decree of final court of appeal. *Lucy Kochuvareed v. P. Mariappa Gounder and others,* AIR 1979 SC 1214: 1979(3) SCC 150: 1979(3) SCR 58: 1979(3) Mah LR 229

Order 20, Rule 14.-Application on local Law.-Decree of pre-emption.- Deposit of money in Court.-It is necessary to specify a definite date of deposit. Order 20, Rule 14(1)(a) lays down that the decree in a pre-emption suit shall, when purchase money has not been paid in the Court, specify a day on or before which the same shall be paid and Order 20, Rule 14(2)(b) provides *inter alia* that in so far as the claims decreed are different in degree, the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the provisions of sub-rule_I. *Mula and others v. Godhu and others,* AIR 1971 SC 89: 1970 Pun LJ 632: 1969(2) SCC 653: 1970(2) SCR 129

Order 20, Rule 14.-Preliminary decree for pre-emption.-Effect of appeal.-The stay of proceedings relieve the necessity of deposit till continuation of stay order. The decree framed under Order 20, Rule 14, Civil Procedure Code requires reciprocal rights and obligations between the parties. The rule says that on payment into Court of the purchase-money the defendant shall deliver posession of the property to the plaintiff. The decree-holder therefore deposits the purchase-money with the expectation that in return the possession of the property would be delivered to him. It is therefore clear that a decree in terms of Order 20, Rule 14, Civil Procedure Code imposes obligations on both sides and they are so conditioned that performance by one is conditional on performance by the other. To put it differently, the obligations are reciprocal and are inter-linked, so that they cannot be separated. If the defendants by obtaining the stay order from the High Court relieve themselves of the obligation to deliver possession of the properties the plaintiff-decree-holder must also be deemed thereby to be relieved of the necessity of depositing the money so long as the stay order continues. *Dattatraya v. Shaikh Mahaboob Shaikh Ali and another,* AIR 1970 SC 750: 72 Bom LR 431: 1970 (1) SCJ 540: 1969(2) SCR 514

Order 20, Rule 14.-Decree of pre- emption.-Extension of time.- Appeal against a decree.-Mere filing of appeal does not automatically extend the time for depositing the payment. Mere filing of an appeal does not suspend the decree of the trial Judge and unless that decree is altered in any manner by the court of appeal, the pre-emptor is bound to comply with its directions. In our opinion, the High Court was right in holding that the pre-emptor's suit stood dismissed by reason of his default in not depositing the pre-emption price within the time fixed in the trial Court's decree. *Naguba Appa v. Namdev,* AIR 1954 SC 50

Order 20, Rule 14.-Decree of pre- emption.-Form of.-Absence of direction about the consequences of non-payment within stipulated time .-The mandatory provisions under rule 14 come into operation.- Dismissal of suit is not improper. The dismissal of the suit is as a result of the mandatory provisions of Order 20, Rule 14 and not by reason of any decision of the Court and the omission to incorporate this direction in the decree could not in any way affect the rights of the parties. *Naguba Appa v. Namdev,* AIR 1954 SC 50

Order 20, Rule 14.-Directions for deposit.-Extension of time.- Pendency of appeal against directions does not exempt non- compliance of directions in the absence of specific stay order by the appellate court. Mere filing of an appeal does not suspend the decree of the trial Court and unless that decree is altered in any manner by the Court of appeal the pre-emptor is bound to comply with that direction. The pre-emptor is bound to comply with the directions of the trial Judge unless that decree is altered in any manner by a Court of Appeal do not mean that where the deposit is not made in accordance

with the directions of the trial Court, the appellate Court can extend the time for payment. Thereafter, the lower appellate Court was in error in extending the time for payment. *Sulleh Singh and others v. Sohan Lal and another,* AIR 1975 SC 1957: 1975 Pun LJ 400: 1975(2) SCC 505: 1976(1) SCR 598

Order 20, Rule 14.-Execution of decree.-Pre-emption.-Deposit of purchase money.-Delay in deposit.-The money deposited one day after the last date as the court concerned was vacant.-A party cannot be made to suffer for no fault of its own .-Deposit rightly held within time. *Bhoop alleged S/o Sheo v. Matadin Bhardwaj S/o Lakmi Chand,* AIR 1991 SC 373: 1991(2) SCC 128: 1990 Supp (3) SCR 410: 1990(2) Scale 1204: 1990(4) JT 594

Order 20, Rule 18.-Relief.-Suit for Partition.-Lessee of half property purchasing interest of co-owner is not entitled to invoke equity against demolish of its construction. The two agreements had contained an express stipulation that on the expiry of the period of the lease, the lessee would deliver the land in the same condition as was leased out and that the lessee would further remove all materials and structures that may be standing on it. As long as the lease subsists it is open to the lessee to construct whatever structures he considered necessary for his business and it would have been contrary to the terms of the lease for the lessors to have objected to any such constructions during the currency of the lease. If this is the legal position, and it could not controverted, then there is no question of the respondents standing by without protest or objection when the lessee was renovating the cinema hall or constructing other buildings. The facts as found by the High Court on the other hand show that the appellant has deliberately tried to create an equity in its favour after purchasing the 1/2 share of Rajendra Narain and again by spending large sums in renovating and constructing the cinema hall for the purpose of creating an impediment in the way of the respondents claiming a partition of the land without the structures. *M/s. Bansal Pvt. Ltd. etc. v. B.S. Bathur etc.,* AIR 1975 SC 400: 1975(1) SCWR 142

Order 20, Rule 18.-Preliminary Decree.-Effect on final decree.-On question determined in preliminary decree, the final decree cannot amend or go behind such matters. *Muthangi Ayyana v. Muthangi Jaggarao and others,* AIR 1977 SC 292: 1977(1) SCC 241

Order 20, Rule 18.-Acquiescence in Preliminary decree.-Effect of.- Parties giving up their share in the suit for partition.-The appellate court should not have granted what the parties had themselves given up. *Most. Anar Kumari v. Jamuna Prasad Singh and others,* AIR 1977 SC 2027: 1977(4) SCC 826

Order 20, Rules 18(2) and 7.-Final decree.-Necessity of.-Suit for partition.-Without the final decree determining the rights of the parties by metes and bounds being drawn up and engrossed on stamped paper(s) supplied by the parties, there is no executable decree.-Both acts together constitute final decree, crystallising the rights of the parties in terms of the preliminary decree. *Shankar Balwant Lokhande (dead) by LRs v. Chandrakant Shankar Lokhande and another,* AIR 1995 SC 1211: 1995(3) SCC 413: 1995(2) Scale 318: 1995(3) JT 186: 1995 Civ. CR (SC) 479

Order 21, Rule 1.-Abatement.-Representative of Suit.-Suit for enforcement of duties in respect of trust of religious nature.-The suit does not abate on account of the death of one of the plaintiffs. *Charan Singh and another v. Darshan Singh and others,* AIR 1975 SC 371: 1975(3) SCR 48: 1975(4) SCC 298: 1977 PLR 262

Order 21, Rule 1.-Deposit.- Computation of deposit.-Last date of prescribed period falling on holiday.-Deposit on next working day is valid. *C.F. Angadi v. Y.S. Hirannayya,* AIR 1972 SC 239: 1972(1) SCC 191: 1972(2) SCR 515

Order 21, Rule 1.-Execution of decree.-Appropriation of decretal amount.-Determination of principal and interest.-Absence of notice to decree-holder informing if the payment was made towards the principal or the interest.-Ordinary rule relating to the Creditor and the debtor is applicable.-The decree holder is free to appropriate the amount either towards principal or towards interest. *Mathunni Mathai v. Hindustan Organic Chemicals Limited and another,* AIR 1995 SC 1572: 1995(4) SCC 26: 1995(3) Scale 159: 1995(4) JT 233: 1995 Civ. CR (SC) 554: 1995(1) KLJ (SC) 695

Order 21, Rule 1.-Interest on decretal amount.-Entitlement of.- The judgment debtor is liable to pay interest on the decretal amount till the date of notice to decree-holder about deposit of decretal amount in Court.-The provision being procedural is applicable even on the proceedings pending at the time of enactment of Amending Act of 1976. It is imperative that the judgment debtor has to give notice to the decree holder about deposit for the decretal amount. Since motor accident in the instant case, had taken place on May 7, 1983, Order XXI, Rule 1 as amended in 1976 is clearly applicable. Even otherwise also, the provision of Order XXI, Rule 1 being a procedural law, amended provisions of Order XXI, Rule 1 are applicable even if the accident had taken place prior to 1976 because such amendment of procedural law is retrospective in its operation. *Rajasthan State Road Transport Corporation, Jaipur v. Smt. Poonam Pahwa and others,* AIR 1997 SC 2951: 1997(6) SCC 100: 1997(6) JT 142: 1997(4) Scale 505: 1997(3) Raj LW 411: 1997(3) Mad LW 280

Order 21, Rule 2.-Adjustment of decree.-Necessity of consent.-No evidence of consent.-Provision has no application. *M.P. Shreevastava v. Mrs. Veena,* AIR 1967 SC 1193: 1967 All LJ 423: 1967 BLJR 487: 1967(1) SCR 147

Order 21, Rule 2.-Recovery of Taxes.-Decree of refund.-Decree against Government.-Refund by a department of Government is sufficient compliance. Order 21, Rule 2 of the Code of Civil Procedure

takes note of payments out of court to decree-holders and provides that where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly. It is also provided that the judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. In our judgment this plea is highly technical. The amount was recovered by the Collector of Customs from the firm and was being held by the Union of India through the Collector of Customs. The Collector of Customs paid the money not on behalf of himself but on behalf of the Union of India and it must be treated as a proper payment of the amount to the firm. The objection of the respondent that it amounts to a payment by one Depart- ment of the Government to another does not, in our opinion, hold much substance. It is also extremely technical. The Union of India operates through different Departments and a notice to the Collector of Customs in the circumstances was a proper notice to issue because it was the Collector of Customs who had in the first instance recovered this money and held it from the firm. In our opinion, a case of a garnishee payment or one made under Section 46(5A) of the Income-tax Act of 1922 stands on a different footing and if the payment has been legally made out of Court in full and final discharge of the liability under a decree, there is no reason why the judgment-debtor cannot move the Court for getting the adjustment or payment certified. The payment was required to be certified under Order 21, Rule 2 of the Code of Civil Procedure and we order that it be so cerfified. *Collector of Customs, Calcutta and others v. M/s. Soorajmull Nagarmull and another,* AIR 1970 SC 118: 1970 (1) SCJ 225: 1970 (1) SCR 123: 1969(1) SCC 858

Order 21, Rule 2(3).-Execution of decree.-Certification of satisfaction .-Decree of ejectment against tenant .-Compromise between the parties to deliver possession of premises on the subsequent date.-No fresh lease in favour of tenant/judgment debtor .-The decree not satisfied.- Tenant/ judgment debtor is liable for ejectment. The decree was for eviction and the respondent himself had agreed in the compromise decree to deliver possession to the appellant by 10th of February, 1992. The plea relating to the delivery of possession in pursuance of the compromise decree, if accepted, would amount to an adjustment of the decree which shall consequently be treated to have been partially satisfied to the extent of eviction of the respondent as a tenant from the disputed property. That being so, it had to be recorded and certified under Order XXI, Rule 2. Since this was not done, the provisions of Order XXI, Rule 2(3) prohibiting the executing Court from giving effect to the said plea were applicable and the executing Court acted erroneously in refusing to execute the decree for eviction of the respondent on the ground that possession having been delivered to the appellant's attorney, the decree to that extent, stood satisfied. *Sultana Begum v. Prem Chand Jain,* AIR 1997 SC 1006: 1997(1) SCC 373: 1996(9) Scale 55: 1996(11) JT 1: 1997(1) Raj. LW 53: 1997(2) Mad. LW 521

Order 21, Rules 2 and 3.-Discharge of decree.-Out of Court uncertified payment not recorded by Court is liable to be ignored.-The general power of executing Court under Section 47 to decide all questions arising in execution is subject to restriction imposed by Rule 2. *Sultana Begum v. Prem Chand Jain,* AIR 1997 SC 1006: 1997(1) SCC 373: 1996(9) Scale 55: 1996(11) JT 1: 1997(1) Raj. LW 53: 1997(2) Mad. LW 521

Order 21, Rule 4.-Auction sale.- Satisfaction of decree.-It is obli- gatory on the court to decide whether it was necessary to sell entire attached property to satisfy the decree. In all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seen necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the Court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction. *Ambati Narasayya v. M. Subba Rao and another,* AIR 1990 SC 119: 1989 Supp. (2) SCC 693: 1989 Supp. (1) SCR 451: 1989(2) Scale 806: 1989(4) JT 50: 1989 Har. Rent. R 687

Order 21, Rule 6.-Non-compliance .-Effect of.-Failure to send a copy of the decree or the certificate referred under Rule 6(2)(b) does not amount to material irregularity so as to entitle setting aside of sale in execution of decree. *Mohanlal Goenka v. Benoy Kishna Mukherjee and others,* AIR 1953 SC 65: 1953 SCJ 130: 1953 SCR 377

Order 21, Rule 11.-Mesne Profit.- Procedure to claim.-Application made for execution of decree passed in appeal as also to seek mesne profit .-Mesne profit claimed on account of the stay of execution of decree.- Composite application seeking execution of decree as also mesne profits is maintainable. The record shows that after objections were filed to the said application by the judgment-debtor Dinkarrao, the respondents offered an explanation and in doing so, they set out the order passed by the High Court in granting stay and made it clear that it is by virtue of the said order that they were

making the claim for mesne profits. In substance, therefore, the respondents were claiming mesne profits by virtue of the order passed by the High Court in granting stay to Dinkarrao. The only point and the technical objection raised by the appellants is that a separate application for execution with adequate Court fees stamp should have been filed to execute the order passed by the High Court on the stay application as such and that since that prayer has been made in an application by which the decree itself is sought to be executed, the said prayer should be treated as incompetent. In our opinion, having regard to the explanation filed by the respondents, it is quite clear that the respondents were seeking to execute the decree so far as possession was concerned and were asking for mesne profits under the stay order granted by the High Court. The execution application filed by them can, therefore, be treated as a composite application asking for execution both of the decree and the stay order. *Pushpawatibai v. Ratansi and another,* AIR 1967 SC 761: 1963 Jab LJ 633: 1963 MPLJ 663: 1963 Mah LJ 631

Order 21, Rules 11 and 17.- Execution of decree.-Amendment of petition.-Petition signed by a person who was dead on the date of filing .-No steps taken for amend-ment of petition.-Executing Court *suo motu* permitting the amendment.-Such procedure is violative of the provi-sions of the Code.-Order executing the decree, set aside. *Smt. Jiwani v. Rajmata Basantika Devi and others,* AIR 1994 SC 1286: 1993 Supp (3) SCC 217: 1993(1) Scale 205: 1993(4) JT 284: 1993 RD 334

Order 21, Rule 16.-Equitable assignment.-Permissibility.-Assignment of right to sue.-Permissibility. It was by the operation of the equitable principle that the right, title and interest of the transferor in the after-acquired decree became the property of the appellant. In other words, it was equity which operated on the decree as soon as it was passed and passed the interest of the decree-holder to the appellant. The result of this transmission was to transfer the property from the decree-holder to the appellant and this transfer was brought about by the operation of the equitable principle discussed above which is as good as any rule of law. It is difficult to appreciate the implication of the first proposition. When on a true construction of the deed it actually operates to transfer a decree then in existence, no equitable principle need be invoked, for in that case the transfer is by the deed itself and as such is by an assignment in writing. It is only when the deed does not effectively transfer the decree because, for instance, the decree is not then in existence, but constitutes only an agreement to transfer the decree after it is passed that the invocation of the equitable principle becomes necessary and it is in those circumstances that equity fastens and operates upon the decree when it is passed and effects a transfer of it. If, however, the learned Judge meant to say that if on a true construction of the deed it did not cover the decree then the equitable principle would not come into play at all and in that case the principle of transfer by operation of law could not be invoked, no exception need then be taken. Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd., AIR 1955 SC 376: 1955 SCJ 571: 58 Bom.L.R. 517: 1955(1) SCR 1369

Order 21, Rule 16.-Execution of decree.-Pre-emption.-Right of assignee of decree to claim pre-emption .-It can not be said to be enforcement of personal right so as to deny the execution of decree of pre-emption. It is not correct to say that the right of pre-emption is a personal right on the part of the pre-emptor to get the re-transfer of the property from the vendee who has already become the owner of the same. It is true that the right of pre-emption becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of stranger into the land. The correct legal position is that the statutory law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's right of sale and compels him to sell the property to the person entitled to pre-emption under the statute. In other words, the statutory right of pre-emption though not amounting to an interest in the land is a right which attaches to the land and which can be enforced against a purchaser by the person entitled to pre-empt. Neki having complied with Order XX, Rule 14, had become the owner of the lands and his legal representatives on his death were rightly substituted in the proceedings. *Zila Singh and others v. Hazari and others,* AIR 1979 SC 1066: 1979 PLJ 342: 1979(3) SCC 265: 1979(3) SCR 222

Order 21, Rule 16.-Execution of decree.-Assignment of decree.- Effect of.-Recognition by a court is not a condition precedence for assignment.-The judgement debtor cannot give valid discharge and defeat the rights of transferee after the assignment of decree. We are unable to read Order XXI, Rule 16 as furnishing any foundation for the basic assumption of the learned counsel for the respondent that property in a decree does not pass to the transferee under the assignment until the transfer is recognised by the Court. Property in a decree must pass to the transferee under a deed of assignment when the parties to the deed of assignment intend such property to pass. It does not depend on the Court's recognition of the transfer. Order XXI, Rule 16 neither expressly nor by implication provides that assignment of a decree does not take effect until recognised by the Court. It is true that while Order XXI, Rule 16 enables a transferee to apply for execution of the decree, the first proviso to Order XXI, Rule 16 enjoins that notice of such application shall be given to the transferor and the judgment-debtor and that the decree shall not be executed until the Court has heard their objections, if any, to its execution. It is one thing to say that the decree may not be executed by the transferee until the objections of the transferor and the judgment-debtor are heard, it is an altogether different thing to say that the assignment is of no consequence until the objections are heard and decided. The transfer as between the original

decree-holder and the transferee is effected by the deed of assignment. If the judgment-debtor has notice of the transfer, he cannot be permitted to defeat the rights of the transferee by entering into an adjustment with the transferor. If the judgment-debtor has no notice of the transfer and enters into an adjustment with the transferor before the transferee serves him with notice under Order XXI, Rule 16, the judgment-debtor is protected. *Dhani Ram Gupta and others v. Lala Sri Ram and another,* AIR 1980 SC 157: 1980(2) SCC 162: 1980(2) SCR 469: 1980(3) Mah. LR 134

Order 21, Rule 16.-Transfer by operation of law.-Scope of.- Meaning of the term `operation of law'.- The term is not limited to statutory law but also include transfer by operation of customary law. It is neither necessary nor profitable to try and enumerate exhaustively the instances of transfer by operation of law. Suffice it to say that there is no warrant for confining transfers by operation of law to transfers by operation of statutory laws. When a Hindu or a Mohammaden dies intestate and his heirs succeed to his estate there is a transfer not by any statute but by the operation of their respective personal law. In order to constitute a transfer of property by operation of law all that is necessary is that there must be a passing of one person's rights in property to another person by the force of some law, statutory or otherwise. *Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd.,* AIR 1955 SC 376: 1955 SCJ 571: 58 Bom.L.R. 517: 1955(1) SCR 1369

Order 21, Rule 17.-Execution of decree.-Maintenance.-Charge created over several properties.- Manner of execution. An executory charge-decree for maintenance becomes executable again and again as future sums become due. The executability of the decree keeps the charge alive on the remaining properties originally charged till the future amounts cease. In other words the charge subsists as long as the decree subsists. By the execution the charge is not transferred in its entirety to the properties purchased by the charge-holder. Nor is the charge divided between those properties and those which still remain with the judgment debtor. The whole of the charge continues over all the properties jointly and severally. Nor is any priority established between the properties purchased by the charge-holder and those that remain. It is not permissible to seek an analogy from the cease of a mortgage. A charge is different from a mortgage. A mortgage is a transfer of an interest in property while a charge is merely a right to receive payment out of some specified property. The former is described *a jus in rem* and the latter as only a *jus ad rem*. In the case of a simple mortgage, there is a personal liablity express or implied but in the case of charge there is no such personal liability and the decree, if it seeks to charge the judgment-debtor personally, has to do so in addition to the charge. This being the distinction it appears to us that the appellant's contention that the consequences of a mortgagee acquiring a share of the mortgagor in a portion of the mortgaged property obtain in the case of a charge is ill- founded. The charge can be enforced against all the properties or severally. *Janapareddy Latchan Naidu v. Janapareddy Sanyasamma,* AIR 1963 SC 1556: 1964 Andh WR (SC) 19: 1964(1) Mad LJ (SC) 19: 1964(1) SCR 920

Order 21, Rule 19.-Appeal against order.-Permissibility.-Order of single Judge of High Court passed under the provision is a judgement therefore is subject to Letter Patent Appeal. There can be no doubt that an application under Order XXI, Rule 90 to set aside an auction sale concerns the rights of a person declared to be the purchaser. If the application is allowed, the sale is set aside and the purchaser is deprived of his right to have the sale confirmed by the Court under Rule 92. Such a right is a valuable right, in that, upon such confirmation the sale becomes absolute and the rights of ownership in the property so sold become vested in him. A decision in such a proceeding, therefore, must be said to be one determining the right of the auction purchaser to have the sale confirmed and made absolute and of the judgment-debtor conferred by Rule 90 to have it set aside and a resale ordered. In our view an order in a proceeding under Order XXI, Rule 90 is a `judgment' inasmuch as such a proceeding raises a controversy between the parties therein affecting their valuable rights and the order allowing the application certainly deprives the purchaser of rights accrued to him as a result of the auction-sale. We, therefore, agree with the High Court that a Letters Patent appeal lay against the order of the learned single Judge. *Radhy Shyam v. Shyam Behari Singh,* AIR 1971 SC 2337: 1971(1) SCR 783: 1970(2) SCC 405

Order 21, Rule 19.-Confirmation of sale.-Nullity.-Distinction with irregularity.-Non-compliance of the rule.-Where a party waives the compliance of a provision by its conducts, non-compliance is an irregularity and the sale is not a nullity. No hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated. Whether a provision falls under one category or the other is not easy of discernment, but in the ultimate analysis it depends upon the nature, scope and object of a particular provision. It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity. Where the court acts without inherent jurisdiction, a party affected cannot by waiver confer jurisdiction on it, which it has not. Where such jurisdiction is not wanting, a directory provision can obviously be waived. But a mandatory provision can only be waived if it is not conceived in the public interests, but in the interests of the party that waives it. *Dhirendra Nath Gorai and others v. Sudhir*

Chandra Ghosh and others, AIR 1964 SC 1300: 1964(1) SCWR 524: 1964(6) SCR 1001

Order 21, Rule 19.-Execution of decree.-Adjustment of cross decree .-Permissibility.-The provision has application only where the amount sought to be adjusted is due under the same decree.-Separate decrees passed in the same suit.-Provision has no application. For its applicability it must be shown by the party seeking relief thereunder that he is entitled to recover a sum of money under the very same decree which is sought to be executed by the other side. The words application for execution of a decree under which two parties are entitled to recover sums of money in the opening part of the Rule clearly indicate that there should be two rival claims by contesting parties against each other arising out of the very same decree which is sought to be executed by one of the parties against the other party. The defendant does not seek to execute that money decree as nothing is awarded to the defendant under that decree against the plaintiff. What is awarded to the defendant is under a final decree on taking accounts between the parties. Though of course both these decrees are passed in the same suit, each of them is a separate decree. One is a money decree obtained by the plaintiff against the defendant. Another is a final accounts decree passed in favour of the defendant against the plaintiff in defendant's cross-claim which is analogous to a cross-suit. Under these circumstances, therefore, applicability of Order XXI, Rule 19, CPC was clearly ruled out. Whatever remedy the appellant may have for execution of his money decree against the defendant will have to be pursued independently. *Mahendra Singh Jaggi etc. v. Dataram Jagannath,* AIR 1997 SC 1219: 1997(1) Scale 327: 1997(1) JT 505: 1997(84) Cut. LT 663: 1997(2) APLJ 45

Order 21, Rule 24.-Auction sale.- Title of property.-Determination of .-The question as to what passes to auction purchaser after the sale of right, title and interest of judgement debtor, is a question of fact which has to be determined in each cases on the basis of its facts and circumstances. *S.M. Jakati and another v. S.M. Borkar and others,* AIR 1959 SC 282: 61 Bom LR 688: 1959 Cal LJ 81: 1959 SCR 1384

Order 21, Rule 29.-Execution of decree.-Auction sale of property in execution.-Decree set aside in appeal after confirmation of sale.- Judgement debtor is entitled to restitution of property. *Chinnamal and others v. P. Arumugham and another,* AIR 1990 SC 1828: 1990(1) SCC 513: 1990(1) SCR 78: 1990(1) JT_51

Order 21, Rule 29.-Stay of execution.-Jurisdiction for.-It is only the court which pass the decree has the jurisdiction to stay its exe- cution.-No other court has juris- diction to stay the execution. *Krishna Singh v. Mathura Ahir and others,* AIR 1982 SC 686: 1981(4) SCC 421: 1982(1) APLJ (SC) 6

Order 21, Rule 30.-Execution of money decree.-Scope of.-Directions for attachment of property subject of suit for specific performance pending before the same Court are beyond the scope of execution proceedings in money decree. *Amal Kumar Ghatak v. United Bank of India and another, etc. etc.,* AIR 1994 SC 2256

Order 21, Rule 32.-Execution of decree.-Specific performance.-The provision can be used only by a person entitled to execute the decree .-Failure to avail the remedy by reason of his own incapacity to perform his part of obligation arising from the decree is not entitled to invoke the provision and is pre- cluded from seeking execution of decree. *Jai Narain Ram Lundia v. Kedar Nath Khetan and others,* AIR 1956 SC 359: 1956 All LJ 345: 1956 BLJR: 1957 Andh LT 81: 1956 SCR 62

Order 21, Rule 32.-Execution of decree.-Restitution of conjugal rights.-The provision serve a social purpose of inducement for husband and wife to live together.- Consequences for disobedience are only if it is wilful without any impedi- ment.-The provision is not arbitrary and unconstitutional. *Smt. Saroj Rani v. Sudarshan Kumar Chadha,* AIR 1984 SC 1562: 1984(4) SCC 90: 1985(1) SCR 303: 1984(2) Scale 118: 1984 MLR 306

Order 21, Rule 35.-Execution of decree.-Ejectment of person in possession.-Waiver of.-Acceptance of possession without removing the person in possession.-Effect of. Now under Order 21, Rule 35 a person in possession and bound by the decree has to be removed only if necessary, that is to say, if necessary to give the decree-holder the possession he is entitled to and asks for. It would not be necessary to remove the person in possession if the decree-holder does not want such removal. It is open to the decree-holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that, then he cannot later say that he has not been given that possession to which he was entitled under the law. *Shew Bux Mohata and another v. Bengal Breweries Ltd. and others,* AIR 1961 SC 137: 1961(1) SCR 680: 1961(1) SCJ 322

Order 21, Rules 35, 95 and 96.- Execution of decree.-Possession of property.-Order for delivery of symbolic possession of undivided share in joint family property.-The order not without jurisdiction and therefore is not nullity. *M.V.S. Manikayala Rao v. M. Narasimhaswami and others,* AIR 1966 SC 470: 1966(1) SCWR 120: 1966(1) SCR 628

Order 21, Rule 35(3).-Application.- Obstruction to execution.- Application can be treated as an application under

Order 21, Rule 97 for adjudication of title. *Babulal v. Raj Kumar and others,* AIR 1996 SC 2050: 1996(3) SCC 154: 1996(2) Scale 438: 1996(2) JT 716: 1996(2) Raj. LW_23

Order 21, Rules 35(3) and 97.- Execution of decree.-Removal of obstruction.-Rejection on the ground of being barred by Limitation.-Application under

Order 21, Rule 35(3) should have been treated one under

Order 21, Rule 97 and enquiry into the title of obstructionists should have been ordered. Order 21, Rule. 97, C.P.C clearly envisages that any person even including the judgment-debtor irrespective of whether he claims derivative title from the judgment- debtor or set up his own right, title or interest de hors the judgment-debtor and he resists execution of a decree, then the court in addition to the power under Rule 35(3) has been empowered to conduct an enquiry whether the obstruction by that person in obtaining possession of immovable property was legal or not. The decree-holder gets right under Rule. 97 to make an application against third parties to have his obstruction and an enquiry thereon could be done. Since each occasion of obstruction or resistance furnishes cause of action to the decree-holder to make an application for removal of the obstruction or resistance by such person. When the appellant had made the application on May 25, 1979 against the Satyanarain, in law it must be only the application made under Order 21, Rule 97(1) of C.P.C. The Executing Court, obviously, was in error in directing to make a fresh application. It is the duty of the executing court to consider the averments in the petition and consider the scope of the applicability of the relevant rule. The procedure is the handmaid of substantive justice but in this case it had run its rooster. *Bhanwar Lal v. Satyanarain and another,* AIR 1995 SC 358: 1995(1) SCC 6: 1994(4) Scale 597: 1994(6) JT 626: 1995(1) Rent. LR 95

Order 21, Rule 43.-Attachment of property.-Attachment by actual seizure.-Effect of.-Local amendment of Rules providing for handing over the goods to a third person to keep in custody.-Transfer of possession by third person to another person.-Such person would be that of a bailee. The rule also empowers the attaching officer to keep the animals attached in the custody of a sapurdar or any other respectable person. Attachment by actual seizure involves a change of possession from the judgment-debtors to the Court; and the rule deals only with the liability of the attaching officer to the Court. Whether the amin keeps the buffaloes in his custody or entrusts them to a sapurdar, the possession of the amin or the sapurdar is in law the possession of the Court and, so long as the attachment is not raised, the possession of the Court continues to subsist. Would it make any difference in the legal position if the sapurdar, for convenience or out of necessity, keeps the said animals with a responsible third party? In law the said third party would be a bailee of the sapurdar. Would it make any difference in law when the bailee happens to be the decree-holder? Obviously it cannot, for the decree-holder's custody is not in his capacity as decree-holder but only as the bailee of the sapurdar. We, therefore hold that the decree-holder's possession of the buffaloes in the present case was only as a bailee of the sapurdar. *Teeka and others v. The State of Uttar Pradesh,* AIR 1961 SC 803: 1961 All LJ 430: 1961 BLJR 545: 1962(1) SCR 75

Order 21, Rule 46.-Attachment of property.-Transfer in violation of attachment order.-The transaction is illegal. Order 21, Rule 46 of the Code of Civil Procedure lays down that in the case of shares in the capital of a corporation the attachment shall be made by a written order prohibiting in the case of the share, the person in whose name the share may be standing from transferring the same. In the present case, in addition to the prohibition issued under Order 21, Rule 46 a separate prohibitory order was issued to the company in form No. 18 in Appendix E of the First Schedule of the Code of Civil Procedure. Therefore, the company by registering the transfer of shares was obviously permitting the transfer and such action on the part of the company being in violation of the prohibition is contrary to law. *Mannalal Khetan etc. etc. v. Kedar Nath Khetan and others, etc.,* AIR 1977 SC 536: 1977(2) SCC 424: 1977(2) SCR 190

Order 21, Rule 46.-Execution of decree.-Attachment of property.- Necessity of actual possession. A prohibitory order is sufficient for the purpose of attachment, though the property mentioned therein is not actually taken in possession by the Court. After attachment has been made in the manner provided by Rule 46 the next step that the Court has to take is to order sale of the property attached. Then comes Order XXI, Rule 79 which provides that where the property sold is movable property of which actual seizure has been made, it shall be delivered to the purchaser [see Rule 79(1)]. But where the property sold is movable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser [see Rule 79(2)]. In the present case there was no actual seizure of the property but attachment had been made under Order XXI, Rule 46(1). The proper procedure for the Court to follow was to sell the property under Order XXI, Rule 64 and then pass an order under Order XXI, Rule 79(2) for its delivery in the manner provided therein. *Chouthi Prasad Gupta v. Union of India and others,* AIR 1967 SC 1080: 1967(2) SCJ 31: 1967 (1) SCR 207

Order 21, Rule 50.-Application of.-Scope of.-Denial of decree against the partners while granting decree against the firm.-Provision has no application due to express exclusion by the Court.-Decree cannot be executed against the personal property of the partners. *Topanmal Chhotamal v. M/s Kundomal Gangaram and others,* AIR 1960 SC 388

Order 21, Rule 50.-Execution of decree.-Partnership Firm.- Execution of Decree is permissible not only against the property of the firm but also a person who have been served with individual notice under

Order 30, Rules 6 and 7 of the Code.A decree against a firm can be executed (i) against the property of the partnership, (ii) against any person who has appeared in the suit individually in his own name and

has been served with a notice under Rule 6 or 7 of Order XXX of C.P.C., (iii) against a person who has admitted on the pleadings that he is or has been adjudged a partner, or (iv) against any person who has been served with notice individually as a partner but has failed to appear. The decree against the firm can be executed against the personal property of such persons. *Topanmal Chhotamal v. M/s Kundomal Gangaram and others,* AIR 1960 SC 388

Order 21, Rule 50.-Execution of decree .-Decree against the firm.- Decree holder may execute decree against any person who has been served with the summons as a partner irrespective of fact whether such person appears in suit or failed to appear. *Gajendra Narain Singh v. Johrimal Prahlad Rai,* AIR 1964 SC 581: 1964(1) Andh WR (SC) 1: 1964 BLJR 396: 1964(1) MadLJ (SC) 1: 1963 Supp (2) SCR 30

Order 21, Rule 50(2).-Scope and object of.-The provision merely entitles a person to prove that he was not a partner of the firm at the relevant time and that the decree is the result of collusion and fraud etc. .-It does not entitle him to reopen the decree. Order 21, Rule 50(2) of the Code deals with executions, but really is a part of the provisions relating to suits against firms. Those provisions are contained in Order 30 of the Code, and must be viewed alongside to get the true meaning of the words. Order 30 of the Code permits suits to be brought against firms. The summons may be issued against the firm or against persons who are alleged to be partners individually. The suit, however, proceeds only against the firm. Any person who is summoned can appear, and prove that he is not a partner and never was; but if he raises that defence, he cannot defend the firm, Persons who admit that they are partners may defend the firm, take as many pleas as they like but not enter upon issues between themselves. When the decree is passed, it is against the firm. Such a decree is capable of being executed against the property of the partnership and also against two classes of persons individually. They are (1) persons who appeared in answer to summons served on them as partners and either admitted that they were partners or were found to be so, and (2) persons who were summoned as partners but stayed away. The decree can also be executed against persons who were not summoned in the suit as partners, but Rule 50(2) of Order 21 gives them an opportunity of showing cause and the plaintiff must prove their liability. This enquiry does not entitle the person summoned to reopen the decree. He can only prove that he was not a partner, and in a proper case, that the decree is the result of collusion, fraud or the like. But, he cannot claim to have other matters tried, so to speak, between himself and his other partners. Once he admits that he is a partner and has no special defence of collusion, fraud, etc. the Court must give leave forthwith. The widest meaning cannot be attributed to the word liability. The proper meaning thus is that primarily the question to try would be whether the person against whom the decree is sought to be executed was a partner of the firm when the cause of action accrued, but he may question the decree on the ground of collusion, fraud or the like but so as not to have the suit tried over again or to raise issues between himself and his other partners. It is to be remembered that the leave that is sought is in respect of execution against the personal property of such partner and the leave that is granted or refused affects only such property and not the property of the firm. Ordinarily, when the person summoned admits that he is a partner, leave would be granted, unless be alleges collusion, fraud or the like. *Gambhir Mal Pandiya v. J.K. Jute Mills Co. Ltd., Kanpur and another,* AIR 1963 SC 243: 1963(1) Andh LT 286: 1963(2) SCR 190.

Order 21, Rule 52.-Attachment of debt.-Allocation in State budget in favour of co-operative society ripening into a debt when an order of its payment is made.-Attachment of such allocation is valid under the provision. Attachment of debts is a process by means of which a judgment-creditor is enabled to reach money due to the judgment-debtor which is in the hands of a third person. These are garnishee proceedings. To be capable of attach- ment, there must be in existence at the date when the attachment becomes operative something which the law recognises as a debt. So long as there is a debt in existence, it is not necessary that it should be imme-diately payable. Where any existing debt is payable by future instalments, the garnishee order may be made to become operative as and when each instalment becomes due. The debt must be one which the judgment-debtor could himself enforce for his own benefit. A debt is a sum of money which is now payable or will become payable in the future by reason of present obligation. In the present case, the letter dated 12 June, 1959 proves that there is an obligation to pay the specified sum of Rs. 4,50,000/- to the Co-operative Society. The budget provision fastened on to the claim of the Co-operative Society against the State and it ripened into a debt payable to the Coperative Society. Therefore, in the circumstances, the attachment levied by the City Civil Court was perfected by bringing money to the Court. *The Hyderabad Co-operative Commercial Corporation Ltd. v. Syed Mohiuddin Khadir (dead) by L.Rs.,* AIR 1975 SC 2254: 1975(2) SCC 6624: 1976(1) SCR 159

Order 21, Rule 52.-Non-compliance .-Effect of.-Attachment without notice to the court or public officer in whose custody the property was entrusted.-Sale without such notice is not void *ab initio.* *Kanhaiyalal v. Dr. D.R. Banaji and others,* AIR 1958 SC 725: 1958 MPLJ 477: 1958 Nag LJ 404: 1958 SCJ 891: 1959 SCR 333

Order 21, Rule 57.-Attachment of property.-Dismissal of execution in default.-Restoration of execution.- The attachment order does not come to an end. Even if a doubt were to be entertained as to whether an order for restoration of the suit or execution application would have the effect of restoring the attachment retrospectively so as to affect alienations made during the period between dismissal of the

suit or execution application and the order directing restoration it is clear that an order directing restoration would certainly restore or revive the attachment for the period during which it was in subsistence, namely, prior to the dismissal of the suit or execution application. In our view, the Division Bench of the Calcutta High Court was in error in taking the view, in the judgment appealed against, that by reason of the dismissal of the said Title Execution Case, the attachment came to an end and the order of restoration of the said case would not affect any alienation made before the restoration although such alienations might have been during the subsistence of the attachment. *Nancy John Lyndon v. Prabhati Lal Chowdhry and others,* AIR 1987 SC 2061: 1987(4) SCC 78: 1987(3) SCR 1038: 1987(2) Scale 413: 1987(3) J.T. 366: 1987(2) Land LR 548

Order 21, Rule 57.-Difficulty in execution.-Options available to the executing Court.-The Court may either adjourn the execution proceedings or may dismiss the application in case of difficulty in execution. The rule leaves three courses open to the executing Court in case it finds it difficult to proceed with the execution case by reason of the default of the decree-holder. It may (1) adjourn the proceedings for good reason which will automatically keep the attachment alive or (2) simply dismiss the application which will automatically destroy the attachment or (3) dismiss the application but specifically keep alive the attachment by an express order. The rule, as amended, therefore, contem- plates three distinct forms of order, any one of which may be made by the Court in the circumstances mentioned in the rule. The amendment which added the words unless the Court shall make an order to the contrary at the end of the Rule envisages a dismissal of an application for execution while at the same time continuing a subsisting attachment. The dismissal of 30-1-1937 must, therefore, be taken to be a dismissal of the execution *application* then before the Court and cannot be taken, to have any wider operation. On the other hand the continuance, in express terms, of the attachment notwithstanding the dismissal, indicates that the *proceeding* which had resulted in the attachment was kept alive to be carried forward lateron by sale of the attached property. Attachment itself is a proceeding in execution and, so long as it subsists, the *proceeding* in execution can well be regarded as pending. *Pashupatinath Malia and another v. Deba Prosanna Mukherjee,* AIR 1951 SC 447: 1951 SCJ 506: 1951 SCR 572

Order 21, Rule 58.-Objection to attachment.-*Locus standi*.-right of prior mortgagee.-The mortgagee not in actual or constructive possession of property.-Such simple mortgagee cannot have any objection to the attachment of equity of redemption of the mortgagor. *Kabidi Venku Sah v. Syed Abdul Hai and another,* AIR 1984 SC 117: 1983(4) SCC 570: 1984(1) SCR 112: 1983(2) Scale 1054: 1984 Guj LH 22

Order 21, Rules 58 and 63.-*Res judicata*.-Application of.-The order passed in claim proceedings operate as bar to the suit for the limited purpose of Rule 63.-The principle of *res judicata* has no application. A claim proceeding under Rule 58 is not a suit or a proceeding analogous to a suit. An order in the claim proceeding does not operate as res judicata. it is because of Rule 63 that the order becomes conclusive. The effect of Rule 63 is that unless a suit is brought as provided by the rule the party against whom the order in the claim proceeding is made or any person claiming through him cannot re-agitate in any other suit or proceeding against the other party or any person claiming through him the question whether the property was or was not liable to attachment and sale in execution of the decree out of which the claim proceeding arose, but the bar of Rule 63 extends no further. *Mangru Mahto and others v. Thakur Taraknathji Tarkeshwar Math and others,* AIR 1967 SC 1390: 1968 All LJ 417: 1968 BLJR 322: 1968 MPWR 326: 1967(3) SCR 125

Order 21, Rules 61 and 90.-Set-aside of sale.-Effect of legal amendment.-Necessity to prove material irregularity or fraud in case of inadequacy in price. Rule 90 of Order XXI of the Code, as amended by the Allahabad High Court, *inter alia*, provides that no sale shall be set aside on the ground of irregularity or even fraud unless upon the facts proved the Court is satisfied that the applicant has sustained injury by reason of such irregularity or fraud. Mere proof of a material irregularity such as the one under Rule 69 and inadequacy of price realised in such a sale, in other words injury, it, therefore, not sufficient. What has to be established is that there was not only inadequacy was caused by reason of the material irregularity or fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity. *Radhy Shyam v. Shyam Behari Singh,* AIR 1971 SC 2337: 1971(1) SCR 783: 1970(2) SCC 405

Order 21, Rule 63.-Auction sale in execution of decree.-Suit seeking to set aside sale.-Execution against joint family property in execution of decree against a member of family.-Decree not binding on other members.-Suit for restitution of property is maintainable. Once the decree which was the subject matter of execution was declared to be not binding on the plaintiffs, Mohanlal and his mother Bhuli Bai, the execution sale would not bind them and as a result they become entitled to restitution. The decree does admittedly contain a direction for restitution. Therefore, it is not a mere declaratory decree but coupled with a decree for restitution of the plaint scheduled house. Accordingly, the decree is executable. *Bhanwar Lal v. Smt. Prem Lata and others,* AIR 1990 SC 623: 1990(1) SCC 353: 1990(1) SCR 25: 1990 (1) J.T. 26

Order 21, Rule 63.-Fictitious documents.-Pleading of.-The burden of proving such document is heavy on the plaintiff seeking to set aside an order passed on the basis of such documents.-The

burden is doubly heavier on the plaintiff seeking to set aside order passed in execution proceedings. The burden of proof is heavy on a plaintiff who sues for a declaration of a document solemnly executed and registered, as a fictitious transaction. The burden becomes doubly heavy when the plaintiff seeks to set aside the order of the civil court, passed in execution proceedings, upholding the claim of a third party to a property sought to be proceeded against in execution. The plaintiff, who seeks to get rid of the effect of the adverse order against him, has to show affirmatively that the order passed on due inquiry by the executing court, was erroneous. *Paras Nath Thakur v. Smt. Mohani Dasi (deceased) and others,* AIR 1959 SC 1204: 26 Cut LT 1: 1959 Supp (2) SCR_271

Order 21, Rule 63.-Fraud and coercion.-Effect of.-Circumstances indicating collusion with creditor forming the basis of fictitious award.-Suit challenging the sale of property on the basis of award, rightly disallowed. *Thakur Dongar Singh v. Dr. Ladli Prasad Bhargava,* AIR 1974 SC 598: 1973(2) SCC 263

Order 21, Rule 63.-Notice to Government.-Necessity of. The argument that the present suit is outside the purview of Section 80 of the Code because it is a continuation of the attachment proceedings must be rejected. We ought to bear in mind that the scope of the enquiry under Order 21, Rule 58 is very limited and is confined to question of possession as therein indicated while suit brought under Order 21 Rule 68 would be concerned not only with the question of possession, but also with the question of title. Thus the scope of the suit is very different from and wider than that of the different from and wider than that of the investigation under Order 21 Rule 58. In fact, it is the order made in the said investigation that is the cause of action of the suit under Order 21, Rule 63. Therefore, it would be impossible to hold that such a suit is outside the purview of Section 80 of the Code. They also proceeded on the basis that Section 80 was a rule of procedure and that any construction which may lead to unjustice is one which ought not to be adopted, since it would be repugnant to the notion of Justice. Having noticed these grounds on which an attempt was judicially made to except from the purview of Section 80 suits, for instance, in which injunction was claimed Viscount Summer, who spoke for the Privy Council, observed that the Act. albeit a Procedure Code, must be read in accordance with the natural meaning of its words and he added that section 80 is express, explicit and mandatory, and it admits of no implications or eceptions. That is why it was held that a suit in which an injunction is proved, is still a suit within the words of the section, and to read any qualification into it is in encroachment on the function of legislation. In our opinion, these observations apply with equal force in dealing with the question as to whether a suit under Order 21, Rule 63 is outside the purview of Section 80 of the Code. *Sawai Singhai Nirmal Chand v. The Union of India,* AIR 1966 SC 1068: 1966 Jab LJ 509: 1966 Mah LJ 371.: 1966(2) SCR 986

Order 21, Rule 64.-Auction sale .-Sufficient portion of property required for satisfaction of decree, not determined.-All property included in sale.-Auction sale is illegal. *Lal Chand v. VIII Addl. District Judge and others,* AIR 1997 SC 2106: 1997(4) SCC 356: 1997(2) Scale 475: 1997(3) JT 767: 1997 All LJ 1170: 1997(2) Land LR 177

Order 21, Rule 64.-Execution of decree.-Inseparable decree in favour of joint decree-holders.- Order for delivery of possession and possession taken by decree-holders.- Challenge to the order of delivery of possession without impleading one decree-holder.-The order attained finality against one of the decree- holders.-The decree being inseparable the order cannot be reversed against the remaining decree holders. *Rajeshwari Amma and another v. Joseph and another,* AIR 1995 SC 719: 1995(2) SCC 159: 1995(1) Scale 149

Order 21, Rule 64.-Sale for satisfaction of decree.-Duty to determine necessity of sale.-When the decree stand satisfied by sale of a part of property, sale beyond the necessary amount is not permissible.-Acquiescence of Judgement Debtor is of no consequence. When the amount as specified in the sale proclamation was fully satisfied by the sale of the properties in village Devanoor, the Court should have stopped the sale of further items of the properties. It is manifest that where the amount specified in the proclamation of sale for the recovery of which the sale was ordered is realised by sale of certain items, the sale of further items should be stopped. This, in our opinion, is the logical corollary which flows from Order 21, Rule 64 of the Code. Executing Court derives jurisdiction to sell properties attached only to the point at which the decree is fully satisfied. The words necessary to satisfy the decree clearly indicate that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. In other words where the sale fetches a price equal to or higher than the amount mentioned in the sale proclamation and is sufficient to satisfy the decree, no further sale should be held and the Court should stop at that stage. The fact that the judgment-debtor did not raise an objection on this ground before the Executing Court is not sufficient to put him out of Court because this was a matter which went to the very root of the jurisdiction of the Executing Court to sell the properties and the non-compliance with the provisions of Order 21, Rule 64 of the Code was sufficient to vitiate the same so far as the properties situated in village Gudipadu were concerned. *Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma and others,* AIR 1977 SC 1789: 1977(3) SCC 337: 1977(3) SCR 692

Order 21, Rules 64 and 65.-Auction sale.-*Bona fide* transfer of property .-Property of deceased judgment debtor transferred by legal heirs without knowledge of execution and prior to appointment of receiver.- Subsequent auction sale of properties held to be not valid. *Amiya Prosad*

Sanyal and another v. Bank of Commerce Limited (in liquidation) and others, AIR 1996 SC 1762: 1996(7) SCC 167: 1996(1) Scale 171: 1996(1) JT 148: 1996 BLJR 1174

Order 21, Rule 66.-Auction sale.- Procedure.-Adjournment of bidding.-Objections to sale on the ground that no adjournment was made.-Non of the bidders who appeared at earlier auction, participating in second auction.-The adjournment of bidding cannot be believed.-The requirement of rule not met.-Sale set-aside. The court has a duty to see that the requirements of Order XXI, Rule 66 are properly complied with. In the words of the Judicial Committee, In sales under the direction of the court, it is incumbent on the court to be scrupulous in the extreme. Though it may not be necessary for the court to make a valuation and enter it in the sales proclamation in every case, it is desirable at least in cases of sale of valuable property that the court make its valuation and enter it in the sale proclamation. The judgment-debtors put the action purchaser on notice of their case in their objections to the sale. They adduced evidence in support of their case. It was the duty of the auction purchaser to adduce the best evidence in support of his case by examining the auctioneer. He refrained from doing so. In those circumstances it was not open to the courts below to rely upon the note made by the auctioneer in the bid list when the substance of the note was itself under challenge. In addition, we have already mentioned the other outstanding circumstance of the case that not one of the eight bidders who participated in the auction on August 29, 1977 was present at the auction on September 1, 1977. We are led to irrestible conclusion that no announce- ment was made on August 29, 1977 that the auction would be continued on September 1, 1977. We are also satisfied that the price of Rs. 4,37,000/- for a 28/48 share of a cinema in New Delhi standing on land of the extent of 500 sq. yard can hardly be considered an adequate price. *M/s. Shalimar Cinema v. Bhasin Film Corporation and another,* AIR 1987 SC 2081: 1987(4) SCC 717: 1987(2) Scale 356: 1987(3) J.T. 362: 1987(2) Land LR 565

Order 21, Rule 66.-Auction sale.- Upset price.-Necessity to fix.-It is the duty of executing court to fix the upset price itself.-Delegation of power to Commissioner, not proper. It is the function of the Court, while proclamation is drawn up to fix the amount of the recovery for which the sale is ordered and also to specify such other particulars as are necessary in that behalf to be material for the purpose of conducting the sale. It is seen that the executing Court appears to have given direction to the Commissioner not only to conduct the sale but also to fix the upset price at Rs. 70,000/-. In that view, there is no infraction of the mandatory language contained in Order XXI, Rule 66, CPC as the Commissioner had fixed the upset price not on his own but on the direction of the Court itself. *M.L. Mubarak Basha and others v. Muni Naidu,* AIR 1997 SC 938: 1997(4) SCC 153: 1997(1) Scale 307: 1997(1) JT 468: 1997(2) APLJ 5: 1997(2) Mad LJ 44

Order 21, Rule 66.-Proclamation of sale.-Valuation of property.- Failure to make independent estimate of sale price.-It constitutes material irregularity. The Court, when stating the estimatd value of the property to be sold, must not accept merely the ipse dixit of one side. It is certainly not necessary for it to state its own estimate. If this were required, it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation which may confuse bidders. It may also be quite misleading if the Court's estimate is erroneous. Moreover, Rule 66(2)(e) requires the Court to state only the facts it considers material for a purchaser to judge the value and nature of the property himself. Hence, the purchaser should be left to judge the value for himself. But essential facts which have a bearing on the very material question of value of the property and which would assist the purchaser in forming his own opinion must be stated. That is, after all, the whole object of Order 21, Rule 66(2)(e), Civil Procedure Code. The Court has only to decide what all these material particulars are in each case. In the case before us, the execution Court had practically accepted, as its own valuation, without indicating reasonable grounds for this preference, whatever the decree holders had asserted about the value of the property. It did not bother to seriously even consider the objections of the judgment-debtors. We think that the duty to consider what particulars should be inserted in the sale proclamation and how the sale ought to be conducted should be performed judicially and reasonably. If the execution Court does not, as it did not in the case before us, apply its mind or give any consideration whatsoever to the objections of the judgment- debtor, we think a material irregularity would be committed by the execution Court. *Gajadhar Prasad v. Babu Bhakta Ratan,* AIR 1973 SC 2593: 1973(2) SCWR 289: 1974(1) SCR 372: 1973(2) SCC 629

Order 21, Rule 67.-Auction sale.- Publication of.-Sale conducted without proper notice is illegal. *Lal Chand v. VIII Addl. District Judge and others,* AIR 1997 SC 2106: 1997(4) SCC 356: 1997(2) Scale 475: 1997(3) JT 767: 1997 All LJ 1170: 1997(2) Land LR 177

Order 21, Rule 71.-Deficiency in price.-Liability of auction purchaser.-Sale deficiency occurring on account of the re-sale of property.-Re-sale must be on account of the default of auction purchaser. Its application is limited to cases in which the deficiency of price has occurred by reason of the auction purchaser's default. Property once put to sale in execution proceedings may have to be resold for reasons which may or may not be connected with the default of the auction purchaser. A re-sale consequent on the failure of the auction purchaser to deposit 25% of the purchase price immediately after he is declared to be the purchaser of the property or a re-sale consequent upon his failure to deposit the balance of the purchase price within 15 days of the sale are instances when the resale is occasioned by the default of the

auction purchaser. On the other hand, re-sale consequent upon the setting aside of the sale on the ground of material irregularity in publishing or conducting the sale as provided in Order XXI, Rule 90, may not be attributable to the default of the purchaser. The provisions of Order XXI, Rule 71, come into play only if the property is required to be re-sold on account of the default of the auction purchaser. If the re-sale is not due to the auction purchaser's default, there can be no question of mulcting him with the deficiency in the price realised in the re-sale. *Gopal Krishan Das v. Sailendra Nath Biswas and another,* AIR 1975 SC 1290: 1975 (1) SCC 815: 1975(1) APLJ (SC) 28: 1975(1) SCWR 426: 1975(3) SCR 726

Order 21, Rule 72.-Auction sale.- Bidding by decree holder.-Leave of court.-Necessity of.-Bidding by decree holder without obtaining prior permission of the court is violative of provision. *Lal Chand v. VIII Addl. District Judge and others,* AIR 1997 SC 2106: 1997(4) SCC 356: 1997(2) Scale 475: 1997(3) JT 367: 1997 All LJ 1170: 1997(2) Land LR 177

Order 21, Rules 72, 92 and 94.-Set aside of sale.-Affect on auction pur- chaser.-Where the auction pur- chaser is the decree holder himself he is not entitled to any protection. Ordinarily, if the auction purchaser is an outsider or a stranger and if the execution of the decree was not stayed of which he may have assured himself by appropriate enquiry, the court auction held and sale confirmed and resultant sale certificate having been issued would protect him even if the decree in execution of which the auction sale has been held is set aside. This proceeds, on the footing that the equity in favour of the stranger should be protected and the situation is occasionally reached on account of default on the part of the judgement debtor not obtaining stay of the execution of the decree during the pendency of the appeal. But what happens if the auction- purchasser is the decree holder himself? In our opinion, the situation would materially alter and this decree holder.-auction purchaser should not be entitled to any protection. *Sardar Govindrao Mahadik and another v. Devi Sahai and others,* AIR 1982 SC 989: 1982(1) SCC 237: 1982(2) SCR 186: 1982(1) Scale 191

Order 21, Rule 77.-Auction sale.- Procedure.-Sale of movable pro- perty.-The officer conducting the sale has power to grant time to pay the price.-The auction sale cannot be faulted on the ground that full payment was not deposited at the fall of the hammer. *Seth Banarsi Dass (dead) by LRs. v. District Magistrate and Collector, Meerut and others,* AIR 1996 SC 2311: 1996(2) SCC 689: 1996(1) Scale 740: 1996(3) JT 1: 1996 RD 397

Order 21, Rules 84 and 85.-Compliance of.-Necessity of.-Deposit not made in accordance with the provision of rules.-Sale is rendered void and not merely irregular. *Gangabai Gopaldas Mohata v. Fulchand and others,* AIR 1997 SC 1812: 1997(1) Scale 1: 1997(1) JT 343: 1997(10) SCC 387: 1997(2) All. WC 930: 1997(2) Mah. LJ 561

Order 21, Rules 84, 85 and 86.-Auction purchase.-Non- deposit.-Effect of.-Failure to make deposit of 25% of purchase money by the stranger purchaser.-No sale comes into existence. The provisions of the rules requiring the deposit of 25 per cent of the purchase money immediately, on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non- compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contem- plation of these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the court is bound to re-sell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all. *Manilal Mohanlal Shah and others v. Sardar Ahmed Sayed Mahmad and another,* AIR 1954 SC 349: 1954 SCJ 509: 1955(1) SCR 108

Order 21, Rules 84, 85 and 86.- Auction sale.-Deposit of consi- deration.-Necessity in case of purchase by the decree-holder.- Though the decree-holder entitled to advantage of set off, the compliance of Rule 85 to deposit full consideration is mandatory.-The executing Court has no inherent power to extend the time to make deposit.-Auction sale held to be void due to non-compliance of provision. *Balram son of Bhasa Ram v. Ilam Singh and others,* AIR 1996 SC 2781: 1996(5) SCC 705: 1996(6) Scale 133: 1996(7) JT 423: 1996 All LJ 1811

Order 21, Rules 84, 85 and 86.- Compliance of.-Necessity of.-The provision is mandatory and non-compliance renders the sale invalid. *Manilal Mohanlal Shah and others v. Sardar Ahmed Sayed Mahmad and another,* AIR 1954 SC 349

Order 21, Rules 84, 85 and 90.- Setting aside of auction sale.-Nature of orders.-It is not an interlocutory order but is a final order in the nature of decree. Under Section 2(2) of the Code a decree is deemed to include the determination of any question falling within Section 47. An execution pro-ceeding no doubt is not a suit but the combined effect of Section 2(2) and Section 47 is that an order passed in execution proceeding is tantamount to a decree in so far as regards the Court passing it if conclusively determines the question arising between the parties to the suit (which expression now includes an auction purchaser) and relating to the execution of the decree. Therefore, if an order decides a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree

it would fall under Section 47 and would be a decree within the meaning of Section 2(2). iI such an order is a decree it is appealable under Section 96 of the Code. The order setting aside the auction sale amounts to a final decision relating to the rights of the parties in dispute in that particular civil proceeding, such a proceeding being one in which the rights and liabilities of the parties arising from the auction sale are in dispute and wherein they are finally determined by the Court passing the order setting it aside. The parties in such a case are only the judgment- debtor and the auction-purchaser the only issue between them for determination being whether the auction sale is liable to be set aside. There is an end of that matter when the Court passes the order and that order is final as it finally determines the rights and liabilities of the parties, *viz.,* the judgment debtor and the auction-purchaser in regard to that sale, as after that order nothing remains to be determined as between them. *M/s. Ram Chand Spg. v. Wvg. Mills M/s. Bijli Cotton Mills (P) Ltd., Hathras and others,* AIR 1967 SC 1344: 1967 All LJ 449: 1969 BLJR 427: 1967(2) SCR 301

Order 21, Rules 88, 89, 90 and 92.- Auction sale.-Confirmation of.- Recovery of arrears of tax.- Repeated opportunities given to individual co-owners to purchase their respective share under sale of joint family property.-Opportunity not availed.-Order confirming sale, affirmed. On the earlier occasion, the executing Court had unsuccessfully limited the sale *inter se* between the parties. This Court in the first round of the present litigation, by several orders tried to save the estate but the same proved fruitless. This Court had on the second occasion, directed to consider whether or not confirmation of sale would be made. This Court had gone into that question. Even the tax liability was one of the issues raised in this case by some of the judgment-debtors and this Court had not agreed with the contention that there was no liability subsisting towards arrears of the tax. Considered from this backdrop, viz., the nature of the litigation which has been going on and several opportunities given by this Court to have the matter settled by negotiation by way of sale between the parties to reach an amicable settlement, having rendered futile, we do not think it is a fit case warranting interference. We do not find any procedural infraction. Otherwise, no court sale would successfully be proceeded with in execution. *Janaki S. Menon and others v. Dr. V.R.S. Krishnan and others,* AIR 1997 SC 1894: 1997(2) SCC 623: 1996(8) Scale 1: 1996(10) JT 15: 1997(1) Bank Cas 135

Order 21, Rule 89.-Application of.-Sale by Receiver.-The provision enabling a person to seek set-aside of sale, has no application. Where the Court appoints a receiver and gives him liberty to sell the property the receiver may either sell the property and thereby realsie the money for the satisfaction of the decree, or he may, even without selling the property, seek to satisfy the decree by the collection of rents due from the property or other ways open to him under the law. In such a case it is difficult to hold that by the very appointment of the receiver clothing him with the power to seel the property if he thought it necessary to do so, the court has ordered the sale of the said property within the meaning of Order 21, R. 82, If the provisions of R. 66 of Order 21 are inapplicable to sales held by receivers it is obvious that the second condition prescribed by R. 89(1)(b) is equally inapplicable and it is undoubtedly one of the two essential conditions for the successful pro- secution of an application under the said rule. In our opinion this fact clearly emphasises the inapplicability of the whole rule to sales held by receivers. *Jibon Krishna Mukherjee and another v. New Beerbhum Coal Co. Ltd.,* AIR 1960 SC 297: (1960) 1 Andh WR (SC) 96: (1960) 1 Mad LJ (SC) 96: (1960) 2 SCR 198

Order 21, Rule 89.-Auction sale.- Setting aside of.-Pendency of objection under Section 47 on grounds covered by Rule 90.-Application under Rule 89 is not barred. 1858 It has been pointed out that some of the grounds of the objections set out in the said application under Section 47 are such as are not covered by Order 21, Rule 90 of the said Code. This is clear from a perusal of the said objections and the provisions of Rule 90 of Order 21 of the said Code. In these circumstances, in our opinion the learned Civil Judge and the High Court were not justified in treating the said application under Section 47 of the said Code as an application under Order 21, Rule 90 thereof. Hence the bar prescribed under sub-rule (2) of Order 21, Rule 89 did not come into play at all. Merely on the reason of the pendency of the objections under Section 47 of the said Code it could not be said that the application under Order 21, Rule 89 of the said Code was necessary barred. *Mangal Prasad (dead) by LRs. and another v. Krishna Kumar Maheshwari and others,* AIR 1992 SC 1857: 1992 Supp (3) SCC 31

Order 21, Rule 89.-Cancellation of sale.-Considerations for.-Sale in execution of money decree cannot be set aside on mere deposit of 5% of consideration amount, by the judg- ment debtor. By abandoning the execution proceeding the claim of the creditor is not extinguished: he is entitled to commence fresh proceedings for sale of the property. Rule 89 of Order 21 is intended to confer a right upon the judgment-debtor, even after the property is sold, to satisfy the claim of the decree-holder and to compensate the auction purchaser by paying him 5% of the purchase-money. The provision is not intended to defeat the claim of the auction purchaser, unless the decree is simultaneously satisfied. When the Judgment creditor agrees to extend the time for payment of the amount due for a specified period and in the meanwhile agrees to receive interest accruing due on the amount of the decree, the condition requiring the Judgment debtor to deposit in Court for payment to the decree-holder the amount specified in the proclamation of sale for the recovery of which the sale was ordered cannot be deemed to be complied with. An order setting aside a court sale in execution of a mortgage decree cannot be obtained,

under Order 21, Rule 89 of the Code of Civil Procedure by merely depositing 5% of the purchase- money for payment to the auction purchaser and persuading the decree- holder to abandon the execution proceeding. *Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel and others,* AIR 1968 SC 372: 70 Bom LR 73: 9 Guj LR 212: 1968(1) SCR 455

Order 21, Rule 89.-Satisfaction of decree.-Postponement of execution .-Decree passed against the trust.- The Scheme of management of trust under formulation before the Court .-Decree holder postponing the execution on the ground that Court will make provision for satisfaction of decree in the scheme proposed to be formulated by it.-Decree cannot be said to have extinguished. It was anticipated that the Court would be in a position to make a provision for the discharge of the decretal debt. The decree was kept alive and not touched upon in any manner much less extinguished. The decree-holder was prepared to stay his hands in case satisfactory provision for payment of his dues was made in the suit. There was no adjustment of the decree which could be recorded under the provisions of Order XXI, Rule 2; neither had the decree been satisfied. _ *Solasa Ramachandra Rao and others v. Maddi Kutumba Rao and another,* AIR 1967 SC 1637: 1968 (1) Andh WR (SC) 66: 1968 (1) Mad LJ (SC) 66: 1967(3) SCR 703

Order 21, Rules 89 and 90.-Auction sale .-Confirma-tion of.-Illegality in sale.-Confirmation of lower price ignoring higher offers.-Manifest illegality in conducting the sale.- Confirmation of sale set aside. *Nani Gopal Paul v. T. Prasad Singh and others,* AIR 1995 SC 1971: 1995(3) SCC 579: 1995(2) Scale 544: 1995(3) JT 387

Order 21, Rules 89 and 92.- Confirmation of Sale.-Set-aside of decree.-Effect on sale. The appellant-auction purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale the decree had been set aside. The policy of the Legislature seems to be that unless a stranger auction purchaser is protected against the vicissitudes of the fortunes of the suit sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified. The Code of Civil Procedure of 1908 makes ample provision for the protection of the interest of the judgment-debtor who feels that the decree ought not to have been passed against him. On the facts of this case, it is difficult to see why the judgment-debtor did not take resort to the provisions of Order XXI, Rule 89. The decree was for a small amount and he could have easily deposited the decretal amount besides 5 per cent of the purchase money and thus have the sale set aside. For reasons which are not known to us he did not do so. *Janak Raj v. Gurdial Singh and another,* AIR 1967 SC 608: 1967 All LJ 524: 1967 BLJR 639: 1967(2) SCR 77

Order 21, Rules 89 and 90.-Decree against lunatic.-Guardian of lunatic not appointed.-The decree is nullity and sale of property in execution of such decree is void *ab initio.* *Ram Chandra Arya v. Man Singh and another,* AIR 1968 SC 954: 1968 All WR (HC) 626: 1968(2) SCR 572

Order 21, Rules 89 and 90.-Simul- taneous application.-Permissibility .- Withdrawal of application under rule 90 after filing of application seeking confirmation of sale.- Permissibility. The words used in the sub-rule are make or prosecute. If it were to be held that the applicant is not entitled merely to prosecute his application under Rule 89 unless he withdraws his application under Rule 90, then the word make would become redundant. In order to bring about the true intention of the Legislature, effect must be given to both the words. If a person has first applied under Rule 90 to set aside the sale, then, unless he withdraws his application, he is not entitled to make and prosecute an application under Rule 89. The application even if made will the deemed to have been made only on withdrawal of the previous application. If, however, a person has filed an application under Rule 89 first and thereafter another application under Rule 90, he will not be allowed to prosecute the former unless he withdrew the latter. The applicant merely has to convey to the Court that he is withdrawing his application under Rule 90 which he had filed prior to the making of the application under Rule 89. Thereupon he becomes entitled a make the latter application. Every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw the application. The Court may make a formal order disposing of the application as withdrawn but the withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as the applicant intimates the Court that he withdrawas the application. *Shiv Prasad v. Durga Prasad and another,* AIR 1975 SC 957: 1975(1) SCC 405: 1975(3) SCR 526

Order 21, Rules 89, 90 and 91.- Execution of decree.-*Res judicata*.- Application of principles of construc- tive *res judicata*.-Execution of decree barred in terms of Constitution (Schedule Tribes) Order 1950.- Failure to raise the objection during execution proceedings does not bar the objection seeking to set aside sale of property. *Raghunath Pradhani v. Damodra Mahapatra and others,* AIR 1978 SC 1820: 1979(1) SCC 508: 1979(2) SCR 196

Order 21, Rules 89 and 92.-Auction sale set aside of.-Limitation.- Deposit of decretal amount with 5 per cent of purchase money by the judgment debtor.-Application for setting aside.-Sale made within 60 days.-The sale was liable to be set aside. *Basavantappa v. Gangadhar Narayan Dharwadkar and another,* AIR 1987 SC 53: 1986(4) SCC 273: 1986(3) SCR 734: 1986(2) Scale 431: 1986 J.T. 443: 1986 Ker. L.J. 857

Order 21, Rules 89 and 92(2).- Auction Sale.-Deposit to set aside sale.-The Article 127 of Limitation Act, 1963 providing limitation for 60 days has no application.-The limitation as provided under the rule is of 30 days. Rule 89 postulates an application on deposit. It says may apply to have the sale set aside on his depositing in Court. These words show that deposit is a condition precedent to the making of an application to set aside a sale. That condition must be satisfied within the period prescribed by sub-rule (2) of Rule 92, which undoubtedly is 30 days. Parliament refused to alter that provision even when a part of the sub-rule was substituted. There is no inconsistency between the two sets of provisions prescribing different periods of limitation. Such inconsistency can arise only if obedience of one provision will result in disobedience of the other. While Rule 92(2) requires a deposit to be made within 30 days from the date of sale, Article 127 requires an application contempleted under Rule 89 to be made within 60 days from the date of sale. The deposit must necessarily precede the application for no application under Rule 89 can be made except on depositing the amount in Court. We see no imconsistency in these two sets of provisions. *P.K. Unni v. Nirmala Industries and others,* AIR 1990 SC 933: 1990(2) SCC 378: 1990(1) SCR 483: 1990(1) JT 423

Order 21, Rule 90.-Challenge to auction sale.-Requirement of pre- deposit.-Effect of local amendment conferring discretion on the court to dispense with the requirement of pre- deposit of twelve and half per cent of amount of sale.-Compliance with condition at appellate stage.-Permissibility. Clause (b) of the proviso confers on court considerable discretion. It is left to the court to decide the quantum of deposit to be made subject to the maximum prescribed therein. The court is also conferred with the power to dispense with the requirements of making a deposit, for reasons to be recorded. From the language of the proviso, it is clear that the power conferred on the court is a discretionary power. It is expected that the court would ordinarily give an opportunity to the applicant to comply with Clause (b) of the proviso and could reject the application if the same were still not complied with. That should be particularly so in an application made before Clause (b) was incorporated into the proviso. As seen earlier before the executing court all the parties had proceeded on the basis that the clause in question did not apply to the present proceedings. Under the circumstances, we are of the opinion, that in the interest of justice the High Court should have remanded the case to the executing court leaving it to that court to exercise its discretion under Cl. (b). *Hindustan Commercial Bank Ltd. v. Punnu Shau (dead) through legal representatives,* AIR 1970 SC 1384: 1971(3) SCC 124

Order 21, Rule 90.-Material irregularities.-Lack of jurisdiction .-Acquiescence.-Failure to challenge the jurisdiction of the court executing the decree.-The judgment debtor cannot raise the plea of lack of jurisdiction after the sale of property in execution. Error! Bookmark not defined. *Mohanlal Goenka v. Benoy Kishna Mukherjee and others,* AIR 1953 SC 65: 1953 SCJ 130: 1953 SCR 377

Order 21, Rule 90.-Material irregularities.-Scope of.-Failure to send a copy of the decree or the certificate referred under Rule 6(2)(b) does not amount to material irregularity so as to entitle setting aside of sale in execution of decree. *Mohanlal Goenka v. Benoy Kishna Mukherjee and others,* AIR 1953 SC 65: 1953 SCJ 130: 1953 SCR 377

Order 21, Rule 90.-Sale in execution.-Material irregularity.- Under declaration of price cannot demolish the value of sale.-In the instant case court accepted highest value after inviting well known industries in public and private.- Sale affirmed. *M/s. Kayjay Industries (P) Ltd. v. M/s. Asnew Drums (P) Ltd. and others,* AIR 1974 SC 1331: 1974(2) SCC 213: 1974(3) SCR 678

Order 21, Rule 90.-Setting aside of sale.-Considera-tions for.-Necessity of pleading of fraud or irregularity and the consequence of such fraud or irregularity.-Failure to mention prior charge on property in the proclamation of sale held to be not a serious irregularity vitiating the sale. That before an application made under Order 21, Rule 90 can succeed, the applicant has to show that the impugned sale was vitiated by a material irregularity or fraud in publishing or conducting it; and as required by the proviso, it is also necessary that he should show that in consequence of the said irregularity or fraud, he had sustained substantial injury.Order 21, Rule 66(2)(c) requires that the proclamation shall be drawn up and shall specify as fairly and accurately as possible any incumbrance to which the property sought to be sold is liable. The failure to mention the charge in favour of respondent No. 1 would, therefore, constitute an irregularity within the meaning of Order 21 Rule 90(1). We do not think it can be reasonably assumed as a matter of law that in every case where a charge has become unenforceable against an auction- purchaser by reason of the fact that it was not shown in the proclamation preceding the auction sale, it follows that the charge-holder has suffered substantial injury. Whether or not the injury suffered by the charge-holder is substantial, must depend upon several relevant facts. How many properties have been sold at the auction sale, how many out of them were the subject-matter of the charge; what is the extent of the claim which the charge-holder can legitimately expect to enforce against the properties charged, these and other relevant matters must be considered before deciding whether or not the injury suffered by the charge -holder is substantial. *Laxmi Devi v. Mukand Kanwar and others,* AIR 1965 SC 834: 1965(2) Mad LJ (SC) 133: 1965(2) SCA 521: 1965(1) SCR 726

Order 21, Rule 90.-Seting aside of sale .-Injury to Judgement debtor.- Determination of.-Express pleading of substantial injury is not necessary .-Substantial injury can be inferred from the circumstances alleged in the petition. The High Court was not unjustified on the material to hold that

the application for setting aside the sale was bald and there was no proper allegation of substantial injury to the judgment debtors. Sometimes however, there may not be express allegations of substantial injury and the same may appear to be implicit from all facts and circumstances alleged. In the present case, the Trial Court as well as the first Appellate Court heard the parties and decided the case on the footing that there were allegations of substantial injury to the judgment debtors. *Putti Kondala Rao and others v. Vellamanchili Sitarattamma and another,* AIR 1976 SC 737: 1976(1) SCC 712: 1976(2) SCR 998

Order 21, Rule 90.-Setting aside of sale .-*Res judicata*.-Application of.- The earlier application rejected.- Second application is barred by *res judicata*. There can be no doubt that when an application for setting aside the sale is made, the order passed by the executing court either allowing or dismissing the application will be final and effective subject to an appeal that may be made under the provisions of the Code. It is inconceivable that even though no appeal has been filed against an order dismissing an application for setting aside the sale, another application for setting aside the sale can be made without first having the order set aside. Such an application will be barred by the principle of *res judicata*. *Ganpat Singh (dead) by LRs. v. Kailash Shankar and others,* AIR 1987 SC 1443: 1987(3) SCC 146: 1987(3) SCR 355: 1987(1) Scale 1273: 1987(2) J.T. 619: 1987(2) APLJ (SC) 32

Order 21, Rule 90 and 22.-Auction sale.-Service of execution petition.- Defect in service.-In the absence of actual proof of service reliance on order sheet for showing service of notice not proper.-Non-compliance of mandatory provision.-Sale of property effected without personal service, set aside. To say the least it was erroneous on the part of the lower appellate court to refer to the order sheets for showing service of notice on the judgment debtor as required under Order 21, Rule 22 of the Code. The proceedings for setting aside the sale under Order 21, Rule 90 of the Code were independent proceedings and the file of proceedings under Order 21, Rule 22 of the Code could not be referred to in such proceedings without actual proof of service as per the various reports of alleged service contained in proceedings under Order 21, Rule 22 of the Code. Without proof of service of notice in these proceedings, the lower appellate court could not have gone merely by order sheets of the execution file. No process-server was examined to prove service of notice under Order 21, Rule 22 of the Code.Issuing of notice under Order 21, Rule 22 was mandatory. The idea of issuing such a notice is to ascertain whether the averments as to the amount being claimed in the execution application are true or incorrect. Besides, even if the amount was due, the judgment-debtor could have paid it and he was deprived of this opportunity to clear off dues, if any, under the decree.The whole conduct of the execution proceedings at the behest of the decree-holder shows that every effort was made by decree-holder to see that the judgment-debator was kept totally ignorant of the execution proceedings right till the sale and its confirmation.In view of the aforesaid illegalities we have no hesitation in assuming substantial injustice and loss to the judgment-debtor. *Satyanarain Bajoria and another v. Ramanarain Tibrewal and another,* AIR 1994 SC 1583: 1993(4) SCC 414: 1993(3) Scale 691: 1993(5) JT 243: 1994(1) LW 214: 1994(1) BLJR 662

Order 21, Rules 90, 66 and 64.-Sale proclamation.-Form of.-Statement made in the sale proclamation made is that the decree in question was subject which charge in another suit.-Position clarified at the time of bidding that the property was not subject matter to the charge as stated in the proclamation.-Validity of sale affirmed. *Valivety Ramakrishnaiah v. Totakura Rangarao,* AIR 1986 SC 2099: 1986(4) SCC 193: 1986(2) Scale 331: 1986 JT 291

Order 21, Rules 90 and 72.-Auction sale.-Irregularity.-Absence of pre- judice.-Permission granted to decree holder not only to bid in the auction but also to bid at a price equivalent to 80 per cent of reserved price.-In the absence of substantial injury, application challenging the sale is not maintainable. *Jaswantlal Natvarlal Thakkar v. Sushilaben Manilal Dangarwala and others,* AIR 1991 SC 770: 1991 Supp (2) SCC 691: 1991(2) Land LR 354

Order 21, Rules 90 and 91.- Certificate of sale.-Construction of .-Such certificate is a document of title which ought not to be lightly regarded or loosely construed. *P. Udayani Devi v. V.V. Rajeshwara Prasad Rao and another,* AIR 1995 SC 1357: 1995(3) SCC 252: 1995(2) Scale 43: 1995(3) JT 523: 1995 Civ. CR (SC) 549

Order 21, Rule 92.-Sale in execution .-Right to challenge.-*Locus Standi* .-Sale of a joint family property.- The persons who were not born on the date of sale are also entitled to challenge it.The view taken by the district Judge that as the plaintiffs were not born on the date of the sale they cannot challenge its validity is wrong. A void sale, as we have already held the sale in execution of the decree obtained by the appellant in this case to be, confers no title on the auction purchaser and therefore, the joint family to which the properties belonged continued to be the owners of that property and did not lose their title thereto, the plaintiffs got a right to the property as soon as they were born, not by way of succession but by right of birth. Therefore, plaintiffs were certainly entitled to file a suit questioning the sale. *N.A. Krishnaiah Setty v. Gopalakrishna and others,* AIR 1974 SC 1911: 1979 (2) SCC 624: 1975(1) SCR 970

Order 21, Rules 92(1) and 58(a).- Auction sale.-Sale certificate.- Challenge by plea of benami.-The title of auction purchaser cannot be challenged after the sale certifi-cate is issued by the Court. *Ghanshyamdas and another v. Om Parkash and another,* AIR 1994 SC 1292: 1993 Supp(3) SCC 368: 1993(2) Scale 187: 1993(3) JT 563: 1993(3) RCR 118

Order 21, Rule 93.-Set aside of sale .-Auction money remaining deposited in Court uninvested.-The judgement debtor is liable to pay interest at the rate of 10 per cent on such amount. *Hindi Pracharak Prakashan and another v. M/s. G.K. Brothers and others,* AIR 1990 SC 2221

Order 21, Rule 94.-Certificate by court.-Necessity of-Sale by Receiver .-The provision has no application .-There is no requirement of certificate by the court that purchase was not made on behalf of the plaintiff. *Tarinikamal Pandit and others v. Perfulla Kumar Chatterjee (dead) by LRs.,* AIR 1979 SC 1165: 1979(3) SCC 280: 1979(3) SCR 340: 1979 BBCJ (SC) 89

Order 21, Rule 94.-Certificate of sale.-Levy of stamp duty.-The certificate merely a declaring the title already passed by force of law is not an instrument of conveyance liable to duty. The title to the property in question has to be conveyed under the document. The document has to be a vehicle for the transfer of the right, title and interest. A document merely stating as a fact that transfer has already taken place cannot be included within this expression. A paper which is recording a fact or is attempting to furnish evidence of an already concluded transaction under which title has already passed cannot be treated to be such an instrument. The title passes under the auction-sale by force of law and the transfer becomes final when an order under Rule 92 confirming it is made. By the Certificate issued under Rule 94, the Court is formally declaring the effect of the same and is not extinguishing or creating title. The object of issuance of such a Certificate is to avoid any controversy with respect to the identity of the property sold, and of the purchaser thereof as also the date when the sale becomes absolute. The use of past tense in the rule stating that the sale became absolute, is consistent with this interpretation. The Certificate, therefore, cannot be termed to be an instrument of sale so as to attract duty. *Municipal Corporation of Delhi v. Pramod Kumar Gupta,* AIR 1991 SC 401: 1991(1) SCC 633: 1990 Supp (2) SCR 547: 1990(2) Scale 1272: 1990(4) JT 787

Order 21, Rule 94.-Execution of decree.-Mis-description of property .-Effect of.-Identity of the plot duly established by reference to boundaries .-Mistake in the plot number cannot affect the identity of the plot sold in execution. The matter may have been different if no boundaries had been given in the final decree for sale as well as in the sale certificate and only the plot number was mentioned. But where we have both the boundaries and the plot number and the circumstanes are as in this case, the mistake in the plot number must be treated as a mere misdescription which does not affect the identity of the property sold. *Sheodhyan Singh and others v. Mst. Sanichara Kuer and others,* AIR 1963 SC 1879: 1962 BLJR 273: 1961(2) Ker LR 431: 1962(2) SCR 753:

Order 21, Rule 94.-Sale of property .-Sale of structure over the land.-The auction purchaser cannot claim to have right, title or interest in respect of permanent tenancy right in the land underneath and appurtenant to the structure. *Mohini Mohan Chakravarty v. The State of West Bengal and another,* AIR 1978 SC 1073: 1978(2) SCC 581: 1978(3) SCR 686

Order 21, Rules 94, 92 and 65.- Auction sale.-Challenge to sale certificate.-Bid knocked down in favour of a person.-Subsequent application by another person claiming real purchaser.-Issuance of sale certificate in favour of such person by the executing Court.- Challenge to order by way of suit for possession by the judgment debtor is not permissible. The sale certificate is issued under Order XXI, Rule 94, C.P.C. The sale certificate is granted by specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. The executing Court had jurisdiction to allow or reject such application and it cannot be said that the act of the executing Court was clearly without jurisdiction and the sale certificate as well as the entire execution proceedings were void and inoperative.Once an order was made under Order XXI, Rule 92 confirming the sale, the title of the auction-purchaser related back to the date of sale as provided under Section 65, C.P.C. The title in the property thereafter vests in the auction-purchaser and not in the judgment-debator. The issue of sale certificate under Order XXI, Rule 94, C.P.C. in favour of the auction-purchaser though mandatory but the granting of certificate is a ministerial act and not judicial. It was not a case of the sale being void and in any case so far as issue of sale certificate in favour of Mahila Vidyalaya is concerned, the same was determined by a judicial order dated 26th February, 1944 and the executing Court was competent to pass such order, such order cannot be held to be void on the ground of being without jurisdiction. *Sagar Mahila Vidyalaya, Sagar v. Pandit Sadashiv Rao Harshe and others,* AIR 1991 SC 1825: 1991(3) SCC 588: 1991(2) SCR 906: 1991(2) Scale 32: 1991(3) JT 75

Order 21, Rules 94 and 96.-Attachment of property.-Effect on *bona fide* occupants in their own right .-Direction given to Local Commissioner to take possession of property and restore to auction purchaser.-It entitle the Commissioner to take possession from trespassers and unauthorised persons and not from *bona fide* tenants.Any sale, transfer, encumbrance or alienation subsequent to the attachment could, no doubt, be impugned but the attachment did not have the legal effect of invalidating earlier interests of others subsisting in the property. In fact also, the sale was on an as is, where is basis i.e. without prejudice to the claims of other persons in whose favour *bona fide* encumbrabces or interests may have been created earlier qua the property. The object of the directions given by this Court was to cut short the proliferation of litigation and to ensure that the Commissioner is able to gather expenditiously the assets of Sanchaita which were dissipated or siphoned off by the persons in charge of the firm. Thus, if the firm's moneys had been utilised to purchase properties in the name of

various individuals benami such property had to be taken back by the Commissioner from such benamidars. Also, where the said benamidars or other persons put up frivolous claims to the property or its possession without the semblance of any legal title to its ownership or possession, such claims could and should be rejected by the Court. But this principle cannot apply to *bona fide* interests of others in the property. Court, by its orders dated 4-5-83 and 27-9-83 intended only that the firm, or the auction purchasers at the sales effected by the Commissioner, should be able to clear the property of trepassers and unauthorised persons and not that even *bona fide* tenants could be got evicted straightway in pursuance thereof. Normally, even trepassers and unauthorised persons cannot be thrown out except by recourse to legal proceedings but having regard to the large scale dealings, the special circumstances and the desperate situation, this Court made an exception and made it possible for the Commissioner to get false and frivolous claimants out of the way by a quick procedure but nothing more. We are, therefore, of opinion that if the Court, on a consideration of the materials placed by the claimants or objectors, comes to the conclusion that they are not mere stooges or false claimants but have a *bona fide* right to possession as against Sanchaita, it cannot direct their eviction but should leave it to the auction purchaser to initiate such eviction proceedings in the normal course and in accordance with law, as may be available to him against the claimants/objectors. This order cannot be availed of to ride rough-shod over the rights and interests of others in the properties which have been created*bona fide.* third parties who have acquired real interests in the property, either independent of, or even through, Sanchaita cannot be called upon to give up their rights. To do so would be to do more than merely realise what rightfully belongs to Sanchaitas; at would amount to conferring on Sanchaita a better title than it had, in fact, acquired. *Phani Bhusan Ghosh and others v. Asim Kumar Mondal and others,* AIR 1991 SC 796: 1990(3) SCC 726: 1990(2) SCR 283: 1990(1) Scale 768: 1990(3) JT 81

Order 21, Rule 95.-Auction sale.- Delivery of possession.-Limitation .-The application for possession is governed by Article 134 of Limitation Act and cannot be equated with application for execution. The periods of limitation prescribed by Arts. 136 and 134 are for two different purposes, the former being for the execution of a decree for possession in respect of which decree is passed and the latter for an application for delivery of possession of immovable property which is purchased in the course of execution of a decree. The two articles have nothing in common for their operation and it is not readily understandable how the two articles stand in conflict with each other. An application for delivery of possession of immovable property purchased in execution cannot, by any stretch of imagination, be construed as an application for execution of a decree for possession of property so as to invoke the provision of Art. 136, Limitation Act. Merely because the auction-purchaser will be deemed to be a party in the suit in which the decree has been passed, as provided in clause (a) of Explanation II to Section 47 of the Code, and by virtue of clause (b) of Explanation II all questions relating to delivery of possession of the property shall be deemed to be questions relating to execution, discharge or satisfaction of the decree within the meaning of Section 47, an application for delivery of possession under Order XXI, Rule 95, C.P.C. cannot be equated with an application for the execution of a decree for possession so as to apply 12 years' period of limitation as prescribed by Art. 136, Limitation Act. *Ganpat Singh (dead) by RLs. v. Kailash Shankar and others,* AIR 1987 SC 1443: 1987(3) SCC 146: 1987(3) SCR 355: 1987(1) Scale 1273: 1987(2) J.T. 619: 1987(2) APLJ (SC) 32

Order 21, Rule 95 and 96.-Auction sale.-Possession of property.- Decree in suit for mortgage.-Property in possession by lessee.-Auction purchaser can only be given symbolic possession. Rules 95 and 96 of Order XXI of the Code of Civil Procedure makes provisions for enabling a purchaser of immovable property in a Court sale after obtaining the necessary certificate from the Court in terms of the provisions contained in Rule 94 of the Code to apply for delivery of possession of the immovable property purchased by him at the Court sale. Rule 95 provides for actual physical possession and Rule 96 provides for symbolic possession. A plain reading of Rule 95 which we have earlier set out, clearly establishes, that the purchaser will be entitled to physical possession of property purchased and the Court will direct delivery of actual possession of the property sold to him by removing any person who refuses to vacate the same, if need be, if the following conditions are satisfied: 1. The property sold must be in the occupation of the judgment-debtor;2. The property sold must be in the occupancy of some person on behalf of the judgment-debtor; 3. The property sold must be in the occupation of some person claiming under a title created by the judgment-debtor subsequently to the attachment of the property. *Dev Raj Dogra and others v. Gyan Chand Jain and others,* AIR 1981 SC 981: 1981(2) SCC 675: 1981(3) SCR 174: 1981(1) Scale 663

Order 21, Rules 97, 98, 101, 105 and 35.-Execution of decree.-Presence of stranger.-The person resisting execu-tion on the basis of independent title is entitled to be heard and seek adjudication of his claim before he is actually dispos-sessed.-Issuance of warrant of possession with police help after noting the presence of obstructionist, is not permissible. Once resistance is offered by a pur-ported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree-holder the remedy available to the decree- holder against such an obstructionist is only under Order XXI, Rule 97 sub-rule (1) and he cannot by-pass such obstruction and insist on re-issuance of warrant for possession under Order XXI, Rule 35 with the help of police force, as that course would amount to by- passing and circumventing the procedure laid down under Order XXI, Rule 97 in

connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99, CPC and pray for restoration of possession. While Order XXI, Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of Order XXI, Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order XXI, Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the Executing Court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. A reading of Order 21, Rule 97, CPC clearly envisages that `any person' even including the judgment-debtor irrespective whether he claims derivative title from the judgment- debtor or set up his own right, title or interest dehors the judgment-debtor and he resists execution of a decree, then the Court in addition to the power under Rule 35(3) has been empowered to conduct an enquiry whether the obstruction by that person in obtaining possession of immovable property was legal or not. The decree-holder gets a right under Rule 97 to make an application against third parties to have his obstruction removed and an enquiry thereon could be done. Each occasion of obstruction or resistance furnishes a cause of action to the decree-holder to make an application for removal of the obstruction or resistance by such person. *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal and another,* AIR 1997 SC 856: 1997(3) SCC 694: 1997(1) Scale 437: 1997(1) JT 641: 1997(1) RCR 332: 1997 Civ. CR (SC) 396

Order 21, Rule 97.-Execution of decree .- Procedure for challenge.- Writ petition challenging the decree is not permissible. The Civil Procedure Code contains elaborate and exhaust provisions for dealing with it in all its aspects. The numerous rules of Order XXI of the Code take care of different situations, providing effective remedies not only to judgment-debtors and decree- holders but also to claimant objectors as the case may be. In an exceptional case, where provisions are rendered incapable of giving relief to an aggrieved party in adequate measure and appropriate time, the answer is a regular suit in the Civil Court. The remedy under the Civil Procedure Code is of superior judicial quality than what is generally available under other statutes, and the Judge being entrusted exclusively with administration of justice, is expected to do better. It will be, therefore, difficult to find a case where interference in writ jurisdiction for granting (relief) to a judgment- debator or a claimant-objector can be justified. The Rules 97 to 106 of Order XXI envisage questions as in the present appeal to be determined on the basis of evidence to be led by the parties and after the 1976 Amendment, the decision has been made appealable like a decree. *Ghan Shyam Das Gupta and another v. Anant Kumar Sinha and others,* AIR 1991 SC 2251: 1991(4) SCC 379: 1991 Supp (1) SCR 219: 1991(2) Scale 611: 1991(4) JT 43: 1991 All LJ 958

Order 21, Rules 97 and 90.-Auction sale.-Mortgage sale.-Judgment debtor himself purchasing the property at an amount less than the amount at which it was mortgaged .-Auction sale held illegal. *Seethammal v. Senthil Finance and another,* AIR 1996 SC 1551: 1996(8) SCC 5: 1996(3) Scale 196: 1996(3) JT 664: 1996 Civ. CR (SC) 407

Order 21, Rules 97, 100 and 101.- Execution of decree.-Obstruction on independent title.-Co-owner admitting the title of the person in possession.- Occupant not bound by decree.- Execution of decree against occupant not permissible. *Ram Chandra Verma v. Shri Jagat Singh Singhi and others,* AIR 1996 SC 1809: 1996(8) SCC 47: 1996(2) Scale 314: 1996(2) JT 494: 1996(1) Mad LJ 65

Order 21, Rules 97, 98, 100 and 101 .-Execution of decree.-Obstruction on independent title.-Court is required to determine the question before ordering removal of the obstruction. An adjudication is required to be conducted under Order 21, Rule 98 before removal of the obstruction caused by the object or the appellant and a finding is required to be recorded in that behalf. The order is treated as a decree under Order 21, Rule 103 and it shall be subject to an appeal. The determination of the question of the right, title or interest of the objector in the immovable property under execution needs to be adjudicated under Order 21, Rule 98 which is an order and is a decree under Order 21, Rule 103 for the purpose of appeal subject to the same conditions as to an appeal or otherwise as if it were a decree. Thus, the

procedure prescribed is a complete code in itself. Therefore, the executing Court is required to determine the question, when the appellants had objected to the execution of the decree as against the appellants who were not parties to the decree for specific performance. *Babulal v. Raj Kumar and others,* AIR 1996 SC 2050: 1996(3) SCC 154: 1996(2) Scale 438: 1996(2) JT 716: 1996(2) Raj. LW 23

Order 21, Rules 98 and 99.- Execution of decree.-Obstruction on independent title.-The objector has a right to remain in possession is subject to adjudication.-Pending adjudication, eviction of tenant without due process of law, not permissible. Without any decree or order of eviction of the appellant from the demised premises, he has been unlawfully dispossessed from the premises without any due process of law. The question, therefore, is: whether he should be allowed to remain in possession till his application under Order 21, Rules 98 and 99 is adjudicated upon and an order made. At this stage we are only concerned with his admitted possession of the demised premises. What rights would flow from a contract between him and his employer is a matter to be adjudicated in his application filed under Order 21, Rules 98 and 99, CPC. At this stage, it is premature to go into and record any finding in that behalf. We find that high-handed action taken by the respondent Nos. 1, 3 and 6 in having the appellant dispossessed without due process of law, cannot be overlooked nor condoned. The Court cannot blink at their unlawful conduct to dispossess the appellant from demised property and would say that the *status que* be maintained. If the court gives acceptance to such high-handed action, there will be no respect for rule of law and unlawful elements would take hold of the due process of law for ransom and it would be put to ridicule in the estimate of the law-abiding citizens and rule of law would remain a mortuary. *Samir Sobhan Sanyal v. Tracks Trade Pvt. Ltd. and others,* AIR 1996 SC 2102: 1996(4) SCC 144: 1996(4) Scale 266: 1996(5) JT 74: 1996 HRR 395

Order 22, Rule 1.-Abatement.- Decree of divorce.-Effect of death of decreeholder on appeal.-Decree affects proprietary rights of party.- Cause of action survive qua the estate of deceased spouse in the hands of legal representatives.- Impleadment of legal representatives is permissible. Petition for divorce can be moved either by the husband or the wife, as the case may be. To that extent it is certainly a personal cause of action based on one or more matrimonial misconducts alleged in the petition against the erring spouse. Conse- quently, in such proceedings before any decree comes to be passed if either of the spouse expires pending the trial then the personal cause of action would die with the person. Such civil proceedings would not abate only if right to sue survives after the death of one more of the parties to the proceedings as laid down by Order XXII, Rule 1 C.P.C. However, if during the pendency of the petition for divorce either of the spouses expires, the cause of action being personal to both of them, the right to sue would not survive. If a decree of divorce on these grounds whether ex parte or bipartite is not permitted to be challenged by the aggrieved spouse, it would deprive the aggrieved spouse of an opportunity of getting such grounds re-examined by the competent Court. It cannot, therefore be said that after a decree of divorce is passed against a spouse whether ex parte or bipartite such aggrieved spouse cannot prefer an appeal against such a decree or cannot move for getting ex parte divorce decree set aside under Order IX, Rule 13, C.P.C. Such proceedings would not abate only because the petitioner who has obtained such decree dies after obtaining such a decree. The cause of action in such a case would survive qua the estate of the deceased spouse in the hands of his or her heirs or legal representatives. It must, therefore, be held that when a divorce decree is challenged by the aggrieved spouse in proceedings whether by way of appeal or by way of application under Order IX, Rule 13, C.P.C. for setting aside the ex parte decree of divorce, right to sue survives to the aggrieved surviving spouse if the other spouse having obtained such decree dies after the decree and before appeal is filed against the same by the aggrieved spouse or application is made under Order IX, Rule 13 by the aggrieved spouse for getting such an ex parte decree of divorce set aside. Similarly, the right to sue would also survive even if the other spouse dies pending such appeal or application under Order IX, Rule 13, C.P.C. In either case proceedings can be continued against the legal heirs of the deceased spouse who may be interested in supporting the decree of divorce passed against the aggrieved spouse. *Smt. Yallawwa v. Smt. Shantavva,* AIR 1997 SC 35: 1996(7) Scale 484: 1996(9) JT 218: 1996(2) DMC 579: 1997(2) Mad. LJ 4

Order 22, Rule 1.-Abatement.- Impleadment of legal heirs.-Suit by reversioner challenging the alienation by Hindu widow claiming it to be without legal necessity.- Death of widow during the pendency of suit.-Legal heirs of the widow are not necessary parties. The case of the death of the widow during the pendency of the declaratory suit, the heirs of the widow are not necessary parties to the suit. Though the widow was joined as a party to the suit, no relief was claimed against her personally. On the death of the widow, the entire estate of the last full owner is represented by the plaintiff suing in a representative capacity on behalf of all the reversions, and the plaintiff can get effective relief against the alienee in the absence of the heirs of the widow. *Radha Rani Bhargava v. Hanuman Prasad Bhargava,* AIR 1966 SC 216: 1966(2) SCJ 587: 1966(2) SCR_1

Order 22, Rule 1.-Abatement.-Suit for rendition of account.-Suit does not extinguish with the death of a party. *Girijanandini Devi and others v. Bijendra Narain Choudhary,* AIR 1967 SC 1124: 1967 All LJ 475: 1967 BLJR 513: 1967(1) SCR 93

Order 22, Rule 1.-Compromise between communities.-The compro- mise entered through prominent persons belonging to each community but no indication that they represented the

community.-It cannot bar the members of communities from exercising their rights. Compromise is signed by a number of persons but there is no indication that they represented the two communities. It may be that these person, who signed the compromise, were important person in the communities and it may be that both the communities should act according to the compromise effected by the so-called important persons. But in law it does not debar the parties from asserting their legal rights in a Civil Court. *Shaikh Piru Bux (dead) and others v. Kalandi Pati and others,* AIR 1970 SC 1885: 35 Cut LT 671: 11 Orissa JD 16: 1969(2) SCR 563

Order 22, Rule 1.-Right to sue.- Partition.-Suit filed by minor co- parcener.-It does not abate on death of minor but can be continued by his legal representatives. *Kakumanu Pedasubhayya and another v. Kakumanu Akkamma and another,* AIR 1958 SC 1042: 1959(1) Mad LJ (SC) 60: 1959 SLJ 138: 1959 SCR 1249

Order 22, Rule 1.-Substitution by legal representative.-Natural heir.- Necessity of.-Substitution sought on the strength of settlement and Will and claiming under the original plaintiff.-Suit relating to right to property.-Substitution should be allowed. The trial court has fond both the settlement and will in favour of the present plaintiffs true and valid. The present plaintiffs are claiming under the original plaintiff and are continuing the same suit. They have not amended the basis of the suit or the reliefs asked for. We are unable to see how their cause of action is different from the cause of action of the original plaintiff, merely because they are claiming to be legal representatives under a settlement and a will. The present plaintiffs were indeed seeking to continue the suit as filed by the original plaintiff and for the same reliefs as were claimed by her. They were not claiming any other or different right. Indeed, the settlement and will executed in their favour were in issue in the suit filed by the original plaintiff herself and findings were recorded affirming both the deeds. The right claimed by the original plaintiff was not a personal right. It was right to property which she settled upon and bequeathed to the present plaintiffs. *Smt. Ambalika Padhi and another v. Sh. Radhakrishna Padhi and others,* AIR 1992 SC 431: 1992(1) SCC 667: 1991(2) Scale 1211: 1992(1) JT 10: 1992(1) APLJ 47

Order 22, Rules 1 and 2.- Abatement.-Suit against Partner- ship Firm.-Decree passed against the firm.-Death of a partner in the course of appeal.-The proceedings do not abate for want of legal represen-tative on record. The suit for eviction was filed against the firm but as other defendants claimed to be the partners of the firm, they are impleaded by the plaintiff as proper parties. It was open to him not to implead the partners of the firm in view of the provision contained in Order XXX, Rule 1 of the C.P.C. which permits a firm to be sued in the firm's name. It is nobody's case that the heirs and legal representatives of the deceased partners joined the firm or they were entitled to be taken in as partners in place of the deceased partners as partners in the firm. Therefore, the question to be answered is whether on the death of two of the proper or formal parties impleaded in their capacity as partners by the plaintiff along with the firm, in absence of substitution of heirs and legal representatives the appeal abates? The answer is in the negative. Therefore, the question of substituting heirs and legal representatives of the two proper formal parties does not arise and the death has no impact on the proceeding. The appeal cannot abate. *The Upper India Cable Co. and others v. Bal Kishan,* AIR 1984 SC 1381: 1984(3) SCC 462: 1984(1) Scale 606: 1984 All WC 582

Order 22, Rules 1 and 3.-Abatement of suit.-Suit for defamation.-Right to sue does not survive if the claim is based on tort and but the proceedings does not abate if the claim is founded on contract. If the entire suit claim is founded on torts the suit would undoubtedly abate. If the action is founded partly on torts and partly on contract then such part of the claim as relates to torts would stand abated and the other part would survive. If the suit claim is founded entirely on contract then the suit has to proceed to trial in its entirely and be adjudicated upon. *M. Veerappa v. Evelyn Sequeira and others,* AIR 1988 SC 506: 1988(1) SCC 556: 1988(2) SCR 606: 1988(1) Scale 107: 1988(1) JT 120: 1988(1) Ker LT 450

Order 22, Rules 1 and 3.- Application of.-Effect of.- Application of provision on pro- ceedings of special statute.-The provisions relating to abatement of delay shall also apply to the proceedings. There is little room to dispute that if Order XXI of the Code applies necessarily Arts. 120 and 121 of the First Schedule of the Limitation Act would also apply. The contention Act have been specially extended to proceedings under the Act by Section 42 thereof is of no consequence once it is held that Order XXII of the Code is applicable to appeals under the Act. Section 38 (1) of the Act in our view clearly extends the procedure applicable to appeals under the Code to appeals under the Act. The extension of the procedure available under the Code to appeal under the Act attracts the entire procedure of the Code relevant for the purpose of disposing of an appeal under the Act. There is no scope to reckon an exception unless the statute indicates any. We are, therefore, not inclined to accept the submission advanced before us that the principles of abatement and delay were not applicable to the case in question. *Balram and others v. The 3rd Additional Distt. Judge and another,* AIR 1983 SC 1137: 1983(2) SCC 419: 1983(2) SCR 734: 1983(1) Scale 370: 1983 Rev. Dec. 244

Order 22, Rules 1 and 10.- Abatement.-Right of statutory pre- emption.-Such right can be en- forced against the legal representa- tives of the deceased and therefore the proceedings do not abate on account of death of the parties. *Hazari and others v. Neki,* AIR 1968 SC 1205: 70 Pun LR 823: 1968(2) SCR 833

Order 22, Rules 1 and 11.- Abate- ment.-Suit for defamation.-Appeal pending against dismissal of suit .-The proceedings do not survive the death of the plaintiff/appellant. Where a suit for defamation is dismissed and the plaintiff has filed ann appeal, what the appellant-plaintiff is seeking to enforce in the appeal is his right to sue for damages for defamation and as this right does not survive his death, his legal representative has no right to be brought on the record of the appeal in his place and stead if the appellant dies during the pendency of the appeal. The position, however is different where a suit for defamation has resulted in a decree in favour of the plaintiff because in such a case the cause of action has merged in the degree and the decretal debt forms part of his estate and the appeal from the decree by the defendant becomes, a question of benefit or detriment to the estate of the plaintiff respondent which his legal representative is entitled to uphold and defend and is, therefore, entitled to be substituted in place of the deceased respondent-plaintiff. *Melepurath Sankunni Ezhuthassan v. Thekittil Geopalankutty Nair,* AIR 1986 SC 411: 1986(1) SCC 118: 1985 Supp. (3) SCR 805: 1985(2) Scale 1098: 1986 (1) APLJ (SC) 18

Order 22, Rule 2 and 11.-Abate- ment.-Omission to implead legal representative.-The remaining legal representatives already on record.- Appeal cannot be dismissed as abated merely for want of implead- ment of one legal representative. *Ram Das and another v. Deputy Director of Consolidation,* AIR 1971 SC 673: 1971 AllWR (HC) 415: 1971(1) SCC 460

Order 22, Rules 2, 3 and 10-A.- Abatement.-Delay in seeking sub- stitution.-Pleader of deceased party intimating the fact of death after about six years.-Application for substitution made within three weeks thereafter.-Delay in substitution should be condoned. *O.P. Kathpalia v. Lakhmir Singh (dead) and others,* AIR 1984 SC 1744: 1984(4) SCC 66: 1984(2) Scale 65: 1984(2) RCR 201

Order 22, Rule 3.-Abatement.- Death of appellants.-Non-impleadment of legal representatives .-The question of abatement can only be gone into after a perusal of nature of pleadings and other material on record.-Matter remanded for re-consideration. *Matindu Prakash (Deceased) by L.Rs. v. Bachan Singh and others,* AIR 1977 SC 2029: 1977(4) SCC 603

Order 22, Rule 3.-Abatement.- Pre-emption under customary law.-Right to sue on the basis of such customary right survives in favour of legal representatives and they are entitled to be brought on record in substitution to the original plaintiff. *Kanta Rani and another v. Rama Rani,* AIR 1988 SC 726: 1988(2) SCC 109: 1988(2) SCR 895: 1988(1) Scale 264: 1988(1) JT 270

Order 22, Rule 3.-Compromise decree.-Lawfulness of compromise .-Admission by one party about existence of legal right of relief, vesting in other party.-The decree is not nullity. Every compromise under Order 23, Rule 3 of the Code of Civil Procedure shall be presumed to be lawful unless it is proved to the contrary. an admission by the tenant about the existence of a statutory ground, expressly or impliedly, will be sufficient and there need not be any evidence before the Court on the merits of the grounds before the compromise order is passed. If there is an admission of the tenant it will not be open to him to challenge its correctness as the admissions made in judicial proceedings area absolutely binding on the parties. At any rate decree cannot be called a nullity to enable the executing court to go behind it. *Hiralal Moolchand Doshi v. Barot Raman Lal Ranchhoddas (dead) by LRs.,* AIR 1993 SC 1449: 1993(2) SCC 450: 1993(1) Scale 629: 1993(1) Guj LR 721: 1993 Har Rent. R 304

Order 22, Rule 3.-Compromise decree.-Lawfulness of compromise .- The Court should not add seal of approval to the compromise unless its terms are consistence to the relevant law. A decree passed on the basis of a compromise by and between the parties is essentially a contract between the parties which derives sanctity by the Court superadding its seal to the contract. But all the same the consent terms retain all the elements of a contract to which the Court's imprimatur is affixed to give it the sanctity of an executable court order. We must, however, point out that the court will not add its seal to the compromise terms unless the terms are consistent with the relevant law. But, if the law vests exclusive jurisdiction in the Court to adjudicate on any matter, e.g. fixation of standard rent, the Court will not add its seal to the consent terms by which the parties have determined the standard rent unless it has applied its mind to the question and has satisfied itself that the rent proposed by consent is just and reasonable. *Prithivichand Ramchand Sablok v. S.Y. Shinde,* AIR 1993 SC 1929: 1993(3) SCC 271: 1993(3) SCR 729: 1993(3) JT 348: 1993(3) Bom. CR 435

Order 22, Rule 3.-Impleadment of legal representative.-Considerations for.-Application by the legal representative himself seeking impleadment.-Absence of fraud or collusion.-Legal representative can be brought on record. This is not a case where a plaintiff or an appellant applies for bringing the heirs of the deceased defendant or respondent on the record; this is a case where one of the appellants died and his heirs have to be brought on record. In such a case there is no question of any diligent or *bona fide* enquiry for the deceased appellant's heirs must be known to the heirs who applied for being brought on the record. Even so we are of opinion that unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceeding, there is no reason why the heirs who have applied for being brought on record should not be held to represent the entire estate including the interests of the heirs not brought on the record. This is not to say that where heirs of an appellant are to be brought on record all of them should not be brought on record and any of them should

be deliberately left out. But if by oversight or on account of some doubt as to who are the heirs, any heir of a deceased appellant is left out that in itself would be no reason for holding that the entire estate of the deceased is not represented unless circumstances like fraud or collusion to which we have referred above exist. *Dolai Maliko and others v. Krushna Chandra Patnaik and others,* AIR 1967 SC 49: 33 Cut LT 1: 1966 Supp SCR 22

Order 22, Rule 3.-Omission to implead legal representative.-Effect of.-Error in impleading a person as representative of estate who did not represent the deceased.-In the absence of fraud or collusion, the Court may hold a decree passed without such representation, to be binding on the estate of the deceased.-The principle is unaffected by the Personal Law or the religious persuasion by the parties. *N.K. Mohd. Sulaiman Sahib v. N.C. Mohd. Ismail Saheb and others,* AIR 1966 SC 792: 1966(1) SCWR 331: 1966(1) SCR 937

Order 22, Rules 3 and 4.- Abatement.-Delay in seeking sub- stitution.-Delay of few days which was duly explained.-Delay condoned and substitution allowed. *Harjeet Singh v. Raj Kishore and others,* AIR 1984 SC 1238: 1984(3) SCC 573: 1984(1) Scale 619: 1984 BLJR 241

Order 22, Rules 3, 4 and 8.- Abatement.-Failure to implead pro forma respondent against whom no relief was claimed, does not result in abatement of proceedings. *Kanhaiyalal v. Rameshwar and others,* AIR 1983 SC 503: 1983(2) SCC 260: 1983(1) Scale 242: 1983 MPLJ 614: 1983 Sim.L.C. 176

Order 22, Rules 3, 4 and 11.- Abate- ment.-Appeal against preliminary decree.-Impleadment of legal representatives in the suit cannot save the appeal from abatement. A combined reading of Order XXII, Rules 3, 4 and 11 of the Code of Civil Procedure shows that the doctrine of abatement applies equally to a suit as well as to an appeal. In the application of the said Rules 3 and 4 to an appeal, instead of plaintiff and defendant. appellant and respondent have to be read in those rules. *Prima facie,* therefore, if a respondent dies and his legal representatives are not brought on record within the prescribed time, the appeal abates as against the respondent under Rule 4, read with Rule 11 of Order XXII of the Code of Civil Procedure. A suit is not a continuation of an appeal. An order made in a suit subsequent to the filing of an appeal at an earlier stage will move forward with the subsequent stages of the suit or appeals taken therefrom; but it cannot be projected backwards into the appeal that has already been filed. It cannot possibly become an order in the appeal. Therefore, the order bringing the legal representatives of the 7th respondent on record in the final decree pro- ceedings cannot ensure for the benefit of the appeal filed against the preliminary decree. *Rangubai Kom Sankar Jagtap v. Sunderabai Bhratar Sakharam Jedhe and others,* AIR 1965 SC 1794: 68 Bom LR 26: 1965 Mah LJ 769: 1965(3) SCR 211

Order 22, Rules 3, 4 and 11.-Abate- ment of appeal.-Impleadment of legal representative.-Necessity in cross appeals.-Legal representative of deceased brought on record in the appeal filed by the deceased but not on record in the cross appeal.- Appeal does not abate. *N. Jayaram Reddi and another v. The Revenue Divisional Officer and Land Acquisition Officer, Kurnool,* AIR 1979 SC 1393: 1979(3) SCC 578: 1979(3) SCR 599: 1979(2) APLJ (SC) 54

Order 22, Rules 3 and 11.- Abatement of appeal.-Death of a party.-Ground of appeal found to be common.-The appeal abated in its entirety in respect of other parties as well. Liability of the sureties is under the law joint and several. If a creditor seeks to enforce the surety bond against some only of the joint sureties, the other sureties will not on that account be discharged: nor will release by the creditor of one of them discharge the other vide Sections 137 and 138 of the Contract Act. But the fact that the surety bond is enforceable against each surety severally, and that it is open to the creditor to release one or more of the joint sureties, does not alter the true character of an adjudication of the Court when proceedings are commenced to enforce the covenants of the bond against all the sureties. We are not concerned in this appeal with the privilege which a creditor may exercise, but with the effect of an adjudication which the Court has made in a proceeding to enforce the covenant of the Bond. The mere fact that the obligation arising under a covenant may be enforced severally against all the covenantors does not make the liability of each covenantor distinct. It is true that in enforcement of the claim of the decree-holder the properties belonging to the sureties individually may be sold separately. But that is because the properties are separately owned and note because the liability arises under distinct transactions. It must, therefore be held that the appeal has abated, because the representatives of the second appellant.-Basant Lal.-have not been brought on record. *Sri Chand and others v. M/s. Jagdish Pershad Kishan Chand and others,* AIR 1966 SC 1427: 1966(68) Pun LR 291 (D): 1966(3) SCR 451

Order 22, Rules 3 and 11.-Abate- ment.-Delay in seeking substitution .-The party acting diligently in seeking substitution on earlier occasions in respect of death of other parties.-Delay condoned and substi- tution allowed. *Piara Singh and others v. Natha Singh and others,* AIR 1991 SC 1529: 1991 Supp (2) SCC 289

Order 22, Rule 4.-Abatement.- Death of party suing in the capacity of karta of Hindu family.-The successor karta could be brought on record under the provision. *Gujarat State Transport Corporation etc. v. Valji Mulji Soneji and others etc.,* AIR 1980 SC 64: 1979(3) SCC 202: 1979(3) SCR 905: 1979(20) Guj. LR 810

Order 22, Rule 4.-Abatement.- Death of defendant.-Suit for partition by adopted son against the widow foster mother.-Death of widow and succession to her Estate by her daughter who also died

subsequently non-impleadment of legal heirs within limitation.-No explanation for delay in seeking to set aside abatement.-Appeal dismissed as abated. *Zilla Singh and another v. Chandgi and others,* AIR 1991 SC 263: 1991 Supp (2) SCC 430

Order 22, Rule 4.-Abatement.- Death of defendant.-Legal representative not impleaded despite knowledge of death.-Appeal against the decree likely to be inconsistent against the interest of the legal representative of deceased respondent.-The appeal stand abated as a whole. It is true that under the amended rules even a counsel can give notice of the death of the parties and on the basis thereof, the legal representatives could be brought on record. But when the factum of the death of Shakuntala was brought to the notice of the counsel for the petitioner, an application came to be filed to delete the name of the first defendant from the array of the parties and accordingly it was allowed; consequence being that the decree as against the first defendant in O.S. No. 121-A/1984, had become final. Since it has become final, the decree as against the second defendant's legal representative would become inconsistent with the decree as against the first defendant. Therefore, the mere fact that the application came to be filed later is of no avail and Order 22, Rule 4(4) C.P.C. is clearly inapplicable to the facts. *Satguru Sharan Shrivastava v. Dwarka Prasad Mathur (dead) through LRs. and others,* AIR 1996 SC 3504: 1996(10) SCC 293: 1996 (6) Scale 189: 1996(7) JT 460

Order 22, Rule 4.-Abatement.- Delay in set aside.-No sufficient cause shown to seek condonation of delay.-Strong case on merits is no ground to set aside abatement. *State of Gujarat v. Sayeed Mohd. Baquir El Edross,* AIR 1981 SC 1921: 1981(4) SCC 1: 1982(1) SCR 551: 1981(3) Scale 1793

Order 22, Rule 4.-Abatement.- Delay in seeking substitution.- Application filed 9 days after the expiry of limitation.-Intervening vacations of Court.-Application for substitution filed 2 days after opening of Court after vacation.- The explanation required for condoning the delay in bringing the legal representative on record is not rigorous.-Order dismissing the appeal as abated, set aside. *Ram Bhajan Singh and others v. Madheshwar Singh (Dead) by LRs. and others,* AIR 1995 SC 1685: 1995 Supp (2) SCC 757: 1995(3) Scale 709: 1995(2) CCC 637

Order 22, Rule 4.-Abatement.- Impleadment of sons of deceased.- Non-impleadment of widow.-Estate of deceased sufficiently represented .-Objection raised after disposal of the matter by way of review, is not permissible. *Collector of 24 Parganas and others v. Lalith Mohan Mullick and others,* AIR 1988 SC 2121: 1988 Supp. SCC 578: 1988(1) JT 598

Order 22, Rule 4.-Abatement.- Joint Claim against all defendants.- Death of one of the defendants.-Effect of. A joint claim made against all the defendants. The first appellate Court, as mentioned earlier, decreed the suit in part against all the defendants. The High Court has dismissed the suit against all the defendants. In the Court relief asked for was against all the defendants. No separate claim was made against any of the defendants. Under these circumstances, quite clearly the appeal has abated as a whole under Order XXII, Rule 4 of the Civil Procedure Code. *Babu Sukhram Singh v. Ram Dular and others,* AIR 1973 SC 204: 1971(2) SCWR 548: 1972(4) SCC (N) 38

Order 22, Rule 4.-Abatement.- Necessary party.-Uncontesting party to suit.-Death of such party during appeal.-The surviving parties contesting the proceedings.-Appeal is maintainable despite abatement qua the deceased party. *Kulwant Rai v. State of Punjab,* AIR 1982 SC 126: 1981(4) SCC 245

Order 22, Rule 4.-Abatement.- Omission to implead legal represent- ative.-The remaining legal representatives already on record.- Appeal cannot be dismissed as abated merely for want of implead- ment of one legal representative. *Ram Das and another v. Deputy Director of Consolidation,* AIR 1971 SC 673: 1971 AllWR (HC) 415: 1971(1) SCC 460

Order 22, Rule 4.-Abatement.-Suit for redemption of mortgage.-Legal representative of co-mortgagee not brought on record.-Suit does not abates if the mortgagee before the court can be directed to pay the entire amount. *Kulwant Rai v. State of Punjab,* AIR 1982 SC 126: 1981(4) SCC 245

Order 22, Rule 4.-Suit against dead person.-Mistake in good faith.- Prompt action taken to implead the legal representatives of dead person .-Plaintiff is entitled to invoke Section 21 of Limitation Act, 1963 for substitution of legal represent- ative of deceased. *Karuppaswamy and others v. C. Ramamurthy,* AIR 1993 SC 2324: 1993(4) SCC 41: 1993(4) JT 192: 1993(3) Scale 165: 1993(2) LJR 608: 1993(2) Land LR 377

Order 22, Rules 4 and 9.-Abatement of appeal.-Suit for accounts.-Death of one of defendants.-The appeal does not abate against all the defendants. *Municipal Board, Lucknow v. Pannalal Bhargava and others,* AIR 1976 SC 1091: 1976(3) SCC 85

Order 22, Rules 4 and 9.-Legal representative.-Meaning of.-The expression include the heirs as well as persons who represent the estate and includes executors, administrators and all such persons in possession. `Legal representative' is defined in Civil Procedure Code which was admittedly applicable to the proceedings in the suit, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The definition is inclusive in character and its scope is wide, it is not confined to legal heirs only instead it stipulates a person who may or may not be heir, competent to inherit the property of the deceased but he should represent the estate of the deceased person. It includes heirs as well as persons

who represents the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression `legal representative'. If there are many heirs those in possession bona fide, without there being any fraud or collusion, are also entitled to represent the estate of the deceased. *Custodian of Branches of BANCO National Ultramarino v. Nalini Bai Naique,* AIR 1989 SC 1589: 1989 Supp. (2) SCC 275: 1989(2) SCR 810: 1989(1) Scale 1410: 1989 Supp. JT 159

Order 22, Rules 4 and 10- A.-Abate- ment of appeal.-Knowledge of death .-Omission by Pleader of deceased to inform the Court about the death of his client.-No inference of know- ledge can be drawn.- Application for substitution should have been allowed. Rule 10-A which has been added in Order XIII of the Code of Civil Procedure by the Amending Act of 1976 provides that when a pleader appearing for a party to the suit comes to know of the death of the party, he shall inform the court about it and the court thereafter shall issue notice to the other party. In the case of an appeal, the word suit has to read as appeal. This provision was introduced specifically to mitigate the hardship arising from the fact that the party to an appeal may not come to know about the death of the other party during the pendency of the appeal but when it is awaiting its turn for being heard. The appeal lies dormant for years on end, one cannot expect the other party to be a watchdog for day to day survival of the other party. When the appeal on being notified for hearing is activated., knowledge occasionally dawns that one or the other party has not only died, but the time for substitution has run out and the appeal has abated. In order to see that administration of justice is not thwarted by such technical procedural lapse, this very innovating provision has been introduced, whereby, a duty is cast upon the learned Advocate appearing for the party who comes to know about the death of the party to intimate to the court about the death of the party represented by the learned counsel and for this purpose a deeming fiction is introduced that the contract between dead client and lawyer subsists to the limited extent after the death of the client. *Gangadhar and another v. Shri Raj Kumar,* AIR 1983 SC 1202: 1984(1) SCC 121: 1983(2) Scale 446

Order 22, Rules 4 and 10.-Abate- ment of proceedings.-Need for liberal approach.-Need to do substantial justice between the parties.-No actual prejudice caused to the other side by delay in bringing on record the legal representatives.- Application for substitution is allowed. The difficulty High Court experienced in granting the application disclosed with great respect, a hypertechnical approach which if carried to end may result in miscarriage of justice. It is the second respondent who is fighting both the appellants and the Ist respondent who wants to derive a technical advantage by this procedural lapse. If the trend is to encourage fair play in action in administrative law, it must all the more inhere in judicial approach. Such application have to be approached with this view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. Undoubtedly, justice according to law; law to be administered to advance justice. Excess of lapses in compliance with the laws of procedure, as a matter of course, with the avowed object of doing substantial justice to the parties may in many many cases lead to miscarriage of justice. In appropriate cases, taking into consideration all the facts and circumstances of a case, the Court may set aside the abatement, even if there be slight negligence or minor laches in not making an application within the time provided an overall picture of the entire case, requires such course for furthering the cause of justice. When negligence and laches are established on the part of the party who seeks to set aside the abatement, the application of such a party should be entertained only in the rarest of cases for furthering the ends of justice only and on proper terms. *Bhagwan Swaroop and others v. Mool Chand and others,* AIR 1983 SC 355: 1983(2) SCC 132: 1983 (1) Scale 204: 1983 BLJR 228

Order 22, Rules 4 and 10-A .- Abatement.-Limitation to set aside .- Application moved within 30 days from the date of knowledge of death .-Information received from a source other than the pleader.- Application held to be within limitation. *Urban Improvement Trust, Jodhpur v. Gokul Narain and another,* AIR 1996 SC 1819: 1996(4) SCC 178: 1996(3) Scale 721: 1996(4) JT 446: 1996(2) Raj. LW 122

Order 22, Rules 4 and 10-A.-Abate- ment.-Limitation for substitution.- To bring on record the legal re- presentatives of the deceased, the limitation starts from the knowledge of the death of the party.-Delay in moving the application for substitution should be liberally condoned as the considerations for condoning the delay are different from the consideration under Section 5 of the Act. *State of Madhya Pradesh v. S.S. Akolkar,* AIR 1996 SC 1984: 1996(2) SCC 568: 1996(2) Scale 130: 1996(2) JT 286: 1996(2) APLJ 77 **Order 22, Rules 4 and 11.-Abatement.-Death of unnecessary party.-Effect on pending appeal.-The party deceased, impleaded as proforma party only.-The appeal is not abated.** *Mangal Singh and others v. Smt. Rattno,* AIR 1967 SC 1786: 69 Pun LR 998: 1967 (2) SCWR 958: 1967(3) SCR 454 **Order 22, Rules 4 and 11.-Abatement.-Representation of Estate of deceased made by the parties already on record.-The appeal cannot be regarded as having been abated.** *Mohammad Arif v. Allah Rabbul Alamin and others,* AIR 1982 SC 948: 1982(2) SCC 455: 1982(1) Scale 543(1)

Order 22, Rules 4 and 11.-Abatement.-Suit for dissolution of partnership.-Failure to implead legal heirs of deceased partner.-The proceedings abated as a whole in the circumstances of the case. It is not correct to say that the appeal abates against the other respondents. Under certain circumstances the appeal may not be proceeded with and is liable to be dismissed. But that is so not because of the

procedural defect but because no exhaustive statement can be made as to the circumstances under which an appeal in such cases cannot proceed. But the courts, as pointed out in the above decision, have applied one or the other of three tests. The courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court, and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed. These three tests, are not comulative tests. Even if one of them is satisfied, the court may dismiss the appeal. *Ramagya Prasad Gupta and others v. Murli Prasad and others,* AIR 1972 SC 1181: 1973(2) SCC 9: 1973(1) SCR 63

Order 22, Rules 4 and 11.-Impleadment of legal representative .-Omission.-Effect of.-Implead- ment made under *bona fide* belief that all legal representatives were impleaded.-The L.R.s impleaded, not disputing their status or that they did not fully represent the estate.-The estate of the deceased is sufficiently represented and the proceedings are not abated. Where a plaintiff or an appellant after diligent and *bona fide* enquiry ascertains who.-the legal represen- tatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record. In a case where the person brought on record is a legal representative we consider that it would be consonant with justice and principle that in the absence of fraud or collusion the bringing on record of such a legal representative is sufficient to prevent the suit or the appeal from abating. We have not been referred to any principle of construction of Order 22, Rule 4 or of the law which would militate against this view. *Daya Ram and others v. Shyam Sundari and others,* AIR 1965 SC 1049: 1965(2) An LT 147: 1965(1) SCA 784: 1965(1) SCR 375

Order 22, Rule 4(2).-Additional written statement by legal representative.-Scope of.-Right to raise individual point which deceased party could not have raised.-The Legal representative must get himself impleaded in his personal capacity.-The provision cannot be availed to assert an independent right, title or interest or to resist the claim made by the plaintiff in individual capacity, without impleadment in independent capacity. *Vidyawati v. Man Mohan and others,* AIR 1995 SC 1653: 1995(5) SCC 431: 1995(3) Scale 680: 1996(1) RCR 7

Order 22, Rule 4(2).-Substitution.-Additional written statement by legal representative.-Permissibility.-The legal representative can file additional written statement or Statement of Objections raising all pleas except the pleas which were personal to the deceased. *Bal Kishan v. Om Prakash and another,* AIR 1986 SC 1952: 1986(4) SCC 155: 1986(3) SCR 622: 1986 JT 253: 1986(2) Scale 347: 1986 Har Rent. R. 610

Order 22, Rule 5.-Abatement.-Death of agent.-Proceedings instituted attorney.-The matter adjudicated by or on behalf of the principal.-Death of agent/attorney is impediment for disposal without his L.Rs. being brought on record. *Neki s/o Bakhatawar v. Satnarain and others,* AIR 1997 SC 1334: 1997(1) Scale 143: 1996(11) JT 620: 1997(9) SCC 149: 1997 Har. R.R. 475: 1997(1) Rev. LR 290

Order 22, Rule 5.-Abatement.-Impleadment of legal representatives .- Necessity of.-The legal heirs of deceased already on record.-The estate of deceased sufficiently represented.-Failure to move application to seek substitution did not result in abatement of proceedings. *Beharilal and another v. Smt. Bhuri Devi and others,* AIR 1997 SC 1879: 1997(2) SCC 279: 1997(1) Scale 6: 1996(11) JT 585

Order 22, Rule 5.-Substitution.-Procedure.-Impleadment of legal heirs of deceased.-Recall of order on the basis of the Will of the deceased in favour of one person, not permissible.-The beneficiaries under will may claim the right in appropriate proceedings. *Mrs. Annupam Pruthi and others v. Smt. Rajen Bal and others,* AIR 1988 SC 2041: 1988(2) Scale 564: 1988(3) JT 505: 1989(1) SCC 147

Order 22, Rule 9.-Abatement of appeal.-Joint and indivisible decree in favour of Respondents.-Death of one of the Respondents.-Abatement of appeal against dead respondent.-Appeal cannot be proceeded against the rest of the Respondents. *Union of India v. Shree Ram Bohra and others,* AIR 1965 SC 1531: 1965 BLJR 589: 1965(2) SCR 830

Order 22, Rule 9.-Abatement of appeal.-Effect of.-Decision on merits after abatement is not permissible.-Second appeal against the decision on merits, after abatement of first appeal is not permissible.-The remedy is only to file appeal against refusal to set aside abatement. When an appeal abates for want of substitution as envisaged by sub-rule (1) of Rule 9 of Order 22, it precludes a fresh suit being brought on the same cause of action. It is a specific provision. If abatement implied adjudication on merits, Section 11 of C.P.C. would be attracted. Abatement of an appeal does not imply adjudication on merits and hence a specific provision had to be made in Order 22, Rule 9(1) that no fresh suit could be brought on the same cause of action. Therefore when the appeal abated there was no decree, disposing of the first appeal, only course open is to move the court for setting aside abatement. An order under Order 22, Rule 9(2) C.P.C. refusing to set aside abatement is specifically appealable under Order 43, Rule 1 (k).

Such an adjudication if it can be so styled would not be a decree as defined in Section 2 (2) C.P.C. Section 100 provides for second appeal to the High Court from every decree passed in appeal by any Court subordinate to the High Court on the grounds therein set out. What is worthy of notice is that second appeal lies against a decree passed in appeal. An order under Order 22, Rule 9 appealable as an order would not be a decree and therefore, no second appeal would lie aganist that order. The second appeal preferred by the original defendants was incompetent. But the appeal from order refusing to set aside abatement was competent. If the second appeal was incompetent, its dismissal cannot have any impact on the disposal on merits of the appeal from order and that was rightly done by the learned single Judge. *Madan Naik (dead by LRs.) and others v. Mst. Hansubala Devi and others,* AIR 1983 SC 676: 1983(3) SCC 15: 1983(1) Scale 382: 1983 Pat. LJR 113

Order 22, Rule 9.-Abatement.-Application seeking substitution filed beyond 90 days of the death of the party.-Application even beyond 90 days of date of the knowledge of the litigation.-Application for substitution rejected. *Mahant Niranjan Dass v. Shriomani Gurudwara Prabandhak Committee, Amritsar,* AIR 1992 SC 492: 1993 Supp (1) SCC 586: 1992(4) PLR 497

Order 22, Rule 9.-Abatement.-Effect of.-Provision under Order 41 Rule 4 enabling one of the parties to file appeal against entire decree.-The provision does not empower the court to pass decree against the legal heirs of a deceased respondent. No question of the provisions of Rule 4 of Order XLI overriding the provisions of Rule 9 of Order XXII arises. The two deal with different stages of the appeal and provide for different contingencies. Rule 4 of Order XLI applies to the stage when an appeal is filed and empowers one of the plaintiffs or defendants to file an appeal against the entire decree in certain circumstances. He can take advantage of this provision, but he may not. Once an appeal has been filed by all the plaintiffs the provisions of Order XLI, Rule 4 became unavailable. Order XXII operates during the pendency of an appeal and not at its institution. If some party dies during the pendency of the appeal, his legal representatives have to be brought on the record within the period of limitation. If that is not done, the appeal by the deceased appellant abates and does not proceed any further. There is thus no inconsistency between the provisions of Rule 9 of Order XXII and those of Rule 4 of Order XLI, C.P.C. They operate at different stages and provide for different contingencies. There is nothing common in their provisions which make the provisions of one interfere inany way with those of the other. *Rameshwar Prasad and others v. Shambehari Lal Jagannath and another,* AIR 1963 SC 1901: 1964 All LJ 109: 1964(3) SCR 549

Order 22, Rule 9.-Abatement.-Finality of decision.-Appeal against one of the defendants not filed.-It may render the decision final but the appellate Court must examine this question. The question of abatement of the appeal does not arise because this is not a case of any of the parties expiring pending proceedings followed by omission to bring the legal representatives on record. In that situation only, the appeal gets abated. But when the decree as against one of the defendants has become final and is either not contested or is not carried in appeal, the decree becomes enforceable as against defendant who suffers the decree. But when one of the defendants contests the correctness of the decree, necessarily. It has to be examined, whether the finding recorded and the decree passed by the trial Court, as affirmed by the appellate Court, is correct in law. *Bhola Nath Misra v. Rajendra Pandey and another,* AIR 1997 SC 1281: 1997(2) Scale 431: 1997(3) JT 215: 1997(9) SCC 276: 1997(2) Land LR 276

Order 22, Rule 9.-Abatement.-Joint property.-Suit for permanent injunction and title decreed.-Death of co-owners during appeal.-Non-impleadment of co-owners in appeal.-No averment in plaint claiming the property to be coparcenary property represented by Karta.-Non-impleadment of legal representative of deceased co-owner.-Appeal abates as a whole. *Municipal Council, Mandsaur v. Fakirchand and another,* AIR 1997 SC 1251: 1997(3) SCC 500: 1997(2) Scale 56: 1997(2) JT 521: 1997(2) AWC 947: 1997 Har. R.R. 300

Order 22, Rule 9.-Abatement.-Scope of.-Death of Co-respondent does not result in abatement of appeal against other co-respondents even though it may otherwise has to be dismissed if otherwise cannot proceed against them. When Order 22, Rule 4 does not provide for the abatement of the appeals against the co-respondents of the deceased respondent there can be no question of abatement of the appeals against them. To say that the appeals against them abated in certain circumstances, is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore to be dismissed. Such a result depends on the nature of the relief sought in the appeal.If the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it. *State of Punjab v. Nathu Ram,* AIR 1962 SC 89: 1962(1) An LT 306: 1962(2) Mad LJ (SC) 182: 1962(2) SCR 636.

Order 22, Rule 9.-Impleadment of legal representative.-Condonation of delay.-Abatement of suit secure valuable rights to the legal representatives of the deceased and therefore, a party seeking their impleadment must state reason for not knowing the death of the other party. There is no question of construing the expression `sufficient cause' liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal representatives

of the deceased respondent. The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement. It is true, as contended, that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the opposite party, but it does not mean that the mere fact of the appellant's coming to know of the respondent's death belatedly will, by itself, justify his application for setting aside the abatement. That is not the law, Rule 9 of Order XXII of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The mere allegation about his not coming to know of the death of the opposite party is not sufficient. He had to state reasons which, according to him, led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, specially when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the abatement of the suit. *Union of India v. Ram Charan (deceased) through his Legal Representatives,* AIR 1964 SC 215: 1964(2) SCJ 324: 1964(3) SCR 467

Order 22, Rule 9.-Setting aside of abatement.-Suffi-cient grounds.-Interference in revision.-Permissibility .-High Court has no jurisdiction to interfere with the finding of facts arrived at by the Trial Court in regard to existence of sufficient grounds to set-aside abatement. *Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee and others,* AIR 1964 SC 1336: 1963(2) SCWR 263: 1964(3) SCR 495

Order 22, Rules 9 and 3.-Abatement .-Delay in substitution.-Delay of 15 days on account of illness supported by medical certificate, stood duly explained.-Abatement should be set aside. *Mani Ram and another v. Hari Singh and others,* AIR 1992 SC 1851: 1992(3) SCC 501: 1992(2) Scale 44: 1992(4) JT 177

Order 22, Rule 9(3).-Abatement.-Delay in seeking set aside of abatement.-Death of prominent citizen duly reflected in news paper is no ground to assume early knowledge and therefore to condone delay. We are unable to appreciate that litigants are presumed to read newspapers so as to be aware of the death of prominent citizens from the obtuary columns of leading national newspapers. And this was the only ground for declining to grant relief. It does not carry conviction. We are satisfied that the appellant had shown sufficient cause which prevented him from moving the application for substitution in time in the High Court and we accept the same as sufficient to condone delay. We accordingly condone the delay. We grant substitution. Consequently, the abate- ment, if any, will have to be set aside. *Bapurao v. Smt. Jamunbai and others,* AIR 1983 SC 186: 1983(2) SCC 253: 1982(2) Scale 1380: 1983 Jab.L.J. 311

Order 22, Rule 10.-Abatement.-Delay in seeking substitution.- Poverty, ignorance and illiteracy.-Effect of.-It is not fair to presume that every one knows that substitution is necessary on death of a party.-Substitution allowed. *Ram Sumiran and others v. D.D.C. and others,* AIR 1985 SC 606: 1985(1) SCC 431: 1985 ACJ 569: 1985 Pun LJ 164: 1985 Har Rent R 269

Order 22, Rule 10.-Abatement.-Devolution of interest.-Transfer of property during the life time.-Successor in interest is entitled to be brought on record. *Ghafoor Ahmad Khan v. Bashir Ahmad Khan (Dead) by LRs.,* AIR 1983 SC 123: 1982(3) SCC 486: 1982(2) Scale 1372: 1983 All. LJ 768

Order 22, Rule 10.-Abatement.-Necessity of substitution.-Sale of property by the deceased in favour of the party already on record.-There is no need to bring on record the legal heirs of deceased. *PPK Gopalan Nambiar v. PPK Balakrishnan Nambiar and others,* AIR 1995 SC 1852: 1995 Supp (2) SCC 664: 1995(2) Scale 560: 1995(5) JT 163: 1995(2) KLT (SC) 318

Order 22, Rule 10-A.-Duty of counsel.-Information of death.-It is the duty of Counsel to inform the court about the death of a party and the Court shall give notice to the other party of the death. *State of Madhya Pradesh v. S.S. Akolkar,* AIR 1996 SC 1984: 1996(2) SCC 568: 1996(2) Scale 130: 1996(2) JT 286: 1996(2) APLJ 77

Order 22, Rule 10-A.-Notice of death.-Insufficient notice.-Death of a party.-Notice of death issued to the plaintiff bank through a branch not concerned with the dispute.-Rejection of application to set aside abatement and to condone delay not proper. *United Bank of India v. Smt. Kanan Bala Devi and others,* AIR 1987 SC 1510: 1987(2) SCC 583: 1987(2) SCR 1090: 1987(1) Scale 859: 1987(2) J.T. 227: 1987 All. W.C. 1183

Order 22, Rule 11.-Abatement of appeal.-Death of one of the decree holders.-The deceased joint decree holder alongwith other.-Failure to implead legal representatives of the deceased.-Appeal cannot proceed against other decree holders. *Madhi v. Mahanbai and others,* AIR 1972 SC 1455:

1973(3) SCC 185

Order 22, Rules 11 and 3.-Abatement of appeal.-Joint decree.- Decree of pre-emption not capable of being separated as there can be no partial pre-emption.-Death of one of the parties.-Failure to bring on record the legal representatives of the deceased.-The appeal abates as a whole. *Ram Sarup v. Munshi and others,* AIR 1963 SC 553: 65 Pun LR 531

Order 22, Rules 34 and 10.-Application of.-Abatement of suit.- Devolution of interest.-Effect on suit for office against occupant of office .-Death of occupant resulting in devaluation of office to another person.-Suit asserting a right to office, is not abated. The suit was for possession and management of the Dera and the properties appertaining to it by the appellant purporting to be the de jure mahant against Som Dass as de facto mahant. The fact that it was after Som Dass died that Shiam Dass was elected to be the mahant of the Dera can make no difference when we are dealing with the question whether the interest in the subject-matter of the suit devolved upon him. And, as it was in a representative capacity that Som Dass was sued and as it was in the same representative capacity that the appeal was sought too be continued against Shiam Dass, Order 22, Rule 10 will apply. *Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass (Deceased) through his Chela Shiama Dass,* AIR 1975 SC 2159: 1976(1) SCC 103: 1976(1) SCR 487

Order 22, Rule 90.-Defect in sale.-Sale proclamation.-Form of.-The error in sale proclamation could be waived by the judgement debtor.-Error is not going to the root of court jurisdiction.-Set aside of sale is not called for. The requirements which were not complied within this case when settling the sale proclamation were intended for the benefit of the appellant and could be waived by him. They were not matters which went to the root of the court's jurisdiction and constituted the foundation or authority for the proceeding or where public interest was involved. Clearly, they were mere irregularities. Consequently, they fall within the scope of Rule 90 of Order XXI. *S.A. Sundarajan v. A.P.V. Rajendran,* AIR 1981 SC 693: 1981(1) SCC 719: 1981(2) SCR 600: 1981 Land LR 277

Order 23, Rule 1.-Subject matter.-Meaning of.-The expression includes cause of action and relief. The expression subject-matter is not defined in the Civil Procedure Code. It does not reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit. Mere identity of some of the issues in the two suits do not bring about an an identity of the subject-matter in the two suits. Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter as the first suit. *Vallabh Das v. Dr. Madanlal and others,* AIR 1970 SC 987: 1970 Cur LJ 493: 1971(1) SCR 211: 1970(1) SCC 761

Order 23, Rule 1.-Withdrawal of suit.-Considerations for.-Suit for partition.-By interim order leave granted to a party to buy a share of property created vested right in such property.-Prayer for withdrawal can be refused by the Court. If any vested right comes into existence before the prayer for withdrawal is made, the court is not bound to allow withdrawal; but it is suggested that this can happen only in very limited circumstances i.e. where a preliminary decree had been passed or in those cases where a set off has been claimed or a counter claim has been made. We find it difficult to accede to the contention of the appellant that the suit can be withdrawn by the plaintiff after he has himself requested for a sale under Section 2 of the Partition Act and the defendant has applied to the court for leave to buy at a valuation the share of the plaintiff under Section_3. Before Judgment.-Leave may be refused to a plaintiff to discontinue the action if the plaintiff is not wholly *dominus litis* or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him. *R. Ramamurthi Aiyar v. Raja V. Rajeswararao,* AIR 1973 SC 643: 1973(1) SCR 904: 1972(9) SCWR 540: 1972(2) SCC 721

Order 23, Rule 1.-Withdrawal of suit.-Liberty to file fresh suit.-Considerations for grant of.-In the absence of any reason or defect due to which, the suit is likely to fail, the liberty to file fresh suit in respect of same cause of action can neither be sought nor can be relied upon. All the courts below including the High Court concurrently found that the plaintiff/appellants failed to produce any evidence to show that the permission to withdraw the suit was given on the ground that the suit was bound to fail by reason of some formal defect or there were sufficient grounds for allowing the plaintiffs to institute a fresh suit in respect of the same subject matter. Not only this the plaintiffs had not even produced the application which is said to have been filed for withdrawn of the earlier suit with permission to file fresh suit on the same cause of action to show as to what was the formal defect in the earlier suit by reason of which it was sought to be withdrawn. However, the order dated may 20, 1971 passed by the Civil Court was on record which did not indicate as to what was the formal defect in the suit by reason of which the permission to withdraw the same was accorded. In these facts and circumstances no cases for fresh institution of suit on the same cause of action and of the same relief after the withdrawal of the earlier suit was made out by the plaintiffs/ appellants in accordance with the provisions of clause (3) of Order XXIII, Rule 1 of the Code. *Bakhtawar Singh and another v. Sada Kaur and another,* AIR 1996 SC 3488: 1996(11) SCC 167: 1996(6) Scale 222: 1996(8) JT 407: 1997(1) Rec CR 51

Order 23, Rules 1 and 2.-Unlawful compromise.-Procedure.-Application claiming the compromise to

be unlawful can file an application under Section 3 or an appeal under Section 96 of the Code. When the amending Act introduced a proviso along with an explanation to Rule 3 of Order 23 saying that where it is alleged by one party and denied by other that an adjustment or satisfaction has been arrived at, the court shall decide the question, the Court before which petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise which is void or voidable under the Indian Contract Act . . . . shall not be deemed to be lawful within the meaning of the said rule. In view of the proviso read with the explanation, a Court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even Rule 1(m) of Order 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to Rule 3 of Order 23, or an appeal under Section 96(1) of the Code, in which he can now question the validity of the compromise in view of Rule 1A of Order 43 of the Code. *Banwari Lal v. Smt. Chando Devi (through LR) and another,* AIR 1993 SC 1139: 1993(1) SCC 581: 1992(3) Scale 448: 1992 Supp JT 420: 1993(1) PLJR (SC) 21

Order 23, Rules 2, 3 and 4.-Compromise in execution.-Enforce- ment of.-Postponement of execution in lieu of payment of higher rate of interest.-Execution of such compromise by the executing court itself is permissible. *Moti Lal Banker v. Maharaj Kumar Mahmood Hasan Khan,* AIR 1968 SC 1087: 1968 (2) Andh LT 220: 1968(3) SCR 158

Order 23, Rule 2 and Order 20, Rule 6.-Consent decree.-Preparation of .-Compromise between the parties evidenced by a hand written document submitted to the Trial Court which directed that decree to be drawn in terms of the documents .-Subsequent order to draw decree as per another type-written but unsigned documents without holding the earlier order to be wrong.-Subsequent order is not sustainable. *Shamlal Batra and another, v. Bhagwandas Narandas Patel,* AIR 1973 SC 816: 1973(1) SCC 175

Order 23, Rule 3.-Application on special statute.-Unlawful Agreement.-Permissibility.-A Tribunal created under a special statute may refuse to record a compromise if it is found to be unlawful or contrary to statute. It is too late in the day to contend that the provisions of Order 23, Rule 3 of the Code of Civil Procedure cannot apply to eviction suits governed by the special statutes. If the agreement or compromise for the eviction of the tenant is found, on the facts of a particular case, to be in violation of a particular Rent Restriction or Control Act, the Court would refuse to record the compromise as it will not be a lawful agreement. If on the other hand, the Court is satisfied on consideration of the terms of the compromise and, if necessary, by considering them in the context of the pleadings and other materials in the case, that the agreement is lawful, as in any other suit, so in an eviction suit, the Court is bound to record the compromise and pass decree in accordance therewith. Passing a decree for eviction on adjudication of the requisite facts or on their admission in a compromise, either express or implied, is not different. *Roshan Lal and another v. Madan Lal and others,* AIR 1975 SC 2130: 1975(2) SCC 785: 1976(1) SCR 878

Order 23, Rule 3.-Compromise between the parties.-Effect of.-Subsequent suit between the parties claiming same right though on different grounds.-Subsequent suit is barred by the principle of estoppel even though it may not be barred by *res judicata*. *Sunderabai w/o Devrao Deshpande and another v. Devaji Shankar Deshpande,* AIR 1954 SC 82: 1953 SCJ 693: 1953(2) Mad LJ 782

Order 23, Rule 3.-Compromise by counsel.-Validity of.-Due authori-sation to the lawyer.-The party himself not averse to compromise except that he expected higher amount.-Application seeking to set aside compromise, rejected. *Employers in relation to Monoharbahal Colliery Calcutta v. K.N. Mishra and others,* AIR 1975 SC 1632: 1975(2) SCC 244

Order 23, Rule 3.-Compromise decree.-Challenge to arbitration award.-Objections made to award becoming rule of the court.-Dispute compromised between the parties.-Matter disposed of in terms of compromise. *M/s. Chhajjomal & Sons v. Union of India,* AIR 1981 SC 17: 1979(4) SCC 803

Order 23, Rule 3.-Compromise decree.-Discharge of decree.-Parties agreeing to sell the properties to mortgagee in full satisfaction of decree.-Actual conveyance and mere agreement to sell the property would amount to satisfaction of decree. *Haji T.J. Abdul Shakoor and others v. Bijai Kumar Kapur and others,* AIR 1964 SC 874: 1963(2) SCJ 672: 1963 Supp (2) SCR 46

Order 23, Rule 3.-Compromise decree.-Default in compliance.-Extension of time for compliance .-No case of manifest injustice made out.-Reprehensible conduct of judgement debtor in non-compliance with directions despite repeated extensions.-Extension of time for compliance is not called for. *Smt. Sova Ray and another v. Gostha Gopal Dey and others,* AIR 1988 SC 981: 1988(2) SCC 134: 1988(3) SCR 287: 1988(1) Scale 534: 1988(1) JT 583

Order 23, Rule 3.-Compromise decree.-Effect of.-Decree passed on the basis of compromise between the parties.-Unless finding of fraud is established, the compromise decree validly recorded in judicial proceedings, remains binding on the parties. *Ram Bhajan Singh and others v. Madheshwar Singh (Dead) by LRs. and others,* AIR 1995 SC 1685: 1995 Supp (2) SCC 757: 1995(3) Scale 709: 1995(2)

CCC 637

Order 23, Rule 3.-Compromise decree.-Lawfulness of compromise .-Decree for eviction passed on the basis of compromise between the parties.-Sufficient material to indicate that decree was not in violation of Rent Control Act.-Presumption is in favour of law- fulness of compromise.-Execution of decree permitted. While recording the compromise under Order XXIII, Rule 3 of the Code, it is not necessary for the Court to say in express terms in the order that it was satisfied that the compromise was a lawful one. It will be presumed to have done so unless the contrary is shown.There is abundant intrinsic material in the compromise itself to indicate that the decree passed upon its basis was not in violation of the Act but was in accordance with it. In our judgment the decree under execution is not a nullity and has got to be executed by the Execution Court without any further loss of time, as quickly as possible. *Suleman Noor- mohamed etc. v. Umarbhai Janubhai,* AIR 1978 SC 952: 1978(2) SCC 179: 1978(3) SCR 387: 1978(1) Rent. LR 765

Order 23, Rule 3.-Compromise decree.-Status of tenure holder.-Concession made at the Bar whereby the offer made for payment of compensation to the other party in terms of relevant land law.-Compromise decree passed in terms of the concession. *Bhola and another v. Hurthi Mandir Shri Jai Narayanji and another,* AIR 1978 SC 299: 1978(1) SCC 66: 1977 WLN 568

Order 23, Rule 3.-Compromise decree.-Transfer of Property.-Necessity of registration.-In the absence of express stipulation in the decree, execution of separate deed of conveyance and registration is not necessary. Even though the decree of a Court embodied an agreement between the parties, we do not think that the agreement between the parties placed before us, involving the recognition of a transfer, could require registration unless the terms of the compromise decree necessarily involved the execution of a deed of conveyance also. *Girdharilal (dead) by L.Rs. v. Hukam Singh and others,* AIR 1977 SC 129: 1977(3) SCC 347: 1977(1) RCR 379

Order 23, Rule 3.-Compromise.-Form of.-Signatures of Counsel and not the parties in person.-It binds the parties. There is no reason to assume that the legislature intended to curtail the implied authority of counsel, engaged in the thick of proceedings in Court, to compromise or agree on matters relating to the parties, even if such matters exceed the subject-matter of the suit. The relationship of counsel and his party or the recognised agent and his principle is a matter of contract;; and with the freedom of contract generally, the legislature does not interfere except when warranted by public policy, and the legislative intent is expressly made manifest. There is no such declaration of policy or indication of intent in the present case. The legislature has not evinced any intention to change the well recognised and universally acclaimed common law tradition of an ever alert, independent and active Bar with freedom to manoeuvre with force and drive for quick action in a battle of wits typical of the adversarial system of oral hearing. Considering the traditional recognised role of counsel in the common law system, and the evil sought to be remedied by Parliament by the C.P.C. (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject-matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by itself duly authorised agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in Court by elimination of uncertainties and enlargements of the scope of compromise. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power-of-compromise on behalf of his principle, so can counsel, possessed of the requisite authorisation by vakalatnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in Court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated. *Byram Pestonji Gariwala v. Union Bank of India and others,* AIR 1991 SC 2234: 1992(1) SCC 31: 1991 Supp (1) SCR 187: 1991(2) Scale 625: 1991(4) JT 15: 1993 Civ CR (SC) 452

Order 23, Rule 3.-Compromise.-Necessity to pass decree.-Duty of court to dispose of proceedings in terms of compromise. Once a dispute is validly settled out of Court, it is open to a party to a litigation to move the Court to pass a decree in accordance with the compromise. Rule 3 of Order 23, of Code of Civil Procedure provides that where it is proved to the satisfaction of the Court that a suit (which expression includes an appeal) has been settled wholly or in part by any lawful agreement, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to that suit. This is a mandatory provision. It is somewhat surprising that the High Court should have felt itself helpless under the circumstances of the case to do justice between the parties. Clause 12 of the compromise provides that if the respondent does not carry out the terms of the compromise, he shall be held responsible for all the losses that the appellant may suffer because of its breach. This clause does not preclude the appellant from putting forward the compromise and asking the Court to dismiss the appeal in accordance with its terms. *M/s. Silver Screen Enterprises v. Devki Nandan*

Nagpal, AIR 1970 SC 669: 72 Pun LR 583: 1970(3) SCC 878

Order 23, Rule 3.-Compromise.-Written compromise.-Necessity of.-The requirement of reducing the compromise into writing and signing by the parties cannot be restricted to agreements reached out of Court. We find no justification to confine the applicability of the first part of Order XXIII, Rule 3 of the Code to a compromise effected out of Court. Under the rule prior to the amendment, the agreement comprimising the suit could be written or oral and necessarily the Court had to enquire whether or not such compromise had been effected. It was open to the Court to decide the matter by taking evidence in the usual way or upon affidavits. The whole object of the amendment by adding the words `in writing and signed by the parties' is to prevent false and frivolous pleas that a suit had been adjusted wholly or in part by any lawful agreement or compromise, with a view to protact or delay the proceedings in the suit. *Gurpreet Singh v. Chatur Bhuj Goel,* AIR 1988 SC 400: 1988(1) SCC 270: 1988(2) SCR 401: 1987(2) Scale 1338: 1987(4) JT 665: 1988 Mah LR 405

Order 23, Rule 3.-Consent decree.-Finality of.-In the absence of compromise having been vitiated by fraud, misrepresentation, misunder- standing or mistake, the decree passed on the basis of compromise has a binding force. *Shankar Sitaram Sontakke and another v. Balkrishna Sitaram Sontakke and others,* AIR 1954 SC 352: 57 Bom LR 1: 1954 SCA 914: 1954 SCJ 552: 1955 SCR 99

Order 23, Rule 3.-Consent decree.-Landlord undertaking to restore possession to tenant after re-construction of building.-Induction of third party in the premises.-The fruit of compromise decree cannot be denied for any sympathy with the person inducted in the premises. In pursuance of a solemn compromise reached by the tenant (appellant's father) and the landlord-respondent No. 3 the possession of the premises was handed over to the landlord in 1966 on the express stipulations that on the construction of the new building the tenant would get an identical area therein. The fresh construction was completed in 1967 and instead of honouring the pledge given by it in the form of an `undertaking' the respondent- Bank inducted the writ petitioners therein and did not make any offer to the tenant or after his death to his heir until the matter reached the High Court on the second occasion and the writ petitions were being argued in 1990. We do not, therefore, think that there is any conceivable reason to condemn the appellant for her insistence for the benefits under the consent decree or for any sympathy with the landlord-Bank or the writ petitioners before the High Court who took advantage of the situation. *Smt. Parvatbai Subhanrao Nalawade v. Anwarali Hasanali Makani and others etc.,* AIR 1992 SC 1780: 1992(1) SCC 414: 1991(2) Scale 1434: 1992(1) JT 50: 1992(47) DLT 102

Order 23, Rule 3.-Consent decree.-*Res judicata.*-The judgement passed with the consent of the parties is as effective an estoppel between the parties as a judgement passed in a contested case. *Sailendra Narayan Bhanja Deo v. The State of Orissa,* AIR 1956 SC 346

Order 23, Rule 3.-Leave to institute fresh suit.-Considerations for.-Cost to defendant.-Non-payment of cost.-It will be open to the Court to reject the plaint but it cannot be construed as condition precedent for filing of fresh suit. Sub-rule (3) of Rule 1 of Order XXIII of the Code of Civil Procedure, 1908 provides that where a Court is satisfied that a suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject- matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permissiion to witdraw such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. While granting such permission, it is, therefore, open to a Court to direct the plaintiff to pay the costs of the defendants. Even if the orders for costs in a given case is construed as directing payment of costs as a condition precedent for filing a fresh suit, the defect, if any, may be cured by depositing in Court or paying to the defendants concerned the costs within a reasonable time to be fixed by the Court before which the second suit is filed. If the plaintiff fails to comply with the said direction, then it will be open to the Court to reject the plaint, but if the amount of costs is paid within the time fixed or extended by the Court the suit should be deemed to have been instituted validly on the date on which it was presented. *M/s. Konkan Trading Company v. Suresh Govind Kamat Tarkar and others,* AIR 1986 SC 1009: 1986(2) SCC 424: 1986(2) SCR 182: 1986(1) Scale 462: 1986 Rev. LR 206: 1986 MPLJ 505

Order 26, Rule 1.-Report of Local Commissioner.-Consideration of.-Necessity of.-Judgment delivered without considering the report of Commissioner and Surveyor appointed with the consent of the parties.-The ultimate conclusion vitiated by non-consideration of vital piece of evidence.-Case remanded for disposal in accordance with law. *Tushar Kanti Bose and others v. Savitri Devi and others,* AIR 1996 SC 2752: 1996 (10) SCC 96: 1996(5) Scale 574: 1996(7) JT 480: 1997(1) Land LR 195

Order 26, Rule 8.-Dispensation with proof.-Absence of formal order.-Effect of.-Examination of witness on commission.-Consideration of recorded evidence dispensing with formal proof.-Necessity of disability of witness.-Burden of proof. No order was made under clause (b) or Rule 8 by the Court. But no objection was raised by Yogindra Prasad to the admission of the recorded statement. The record of the statement was read with his consent. There was before the Court an application received a week before the date on which the commission was returned duly executed that Gopal Prasad Sinha was lying ill and was unable to attend the Court. The Court was satisfied of the truth of the grounds in that application and directed that the witness be examined on commission. Correctness of the order issuing the commission for

exemption of the witness is not challenged. There is no evidence that the sickness or infirmity which prevented the witness from attending the Court on or after July 22, 1969 did not persist till the case was finally disposed of, and on that account the evidence was inadmissible. The statement of Gopal Prasad Sinha was admitted to the record on the day on which the case of Markandeshwar Singh was closed. There is no evidence that the witness Gopal Prasad Sinha could have attended the Court during the time the case was pending. We do not think that the statement of Gopal Prasad Sinha is inadmissible. *Yogendra Prasad Shrivastava v. Markandeshwar Singh,* AIR 1971 SC 690: 1971(4) SCC 66

Order 26, Rule 13.-Judicial function.-Abdication of.-Authorisation to ascertain property available for partition.-It does not amount abdication of judicial function. *R.B.S.S. Munnalal and others v. S.S. Rajkumar and others,* AIR 1962 SC 1493: 1962 Nag LJ 521: 1962 Supp. (3) SCR 418

Order 27, Rules 2 and 8.-Concession by Government Counsel.-Distinction with concession by Advocate General.-The concession made by Advocate General would bind the State. Any concession made by the Government pleader in the trial Court cannot bind the Government as it is obviously always unsafe to rely on the wrong or erroneous or wanton concession made by the counsel appearing for the State unless it is writing on instructions from the responsible officer. Otherwise it would place undue and needless heavy burden on the public exchequer. But the same yardstick cannot be applied when the Advocate General has made a statement makes the bar since the Advocate General makes the statement with all responsibility. *Periyar and Pareekanni Rubbers Ltd. v. State of Kerala,* AIR 1990 SC 2192: 1996(4) SCC 195: 1990 Supp (1) SCR 362: 1991(1) JT 450

Order 28, Rules 3 and 4.-Impleadment of legal heirs.- Necessity of.-In the absence of fraud or acquiescence.-Omission to bring on record one of the legal representative will not abate the proceedings. Where a plaintiff or an appellant after diligent and *bona fide* enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and the decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record. Unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceeding, there is no reason why the heirs who have applied for being brought on record should not be held to represent the entire estate including the interests of the heirs not brought on the record. This is not to say that where heirs of an appellant are to be brought on record all of them should not be brought on record and any of them should be deliberately left out. But if by oversight or on account of some doubt as to who are the heirs, any heir of a deceased, appellant is left out that in itself would be no reason for holding that the entire estate of the deceased is not represented. It must be made clear that the fraud or collusion mentioned must be a fraud or collusion between the appellant on the one hand and the representative of the deceased respondent who is brought on record on the other and vice versa. *Harihar Prasad Singh and others v. Balmiki Prasad Singh and others,* AIR 1975 SC 733: 1975(2) SCR 932: 1975(1) SCC 212

Order 29, Rule 1.-Suit by corporation.-Institution of.-Pleadings singed on behalf of public corporation, i.e. Bank.-Prior resolution giving authorisation or power of attorney not necessary.-Corporation can ratify the act of its Officer subsequently as well.-Public interest should not be defeated on such technical plea as it shall be travesty of justice. *United Bank of India v. Naresh Kumar and others,* AIR 1997 SC 3: 1996(6) SCC 660: 1996(6) Scale 764: 1996(7) AD (SC) 208: 1997 Civ. CR (SC) 53: 1997(1) Orissa LR 108

Order 29, Rule 2.-Service on company.-Mode of service.-Handing over of summons to an unauthorised employee is not sufficient service. The meaning of Clause (b) has got to be understood in the background of the provisions of the Code in Order 5 which is meant for issue and service of summons on natural persons. Sending a summons by post to the registered office of the company, unless the contrary is shown, will be presumed to be service on the company itself. But the first part of Clause (b) has got to be understood with reference to the other provisions of the Code. Sending summons to a corporation by post addressed to it at its registered office may be a good mode of service either by itself, or preferably, by way of an additional mode of service. But leaving the summons at the registered office of the corporation if it is literally interpreted to say that the summons can be left anywhere uncared for in the registered office of the company, then it will lead to anomalous and absurd results. It has to be read in the background of the provision contained in Order 5, Rule 17 of the Code. In other words, if the serving peon or bailiff is not able to serve the summons on the Secretary or any Director or any other Principal Officer of the corporation because either he refuses to sign the summons or is not to be found by the serving person even after due diligence then he can leave the summons at the registered office of the company and make a report to that effect. *M/s. Shalimar Rope Works Ltd. v. M/s. Abdul Hussain H.M. Hasan Bhai Rassiwala and others,* AIR 1980 SC 1163: 1980(3) SCR 1028: 1980(3) Mah.LR 242

Order 29, Rule 3.-Any Director.-Meaning of. One can visualize a situation where a director who signed and verified the pleadings may not be in a position to answer certain material questions relating to the suit. If so, there is no reason why the director who may be able to answer such material questions is

excluded from the scope of Rule 3. Such an interpretation will defeat the purpose of the said rule. Therefore, Any director in Rule 3 need not be the same director who has signed and verified a pleading or on whom summons has been served. He can be any one of the directors who will be in a position to answer material questions relating to the suit. *M/s. Ram Chand and Sons Sugar Mills Private Ltd. Barabanki (U.P.) v. Kanhayalal Bhargava and others,* AIR 1966 SC 1899: 1966(2) SCJ 731: 1966(3) SCR 856

Order 29, Rule 3.-Default in appearance .-Effect of.-Disobedience by a Director of the Company to directions to appear in Court.-In the absence of collusion between the company and the director, the company cannot be made to suffer on account of the default of director. There is nothing in Order XXIX of the Code, which, expressly or by necessary implication, precludes the exercise of the inherent power of the Court under Section 151 of the Code. We are, therefore, of the opinion that in a case of default made by a director who failed to appear in Court when he was so required under Order XXIX, Rule 3 of the Code, the Court can make a suitable consequential order under Section 151 of the Code as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It is not possible to hold that the director in refusing to respond to the notice given by the Court was acting within the scope the powers conferred on him. He is only liable for his acts and not the company. If it was establsihed that the company was guilty of abuse of the process of the Court by preventing the director from attending the Court, the Court would have been justified in striking off the defence. But no such finding was given by the Courts below. *M/s. Ram Chand and Sons Sugar Mills Private Ltd. Barabanki (U.P.) v. Kanhayalal Bhargava and others,* AIR 1966 SC 1899: 1966(2) SCJ 731: 1966(3) SCR 856

Order 29, Rule 1.-Suit by corporation.-Institution of.-Pleadings singed on behalf of public corporation, i.e. Bank.-Prior resolution giving authorisation or power of attorney not necessary.-Corporation can ratify the act of its Officer subsequently as well.-Public interest should not be defeated on such technical plea as it shall be travesty of justice. *United Bank of India v. Naresh Kumar and others,* AIR 1997 SC 3: 1996(6) SCC 660: 1996(6) Scale 764: 1996(7) AD (SC) 208: 1997 Civ. CR (SC) 53: 1997(1) Orissa LR 108

Order 29, Rule 2.-Service on company.-Mode of service.-Handing over of summons to an unauthorised employee is not sufficient service. The meaning of Clause (b) has got to be understood in the background of the provisions of the Code in Order 5 which is meant for issue and service of summons on natural persons. Sending a summons by post to the registered office of the company, unless the contrary is shown, will be presumed to be service on the company itself. But the first part of Clause (b) has got to be understood with reference to the other provisions of the Code. Sending summons to a corporation by post addressed to it at its registered office may be a good mode of service either by itself, or preferably, by way of an additional mode of service. But leaving the summons at the registered office of the corporation if it is literally interpreted to say that the summons can be left anywhere uncared for in the registered office of the company, then it will lead to anomalous and absurd results. It has to be read in the background of the provision contained in Order 5, Rule 17 of the Code. In other words, if the serving peon or bailiff is not able to serve the summons on the Secretary or any Director or any other Principal Officer of the corporation because either he refuses to sign the summons or is not to be found by the serving person even after due diligence then he can leave the summons at the registered office of the company and make a report to that effect. *M/s. Shalimar Rope Works Ltd. v. M/s. Abdul Hussain H.M. Hasan Bhai Rassiwala and others,* AIR 1980 SC 1163: 1980(3) SCR 1028: 1980(3) Mah.LR 242

Order 29, Rule 3.-Any Director.-Meaning of. One can visualize a situation where a director who signed and verified the pleadings may not be in a position to answer certain material questions relating to the suit. If so, there is no reason why the director who may be able to answer such material questions is excluded from the scope of Rule 3. Such an interpretation will defeat the purpose of the said rule. Therefore, Any director in Rule 3 need not be the same director who has signed and verified a pleading or on whom summons has been served. He can be any one of the directors who will be in a position to answer material questions relating to the suit. *M/s. Ram Chand and Sons Sugar Mills Private Ltd. Barabanki (U.P.) v. Kanhayalal Bhargava and others,* AIR 1966 SC 1899: 1966(2) SCJ 731: 1966(3) SCR 856

Order 29, Rule 3.-Default in appearance .-Effect of.-Disobedience by a Director of the Company to directions to appear in Court.-In the absence of collusion between the company and the director, the company cannot be made to suffer on account of the default of director. There is nothing in Order XXIX of the Code, which, expressly or by necessary implication, precludes the exercise of the inherent power of the Court under Section 151 of the Code. We are, therefore, of the opinion that in a case of default made by a director who failed to appear in Court when he was so required under Order XXIX, Rule 3 of the Code, the Court can make a suitable consequential order under Section 151 of the Code as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It is not possible to hold that the director in refusing to respond to the notice given by the Court was acting within the scope the powers conferred on him. He is only liable for his acts and not the company. If it was establsihed that the company was guilty of abuse of the process of the Court by preventing the director from attending the Court, the Court would have been justified in striking off the defence. But no such finding was given by

the Courts below. *M/s. Ram Chand and Sons Sugar Mills Private Ltd. Barabanki (U.P.) v. Kanhayalal Bhargava and others,* AIR 1966 SC 1899: 1966(2) SCJ 731: 1966(3) SCR 856

Order 30, Rule 2.-Partner of firm.-Locus standi to dispute.-A defendant cannot claim a person to be a partner, who is not claimed as such by the plaintiff firm. It would, in our opinion, be a wholly untenable plea for the defendant from whom money is claimed, to urge that even though Satyavati as well as the other partners claim that it is not she but her son Shashi Kumar who is entitled to 4 Annas share in the partnership, the court should hold that it is Satyavati who is entitled to that share. The distinction between a plaintiff-firm and a defendant-firm in the above context should not be lost sight of. So far as a defendant-firm against whom a suit for recovery of money has been filed is concerned, it would be open to the plaintiff to prove that a person is a partner of the defendant firm despite the denial of that fact by that person as well as the other partners of the defendant-firm. The reason for that is that a creditor of a defendant-firm can, except in some cases to which it is not necessary to refer, also proceed against the personal assets of each and every partner. Such a consideration does not hold good when the dispute relates to the question as to who are the partners of the plaintiff-firm. *M/s. Mohatta Brothers v. The Bharat Suryodaya Mills Co. Ltd., Ahmedabad,* AIR 1976 SC 1703: 1976(4) SCC 420: 1976(3) SCR 1022

Order 30, Rule 4.-Suit by firm.-Abatement.-Permissibility.-Death of the one of the partners during the pendency of the appeal does not cause the appeal to abate. *Sohan Lal v. Amin Chand & Sons,* AIR 1973 SC 2572: 1973(2) SCWR 477: 1974(1) SCR 453: 1973(2) SCC 608

Order 30, Rule 4.-Suit against firm.-Impleadment of legal heirs of deceased partner.-provision is an exception to Section 45 of Contract Act.-It does not confer any right upon the legal representatives of deceased partner to be impleaded if they are not necessary party. What sub-rule (1) of Rule 4 in Order 30 of the Code provides is that it is not mandatory to join the legal representative of a deceased partner as a party in the said suit. What sub-rule (2) says, in other words, is that sub-rule (1) is not a hindrance to any legal representative of a deceased partner to get himself impleaded if he has otherwise any right to do so. It is, therefore, clear that sub-rule (2) does not create any right as such for a legal representative to get impleaded in a suit, but it only operates as an exception to sub-rule (1). At any rate, Rule 4 (2) of Order 30 cannot come into operation in a situation where Order 1 Rule 10 of the Code cannot be invoked. *Anokhe Lal v. Radhamohan Bansal and others,* AIR 1997 SC 257: 1996(6) SCC 730: 1996(8) Scale 121: 1996(10) JT 266: 1997 Har RR 70: 1997(1) Jab. LJ 252

Order 30, Rules 6 and 7.-Service of notice to Partner.-Effect of.-A partner who has been served with an individual notice is liable for execution of decree passed against partnership firm and the decree can be executed against the property of such person. *Topanmal Chhotamal v. M/s Kundomal Gangaram and others,* AIR 1960 SC 388

Order 30, Rules 8 and 3.-Suit against the firm.-Service of summons.-The person served with summons denying that he was a partner.-The Court may be requested to adjudicate the status of such person where after the suit may proceed either against such person or the plaintiff may seek fresh summons against proper person. The rule enables the person served as a partner to appear under protest and to deny that he is a partner of the firm which is sued. Appearance under protest by the person sued renders the service of summons as regards the defendant firm ineffective. The plaintiff may obtain a fresh summons against the firm and serve it is the manner prescribed by Order 30, Rule 3 against another person who is alleged to be a partner by the plaintiff or against the person who has the control or management of the partnership business. A decree against the defendant firm so obtained may with leave under Order 21, Rule 50(2) be executed against the firm and also against the person who had been initially served as a partner and who had appeared under protest denying that he was a partner. The plaintiff, however, is not obliged to obtain a fresh summons: he may request the Court to adjudicate upon the plea of denial raised by the person served and appearing under protest. The Court will then proceed to determine the issue raised by that plea. If the Court finds on evidence that the person served was not a partner at the material time, the suit, cannot proceed, unless summons is served a fresh under Rule 3: if the Court holds that he was a partner, service on him will be regarded as good service on the firm and the suit will proceed against the firm. *Gajendra Narain Singh v. Johrimal Prahlad Rai,* AIR 1964 SC 581: 1964(1) Andh WR (SC) 1: 1964 BLJR 396: 1964(1) MadLJ (SC) 1: 1963 Supp (2) SCR 30

Order 31, Rule 9.-Application of.-Pre-condition for stay of execution. It is obvious from a mere perusal of the rule that there should be simultaneously two proceedings in one Court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the instance of the judgment-debtor against the decree-holder. That is a condition under which the Court in which the suit is pending may stay the execution before it. Rule 29 clearly shows that the power of the Court to stay execution before it flows directly from the fact that the execution is at the instance of the decree-holder whose decree had been passed by that Court only. If the decree in execution was not passed by it, it had no jurisdiction to stay the execution. *Shaukat Hussain v. Smt. Bhuneshwari Devi,* AIR 1973 SC 528: 1972 Pat LJR 535: 1972(2) SCC 731: 1973(1) SCR 1022

Order 32, Rule 1.-Decree against minor.-Negligence of next friend.-Suit by minor seeking to set aside decree, maintainable. *Asharfi Lal v. Smt. Koili (dead) by LRs.,* AIR 1995 SC 1440: 1995(4) SCC 163: 1995(2) Scale 827: 1995(5) JT 496: 1995 Civ. CR (SC) 782: 1995 All LJ 1154 **Order 32, Rule 3.-**

Guardian *ad litem*.-Discharge of.-Appointment of guardian *ad litem* does not take away the right of natural guardian for ever.-On discharge of guardian *ad litem*, the rights of natural guardian revive.-Sale of property by natural guardian not challenged by minor on attaining majority.-Sale is not void. *Divya Dip Singh and others v. Ram Bachan Mishra and others,* AIR 1997 SC 1465: 1997(1) SCC 504: 1996(7) Scale 813 1996(9) JT: 1997(1) Mat. LR 1: 1997(2) BLJ 210

Order 32, Rules 3 and 15.-Decree against lunatic.-Guardian of lunatic not appointed.-The decree is nullity and sale of property in execution of such decree is void *ab initio*. *Ram Chandra Arya v. Man Singh and another,* AIR 1968 SC 954: 1968 All WR (HC) 626: 1968(2) SCR 572

Order 32, Rules 6 and 7.-Application on joint Hindu family.-Authority of Manager to give valid discharge. Under the Hindu Law the Karta of a Hindu joint family represents all the members of the family and has the power and duty to take action which binds the family in connection with all matters of management of the family property. Clearly, therefore, when in respect of a transaction of property possession has to be received by the several members of the family, it is the Karta's duty and power to take possession on behalf of the entire family, including himself, the members of the family who are *sui juris* as well as those who are not. Acceptance of delivery of possession of property in terms of the decree in a partition suit can by no stretch of imagination be considered entering into any agreement or compromise. *Sarda Prasad and others v. Lala Jumna Prasad and others,* AIR 1961 SC 1074: 1961 Andh LT 433: 1961 BLJR 570: 1961(1) Ker LR 472: 1961(3) SCR 875

Order 32, Rule 7.-Application of.-Scope of.-Provision must be interpreted to be limited to rights the issue in suit.-Provision does not require that the leave of court should be taken every time a step in proceeding is taken. Order XXXII, Rule 7, is one of the provisions designed to safeguard the interests of a minor during the pendency of a suit against hostile, negligent or collusive acts of a guardian. The scope of the provisions is implicit in the phraseology used therein. The crucial words are any agreement of compromise..... with reference to the suit. The words with reference, if taken out of the context are of the widest import. They may take in every procedural step in the conduct of a suit, such as adjournment, admission of documents, inter- locutories, inspection etc., and obviously it could not have been the intention of the Legislature that agreements in respect of such procedural steps should conform to the requirements of the rule. If that be not so, the rule instead of protecting the interests of a minor would easily become a major obstacle in disposing of suits, in which a minor is ranged as party on one side or the other. So consistent with the purpose of the rule the words with reference to the suit must be limited to the rights put in issue in the suit. For the purpose of the said rule an execution proceeding is a continuation of a suit. If it was a continuation, the rule would also apply to an agreement or compromise with reference to the said execution proceeding. But, just like in the case of a suit, in the case of execution proceedings, also, the agreement or compromise shall be one affecting rights or liabilities ascertained or declared by the decree put in execution. As in the case of a suit, so also in the case of an execution of a decree, mere procedural steps not affecting the rights or liabilities so declared are not governed by the provision. The guardian may agree to an adjournment of a sale, to a waiver of a fresh proclamation, to a reduction of upset price etc. It could not have been the intention of the Legislature that every time such a step is taken, the procedure laid down in Order XXXII, Rule 7, of the Code should be complied with. The result is that Order XXXII, Rule 7 of the Code will apply only to an agreement or compromise entered into by a guardian of a party to the suit, who is a minor, with another party thereof during the pendency of the suit and the execution proceedings. *Dokku Bhushayya v. Katragadda Ramakrishnayya and others,* AIR 1962 SC 1886: 1963(2) SCR 499

Order 32, Rule 7.-Leave of Court.-Compromise on behalf of minor.-The Guardian acting on behalf of minor, not legally competent.-The settlement and decree is void. *Syed Shah Gulam Ghouse Mohiuddin and others v. Syed Shah Ahmad Mohiuddin Kamisul Qadri,* AIR 1971 SC 2184: 1971(1) SCC 597: 1971(3) SCR 734

Order 32, Rule 7.-Leave of Court.-Compromise on behalf of minor.-Validity without leave of Court.-Guardians of minor guilty of gross negligence by entering into compromise without proper consent of the Court.-The compromise is liable to set aside. *Dhirendra Kumar Garg and others v. Smt. Sugandhi Bai Jain and others,* AIR 1989 SC 147: 1989(1) SCC 85: 1988 Supp. (3) SCR 196: 1988(2) Scale 1539: 1988(3) JT 778: 1989 Jab LJ 103

Order 32, Rule 7.-Leave of Court .-Form of.-There is no prescribed form in which the certificate which the Court is required to record, may be made. There is no set form in which the certificate which the Court is required to record need be made. It is evident that the Judge had the provisions of Order 32, Rule 7 in view. He adjourned the case on 17-11-1924. He realised that he had to give permission and he realised that the compromise had to be for the benefit of the minors. The portion of the order reproduced above shows that he did give permission and that he was satisfied about the minors' benefit. In our opinion, there was not only a technical but also a clear compliance with the law. *Bishundeo Narain and another v. Seogeni Rai and others,* AIR 1951 SC 280: 1951 ALJ SC 127: 64 MLW 971(2): 1951 SCJ 413: 1951 SCR 548

Order 32, Rule 7.-Non compliance .-Effect of.-Compromise on behalf of minor without leave of the Court is voidable and not void or nullity. What the rule really means is that the impugned agreement

can be avoided by the minor against the parties who are major and that it cannot be avoided by the parties who are major against the minor. It is voidable and not void. It is voidable at the instance of the minor and not at the instance of any other party. It is voidable against the parties that are major but not against a minor. This provision has been made for the protection of minors, and it means nothing more than this that the failure to comply with the requirements of Order 32, Rule 7(1) will entitle a moor to avoid the agreement and its consequences. If he avoids the said agreement it would be set aside but in no case can the infirmity in the agreement be used by other parties for the purpose of avoiding it in their own interest. The protection of the minor's interest requires that he should be given liberty to avoid it. No such consideration arises in respect of the other parties to the agreement and they can make no grievance or complaint against the agreement on the ground that it has not complied with Order 32, Rule 7(1). The non-observance of the condition laid down by Rule 1 does not make the agreement or decree void for it does not affect the jurisdiction of the Court at all. *Kaushalya Devi and others v. Baijnath Sayal and others,* AIR 1961 SC 790: 1962(1) SCJ 684: 1961(3) SCR 769

Order 32, Rule 7.-Negotiation without leave.-Permissibility.-The guardian may began negotiation for compromise with the other side before obtaining the sanction of the Court.-He cannot enter into compromise or agreement without the leave of the Court. Order 32, Rule 7 must be read as a whole. Sub-rule (2) contemplates a position where the mandatory provisions of sub-rule (1) have been ignored. In such a case, the resultant agreement or compromise is not to be held a nullity. It is only voidable. Therefore, it is good unless the minor chooses to avoid it. It follows that a decree or order based on the agreement is also good unless the minor chooses to challenge it. That is the position where there is no sanction of the Court Reading the two provisions together, the rule merely means this. No next friend or guardian for the suit can enter into an agreement or compromise *which will bind the minor* unless the Court sanctions it. If the Patna decision is meant to convey that before the guardian even begins negotiations for compromise with the other side, he must obtain the sanction of the Court, we are unable to agree with that view. *Bishundeo Narain and another v. Seogeni Rai and others,* AIR 1951 SC 280

Order 33, Rule 1.-Application as *forma pauperis*.-Consideration for.-Absence of necessary parties.-A person claiming to join by transposition as an applicant.-Application is not liable to be rejected on the ground that the claim made by him is personal to him alone. An application to sue in *forma pauperis*, is but a method prescribed by the Code for institution of a suit by a pauper without payment of fee prescribed by the Court Fees Act. If the claim made by the applicant that he is a pauper is not established the application may fail. But there is nothing personal in such an application. The suit commences from the moment an application for permission to sue in *forma pauperis* as required by Order 33 of the Code of Civil Procedure is presented, and Order 1, Rule 10 of the Code of Civil Procedure would be as much applicabe in such a suit as in a suit in which court fee had been duly paid. It is true that a person who claims to join a petitioner praying for leave to sue in *forma pauperis* must himself be a pauper. But his claim to join by transposition as an applicant must be investigated; it is not liable to be rejected on the ground that the claim made by the original applicant is personal to himself. *Vijai Pratap Singh and others v. Dukh Haran Nath Singh and another,* AIR 1962 SC 941: 1962 All LJ 623: 1962 Supp. (2) SCR 675

Order 33, Rule 1.-Application of.-Accidents claim tribunal.-The benefit of provision rightly extended to the claims before the Tribunal. *State of Haryana v. Smt. Darshana Devi and others,* AIR 1979 SC 855: 1979(2) SCC 236: 1979(3) SCR 184: 81 Puri LR 472

Order 33, Rule 3.-Appeal in *forma pauperis*.-Presentation in person.-Necessity of.-Rule of procedure are meant to advance the cause of justice and not to short circuit decision on merits.-Dismissal of appeal not proper. *Smt. Dipo v. Wassan Singh and others,* AIR 1983 SC 846: 1983(3) SCC 376: 1983(3) SCR 20: 1983(1) Scale 582

Order 33 Rules, 3 and 7.-Effect of.- Date of filing of suit.-Determination of.-The date of application seeking permission to sue as forma paupries if the date of institution of suit.-Determination of.-Date of presentation of application is date of institution of suit even if the plaintiff offers to pay Court fee subsequently on his own or after dismissal of application to sue as pauper. The suit by a pauper or a person claiming to be a pauper must be regarded as instituted on the date of the presentation of the application for permission to sue in forma pauperis as required by Rules 2 and 3 of Order 33 Civil Procedure Code. Where, before the formal disposal of the application to sue as a pauper, the plaintiff offers to pay the court-fee treating the application as his plaint, or, the Court, agreeing to treat it as a plaint, enlarges the time for payment of the Court-fee the application must be regarded as a plaint instituted on the day when the application was presented. On the acceptance of the court fee, by the court, the document, namely, the plaint would by virtue of Section 149 C.P.C., have the same force and effect as if such fee had been paid in the first instance *viz.* on the date it was presented to the court. *Jugal Kishore v. Dhanno Devi,* AIR 1973 SC 2508: 1973(2) SCWR 312: 1973(2) SCC 567: 1974(1) SCR 360

Order 33, Rule 5(d).-Application as *forma pauperis*.-Scope of enquiry.-cause of action in suit cannot be determined by the court while considering the application to sue as forma pauperis. It does not appear that any objection was raised as to the existence of prohibitions (c) and (d) set out in rule 5, and the Subordinate Judge disallowed the objection that the petition was not framed and presented as prescribed by rules 2 and 3. He did not consider the question whether the plaintiff was a pauper. He

rejected the application only on the ground that it did not show a cause of action, and the High Court confirmed the order also on that ground. By the express terms of rule 5, clause (d), the court is concerned to ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed: it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, prima facie, show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him. By the Statute, the jurisdiction of the Court is restricted to ascertaining whether on the allegations a cause of action is shown: the juris- diction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit. *Vijai Pratap Singh and others v. Dukh Haran Nath Singh and another,* AIR 1962 SC 941: 1962 All LJ 634: 1962 Supp. (2) SCR 675

Order 34, Rules 2 and 4.-Account of mortgage.-Omission.-Effect of.-The matters liable to be decided by way of preliminary decree became final and therefore omission to order to ascertain the amount due to the mortgagee does not affect the account of receipt of mortgage property by the mortgagee subsequent to preliminary decree. In a case where a decree is made in Form No. 5A, it is the duty of the Court to ascertain the amount due to the mortgagee at the date of the preliminary decree. How can the amount due to the mortgagee as on the date of preliminary decree be declared unless the net profits realized by him from the mortgaged property are debited against him? The statutory liability of the mortgagee to account upto the date of the preliminary decree would be the subject-matter of dispute in the suit upto the date of the said decree. The Court has to ascertain the amount due under the mortgage in terms of the mortgage deed and deduct the net realizations in the manner prescribed in Section 76(h) of the Transfer of Property Act and ascertain the balance due to the mortgagee on the date of the preliminary decree. If the mortgagor did not raie the plea, he would be barred on the principle of *res judicata* from raising the same as the said matter should be deemed to have been a matter which was directly and substantially in issue in the suit up to that stage. It is settled law that though a mortgage suit would be pending till a final decree was made, the matters decided or ought to have been decided by the preliminary decree were final. A preliminary decree is only concerned with disputes germane to the suit upto the date of the passing of the said decree. The net receipts of the mortgaged property by the mortgagee subsequent to the preliminary decree are outside the scope of the preliminary decree: they are analogous to amounts paid to a mortgagee by a mortgagor subsequent to the preliminary decree. *Gyarsi Bai and others v. Dhansukh Lal and others,* AIR 1965 SC 1055: 1965(2) SCJ 783: 1965(2) SCR 154 **Order 34, Rule 4.-Set aside preliminary decree.-Effect on final decree.-Where the preliminary decree is set-aside in appeal, execution of final decree is not permissible and executing Court should refuse to execute the final decree.** If in appeal the preliminary decree is reversed, the final decree must fall to the ground for there is no preliminary decree thereafter in support of it. It is not necessary in such a case for the defendant to go to the Court passing the final decree and ask it to set aside the final decree. Even if the defendant does not make an application to the Court for setting aside the final decree within three years because the preliminary decree has been reversed, the decree- holder cannot get the right to execute the final decree which has no preliminary decree in support of it. If an execution petition is made on such a final decree even though more than three years after the decree in appeal has been reversed, the defendant has simply to ask the Court where the execution petition is made to refuse to execute the decree on the ground that the preliminary decree in support of it has been set aside. It seems to us that in such a case it is the duty of the executing Court to take note of the fact that the preliminary decree in support of the final decree has been reversed and it should refuse to execute the final decree even though the fact is brought to its notice more than three years after the decree in appeal reversing the preliminary decree. In such a case in our opinion no question of limitation arises. *Sital Parshad and another v. Kishori Lal,* AIR 1967 SC 1236: 1967(2) SCJ 479: 1967(3) SCR 101

Order 34, Rule 4.-Mortgage suit.-Preliminary decree.-It cannot be contended that preliminary decree is valid for defining the obligations of defendants but was not valid because rights had accrued to plaintiff on account of non-fulfilment of its obligations . *Kumar Sudhendu Narain Deb v. Mrs. Renuka Biswas and others,* AIR 1992 SC 385: 1992(1) SCC 206: 1991(2) Scale 990: 1991(4) JT 320: 1992 AWC 114

Order 34, Rule 5.-Redemption of mortgage.-Application on special law.-Attachment in sale of property under Section 31 and 32 of State Financial Corporation Act.-The provision relating to mortgage are also applicable on such transaction. Expression `as far as practicable' and `in execution of a decree as if the Financial Corporation were the decree-holder' are the only expressions which qualify the `manner provided' for `sale of property in execution of a decree', as contained not only in some specific provision of the Code e.g. Order 21 thereof but `in the Code of Civil Procedure, 1908' namely, all the

provisions in the Code in this regard wherever they may be. As is apparent from the plain language of Section 32(8) of the Act the legal fiction was created for the purpose of executing an order under Section 32 of the Act for sale of attached property as if such order was a decree in a suit for sale and the Financial Corporation was the decree holder whereas the debtor was the judgment debtor. Consequently, the provisions of the Code of Civil Procedure with regard to execution of a decree for sale of mortgaged property contained in Order 21 of the Code including the right to file an appeal against such orders passed during the course of execution which are appealable, shall apply *mutatis mutandis* to execution of an order under Section 32 of the Act unless some provision is not practicable to be applied. It cannot be disputed that the provisions contained in Order 34, Rule 5 of the Code are attracted as in apparent from the plain language thereof during the proceedings in execution of a final decree for sale and are thus provisions contained in the Code with regard to and having a material bearing on the execution of a decree as aforesaid. The provisions contained in Order 34, Rule 5 of the Code in substance permit the judgment debtor to redeem the mortgage even at the stage contem- plated by Order 34, Rule 5 unless the equity of redemption has got extinguished. Since the contingency whereunder an equity of redemption gets extinguished is contained in the proviso to Section 60 of the Transfer of Property Act and since as indicated above, in the instant case the equity of redemption has not extinguished we find no good ground to take the view that even though all the remaining provisions with regard to execution of a decree for sale of mortgaged property will apply to execution of an order under Section 32 of the Act, the provision contained in Order 34, Rule 5 of the Code shall not apply. *Maganla v. M/s. Jaiswal Industries, Neemach and others,* AIR 1989 SC 2113: 1989(4) SCC 344: 1989(3) SCR 696: 1989(2) Scale 208: 1989(3) JT 415

Order 34, Rule 5.-Extension of time .-Considerations for.-Dismissal of application under Order 21, Rule 90 while granting the time to the judgement debtor to deposit the decretal amount.-Failure to deposit the amount.-Duty of Court to confirm the sale.-Opposition by decree holder to extension of time.-The Court had no jurisdiction to extend time. The applicator under Order XXI, Rule 90 had been dismissed on October 7, 1958 and thereafter, the Court was bound to confirm the sale but for the compromise between the parties. There is no power under Order XXXIV, Rule 5 to extend time and all that it does is to permit the mortgagor judgment-debtor to deposit the amount before confirmation of sale. It does not give any right to the mortgagor judgment-debtor to ask for postponement of confirmation of sale in order to enable him to deposit the amount. We have to interpret Order XXXIV, Rule 5 and Order XXI, Rule 92 harmoniously and on a harmonious interpretation of the two provisions it is clear that though the mortgagor has the right to deposit the amount due at any time before confirmation of sale, there is no question of his being granted time under Order XXXIV, Rule 5 and if the provisions of Order XXI, Rule 92(1) apply the sale must be confirmed unless before the confirmation the mortgagor judgment- debtor has deposited the amount as permitted by Order XXXIV, Rule 5. Section 148 of the Code of Civil Procedure would not apply in these circumstances, and the executing Court was right in holding that it could not extend time. Thereafter it rightly confirmed the sale as required under Order XXI, Rule 92 there being no question of the application of Order XXXIV, Rule 5 for the money had not been deposited on November 22, 1958 before the order of confirmation was passed. In this view of the matter, we are of opinion that the order of the executing Court refusing grant of time and confirming the sale was correct. *Hukumchand v. Bansilal and others,* AIR 1968 SC 86: 1968 (1) Andh LT 147: 1968 MPLJ 187: 1967(3) SCR 695

Order 34, Rules 4 and 5.-Appeal from preliminary decree.-Effect of dismissal.-The preliminary decree set-aside in toto.-Period of payment allowed in the preliminary decree is automatically extended. In a case where an appeal from the preliminary decree is dismissed and the preliminary decree is confirmed in toto, it does not follow that the period of payment allowed is the trial Court's decree is extended automatically even though a final decree has been passed in the meantime. It seems to us that it is the duty of the appellate Court to indicate when dismissing the appeal from a preliminary decree in toto whether the time for payment is to be extended and if it does not do so, the original time granted for the purpose must stand. *Sital Parshad and another v. Kishori Lal,* AIR 1967 SC 1236: 1967(2) SCJ 479: 1967(3) SCR 101

Order 34, Rules 4 and 5.-Mortgaged property.-Execution of money decree.-Manner of execution.-Composite decree granted against the Principal Debtor, Guarantor and the Mortgaged property.-The decree holder should proceed against the mortgaged property first. *Union Bank of India v. Manku Narayana,* AIR 1987 SC 1078: 1987(2) SCC 335: 1987(1) Scale 669: 1987(2) J.T. 24: 1987 Pat. L.J.R. 42

Order 34, Rules 4 and 5.-Preliminary decree.-Effect of appeal.-Appellate Court changing terms of preliminary decree.-Final decree passed in the meanwhile can be executed by executing Court. This form of the final decree that it is entirely dependent upon the preliminary decree. Therefore, where the preliminary decree has been confirmed in toto and the appeal therefrom has been dismissed, there is no change whatever to be made in the final decree, for that decree already provides for subsequent interest after the date of the preliminary decree and for subsequent costs, charges and expenses. Therefore, in such circumstances if the final decree has already been prepared before the judgment in appeal from the preliminary decree, there is nothing more to be done and the final decree as it stands needs no amendment. It is true that there is a general principle that a decree passed in appeal even where it confirms the trial Court's decree supersedes that decree. But where we are dealing with a decree passed in

appeal from a preliminary decree and the final decree has already been passed in the meantime, the decree of the appellate Court on appeal from the preliminary decree only supersedes the preliminary decree; it cannot and does not supersede the final decree which was not taken in appeal. Therefore, if the decree in appeal from the preliminary decree confirms it in toto, the final decree already passed needs no change and must continue to stand. It is true that if no final decree has been passed before the appeal from the preliminary decree is decided, the decree holder gets three years from the date of the decree in appeal from the preliminary decree to apply for a final decree. That, however, is a question of limitation and Courts have held that in such a case three years run from the date of the decree in appeal from the preliminary decree in order apparently not to compel the decree-holder to apply for a final decree if he does not wish to do so and wants to await the result of the appeal from the preliminary decree. But if the decree-holder does not wish to await the result of the appeal from the preliminary decree he can ask for a final decree in the meantime, and if the preliminary decree is confirmed in toto the final decree will need no change and can be executed as it stands. The decree-holder in such a case need not apply for a fresh final decree and can execute the final decree already passed in the meantime. The existence of the final decree ought to be brought to the notice of the appellate Court in all cases and that it is the duty of the appellate Court to give directions with respect to the final decree if it considers necessary. *Sital Parshad and another v. Kishori Lal,* AIR 1967 SC 1236: 1967(2) SCJ 479: 1967(3) SCR 101

Order 34, Rule 7(1)(c) Deposit by Mortgagor.-Future interest.-Liability to pay.-Mortgagor required to pay in accordance with the directions of Preliminary Decree .-Non-payment of extra amount of interest arising out of stay of decree during pendency of appeal.-The mortgager cannot be considered in default. Under Order XXXIV, Rule 8(1) the mortgagor can deposit all amounts due under Order XXXIV. Rule 7(1) before the final decree debarring him from all rights to redeem is passed. Order XXXIV, Rule (1) lays down what a preliminary decree should contain and we are in the present case concerned with Clauses (b) and (c) thereof. In this case the preliminary decree had declared the amount due upto a certain date towards principal and interest and had also provided for three per cent per annum interest on a certain sum from that date and had directed as required by Clause (c) of Order XXXIV, Rule 7(1) that if the mortgagor-plaintiff paid in Court the amount found before a certain date a final decree in his favour would be passed. The preliminary decree also laid down that if payment was not made within the time fixed a final decree for foreclosure in favour of the defendant-mortgagee would be passed. Now under Order XXXIV, Rule 7(1)(c)(i) and (ii) what the appellant had to deposit was the amount found under the preliminary decree and also the amount adjudged due in respect of subsequent costs, charges, expenses and interests. It is not in dispute that the High Court dismissed the appeal of the appellant in 1958 and confirmed the preliminary decree and that the amount due on account of the undertaking to any extra interest at the rate of six per cent per annum for the period of stay was not included by the High Court in the preliminary decree. This amount arose out of an independent order of stay and though the appellant was bound to pay it in view of his undertaking, it was not made a part of the amount due under the preliminary decree. *Gyasi Ram v. Brijbhushandas and others,* AIR 1966 SC 1950: 1966 Jab LJ 1078: 1966 Mah LJ 735: 1966(2) SCJ 752: 1966 Supp. SCR 109

Order 34, Rule 8.-Final decree.-Dismissal of application for non prosecution.-It does not bar subsequent application.-In the circumstances of mortgager having filed independent suit, subsequent application held to be not maintainable. The proceeding in the preliminary decree does not get terminated by dismissal of I.A. No. 58 of 1972, on June 26, 1975 or for non-prosecution. Till date of passing the final decree and executed or till its remedy is barred by limitation under Art. 137 of the Schedule to the Limitation Act, 1963 the Court has power and jurisdiction to entertain the application to pass the final decree. At any time before the remedy is barred, it is open to the plaintiff to deposit the redemption money under the preliminary decree. The dismissal of the earlier application or non-prosecution, therefore, does not per se bars the right of the plaintiff. But if remedy to enforce preliminary decree for the redemption is barred by the limitation, thereafter the right remains unenforceable. the deposit, therefore, is non est and the Court cannot proceed to pass final decree as the remedy is lost. Therefore, the mere dismissal of the first application for non-prosecution and withdrawal of the redemption money deposited thereunder per se creates no bar to entertain second application. Equally instead of availing the remedy of depositing the redemption amount in the pending proceedings under Rule 8(1) of Order 34, the respondent instituted an independent suit for redemption. Per force, though it does not operate as bar to maintain the application to pass final decree, Court cannot proceed further with the application. Otherwise conflicting decisions would arise giving rise to multiplicity of proceedings. The Court would stop to proceed further in the matter. In view of finding that the application to pass final decree is barred by limitation, the trial Court has no jurisdiction to proceed with the application under Rule 8(3) of Order 34 and to pass final degree. *K. Parameswaran Pillai (dead) v. K. Sumathi alias Jesis Jesise Jacquiline and another,* AIR 1994 SC 191: 1993(4) SCC 431: 1993(3) Scale 700: 1993(6) JT 515: 1994 RD 496: 1993(3) Andh LT 33: 1994 Civ CR (SC) 309

Order 34, Rule 8.-Final decree.-Limitation.-Unless specified otherwise in the preliminary decree or extended by the order of the Court, the limitation is three years under Article 137 of Limitation Act, 1963. The limitation to file an application under Order 34, Rule 8(1) to pass a final decree for

redemption, other than the preliminary decree for redemption of unufructuary mortgage, starts running and continues to run its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed or suspended or the time prescribed in the preliminary decree is extended by an order of the Court. In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree is expired under Art. 137 of the Schedule to Limitation Act 1963 (Art. 181 of Schedule 2 of the old Act), the plaintiff is debarred to enforce the right to pass the final decree. But in the case of preliminary decree for redemption of unufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof. *K. Parameswaran Pillai (dead) v. K. Sumathi alias Jesis Jesise Jacquiline and another,* AIR 1994 SC 191: 1993(4) SCC 431: 1993(3) Scale 700: 1993(6) JT 515: 1994 RD 496: 1993(3) Andh LT 33: 1994 Civ CR (SC) 309

Order 34, Rule 10.-Necessary parties.-Lessee of mortgager.-Lessee introduced in the ordinary course of management is though not binding on mortgagee but acquired an interest in the equity of redemption.-Such Lessee must be joined as party to the suit. *Mangru Mahto and others v. Thakur Taraknathji Tarkeshwar Math and others,* AIR 1967 SC 1390: 1968 All LJ 417: 1968 BLJR 322: 1968 MPWR 326: 1967(3) SCR_125

Order 37, Rule 2.-Summary suit.-Promissory Note.-Agreements also executed between parties.-Suit on the basis of Promissory Notes alone is maintainable independent of agreement. The cause of action for respondents' claim as laid in the suit is *prima facie* independent of the aforesaid agreement. No doubt they advanced the money by way of financing the export business of the company but the right to repayment was absolute and unconditional. This is made clear by the subsequent agreement executed by the appellants 2 to 4. No doubt the respondents contend that they are also entitled to recover damages from the appellants under the agreement but according to them this claim is in addition to and not in substitution of that based upon the promissory notes and the indenture of guarantee. The suit for its enforcement could, therefore, be instituted under Order 37, Rule 2. *Milkhiram (India) Private Ltd. and others v. Chamanlal Bros.,* AIR 1965 SC 1698: 68 Bom LR 36

Order 37, Rule 2.-Leave to defend.-Consideration for grant of.-The Court may decline the leave if it would merely enable the defendant to prolong litigation.-If the defence raises a triable issue, the court should not reject leave merely because of inherent implausibility or inconsistency. Leave is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defendence. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the Court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his withnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a *bona fide* defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency. *Mrs. Raj Duggal v. Ramesh Kumar Bansal,* AIR 1990 SC 2218: 1991 Supp (1) SCC 191

Order 37, Rule 3.-Leave to defend.-Consideration for grant of.-Triable issue.-The court must exercise its discretion judicially.-Leave to defend must be granted unconditionally where defence raises a triable issue. Whenever the defence raises a triable issue, leave must be given, and later cases say that when that is the case it must be given unconditionally, otherwise the leave may be illusory. It is always undesirable, and indeed impossible, to lay down hard and fast rules in matters that affect discretion. But it is necessary to understand the reason for a special procedure of this kind in order that the discretion may be properly exercised. Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts. Santosh Kumar v. Bhai Mool Singh, AIR 1958 SC 321: 1958(1) And WR (SC) 159: 1958 SCJ 434: 1958 SCR 1211

Order 37, Rule 3.-Leave to defend .-Consideration for.-Principles for grant of leave to defend, indicated. The principles applicable to cases covered by Order 37, C.P.C. are: (a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend. (b) If the defendant raises a triable issue indicating that he has a fair or *bona fide* or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend. (c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence,

yet, shews such a state of facts as leads to the inference that at the trial the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security. (d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend. (e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence. *M/s. Mechalec Engineers & Manufacturers v. M/s. Basic Equipment Corporation,* AIR 1977 SC 577: 1976(4) SCC 687: 1977(1) SCR 1060

Order 37, Rule 3.-Leave to defend .-Interference in revision.-It is only where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed, that exercise of discretion by trial court can be interfered in revision. *M/s. Mechalec Engineers & Manufacturers v. M/s. Basic Equipment Corporation,* AIR 1977 SC 577: 1976(4) SCC 687: 1977(1) SCR 1060

Order 39, Rule 1.-Restraint on construction.-Dispute about title of land.-Both the parties in partial possession of disputed land.-Restraint on construction over the entire land would be fair and just as the situation may otherwise become irreversible. *Gangubai Bablya Chaudhary and others v. Sitaram Balchandra Sukhtankar and others etc.,* AIR 1983 SC 742: 1983(4) SCC 31: 1983(1) Scale 775

Order 39, Rule 1.-Bank guarantee.- Restraint of encashment.-In the absence of fraud or special equities in the form of preventing irretrievable injustice between the parties, restraint on bank from honouring the commitment under bank guarantee, is not permissible. *General Electric Technical Services Company Inc. v. M/s. Punj Sons (P) Ltd. and another,* AIR 1991 SC 1994: 1991(4) SCC 230: 1991(1) SCR 412: 1991(2) Scale 272: 1991(3) JT 360: 1993 Civ C.R. (SC) 1

Order 39, Rules 1 and 2.-Balance of convenience.-Determination of.-Considerations for.-The object of interim injunction is to prevent injustice to parties during the pendency of litigation.-The likely hardship on both the parties has to be weighed by the Court. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need to the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the balance of convenience lies. *M/s. Gujarat Bottling Co. Ltd. and others v. Coca Cola Company and others,* AIR 1995 SC 2372: 1995(5) SCC 545: 1995(4) Scale 635: 1995(6) JT 3: 1995(2) Arb. LR 249

Order 39, Rules 1 and 2.-Bank guarantee.-Letter of Credit.-Restraint on encashment.-Considerations for injuncting the encashment. *M/s. Tarapore and Co., Madras, v. M/s. V/O Tractoroexport Moscow and another,* AIR 1970 SC 891: 1970 (1) MLJ (SC) 105: 1969(2) SCR 920: 1969(1) SCC 233

Order 39, Rules 1 and 2.-Bank guarantee.-Restraint on encashment.-No specific pleading of fraud .-Bald averment in the application seeking injunction is of no consequence without pleading of established fraud.-Temporary injunction against encashment of bank guarantee, should not be granted. It is an admitted fact that in the plaint itself, there was no such allegation. It was initially only in the first application for the grant of injunction that in a paragraph it has been mentioned that the appellant herein had invoked the bank guarantee arbitrarily. This application contains no facts or particulars in support of the allegation of fraud. A similar bald averment alleging fraud is also contained in the second application for injunction relating to bank guarantee No. 40/47. This is not a case where defendant No. 1 had at any time alleged fraud prior to the filing of injunction application. The main contract, pursuant to which the bank guarantees were issued, was not sought to be avoided by alleging fraud, nor was it at any point of time alleged that the bank guarantee was issued because any fraud had been played by the appellant. We have no manner of doubt that the bald assertion of fraud had been made solely with a view to obtain an order of injunction. In the absence of established fraud and not a mere allegation of fraud and that also having been made only in the injunction application, the Court could not, in the present case, have granted an injunction relating to the encashment of the bank guarantees. *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and another,* AIR 1997 SC 2477: 1997(6) SCC 450: 1997(5) JT 417: 1997(2) Arb. LR 350: 1997(4) Scale 103

Order 39, Rules 1 and 2.-Discretion of Court.-Interference in revision.-Permissibility.-The High

Court even though agreeing with the finding of fact of the trial Court, granting injunction.-In the absence of illegality or material irregularity, interference is not justified. *Terene Traders v. Rameshchandra Jamnadas & Co. and another,* AIR 1987 SC 1492: 1986(88) Bom LR 584

Order 39, Rules 1 and 2.-Interference in disciplinary matter.-Management of educational institution.-Interference with-Permissibility.-Provision of local Act also barring the interference.-In the absence of any jurisdictional deficiency interference by Civil Court is not permissible. *Shyam Lal Yadev and others v. Smt. Kusum Dhawan and others,* AIR 1979 SC 1247: 1979(4) SCC 143: 1979 All LJ 785

Order 39, Rules 1 and 2.-Interference with administration.-Internal affairs of an educational institute.-Ordinarily court should refuse grant of injunction. In a matter touching either the discipline or the administration of the internal affairs of a University, Courts should be most reluctant to interfere. They should refuse to grant an injunction unless a fairly good *prima facie* case is made out for interference with the internal affairs of educational institutions. *Varanasaya Sanskrit Vishwavidyalaya and another v. Dr. Rajkishore Tripathi and another,* AIR 1977 SC 615: 1977(1) SCC 279: 1977(2) SCR 213

Order 39, Rules 1 and 2.-Interim injunction.-Mechanical order.-Permissibility.-Court must record satisfaction before grant of order of injunction. We must refer to the mechanical manner in which some of the Courts have been granting interim orders.- injunctions and stay orders without realising the harm such mechanical orders cause to the other side and in some cases to public interest. It is no answer to say that let us make the order and if the other side is aggrieved, let it come and apply for vacating it. With respect, this is not a correct attitude. Before making the order, the Court must be satisfied that it is a case which calls for such an order. This obligation cannot be soned and the onus placed upon the respondents/ defendants to apply for vacating it. *Delhi Development Authority v. Skipper Construction Company (P) Ltd. and another,* AIR 1996 SC 2005: 1996(4) SCC 622: 1996(4) Scale 202: 1996(4) JT 679: 1996(62) DLT 543

Order 39, Rules 1 and 2.-Interim injunction.-Stay of encashment of.-The guarantee worded in absolute terms.-Bank undertaking to pay without any demur or pendency of any legal proceedings.-Stay of encashment of bank guarantee permissible only on the grounds of fraud and irretrievable injury.-Termination of contract disputed between the parties is no fraud in encashment.-Courts should be slow to restrain unconditional bank guarantee.-Stay refused. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The Courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The Courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the enactment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may co-exist in some cases. *U.P. State Sugar Corporation v. M/s. Sumac International Ltd.,* AIR 1997 SC 1644: 1997(1) SCC 568: 1996(8) Scale 676: 1996(10) JT 709: 1997 All. LJ 638

Order 39, Rules 1 and 2.-Interim injunction.-Execution of decree.-Declaration of title sought in respect of land in possession of State by practising fraud and collusion.-State in a suit seeking to set aside the decree, is entitled to interim injunction restraining execution of decree. *State of M.P. and another v. Brijesh Kumar Awasthi and others,* AIR 1997 SC 2104: 1997(4) SCC 472: 1997(3) Scale 110: 1997(3) JT 734: 1997 All. CJ 933: 1997(2) APLJ 48

Order 39, Rules 1 and 2.-Interim injunction.-Protection of possession.-Grant of mining lease over a mine in which earlier lessee was continuing in possession and was not ejected in accordance with law.-Possession of earlier lessee is entitled to be protected. That the appellant has mining lease in respect of 1 acre 16 gunthas of land in the same survey number in which the respondent has by a lease deed dated November 29, 1993. The respondent cannot unlawfully be dispossessed from the lands nor his possession and enjoyment intradicted except in accordance with the due process of law. Though the appellant had a lease, he cannot be given possession by the Government except after duly ejecting the respondent in accordance with law.The injunction granted by the High Court is in accordance with law and the respondent is entitled to the protection of his lawful possession by way of ad interim injunction. *N. Umapathy v. B.V. Muniyappa,* AIR 1997 SC 2467: 1997(9) SCC 247: 1997(5) JT 212: 1997(3) Rec. Civ. R 306

Order 39, Rules 1 and 2.-Interim injunction.-*Locus standi* to seek.-Challenge to allotment of shops.-The persons challenging having no concluded right to seek allotment in the category

challenged.-Stay of allotment, not permissible. The High Court has stated in the order as if there is a concluded right between the parties. Order XXXIX, Rule 2, CPC postulates that in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. As pointed out earlier, since the right of the respondents is still in embryo even Order XXXIX, Rule 2, CPC is inapplicable and the enforcement thereof is also unthinkable. *Agricultural Produce Market Committee, Gondal and others, v. Girdharbhai Ramjibhai Chhaniyara and others,* AIR 1997 SC 2674: 1997(5) SCC 468: 1997(5) JT 591: 1997(4) Scale 198: 1997(2) Raj.LW 311: 1997(3) APLJ 33

Order 39, Rules 1 and 2.-Irreparable damage.-Gain by way of reputation.-Contribution by plaintiff by rendering services to a film maker.-Suit for specific performance seeking directions that his services may be acknowledged while exhibiting the film.-*Prima facie* case made out.-Damages for breach is not adequate remedy.-Interim directions given to exhibit the film in India only after acknowledging the services rendered by plaintiff. We think that in a matter of this type the award of damages is not a complete and adequate remedy or relief. As the appellant has made clear, he is not interested so much in the monetary aspect of the deal he claims to have entered into with the respondents. The gain by way of reputation as well as goodwill which the appellant would secure if his services are acknowledged in title shots of the film is not one which can be adequately expressed in terms of money. We, however, think on the *prima facie* case made out and having regard to the fact that the necessary modifications in the credit-titles can be easily made as the film is still in the early stages of its exhibition, that it is just and necessary that the appellant should be granted interim relief at this stage by injuncting the respondents from exhibiting the film except after displaying an acknowledgement of the appellant's services. We, therefore, restrict the scope of the interim relief and direct, in the interests of justice, that in case the film is proposed to be, or is, exhibited either on the T.V. or in any other medium in India, it shall not be so exhibited by the respondents or their agents unless it carries, in its title shots, an acknowledgement of the services rendered by the appellant to the producers in some appropriate language. We direct accordingly. *Suresh Jindal v. Rizsoli Corriere Della Sera Prodzioni T.V.S. p.a. and others,* AIR 1991 SC 2092: 1991 Supp (2) SCC 3: 1991(2) Scale 124: 1992(1) JT 33

Order 39, Rules 1 and 2.-Irreparable damage.-Suit for specific performance of agreement to sell.-Challenge to agreement of sale on the ground of fraud.-Possession sought to be protected pending the proceedings.-The plaintiff could be adequately compensated by damages.-Grant of interim injunction not called for. It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the court's interference is necessary to protect the party from the species of injury. In other words. irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it. The Court further has to satisfy that non-interference by the Court would result in `irreparable injury' to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that `the balance of convenience' must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. Undoubtedly, in a suit seeking to set aside the decree, the subject-matter in the earlier suit, though became final, the Court would in an appropriate case grant ad interim injunction when the party seeks to set aside the decree on the ground of fraud pleaded in the suit or for want of jurisdiction in the Court which passed the decree. But the Court would be circumspect before granting the injunction and look to the conduct of the party, the probable injuries to either party and whether the plaintiff could be adequately compensated if injunction is refused. *Dalpat Kumar and another v. Prahlad Singh and others,* AIR 1993 SC 276: 1992(1) SCC 719: 1991(2) Scale 1431: 1991(6) JT 502: 1992(1) Rev. LR 377

Order 39, Rules 1 and 2.-Protection of possession.-Suit for declaration of title.-Plaintiff may claim interim relief of protection of possession even in a suit for declaration of prescriptive title. In a suit for declaration of title simpliciter the Court has power under Order 39, Rules 1 and 2 or even in Section 151 to grant and interim injunction pending suit. Admittedly, the appellant is in possession of the property. In view of his apprehension that there is a threat to his possession, his only remedy would, be whether he will be entitled to the declaration sought for. When he seeks to protect his possession, if he is

otherwise entitled according to law, necessarily the Court has to consider whether protection is to be given to him pending the suit. Merely because there is no dispute as regards the corporeal right to the property, it does not necessarily follow that he is not entitled to avail the remedy under Order 39, Rules 1 and 2 CPC. Even otherwise also, it is settled law that under Section 151 CPC, the Court has got inherent power to protect the rights of the parties pending the suit. *Smt. Rajnibai alias Mannubai v. Smt. Kamla Devi and others,* AIR 1996 SC 1946: 1996(2) SCC 225: 1996(1) Scale 730: 1996(1) JT 706: 1996 Jab LJ 435

Order 39, Rules 1 and 2.-Restraint against exhibition of T.V. Serial.-Consideration for.-No allegation of contravention of law.-No material except the allegations itself.-Infringement of fundamental rights of the Producer guaranteeing freedom of expression.-Interim injunction, set aside. The objection to the exhibition of the film had, however, been raised by them on the basis that it was likely to spread false or blind beliefs amongst the members of the public. They had not asserted any right conferred on them by any statate or acquired by them under a contract which entitled them to secure an order of temporary injunction against which this appeal is filed. They had not produced any material apart from their own statements to shoe that the exhibition of the serial was *prima facie* prejudicial to the community. The High Court overlooked that the issue of an order of interim injunction in this case would infringe a fundamental right of the producer of the serial. In the absence of any *prima facie* evidence of grave prejudice that was likely to be caused to the public generally by the exhibition of the serial it was not just and proper to issue an order of temporary injunction. We are not satisifed that the exhibition of the serial in question was likely to endanger public morality. In the circumstances of the case the balance of convenience lay in favour of the rejection of the prayer for interim injunction. *Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana and others,* AIR 1988 SC 1642: 1988(3) SCC 410: 1988 Supp. (1) SCR 486: 1988(2) Scale 34: 1988(3) JT 66

Order 39, Rules 1 and 2.-Restraint on alienation of property.-Conditional order passed subject to deposit an amount or bank guarantee of equivalent amount.-Non-compliance of order.-Similar prayer cannot be entertained subsequently. *Sunil D. Chedda v. Suresh Bansilal Sethi and others,* AIR 1992 SC 1200:

Order 39, Rules 1 and 2.-Restraint on bank guarantee.-Considerations for.-It is an independent contract obliging the bankers to pay unconditionally on the basis of demand made by the beneficiaries in terms of the documents.-Grant of temporary injunction restraining the encashment of unconditional letter of credit without any allegation of fraud or irreparable damage.-Order granting temporary injunction, set aside. The opening of a confirmed letter of credit constitutes a bargain between the banker and the seller of the goods which imposes on the banker an absolute obligation to pay. A bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit. It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the coutrs will leave the merchants to settle their disputes under the contracts by litigation or arbitration as avialable to them or stipulated in the contracts. The courts are not concerned with their difficuties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the un- conditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Other- wise trust in international commerce could be irreparably damaged. In the instant case, the High Court has assumed that the plaintiffs had a *prima facie* case. It has not touched upon the question where the balance of convenience lay, nor has it dealt with the question whether or not the plaintiffs would be put to irreparable loss if there was no injunction granted. In dealing with the*prima facie* case, the High Court assumes that the appellant was in breach. There is no basis for this assumption at all. No injunction could be granted under Order 39, Rules 1 and 2 of the Code unless the plaintiffs establish that they had a *prima facie* case, meaning thereby that there was a *bona fide* contention between the parties or a serious question to be tried. The question that must necessarily arise is whether in the facts and circumstances of the case, there is a *prima facie* case and, if so, as between whom? In view of the legal principles applicable, it is difficult for us to say on the material on record that the palintiffs have a *prima facie* case. *United Commercial Bank v. Bank of India and others,* AIR 1981 SC 1426: 1981(2) SCC 766: 1981(3) SCR 300: 1981(1) Scale 548

Order 39, Rules 1 and 2.-Restraint on execution.-Permissibility.-The decree became final.-Interim injunction should not, ordinarily, be granted unless strong *prima facie* case exists in favour of plaintiff. *Bate Krishna Damani (dead) by his LRs. v. Kailash Chand Srivastava and another,* AIR 1995 SC 453: 1995 Supp (1) SCC 477: 1994(4) Scale 892: 1995(1) JT 32: 1995(2) RCR 119

Order 39, Rules 1 and 2.-Restraint on legal proceedings.-Permissibility.-The Court cannot grant injunction restraining a person from initiating legal proceedings. The Legislature manifestly expressed its mind by enacting Section 41 (b) in such clear and unambignous language that an injunction cannot be

granted to restrain any person, the language takes care of injunction acting in personum, from instituting or prosecuting any proceeding in a Court not subordinate to that from which injunction is sought. Section 41 (b) denies to the Court the jurisdiction to grant an injunction restraining any person from instituting or prosecuting any proceeding in a Court which is not subordinate to the Court from which the injunction is sought. In other words, the Court can still grant an injunction restraining a person from instituting or prosecuting any proceeding in a Court which is subordinate to the Court from which the injunction is sought. As a necessary corollary, it would follow that the Court is precluded from granting an injunction restraining any person from instituting or prosecuting any proceeding in a Court of co-ordinate or superior jurisdiction. Expression `injunction' in Section 41 (b) is not qualified by an adjective and, therefore, it would comprehend both interim and perpetual injunction. It is, however, true that Section 37 specifically provides that temporary injunctions which have to continue until a specified time or until further order of the court are regulated by the Code of Civil Procedure. But if a dichotomy is introduced by confining Section 41 to perpetual injunction only and Section 37 read with Order 39 of the Code of Civil Procedure being confined to temporary injunction, an unnecessary grey area will have develop. *Cotton Corporation of India Limited v. United Industrial Bank Limited and others,* AIR 1983 SC 1272: 1983(4) SCC 625: 1983(3) SCR 729: 1983(2) Scale 206

Order 39, Rules 1 and 2.-Restraint on transfer of possession.-Joint family property.-Joint dwelling house.-Sale by one co-owner.-The transfer of possession *prima facie* cause irreparable injury.-Interim injunction granted. The right to joint possession is denied to a transferee in order to prevent a transferee who is an outsider from forcing his way into a dwelling house in which the other members of his tranferee's family have a right to live. In some other cases giving joint possession was considered to be illegal and the only right of the staranger purchser is to sue for partition. All these considerations in our opinion would go only to show that denying an injunction against a tranferee in such cases would *prima facie* cause irreparable injury to the other members of the family. *Dorab Cawasji Warden v. Coomi Sorab Warden and others,* AIR 1990 SC 867: 1990(2) SCC 117: 1990(1) SCR 332: 1990(1) Scale 416: 1990(1) JT 199

Order 39, Rules 1 and 2.-Status quo .-Effect of.-Subsequent creation of sub-tenancy.-Induction by a tenant who was not a party to proceedings is also illegal.-The person inducted is liable to eviction. According to the ordinary legal connotation, the term `status quo' implies the existing state of things at any given point of time. It has the effect of violating the preservation of status of the property. This will all the more be so when this was done without the leave of the Court to disturb the state of things as they then stood. It would amount to violation of the order. The principle contained in the maxim: `*Actus Curiae Neminem Gravabit*' has no application at all to the fatcs of this case when in violation of status quo order a sub-tenancy has been created. Equally, the contention that even a trepasser cannot be evicted without recourse to law is without merit, because the state of affairs in relation to property as on 15-9-1988 is what the Court is concerned with. Such an order cannot be circumvented by parties with impunity and expect the Court to confer its blessings. It does not matter that to the contempt proceedings Somani Builders was not a party. It cannot gain an advantage in derogation of the rights of the parties who were letigating originally. If the right of sub- tenancy is recognised, how is status quo as of 15-9-1988 maintained? Hence, the grant of sub-lease is contrary to the order of status quo. Any act done on the teeth of the order of status quo is clearly illegal. All actions including the grant of sub-lease are clearly illegal. *Satyabrata Biswas and others v. Kalyan Kumar Kisku and others,* AIR 1994 SC 1837: 1994(1) JT 325: 1995(1) RCJ 264: 1994(2) Cal. LT (SC) 1: 1994(1) BLJ 501: 1994 Civ. CR (SC) 553

Order 39, Rules 1 and 2.-Stay of encashment of Bank Guarantee.-No allegation of fraud which is of an egregious nature.-Pleading and production of necessary evidence in proof of the fraud held too be necessary to seek injunction against stay of encashment of bank guarantee. The grant of injunction is a discretionary power in equity jurisdiction. The contract of guarantee is a trilateral contract which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in internal or international trade or business. It creates an irrevocable obligation to perform the contract in terms thereof. On the occurrence of the events mentioned therein the bank guarantee becomes enforceable. The subsequent disputes in the performance of the contract does not give rise to a cause nor is the court justified on that basis, to issue an injunction from enforcing the contract, i.e., bank guarantee. The parties are not left with no remedy. In th event of the dispute in the main contract ends in the party's favour, he/it is entitled to damages or other consequential reliefs.It is settled law that the Court, before issuing the injunction under Order 39, Rules 1 and 2, C.P.C. should*prima facie* be satisfied that there is triable issue strong *prima facie* case of fraud or irretrievable injury and balance of convenience is in favour of issuing injunction to prevent irremedial injury. The court should normally insist upon enforcement of the bank guarantee and the court should not interfere with the enforcement of the contract of guarantee unless there is a specific plea of fraud or special equities in favour of the plaintiff. He must necessarily plead and produce all the necessary evidence in proof of the fraud in execution of the contract of the guarantee, but not the contract either of the original contract or any of the subsequent events that may happen as a ground for fraud. *The State Trading Corporation of India Ltd. v. Jainsons Clothing Corporation and another,* AIR 1994 SC 2778: 1994(6)

SCC 597: 1994(4) Scale 332: 1995(5) JT 403

Order 39, Rule 2.-Injury.--Meaning of.-Liability of eviction in execution of valid order is not an injury. *Firm Ishardass Devi Chand and another v. R.B. Parkash Chand and another,* AIR 1969 SC 938: 1969 (1) SCWR 574: 1969(3) SCR 677: 1969(1) SCC 664

Order 39, Rule 2.-Appeal against the order.-Permissibility.-Impugned order holding that rule 2 has no application is appealable. The preliminary objection of the respondent before the learned District Judge that the order dated July 20, 1967, of the Sub-Judge was passed under Section 151, Civil Procedure Code, and not under Order XXXIX, Rules 1 and 2, Civil Procedure Code, is not sound because in holding that Order XXXIX, Rule 2 did not apply the learned Sub-Judge was not exercising his inherent powers. What the learned District Judge seems to have done is to hold that the application for temporary injunction did not fall, within Order XXXIX, Rule 2 and, therefore, no appeal lay. This reasoning is really on the merits of the case and not relevant to the preliminary objection raised by the respondent. *Firm Ishardass Devi Chand and another v. R.B. Parkash Chand and another,* AIR 1969 SC 938: 1969 (1) SCWR 574: 1969(3) SCR 677: 1969(1) SCC 664

Order 39, Rule 2-A.-Disobedience of interim injunction.-Jurisdiction to grant injunction.-Necessity of.-A party in default of complying with the orders can be punished even if ultimately it is found that Court had no jurisdiction to try the suit. Where an objection to jurisdiction of a civil court is raised to entertain a suit and to pass any interim orders therein, the Court should decide the question of jurisdiction in the first instance but that does not mean that pending the decision on the question of jurisdiction, the Court has no jurisdiction to pass interim orders as may be called for in the facts and circumstances of the case. A mere objection to jurisdiction does not instantly disable the court from passing any interim orders. It can yet pass appropriate orders. At the same time, it should also decide the question of jurisdiction at the earliest possible time. The interim orders so passed are orders within jurisdiction when passed and effective till the Court decides that it has no jurisdiction to entertain the suit. These interim orders undoubtedly come to an end with the decision that this Court had no jurisdiction. It is open to the Court to modify these orders while holding that it has no jurisdiction to try the suit. Indeed, in certain situations, it would be its duty to modify such orders or make appropriate directions. For example, take a case, where a party has been dispossessed from the suit property by appointing a receiver or otherwise; in such a case, the Court should, while holding that it has no jurisdiction to entertain the suit, must put back the party in the position he was on the date of suit. But this power or obligation has nothing to do with the proposition that while in force, these orders have to be obeyed and their violation can be punished even after the question of jurisdiction is decided against the plaintiff provided the violation is committed before the decision of the Court on the question of jurisdiction. *Tayabbhai M. Bhagasarwalla and another v. Hind Rubber Industries Pvt. Ltd., etc.,* AIR 1997 SC 1240: 1997(3) SCC 443: 1997(2) Scale 205: 1997(2) JT 699: 1997(2) Andh. LT 1: 1997(4) Bom. CR 312

Order 39, Rule 2(iii).-Disobedience of order.-Procedure.-Order passed without fixing the responsibility or naming the contemnor.-The property to be attached also not specified.-Order passed in haste without compliance of necessary pre-condition of incorporating these details, set aside. We are a little startled that a court in the contempt jurisdiction should deprive the personal liberty of a person without naming in the order whom the court's bailiff should take into custody or the jail authorities should receive. Equally clearly, how could property be taken without its being particularised in the judgment, disregarding procedural obligations? It is not as if without hearing the officer to be jailed and his case against detention considered, the Munsif give and hoc details of property to be attached without hearing the owner thereof as to his version about why his property should not be touched. Nameless humans cannot be whisked off to prison even in the name of contempt by insertion of the name after the judgment is delivered. Natural justice is a pervasive doctrine integral to processual fairplay in Indian jurisprudence. For this reason alone, the extant order under challenge is vulnerable against both the attachment of unspecified property and detention of unnamed contemners. We are in no mood to condone wilful procrastination nor suffer wanton stagnation in Administration as a ground for default in obeying court orders. The law does not respect lazy bosses nor `cheeky' evaders. But no proof of that species of guilt has been brought to our notice. Mere inaction has no long mileage where *mens rea* is a *sine qua non.* We, therefore, regard the court's order, holding the appellants in contempt, a hasty measure, probably annoyed by absence of instant compliance. *Union of India and others v. Satish Chandra Sharma,* AIR 1980 SC 600: 1980(2) SCC 144: 1980(2) SCR 298: 1980 BLJR_95

Order 39, Rule 2(3).-Disobedience of order.-Sovereign immunity.-Plea of.-Permissibility. The State is bound by the Code of Civil Procedure, the scheme of the Code being that subject to any special provision made in that regard, as respects Governments, it occupies the same position as any other party to a proceeding before the Court. If such is the scope of an order for, injunction, it would be apparent that the expression person has in Order 39, Rule 2(3) been employed merely compendiously to designate every one in the group Defendant, his agents, servants and workmen and not for excluding any defendant against whom the order of injunction has primarily been passed. It would therefore follow that in cases where the State is the defendant against whom an order of injunction has been issued, it is expressly named in the clause and not even by necessary implication, and the rule of construction invoked does not in any

manner avail the appellant.Where a Court is empowered by statute to issue an injunction against any defendant, even if the defendant be the State.-the provision would be frustrated and the power rendered in effective and unmeaning if the machinery for enforcement specially enacted did not extend to every one against whom the order of injunction is directed. Apart, therefore, from a critical examination of the phraseology of Order 39, Rule 2(3), the obligation on the part of the State to obey the injunction and be proceeded against for disobedience if it should take place would appear to follow by necessary implication. *The State of Bihar v. Rani Sonabati Kumari,* AIR 1961 SC 221: 1961(1) SCR 728: 1961 BLJR 285

Order 39, Rule 2(3).-Disobedience of order.-Ambiguous order.-Susceptibility of order to two possible meaning.-A party *bona fide* acting on his own interpretation cannot be held to have willfully disobeyed the order. Two conditions have to be satisfied: (1) that the order was ambiguous and was reasonably capable of more than one interpretation, (2) that the party being proceeded against in fact did not intend to disobey the order, but conducted himself in accordance with his interpretation of the order. We are clearly of the view that the case before us does not satisfy either condition. *The State of Bihar v. Rani Sonabati Kumari,* AIR 1961 SC 221: 1961(1) SCR 728: 1961 BLJR 285

Order 39, Rule 4.-Conduct of parties.-Relevance of.-Considerations for grant of interim injunction and its vacation.-The party invoking jurisdiction of the court should be honest in conduct and free from blame. Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39, Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings. The interim injunction granted by the High Court has been assailed by the appellants on the ground that as a result of refusal by Coca Cola to continue with the supply of essence/syrup and/or materials the bottling plants of GBC at Ahmedabad and Rajkot would remain idle and a large number of workmen who were employed in the said plants would be rendered unemployed. We cannot lose sight of the fact that this complaint is being made by Pepsi through the mouth of the appellants. It is difficult to appreciate how Pepsi can ask Coca Cola to part with its trade secrets to its business rival by supplying the essence/syrup etc. for which Coca Cola holds the trade marks to GBC which is under effective control of Pepsi. Pepsi took a deliberate decision to take over GBC with the full knowledge of the terms of the 1993 Agreement. It did so with a view to paralyse the operations of Coca Cola in that region and promote its products. In view of the negative stipulation contained in paragraph 14 of the 1993 Agreement which has been enforced by the High Court, Pepsi has not succeeded in this effect. It must suffer the consequences of the failure of the effort and it cannot assail the interim injunction granted by the High Court by invoking the plight of the workmen who are employed in the bottling plants of GBC. *M/s. Gujarat Bottling Co. Ltd. and others v. Coca Cola Company and others,* AIR 1995 SC 2372: 1995(5) SCC 545: 1995(4) Scale 635: 1995(6) JT 3: 1995(2) Arb. LR 249

Order 40, Rule 1.-Receiver.-Appointment of.-Property in respect of which no claim made in the plaint or relief in respect of which claimed, can not be subjected to receivership. The High Court erred in appointing the Joint Receivers in respect of the book-debts already realised by Bharat Coking Coal before the suit was filed. Those moneys were not made the subject of the suit and no relief has been claimed in the plaint in respect of them. A perusal of the plaint will show that the relief in respect of the book-debts relates to unrealised present and future book-debts. In acting on the plaint as it stands and without specifically finding that the moneys representing the realised book-debts could legitimately be claimed by the Bank, the High Court erred in making an order appointing Joint Receivers in respect of those moneys. *Bharat Coking Coal Ltd. v. The Raneegunge Coal Association Ltd. and others,* AIR 1978 SC 1456: 1978(4) SCC 299

Order 40, Rule 1.-Receiver.-Appointment of party to dispute.-Possession obtained in terms of agreement to run the business on the premises.-The party continuing in possession under the agreement directed to act as c*ustodia legis*, pending suit as receivers on behalf of the Court. In view of the fact that the respondents are continuing, as alleged, to be under an agreement, they would obviously act as a *custodia legis* pending the suit as Receivers on behalf of the Court. But any rights accrued or claimed by them will be subject to the result in the suit. The claim for enhancement of the rentals cannot be gone into in this case and it is *dehors* the relief in the suit. Under these circumstances, if it is permissible, appropriate steps may be taken by the appellant in any appropriate proceedings as per law. *Brig. Sawai Bhawani Singh v. M/s. Indian Hotels Company Ltd. and others,* AIR 1997 SC 2183: 1997(1) SCC 260: 1997(2) Pat. LJR 57: 1997 All CJ 273

Order 40, Rule 1.-Receiver.-Conduct of elections of society.-Management of College affected.-

Dispute about affairs of society.-Receiver appointed by the Court to conduct elections. *Nadar Mahajan Sangam S. Velaichamy Nadar Kalloori and others v. District Registrar (Societies) and others,* AIR 1997 SC 3296: 1997(10) SCC 170: 1997(6) JT 743

Order 40, Rule 1.-Receiver.-Considerations for appointment.-Dispute about family property.-Suit property is being dissipated and disposed of pending dispute, by the claimant.-Administrator appointed to take charge of suit property. What is more significant, is that admittedly respondent No. 1 has sold off over six thousand shares of Jaipur Taj Enterprises Ltd. and admittedly at least over two thousand of these shares were included in the said schedules to the plaint. In these circumstances, it appears to us just and convenient, in order to effectively prevent any of the suit properties being dissipated or disposed of and in order to preserve the same, that the suit properties should be placed under the management and control of a person other than respondent No. 1. That would also avoid allegations being made against respondent No. 1 for contempt of court, breach of the injunction and so on and would effectively safeguard the properties. *Maharaj Jagat Singh v. Lt. Col. Sawai Bhawani Singh and others,* AIR 1993 SC 1721: 1993 Supp. (2) SCC 343: 1992(2) Scale 859: 1992 Supp JT 775: 1993(1) Land.LR 208

Order 40, Rule 1.-Receiver.-Considerations for appointment.-Default in implementing the order of payment of specified amount every month to the Financial corporation .-Order of appointment of Receiver passed due to default.-On undertaking to regularly pay the amount the order of appointment of receiver set aside with direction to the receiver to handover the property back within three days of payment. *Chanumolu Nirmala and others v. Ch. Indira Devi and another,* AIR 1994 SC 662: 1995 Supp (4) SCC 531

Order 40, Rule 1.-Receiver.-Duration of appointment.-No provision specifying any fixed duration.-In appropriate case the appointment of Receiver can continue even after disposal of the case and passing of the final decree in Suit. Neigher Section 51(d) nor order XL of the Code of Civil Procedure prescribes for the fermination of the office of receivership. The law may briefly be sated thus: (1) If a receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment in the act on. (2) If a receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be receiver till he is discharged. (3) But, after the final disposal of the suit as between the parties to the litigation, the receiver's functions are terminated, he would still be answerable to the court as its officer till he is finally discharged. (4) The court has ample power to continue the receiver even after the final decree if the exigencies of the case so require. *Hiralal Patni, v. Loonkaran Sethiya and others,* AIR 1962 SC 21: 1962(2) SCJ 418: 1962(1) SCR
868 **Order 40, Rule 1.-Receiver.-Exercise of powers.-Collieries entrusted to the Receiver.-Appointment of agent by Receiver to manage Collieries.-The Receiver appointing agent on proper considerations on the basis of higher minimum guarantee offered by the party.-No interference with the decision of Arbitrator is called for.** It is absolutely clear that the receiver had acted in the most proper manner. There is no basis for the allegation made by the petitioner that he had been coerced to appoint the respondent. Kishori Lal Goenka as his agent. The fact that at one stage the respondent had filed an application to this court to remove the receiver can in no manner be said to have influenced the decision of the receiver to appoint the respondent as his agent. There are no grounds to think that the receiver had acted either improperly or under coercion. *Smt. Bhagwati Debi Goenka v. Kishorilal Goenka,* AIR 1974 SC 2288: 1972(4) SCC 736

Order 40, Rule 1.-Receiver.-Possession of property.-Effect on title of property.-effect on tenants in property.-Court being custodian of the premises has no jurisdiction to affect the right of tenant protected under Rent Act.-Court may pass orders against tenant for preserving or maintaining the property in custodia legis from an unauthorised act of tenant but it should refrain from determining any right in its summery jurisdiction. No order for eviction of the tenant can be passed by the Court at the instance of its officer, the receiver, without taking recourse to appropriate proceedings for eviction of the tenant under the appropriate statute regulating and governing the *inter se* rights of landlord and tenant. It may also be emphasised here that even apart from an eviction proceeding, any incidence of tenancy which is regulated and controlled by a special statute cannot be altered, varied on interfered with except in accordance with the provisions of such statute. The court in such cases has no jurisdiction to pass orders and direction affecting the right of the tenaut protected, controlled or regulated by the Rent Act on the score of expediency in passing some order or direction for the maintenance and preservation of the property in *custodia legis.* If a tenant resorts to unauthorised and illegal activity in respect of tenanted premises when such premises is in *custodia legis,* for prevention of such illegal and unauthorised activities not consistent with any right flowing from the incidence of his tenancy, it may not be necessary to institute a suit for preventing the tenant from such illegal activities; but the Court, being apprised by the receiver of such illegal activities of a tenant, thereby obstructing the Court's overall supervision and concern for preserving or maintaining the property in *custodia legis*, will be within its right to pass suitable order or direction against the tenant for prevention of illegal and unauthorised activities after giving the tenant reasonable opportunity to place his defences against allegation of unlawful and illegal activity. It, however, should be made clear that if for the purpose of deciding the dispute of unauthorised and illegal

activity affecting maintenance and preservation of the property in custodia legis it becomes necessary to determine any right claimed under a statute or flowing from some action inter parte as may be pleaded and required to be decided, it is only desirable that the Court would refrain from such determination in the summary proceeding initiated before it on the complaint of the receiver or a party to the suit and the Court will direct the receiver to seek adjudication of the dispute before a competent Court by bringing appropriate legal action. *Anthony C. Leo v. Nandlal Bal Krishnan and others,* AIR 1997 SC 173: 1996(11) SCC 376: 1996(7) Scale 829: 1996(9) JT 672: 1997(1) RCR 301

Order 40, Rule 1.-Receiver.-Realisation of debt.-Scope of powers .-Authority to initiate winding up proceedings.-Though the winding up is not an ordinary procedure for realisation of debt due but is an equitable execution.-Winding up petition by Receiver is maintainable. It is true that a winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it; but nonetheless it is a form of equitable execution. Propriety does not affect the power but only its exercise.It is common place that a receiver appointed by Court has no estate or interest himself and the scope of his power is defined by the provisions of Order XL of the said Code and the specific orders made by the Court thereunder. He is frequently spoken to as the hand of the Court. In exercise of the power under the said Clause (d) if a Court confers upon the receiver power to bring a suit to realise the assets which are the subject-matter of the suit, it cannot be denied that the said receiver can file suits to recover the debts forming part of the said assets. The position of such a receiver is analogous to that of a receiver who can file an action in law or in equity to recover a debt under the English law. If the latter is a creditor in English law in respect of the debt recoverable by him, there is no reason why a receiver empowered to file a suit under Order XL of the Code of Civil Procedure cannot be a creditor. in one case there is a voluntary assignment and in the other there is a statutory assignment. Under Order XL, Rule 1(d), of the Code of Civil Procedure the Court can also confer on the Receiver such of those powers as the Court thinks fit. It is implicit in this apparently wide power that it shall be confined to the scope of the Receiver's administration of the estate. If, for the proper and effective management of the estate of which the Receiver has been appointed the Court thinks fit that it shall confer power on the said Receiver to take steps for winding up of the debtor-company, it must be conceded that the Court will have power to give necessary directions to the Receiver in that regard. *Harinagar Sugar Mills Co. Ltd. v. M.W. Pradhan, Court Reciver, High Court, Bombay,* AIR 1966 SC 1707: 68 Bom LR 632: 1966 Mah LJ 1089: 1966(3) SCR 948

Order 40, Rule 1.-Receiver.-Sale of property.-Challenge to sale on the ground of misdescription of property.-Challenge made by equitable mortgagee.-Maintainability. Mortgage in favour of V.L. Varadaraj empowered the mortgagee to sell the mortgage property withuot the intervention of the Court for discharging all the debts under the mortgage. When the decree-holder in O.S. 623 of 1931 sought to execute his decree, V.L. Varadaraj applied to the court to appoint Mr. Ranganatha Sastri as the Commissioner for selling the properties mortgaged to him in accordance with the terms of the mortgage debts. The Court accepted that prayer and appointed Mr. Ranganatha Sastri as the Commissioner to sell mortgaged properties by private treaties. Mr. Ranganatha Sastri sold the properties in accordance with the power conferred on the mortgagee under the mortgage deed of 1937. That power included the power to sell the suit properties without the intervention of the court. (It may be noted that the mortgage in favour of V.L. Varadaraj was an equitable mortgage). Hence it is immaterial whether the suit property was included in the mortgage which resulted in a decree in O.S. 623 of 1931 or not. *S. Dhanalakshmi Ammal and another v. T. Tharani Singh Gramani and another,* AIR 1974 SC 1207: 1973(3) SCC 624

Order 40, Rule 1.-Receiver.-Sale of property.-Higher offer by third party .-The contract between the Receiver and the parties is not concluded contract.-Higher offer made by the occupants of property.-In the interest of social justice the offer should have been accepted. *Sadhuram Bansal v. Pulin Behari Sarkar and others,* AIR 1984 SC 1471: 1984(3) SCC 410: 1984(3) SCR 582: 1984(1) Scale 997

Order 40, Rule 1.-Receiver.-Sale of property.-Leave of Court.-Necessity of.-Sale of property in custody of receiver, without leave of court is, illegal. Proceedings taken in respect of a property which is in the possession and management of a Receiver appointed by Court under Order 40, Rule 1 of the Code of Civil Procedure, without the leave of that Court, are illegal in the sense that the party proceeding against the property without the leave of the Court concerned, is liable to be committed for contempt of the Court, and that the proceedings so held, do not affect the interest in the hands of the Receiver who holds the property for the benefit of the party who, ultimately, may be adjudged by the Court to be entitled to the same. *Kanhaiyalal v. Dr. D.R. Banaji and others,* AIR 1958 SC 725: 1958 MPLJ 477: 1958 Nag LJ 404: 1958 SCJ 891: 1959 SCR 333

Order 40, Rule 1.-Receiver.-Scope of power.-Recovery of property from party.-Court, by express order empowered the Receiver to recover property from the party.-Conferment of such power on receiver is not illegal. A receiver is an officer or re- presentative of the court and he functions under its directions. The court may, for the purpose of enabling the receiver to take possession and administer the property, by order, remove any person from the possession or custody of the property. Sub-rule (2) of rule 1 of the Order limits that power in the case of a person who is not a party to the suit, if the plaintiff has

not a present right to remove him. But when a person is a party to the suit, the court can direct the receiver to remove him from the possession of the property even if the plaintiff has not a present right to remove him. In the present case, the appellant was a party to the suit and the court, through the Receiver took possession of the mill and thereafter the Receiver, during the course of the administration of the property, under a compromise arrangement for running the mills leased out the flour mill to the appellant with an express condition that the appellant should redeliver the property to the Receiver on the expiry of the law. Admittedly the term of the lease had expired, and the Court directed the Receiver to take possession of the mill. The Court, in our view, was legally competent to confer a power on the Receiver under Order XL, Rule 1(1)(d), of the Code of Civil Procedure to recover the property from the appellant. *Hiralal Patni, v. Loonkaran Sethiya and others,* AIR 1962 SC 21

Order 40, Rule 1.-Receiver.-Scope of power.-Authorisation to ascertain property available for partition.-It does not amount abdication of judicial function. The trial Judge only directed the Commissioner to submit his proposals for partition of the property, and for the purpose authorised him to ascertain the property which was available for partition and to ascertain the liability of the joint family. By so authorising the Commissioner, the trial Court did not abdicate its functions to the commissioner: the commissioner was merely called upon to make proposals for partition, on which the parties would be heard, and the Court would adjudicate upon such proposals in the light of the decree, and the contentions of the parties. The proposals of the commissioner cannot from their very nature be binding upon the parties nor the reasons in support thereof. The order it may be remembered was made with the consent of the parties and no objection to the order was it appears, pressed before the High Court. *R.B.S.S. Munnalal and others v. S.S. Rajkumar and others,* AIR 1962 SC 1493: 1962 Nag LJ 521: 1962 Sup. (3) SCR 418

Order 40, Rule 1.-Receiver.-Scope of power.-Authority given by the Court to the Receiver to collect debts due to firm is entitled to institute a suit in its own name for recovery of debt. *Kurapati Venkata Mallayya and another v. Thondepu Ramaswami and Co. and another,* AIR 1964 SC 818: 1963(2) AndhWR (SC) 110: 1963(2) Mad LJ (SC) 110

Order 40, Rule 1.-Receiver.-Scope of power.-Any act of Receiver done on behalf of the Court pendent lite and any person who gets possession through such an act could only do so subject to the directions of the Court. *Krishna Kumar Khemka v. Grindlays Bank P.L.C. and others,* AIR 1991 SC 899: 1990(3) SCC 669: 1990(2) SCR 961: 1990 Supp (1) Scale 70: 1990(3) JT 58

Order 40, Rule 1.-Receiver.-Willingness.-The Receiver appointed seeking to be relieved from receivership.-The receivership cannot be imposed by the Court.-Request of receiver accepted and relieved from the receivership with direction to the trial Court to suggest the name of an advocate who may act as receiver. *Hindustan Petroleum Corpn. Ltd. and another v. M/s. Ram Chandra and Sons and others,* AIR 1994 SC 478: 1994(1) APLJ 46

Order 41, Rule 1.-Appeal.-Necessity of certified copy of decree .-Appeal against decision of executing court.-Decision itself is a decree .- Appeal accompanied by certified copy of the decision is maintainable. An order under Section 47 is a decree, and the High Court had no power to dispense with the filing of a copy of the decree. Ordinarily a decree means the formal expression of an adjudication in a suit. The decree follows the judgment and must be drawn up separately. But under Section 2(2), the term decree is deemed to include the determination of any question within Section 47. This inclusive definition of decree applies to Order 41, Rule 1. In some Courts, the decision under Section 47 is required to be formally drawn up as a decree and in that case the memorandum of appeal must be accompanied by a copy of the decree as well as the judgment. But in some other Courts no separate decree is drawn up embodying the adjudication under Section 47. In such a case, the decision under Section 47 is the decree and also the judgment, and the filing of a certified copy of the decision is sufficient compliance with Order 41, Rule 1. As the decision is the decree, the appeal is incompetent unless the memorandum of appeal is accompanied by a certified copy of the decision. *Shakuntala Devi Jain v. Kuntal Kumari and others,* AIR 1969 SC 575: 1969 (1) SCJ 912: 1969(1) SCR 1006

Order 41, Rule 1.-Appeal.-Form of .-Accompanying documents.-Copy of the judgment dispensed with, in case of more than one cases.-The provision has no effect on Limitation Act to seek benefit of time spent in obtaining certified copy.-An appellant who did not file certified copy cannot claim the benefit on the basis of certified copy of the common judgment. Thus the entire purpose of introducing the above provision was to avoid extra expenses where more cases than one were disposed of by common judgment and the Appellate Court was authorised to dispense with the necessity of filing more than one copy of the judgment. It was no doubt made clear by adding the proviso to Order XLI, Rule 1, C.P.C. that the filing of the certified copies of the judgment could be dispensed with where two or more appeals are filed against the common judgment by the same appellant or by different appellants. The above Order XLI, Rule 1 contained in the Code of Civil Procedure only deals with the provision as to what documents should be accompanied alongwith the memorandum of appeal. This provision has no relevance nor can control the provisions of limitation which are contained separately under the Limitation Act, 1963. The appellant and respondents Nos. 105 of 1980 had filed certified copy of the decree under challenge along with the memorandum of appeal and the time in obtaining the certified copy of the decree can be

excluded in computing the limitation and there is no dispute that such time has been excluded but even after excluding such time the appeal is barred by limitation. So far as the printed copy of the judgment filed with the memorandum of appeal it does not contain the necessary particulars regarding the person who made the application, the date of application, the date of issue, the date notified for receiving the same as required in Rules 253 and 254 of the Civil Rules of Practice in order to entitle the appellants to claim extension of time under Section 12(3) of the Limitation Act. Confronted with this difficulty, the appellant and other plaintiffs in O.S. No. 105 of 1980 sought to rely on the proviso to Order XLI, Rule 1, C.P.C. and to get the advantage of the time taken by the plaintiffs in O.S. No. 21 of 1979 in obtaining the certified copy of the common judgment. We are clearly of the view that there is no justification nor any basis for claiming such benefit. *P.A. Oommen v. Moran Mar Baselius Marthoma,* AIR 1992 SC 1977: 1992(2) SCC 503: 1992(4) JT 141: 1992(2) Scale 40 1992(1) KLT 293

Order 41, Rule 1.-Appeal.-Form of .-Certified copy of decree not annexed with the appeal.-Appeal filed alongwith the common judgement delivered in two separate suits.-The endorsement of ministerial officer about non-filing found to be incorrect and contrary to record.-Appeal is not invalid *R. Viswanathan v. R. Narayanaswamy,* AIR 1972 SC 414: 1972(4) SCC 822

Order 41, Rule 1.-Appeal by alienee .-Permissibility.-An alienee is entitled to prosecute an appeal to protect the rights under the alienation.-The rights of alienee do not depend on the fact whether alienor chooses to stand by the alienee or not. *Mst. Kirpal Kaur v. Bachan Singh and others,* AIR 1958 SC 199: 1958 SCJ 438: 1958 SCR

948 **Order 41, Rule 1.-Memo of appeal .-Form of.-Copy of decree not annexed.-The provision is not mandatory.-Its application depends upon the facts and circumstances.** If at the time when the appeal is preferred a decree has already been drawn up by the trial Court and the appellant has not applied for it in time it would be a clear case where the appeal would be incompetent and a penalty of dismissal would be justified. The position would, however, be substantially different if at that time when the appeal is presented before the appellate Court a decree in fact had not been drawn up by the trial Court; in such a case if an application has been made by the appellant for a certified copy of the decree, then all that can be said against the appeal preferred by him is that the appeal is premature since a decree has not been drawn up, and it is the decree against which an appeal lies. In such a case, if the office of the High Court examines the appeal carefully and discovers the defect the appeal may be returned to the appellant for presentation with the certified copy of the decree after it is obtained. In the case like the present, if the appeal has passed through the stage of admission through oversight of the office then the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. In such a case it would be open to the High Court, and we apprehend it would be its duty, to direct the subordinate Court to draw up the decree fortwith without any delay. On the other hand, if a decree has been drawn up and an application for its certified copy has been made by the appellant after the decree was drawn up, the office of the appellate Court should return the appeal to the appellant as defective, and when the decree is filed by him the question of limitation may be examined on the merits. *Jagat Dhish Bhargava v. Jawahar Lal Bhargava and others,* AIR 1961 SC 832: 1961(1) Ker LR 437: 1961(2) SCR 918

Order 41, Rule 1.-Receiver.-Consideration for appointment.-*Locus standi* to challenge the order.-Suit for dissolution of partnership and accounts.-Challenge to appointment of receiver by a person not having a substantial interest in the property that challenge is not maintainable. *Delhi Pradesh House Owners Association v. Union of India,* AIR 1987 SC 1149: 1986(1) SCC 350

Order 41, Rule 3.-Amendment of Memo of Appeal.-Enhancement of claim.-Effect of delay.-Amendment sought to increase the amount of claim of compensation for land acquisition on the basis of previous decisions.-Rejection of amendment only on the ground of delay is not proper.-Amendment allowed. *Harcharan v. State of Haryana,* AIR 1983 SC 43: 1982(3) SCC 408: 1982(2) Scale 1075: 1983 BBCJ 11: 1983(1) Land LR 307

Order 41, Rule 3.-Remand of a case.-scope of challenge.-Failure to challenge by way of appeal.-Subsequently remand order cannot be challenged even under inherent powers of the court. *Nainsingh v. Koonwarjee and others,* AIR 1970 SC 997: 1970 Jab LJ 544: 1970 MPLJ 568: 1971(1) SCR 207: 1970(1) SCC 732

Order 41, Rules 3 and 11.-Admission of appeal.-Partial admission.-Permissibility.-The court cannot admit an appeal in respect of some of the prayers while rejecting the other prayers. *Ramji Bhagala v. Krishnarao Karirao Bagre and another,* AIR 1982 SC 1223: 1982(1) SCC 433: 1982 MPLJ 710: 1982 Mah LJ 835

Order 41, Rule 4.-Abatement of appeal.-Death of a party.-Challenge to integrated award for partition which was not possible to be split up.-Appeal abates as a whole. *Govind Rao and another v. Mahadev,* AIR 1977 SC 627: 1976 (4) SCC 508

Order 41, Rule 4.-Abatement of appeal.-Joint decree of eviction .- Death of one of the tenants/Judgment Debtors.-Appeal by remaining Judgement Debtors against the whole decree is maintainable. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the

plaintiffs or defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of the all the plaintiffs or defendants, as the case may be. *Lal Chand (dead) by L.Rs. and others v. Radha Kishan,* AIR 1977 SC 789: 1977(2) SCC 88: 1977(2) SCR 522: 1977(1) Rent LR 588

Order 41, Rule 4.-Death of one party.-Suit for specific performance .-Non-impleadment of legal heirs, likely to result in inconsistent and contradictory decree.-Proceedings abate as a whole. *R. Ramamurthi Aiyar v. Raja V. Rajeswararao,* AIR 1973 SC 643: 1973(1) SCR 904: 1972(9) SCWR 540: 1972(2) SCC 721

Order 41, Rule 4.-Effect of.-Non-impleadment of legal representatives.- The provision does not empower the court to pass decree against the legal heirs of a deceased respondent. These provisions enable one of the plaintiffs or one of the defendants to file an appeal against the entire decree.The principle behind the provisions of Rule 4 seems to be that any one of the plaintiffs or defendants, in filing such an appeal, represents all the other non-appealing plaintiffs or defendants as he wants the reversal or modification of the decree in favour of them as well, in view of the fact that the original decree proceeded on a ground common to all of them. Kedar Nath was alive when the appeal was filed and was actually one of the appellant. The surviving appellants cannot be said to have filed the appeal as representing Kedar Nath. It will be against the scheme of the Code to hold that Rule 4 of Order XLI empowered the Court to pass a decree in favour of the legal representatives of the deceased. *Rameshwar Prasad and others v. Shambehari Lal Jagannath and another,* AIR 1963 SC 1901: 1964 All LJ 109: 1964(3) SCR 549

Order 41, Rule 5.-Mesne Profit.-Procedure to claim.-Application made for execution of decree passed in appeal as also to seek mesne profit.-Mesne profit claimed on account of the stay of execution of decree.-Composite application seeking execution of decree as also Mesne Profits is maintainable. *Pushpawatibai v. Ratansi and another,* AIR 1967 SC 761: 1963 Jab LJ 633: 1963 MPLJ 663: 1963 Mah LJ 631

Order 41, Rule 5.-Stay of execution .-Procedure.-The decretal amount deposited in Court.-Pendency of appeal is no ground to refund the deposited amount to judgment debtor. *Central Bank of India v. State of Gujarat and others,* AIR 1987 SC 2320: 1987(4) SCC 407: 1988(1) SCR 106: 1987(2) Scale 510: 1987(3) J.T. 552: 1987(2) Guj. LH 311

Order 41, Rule 5.-Stay of money decree.-Considerations for.-The decree making award, a rule of the Court, directing payment in terms of US .-Directions for deposit a part of decretal amount for stay of decree.-Dispute about the rate of exchange.-Directions given for deposit of an additional amount without deciding the principle for ascertaining the relevant date to determine the rate of exchange. *Renu Saagar Power Company v. General Electric Company,* AIR 1991 SC 351: 1991 Supp (1) SCC 155

Order 41, Rule 11.-Admission of appeal.-Considerations for.-The appeal raising triable issues should not be summarily dismissed. *Umakant Vishnu Junnarkar v. Parashuram Damodar Vaidya,* AIR 1973 SC 218: 1973(1) SCC 152

Order 41, Rules 16, 30, 31 and 32.-Appeal.-Dismissal in default.-Permissibility.-The appellant failing to address the Court.-The judgement of appellate Court need not contain all the reasons stipulated under Rule 31.-The appellate Court in such case is not required to comply with the provisions of rule 31. It is the duty of the appellant to show that the judgment under appeal is erroneous for certain reason and it is only after the appellant has shown this that the appellate Court would call upon the respondent to reply to the contention. It is only then that the judgment of the appellate Court can fully contain all the various matters mentioned in Rule 31, Order XLI. The provisions of Rule 31 should therefore be reasonably construed and should be held to require the various particulars to be mentioned in the judgment only when the appellant has actually raised certain points for determination by the appellate Court, and not when no such points have been raised as had been the case in the present instance when the appellant did not address the Court at all. We therefore repel the contention for the appellant that the High Court had to decide the appeal after going through the record of the case and the judgment of the Court below and must have complied with the provisions of Rule 31 of Order XLI, C.P.C., when the appellant did not address the Court. *Thakur Sukhpal Singh v. Thakur Kalyan Singh and another,* AIR 1963 SC 146: 1963(2) SCR 733

Order 41, Rule 17.-Dismissal in default.-Non appearance of counsel.-The party whose interest was represented by the lawyer affected by the absence.-An innocent party suffering injustice on account of default of lawyer.-Appeal restored and remanded for disposal on merits. *Rafiq and another v. Munshilal and another,* AIR 1981 SC 1400: 1981(2) SCC 788: 1981(3) SCR 509: 1981 BBCJ (SC) 219

Order 41, Rule 20.-Necessary parties.-Recovery suit against partnership firm wherein partners also impleaded as parties.-Decree passed against the firm as also against two of the partners.-Appeal against the party of decree dismissing the suit against two partners.-The other partners and firm is not necessary party in appeal against such decree. *State Bank of India v. Ramkrishna Pandurang Barve and another,* AIR 1990 SC 1981: 1990 Supp SCC 801

Order 41, Rule 20.-Non joinder of necessary parties.-Legal representative of plaintiff not impleaded in appeal.-Subsequent application moved on the date of decision, to implead such person as a party is not maintainable. *Ch. Surat Singh v. Manohar Lal and others,* AIR 1971 SC 240: 1971 (3) SCC 889

Order 41, Rule 21.-Application of principle on revision petition.-Non- appearance of counsel due to occupation in another court.-It constitutes sufficient cause.-The application should have been re-heard by the court. *Savithri Amma Seethamma v. Aratha Karthy and others,* AIR 1983 SC 318: 1983(1) SCC 401: 1983(1) Scale 706: 1983 Ker.L.T. 379: 1982 TLNJ 1

Order 41, Rule 22.-Right to support decree.-Scope of.-Respondent cannot support decree on a ground which would not have been available to him as an appellant. Under Order XLI, Rule 22 of the Code of Civil Procedure any respondent may support the decree on any of the grounds decided against him in the Court below. But this does not, and cannot, confer on him a right higher than that he would have had if he had preferred an appeal against the ground decided against him. To put it differently, he cannot, support the decree on a ground which would not have been available to him if he were an appellant. *The Management of Itakhoodie Tea Estate v. Its Workmen,* AIR 1960 SC 1349

Order 41, Rule 23.-Remand.-Consideration for.-Dismissal of suit on jurisdictional issue.-Reversal of judgement in appeal.-The proper procedure is to remand the suit for judgement on other issue.-Disposal of other issues by the appellate court itself is not proper. Since the only question considered by the trial court was one of jurisdiction, which depended upon the nature and character of the land and since we cannot exclude the possibility that the appellant may have been prejudiced by reason of denial to him of an opportunity to make good his case, it is in the interest of justice to afford him that opportunity. *Dwarka Nath Prasad Atal v. Ram Rati Devi,* AIR 1980 SC 192: 1980(1) SCC 17

Order 41, Rule 23.-Remand.-Non-filing of appeal.-Remand of case to protect interest of a party who did not file appeal.-Permissibility. It is contended that in any event the High Court should not have remanded the case to the lower appellate court with a direction that the defendants should be asked to render accounts before they claim any payment from the plaintiff at the time of redemption of the mortgage. It was pointed out that the plaintiff did not file an appeal against the decree of the trial Court and in the absence of such an appeal the High Court was not legally justified in giving further relief to the plaintiff than that granted by the trial Court. In our opinion, there is justification for this argument. We accordingly set aside that portion of the decree of the High Court remanding the case to the lower appellate Court with a direction that the defendants should be asked to render accounts. *Raghunath and others v. Kedarnath*, AIR 1969 SC 1316: 1969(3) SCR 497: 1969(1) SCC 497

Order 41, Rule 23.-Remand of case.-Considerations for.-Finding on a specific point required.-Remittal of the whole case is not called for. *Pasupuleti Venkateswarlu v. The Motor & General Traders,* AIR 1975 SC 1409: 1975(2) APLJ (SC) 11: 1975(1) SCC 770: 1975(3) SCR 958

Order 41, Rule 25.-Remand.-Considerations for.-Vague answer to question remanded to trial Court.-Matter remanded for fresh disposal of unanswered issues. *M/s. Badri Prasad Bhola Nath and others v. Ganesh Prasad and others,* AIR 1977 SC 2047: 1977(4) SCC 603: 1977(1) RCJ 569

Order 41, Rule 25.-Remand.-Distinction with calling for finding on specific issue.-Effect of such distinction. When a finding is called for on the basis of certain issues framed by the Appellate Court the appeal is not disposed of either in whole or in part. Therefore, the parties cannot be barred from arguing the whole appeal after the findings are received from the court of first instance. *Gogula Gurumurthy and others v. Kurimeti Ayyappa,* AIR 1974 SC 1702: 1974 SCD 566: 1974(3) SCR 595: 1975(4) SCC 458

Order 41, Rule 27.-Additional evidence.-Object of provision.-Application if mandatory. The object of the provision is to keep a clear record of what weighted with the appellate court in allowing the additional evidence to be produced.-whether this was done on the ground (i) that the court appealed from had refused to admit evidence which ought to have been admitted, or (ii) it allowed it because it required it to enable it to pronounce judgment in the appeal or (iii) it allowed this for any other substantial cause. Where a further appeal lies from the decision of the appellate court such recording of the reasons is necessary and useful also to the court of further appeal for deciding whether the discretion under the rule has been judicially exercised by the court below. The omission to record the reason must therefore be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory. For, it does not seem reasonable to think that the legislature intended that even though in the circumstances of a particular case it could be definitely ascertained from the record why the appellate court allowed additional evidence and it is clear that the power was properly exercised within the limitation imposed by the first clause of the Rule all that should be set at naught merely because the provision in the second clause was not complied with. It is true that the word shall is used in Rule 27(2), but that by itself does not make it mandatory. We are therefore of opinion that the omission of the High Court to record reasons for allowing additional evidence does not vitiate such admission. *K. Venkataramiah v. A Seetharama Reddy and others,* AIR 1963 SC 1526: 1963 All LJ 903: 1964 (1) Andh LT 64: 1964(2) SCR 35

Order 41, Rule 27.-Additional evidence.-Considerations for.-Production of documents, sought for the first time in appeal.-Necessity of oral evidence to prove such docu-mentary evidence.-Application for production of documents cannot be allowed. *S. Rajagopal v. C.M. Armugam and others,* AIR 1969 SC 101: 1969 (1) SCJ 738: 1969(1) SCR 254

Order 41, Rule 27.-Additional evidence.-Considerations for.-The appellate court required the evidence to clear up the matter and to enable it to come to a proper decision.-Objection to receiving additional evidence at appellate stage is not sustainable. *Kamala Ranjan Roy v. Baijnath*

Bajoria, AIR 1951 SC 1: 64 MLW 31: 1951 SCJ 13: 1950 SCR 840

Order 41, Rule 27.-Additional evidence.-Considerations for.-The discretion to seek additional evidence must be exercised on the basis of the principles governing the exercise of discretion.-Where the appellate courts were able to pronounce judgment without taking into consideration additional evidence, reception of additional evidence by the appellate court is not called for. *Arjan Singh v. Kartar Singh and others,* AIR 1951 SC 193: 1951 ALJ (SC) 78: 1951(1) MLJ 556: 1951 SCJ 274: 1951 SCR 258

Order 41, Rule 27.-Additional evidence.-Considerations for.-No party should be permitted at the appellate stage to remove the lacuna in its case by producing additional evidence. Additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at the proper stage, and to fill in gaps. Of course, the position is different where the appellate court itself requires certain evidence to be adduced in order to enable it to do justice between the parties. *State of U.P. v. Manbodhan Lal Srivastava,* AIR 1957 SC 912: 1957 All LJ 921: 1958 Mad LJ: 1958 SCJ 150

Order 41, Rule 27.-Additional evidence.-Considerations for.-Principles for exercise of power to receive additional evidence. The appellate court has the power to allow additional evidence not only if it require such evidence to enable it to pronounce judgment but also for any other substantial cause. There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence to enable it to pronounce judgment, it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence for any other substantial cause under Rule 27(1)(b) of the Code. It is easy to see that such requirement of the Court to enable it to pronounce judgment or for any other substantial cause is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence. *K. Venkataramiah v. A Seetharama Reddy and others,* AIR 1963 SC 1526: 1963 All LJ 903: 1964 (1) Andh LT 64: 1964(2) SCR 35

Order 41, Rule 27.-Additional evidence.-Considerations for.-Parties have ample of opportunities to test veracity of additional evidence.-Admission of additional evidence affirmed. *Yudhister v. Ashok Kumar,* AIR 1987 SC 558: 1987(1) SCC 204: 1987(1) SCR 516: 1986(2) Scale 1044: 1986 J.T. 1021: 1987(91) Pun. LR 11

Order 41, Rule 27.-Additional evidence.-Considerations for granting leave.-Appeal against ex-parte decree.-If application meets the conditions specified in the provision, even a party which led no evidence is entitled to adduce additional evidence. The sub-rule mentions the conditions which must be complied with by the party producing the additional evidence, namely, that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him in the trial Court. It is not one of the conditions that the party seeking to introduce `additional' evidence must have also been one who has led some evidence in the trial Court. Such a view amounts to introducing an additional condition not contemplated by the sub-rule. No distinction was intended by the sub-rule between a party who has produced some evidence in the trial court and one who has adduced no evidence in the trial Court. all that is required is that the conditions mentioned in the body of the sub-rule must be proved to exist. It is not permissible to restrict the sub-clause (aa) for the benefit of only those who have adduced some evidence in the trial Court. *Jaipur Development Authority v. Smt. Kailashwati Devi,* AIR 1997 SC 3243: 1997(7) JT 643: 1997(5) Scale 658: 1997(3) All LR 678

Order 41, Rule 27.-Additional evidence.-Consideration for.-Refusal to receive additional evidence in second appeal.-Inadequacy of the evidence to support pleadings.-No Prayer made before First Appellate Court.-Order of second appellate court refusing second opportunity to adduce evidence affirmed. *Soonda Ram and another v. Rameshwaralal and another,* AIR 1975 SC 479: 1975(3) SCC 698

Order 41, Rule 27.-Additional evidence.-Directions to trial Court .-Permissibility.-Appellate Court can direct that additional evidence be recorded if trial Court has refused to allow or has declined to record evidence sought to be produced by the party against whom the decree has been passed. *The Official Liquidator v. Raghava Desikachar,* AIR 1974 SC 2069: 1974(2) SCC 741: 1975(1) SCR 890

Order 41, Rule 27.-Additional evidence.-Effect of consent.-The evidence taken on record with the consent of both the parties.-Subsequent challenge by a party is not permissible. *K. Venkataramiah v. A Seetharama Reddy and others,* AIR 1963 SC 1526: 1963 All LJ 903: 1964 (1) Andh LT 64: 1964(2) SCR 35

Order 41, Rule 27.-Additional evidence.-Effect of delay.-No steps taken to produce additional evidence before the High Court.-Application filed for the first time in Supreme Court after the conclusion of arguments when the matter was reserved for judgement.-The application cannot be allowed. *Shiv Chander Kapoor v. Amar Bose,* AIR 1990 SC 325: 1990(1) SCC 234: 1989 Supp. (2) SCR 299: 1989(2) Scale 1168: 1989(4) JT 471

Order 41, Rule 27.-Additional evidence.-Exercise of discretion.-In the absence of any inherent obscurity or difficulty in rendering the judgment without such record, receipt of documents in

additional evidence, is not proper. The discretion given to the appellate court to receive and admit additional evidence is not an arbitrary one but is a judicial one circumscribed by the limitations specified in Order 41, Rule 27 of the Code of Civil Procedure. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and the additional evidence so brought on the record will have to be ignored. The true test to be applied in dealing with applications for additional evidence is whether the appellate court is able to pronounce judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced. In the instant case, we have not been able to experience any difficulty in rendering the judgment on the material already before us. Instead we feel that the prayer for adducing additional evidence has been made merely to fill up gaps on the basis of some revenue record which has been found by the Collector and the Commissioner to be spurious. *Natha Singh and others v. The Financial Commissioner, Taxation, Punjab and others,* AIR 1976 SC 1053: 1976(3) SCC 28: 1976(3) SCR 620

Order 41, Rule 27.-Additional evidence.-Fresh trial.-Permissibility.-The appellate Court while receiving additional evidence cannot permit an altogether fresh trial of the case. No doubt, under Rule 27 the High Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entile the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The power under clause (b) of sub-rule (1) of rule 27 cannot be exercised for adding to the evidence already on record except upon one of the ground specified in the provision. If the documents on record are relevant on the issue of fraud the court could well proceed to consider them and decide the issue. *The Municipal Corporation of Greater Bombay v. Lala Pancham and others,* AIR 1965 SC 1008: 67 Bom LR 782: 1965(1) SCR 542

Order 41, Rule 27.-Additional evidence.-Procedure.-Non-consideration of application during pendency of appeal but after disposal of appeal rejection in limine.-Matter remanded with directions to first dispose off the application and then dispose off the appeal. *The Premier Automobiles Ltd., Bombay v. Kabirunissa and others,* AIR 1991 SC 91: 1991 Supp (2) SCc 282: 1991(1) Land LR 522

Order 41, Rule 27.-Additional evidence.-Interference with permission in revision.-Decision of first Appellate Court permitting additional evidence.-The order appealable in second appeal.-Exercise of revisional jurisdiction not proper. *Gurdev Singh and others v. Mehnga Ram and another,* AIR 1997 SC 3572: 1997(6) SCC 507: 1997(7) JT 56: 1997(3) Mad LW 154: 1997(5) Scale 222: 1997 RD 530

Order 41, Rule 27.-Additional evidence.-Receipt of - Consideration for.-Books of Account not produced in the court below.-First Appellate Court is not justified to seek production of books of account and relying thereon. *Trimbak Narayan Hardas v. Babulal Motaji and other,* AIR 1973 SC 1363: 1973(2) SCC 154

Order 41, Rules 27 and 23.-Additional evidence.-Subsequent event.-Court can take into consideration by permitting evidence to be adduced by way of affidavit. When subsequent events are pleaded in the course of an appeal or proceedings of revision, the Court may, having regard to the nature of the allegations of fact on which the plea is based, permit evidence to be adduced by means of affidavits as envisaged in Rule 1 of Order 19, CPC. The Court may also treat any affidavit filed in support of the pleadings itself as one under the said provision and can upon the opposite side to traverse it. The Court, if it finds that having regard to the nature of the allegations, it is necessary to record oral evidence tested by oral cross-examination, may have recourse to that procedure. It may record the evidence itself or remit the matter for an enquiry and evidence. All these depend upon the factual and situational differences characterising a particular case and the nature of the plea raised. There can be no hard and fast rule governing the matter. The procedure is not to be burdened with technicalities. While it is true that a distinction must be made between pleading and proof, the further submissions that these must necessarily be in two successive sequential stages need not always be so and particularly when dealing with pleas of subsequent events in appeals and revisions. If the allegations of facts made in support of such a plea are denied then alone the question of their proof in an appropriate way arises. If those allegations of facts are admitted, there is no need to prove what is admitted or must be deemed to be admitted. There can be admissions by non-traverse. *Ramesh Kumar v. Kesho Ram,* AIR 1992 SC 700: 1992 Supp (2) SCC 623: 1992(1) RCR 370

Order 41, Rule 33.-Decision in appeal.-Composite suit.-Suit for pre-emption against the joint purchaser.-Decree challenged by one of the joint purchasers while other purchasers also parties to appeal.-The suit liable for dismissal.-Non-filing of appeal by all is of no consequence.-Appeal allowed and decree set-aside in respect of all. *Har Narain v. Chandgi etc.,* AIR 1987 SC 1325: 1987 Supp. SCC 738: 1987 (1) J.T. 527

Order 41, Rule 33.-Mismanagement of trust.-Exercise of powers by Appellate Court.-Necessity of. The present is, in our judgment, a case in which in exercise of the powers under Order 41, Rule 33 of the

Code of Civil Procedure we should direct that the Court of first instance to frame a scheme of management of the temple collections and the income and disbursement of expenses, application of the surplus if any and for that purpose to appoint a manager of the property of the deity and its properties, with authority to take possession of the temple and the properties from the defendant Ramchand and to administer the property and its income under the directions of the Court. *Ramchand v. Thakur Janki Ballabhji Maharaj and another,* AIR 1970 SC 532: 1970 (1) SCJ 174: 1970 (1) SCR 334: 1969(2) SCC 313

Order 41, Rule 33.-Pleadings.-Necessity for relief.-Considerations for.-Knowledge of the party about an issue indirectly or impliedly covered by another issue may, in circumstances be sufficient to grant relief. There can be no doubt that if a party asks for a relief on a clear and specific ground, and in the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessary taken in the pleadings would not necessarily disentail a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice and in doing justice to one party, the Court cannot do injustice to another. *Bhagwati Prasad v. Chandramaul,* AIR 1966 SC 735: 1966 All LJ 799: 1966 All WR 609: 1966(2) SCR 286

Order 41, Rule 33.-Power to pass any order.-Scope of.-Expression which ought to have been passed.-Meaning of.-Grant of relief in the absence of cross objections by parties.-Permissibility. The expression which ought to have been passed means which ought in law to have been passed. If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the Subordiante Court, it may pass or make such further or other decree or order as the justice of the case may require. If the claim of the respondents to retain any part of the property after the death of Jwala is negatived it would be perpetrating grave injustice to deny to the widow and the two daughters their share in the property to which they are in law entitled. In our view, the case was one in which the power under Order 41, Rule 33, Code of Civil Procedure ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed. *Giani Ram and others v. Ramji Lal and others,* AIR 1969 SC 1144: 71 Pun LR 996: 1969(3) SCR 944: 1969(1) SCC 813

Order 41, Rule 33.-Relief.-Liability of Karta.-Postponement of liability against surety till the decree is executed against joint family.-Such postponement is not permissible.-Decree amended accordingly. According to the decree of the High Court the plaintiff, namely, the Bank was to proceed and execute the decree against the second defendant in the first instance and was to proceed against the first defendant only afterwards for such balance amount which could not be realized from the second defendant. It is not disputed that the liability of the first and the second defendant was joint and several and the decree of the High Court proceeded on the basis of some equitable relief which was sought for and granted to the first defendant. We are unable to hold and no such principle or statutory provision has been pointed out to us that any such equitable relief could be granted in a suit of the nature filed by the Bank against the two defendants. *Joint Family of Mukundas Raja Bhagwandas & Sons and others v. The State of Bank of Hyderabad etc.,* AIR 1971 SC 449: 1971(1) AnWR (SC) 110: 1971(1) MLJ (SC) 110: 1970(2) SCC 766: 1971(2) SCR 136

Order 41, Rule 33.-Relief by appellate Court.-Relief to non-party.-Considerations for exercise of power.-Necessity to maintain finality of decrees. The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessities interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41, Rule 33 may properly be invoked. The rule however does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from. *Nirmala Bala Ghose and another v. Balai Chand Ghose and others,* AIR 1965 SC 1874: 1965(2) SCWR 988: 1965(3) SCR 550

Order 41, Rule 33.-Relief by appellate Court.-Power of appellate court.-Interference with decree without an appeal.-Interference in favour of party who neither appealed nor filed cross objections.-

The power must be exercised in exceptional circumstances.-Order of appellate court set aside. The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from. The facts and circumstances of these appeals are not such in which it would be appropriate to exercise the power under Order 41, Rule 33. The Commissioner as well as the High Court committed a manifest error in reversing the finding regarding allotment of units to the various appellants in the absence of any appeal by the State of Bihar when the same had become final and rights of the State of Bihar had come to an end to that extent by not filing any appeal or cross-objection within the period of limitation. *Choudhary Sahu (dead) by LRs. v. State of Bihar,* AIR 1982 SC 98: 1982(1) SCC 232: 1982(2) SCR 178: 1982(1) Scale 161

Order 41, Rule 33.-Relief by appellate Court.-Relief to non-party .-Consideration for grant of.-Appeal against a composite decree or a compensation of decree.-The court may grant relief to the non-party. Though Order 41, Rule 33 confers wide and unlimited jurisdiction on Courts to pass a decree in favour of a party who has not preferred any appeal, there are, however, certain well-defined principles in accordance with which that jurisdiction should be exercised. Normally, a party who is aggrieved by a decree should, if he seeks to escape from its operation, appeal against it within the time allowed after complying with the requirements of law. Where he fails to do so, no relief should ordinarily be given to him under Order 41, Rule 33.But there are well-recognised exceptions to this rule. One is where as a result of interference in favour of the appallant it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is the possibility that there might come into operation at the same time and with reference to the same subject-matter two decrees which are inconsis- tent and contradictory. This, however, is not an exhaustive enumration of the class of cases in which courts could interfere under Order 41, Rule 33. Such an enumeration would neither be possible nor even desirable. Considering the question no principle, when a decree is in substance a combination of several decrees against several defendants, there is no reason why an appeal presented by one of the defendants in respect of his interest should enure for the benefit of the other defendants with reference to their interests. *Harihar Prasad Singh and others v. Balmiki Prasad Singh and others,* AIR 1975 SC 733: 1975(2) SCR 932: 1975(1) SCC 212 **Order 41, Rule 33.-Relief by appellate court.-Relief to unrepresented party.-The plaintiff filing cross objections but not attacking a part of decree.-The appellate court could not grant relief without specific plea in this regard in cross objections.** The plaintiff was a party to the appeal. He had filed a cross objection but did not attack the decree of the trial court making him liable to return Rs. 13,000/- before he could take back possession from the defendant. Without a specific ground in the cross objection and without payment of court-fees on the said amount he was not entitled to get any relief by the court, under Order 41, Rule 33, C.P.C. *Tummalla Atchaiah v. Venka Narasingarao,* AIR 1978 SC 725: 1979(1) SCC 166

Order 41, Rule 33.-Relief by appellate Court.-Scope of.-The court may pass a decree in favour of a party who did not appeal. The expression which ought to have been passed means what ought in law to have been passed and if an appellate Court is of the view that any decree which ought in law to that any decree which ought in law to have been passed was in fact not passed by the Court below, it may pass or make such further or other decree or order as the justice of the case may require. Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial Court that was no bar to the High Court passing a decree in favour the respondent for the enforcement of the charge. *Koksingh v. Smt. Deokabai,* AIR 1976 SC 634: 1976(1) SCC 383: 1976(2) SCR 963

Order 41, Rule 33.-Relief by appellate Court.-Scope of.-No cause of action established against one of the defendants.-The Court may set aside decree in respect of person to whom no cause of action accrued. The Rule is in three parts. The first part confers on the appellate Court very wide powers to pass such orders in appeal as the case may require. The second part contemplates that this wide power will be exercised by the appellate Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The third part is where there have been decrees in cross-suits or where two or more decrees are passed in one suit, this power is directed to be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees. *M/s. Bihar Supply Syndicate v. Asiatic Navigation and others,* AIR 1993 SC 2054: 1993(2) SCC 639: 1993(2) SCR 425: 1993(2) Scale 111: 1993(2) JT 396: 1993(1) BLJR 731

Order 41, Rule 33.-Relief by appellate Court.-Scope of.-Cross objections filed by a respondent against co-respondent.-Relief can be granted by appellate Court. *M/s. Bihar Supply Syndicate v. Asiatic Navigation and others,* AIR 1993 SC 2054: 1993(2) SCC 639: 1993(2) SCR 425: 1993(2) Scale 111: 1993(2) JT 396: 1993(1) BLJR 731

Order 41, Rule 33.-Relief by appellate Court.-Relief to other parties.-Permissibility.-Object of provision. The object of the rule is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant. *Ratan Lal Shah v. Firm Lalman Das Chhadamma Lal and another,* AIR 1970 SC 108: 1970 All LJ 53: 1970 MPWR 47: 1970 BLJR 158: 1970(1) SCR 296: 1969(2) SCC 70

Order 41, Rule 33.-Relief in appeal.-Change in circumstances.-Effect on appeal.-The appellate court is entitled to take into consideration the change in law. *Gummalapura Taggina Matada Kotturuswami, v. Setra Veeravva and others,* AIR 1959 SC 577: 1959 Mad LJ (SC) 158: 1959 Nag LJ 299: 1959 Pat LR (SC) 31: 1959 Supp. (1) SCR 768

Order 41, Rule 33.-Relief of restitution.-Avoidance of contract by minor on becoming major.-Court must ensure restitution of benefits received under the transaction. *Sri Chandra Prabhuji Jain v. Harikrishna,* AIR 1973 SC 2565: 1973(2) SCWR 398: 1974(1) SCR 442: 1973(2) SCC 665

Order 41, Rules 33 and 22.-Relief to respondents.-Necessity of cross-objections.-The appellate court may grant relief in favour of respondents even if they have not filed their cross-objections. Even a bare reading of Order 41, Rule 33 is sufficient to convince any one that the wide wording, was intended to empower the appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. It empowers the appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as the case may require. In the present case, if there was no impediment in law the High Court could therefore, though allowing the appeal of the State by dismissing the plaintiff's suits against it, give the plaintiff a decree against any or all the other defendants who were parties to the appeal as respondents. While the very words of the section make this position abundantly clear the illustration puts the position beyond argument. We are not, at present advised, prepared to agree that if a party who could have filed a cross-objection under Order 41, Rule 22 of the Code of Civil Procedure has not done so, the Appeal Court can under no circumstance give him relief under the provisions of Order 41, Rule 33 of the Code. *Panna Lal v. State of Bombay and others,* AIR 1963 SC 1516: 1963 Mah LJ 616: 1963 MPLJ 648: 1964(1) SCR 980

Order 41, Rules 33 and 22.-Relief.-Scope of power.-Cross objections.-Effect of.-The power of appellate Court to do justice is not exclusive of Rule 22. Rule 22 and Rule 33 not mutually exclusive. They are closely related with each other. If objection cannot be urged under R. 22 against co-respondent, R. 33 could take over and come to the rescue of the objector. The appellate court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower court. The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words as the case may require used in Rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constrains that we could see may be these: That the parties before the lower court should be there before the appellate court. The question raised must properly arise out of judgement of the lower court. If these two requirements are there, the appellate court could consider any objection against any part of the judgement or decree of the lower court. It may be urged be any party to the appeal. It is true that the power of the appellate court under Rule 33 is discretion to determine all questions urged in order to render complete justice between the parties. *Mahant Dhangir and another v. Shri Madan Mohan and others,* AIR 1988 SC 54: 1987 Supp. SCC 528: 1988(1) SCR 679: 1987(2) Scale 874: 1987(4) JT 202: 1987(2) APLJ (SC) 76

Order 42, Rule 1.-Second appeal.-Form of.-Delay in filing certified copy of judgment in appeal.-Dismissal of appeal, otherwise filed within limitation is not proper. *Smt. Dipo v. Wassan Singh and others,* AIR 1983 SC 846: 1983(3) SCC 376: 1983(3) SCR 20: 1983(1) Scale 582

Order 43, Rule 1.-Appeal.-Permissibility .-No appeal lies on a mere finding of the court unless provided under the provisions of the Code. *Smt. Ganga Bai v. Vijay Kumar and others,* AIR 1974 SC 1126: 1974 Mah LJ 602: 1974 MPLJ 629: 1974 (2) SCC 393: 1974 (3) SCR 882 **Order 43, Rule 1(2).-Appeal against order under Order 39, Rule 2.- Permissibility.-Impugned order holding that Rule 2 has no application is appealable.** *Firm Ishardass Devi Chand and another v. R.B. Parkash Chand and another,* AIR 1969 SC 938: 1969 (1) SCWR 574: 1969(3) SCR 677: 1969(1) SCC 664 **Order 43, Rule 3.-Liability of Receiver.-Effect of negligence.-Destruction of goods on account loss by fire.-Receiver who executed surety bond is liable for damages.** *M/s. Howrah Insurance Co. Ltd. v. Shri Sochindra Mohan Das Gupta,* AIR 1975 SC 2051: 1975(2) SCC 523: 1976(1) SCR 356

Order 44, Rules 1 and 2.-Appeal as indigent person.-Rejection of appeal.-Rejection is not on merits.-Subsequent application seeking to deposit Court fee cannot be rejected on the ground that the appeal was rejected on merits. By the abovesaid amendment made in the year 1976 sub-rule (2) of Rule 1 of Order 44 of the Code of Civil Procedure is deleted. The result is that when an application made

under Rule 1 of Order 44 of Civil Procedure Code comes up for hearing, the only question which has now to be considered is whether the applicant is an indigent person or not. Any question relating to the merits of the case does not arise for consideration at that stage. A rejection of the application made under Rule 1 of Order 44, now can only mean that the Court is not satisfied about the claim of the applicant that he is an indigent person and nothing more. It does not however, amount to a finding that the appeal is not a fit one for admission on merits. *Ram Sarup v. Union of India and others,* AIR 1983 SC 1196: 1983(4) SCC 413: 1984(1) SCR 275: 1983(2) Scale 827: 1983 All.W.C. 878

Order 45, Rule 7.-Security for cost.-Extension of time.-Failure to furnish deposit in time does not necessarily lead to cancellation of certificate.-The Court may in its discretion condone the default. *Shew Bux Mohata and another v. Sm. Tulsimanjari Dasi and another,* AIR 1961 SC 1453: 1961 ALJ 79

Order 47, Rule 1.-Appeal.-Erroneous statement of fact.-Challenge by way of appeal is not permissible except with the consent of the other party.-The proper remedy is by way of review before the same Court. *Bank of Bihar v. Mahabir Lal and others,* AIR 1964 SC 377: 1964 BLJR 1: 1964(2) SCJ 611: 1964(1) SCR 842

Order 47, Rule 1.-Review.-Error.-Misconception on concession made by counsel about the position in law or where such concession was assumed, it is valid ground for review.A misconception by the Court of a concession made by the advocate or of the attitude taken up by the party appears to be a ground analogous to the grounds set forth in the first part of the review section and affords a good and cogent ground for review. Further, when the error complained of is that the Court assumed that a concession had been made when none had in fact been made or that the Court misconceived the terms of the concession or the scope and extent of it, it will not generally appear on the record but will have to be brought before the Court by way of an affidavit and this can only be done by way of review. The misconception of the Court must be regarded as sufficient reason analogous to an error on the face of the record. In our opinion it is permissible to rely on the affidavit as an additional ground for review of the judgment. *Moran Mar Basselios Catholicos and another v. Most Rev. Mar Poulose Athanastus and others,* AIR 1954 SC 526: 1954 Ker LJ 385: 1954 SCJ 736: 1955(1) SCR 520

Order 47, Rule 1.-Review.-Error apparent.-Meaning of.-Review is not an appeal in disguise.-An erroneous decision cannot be said to be suffering from an error apparent on the face of it. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by error apparent. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out. *M/s. Thungabhadra Industries Ltd. v. Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, Anantapur,* AIR 1964 SC 1372: 1964(1) SCWR 310: 1964(5) SCR 174

Order 47, Rule 1.-Review.-Power of.-It is not an inherent power.-Power of review must be conferred by law either specifically or by necessary implication. Patel Narshi Thakershi and others v. Pradyumansinghji Arjunsinghji, AIR 1970 SC 1273: 1971 (3) SCC 844

Order 47, Rule 1.-Review.-Procedure.-Disposal of review by another judge who took different view of the matter.-The procedure is not proper.-The appropriate remedy is of appeal. On an application being filed for review of the Judgment of the learned single Judge, another learned single Judge of the High Court.-the Judge who heard the Second Appeal not being available.-, virtually sitting in Judgment over the decision of the learned Judge who decided the Second Appeal construed the document differently and held that it was a will and not a deed of settlement. This the learned single Judge was not entitled to do. If the party was aggrieved by the Judgment of the learned single Judge sitting in Second Appeal the appropriate remedy for the party was to file an appeal against the Judgment of the learned single Judge. *Devaraju Pillai v. Sellayya Pillai,* AIR 1987 SC 1160: 1987(1) SCC 61: 1987 Pat. LJR 63

Order 47, Rule 1.-Review.-Relief on admission.-Relief granted to persons on concession of opposite party.-Reopening of matter and grant of concession to other persons, in respect of whom the opposite party had not specifically agreed earlier, not proper.-Order passed in review, set aside. *U.P. Avas Evam Vikas Parishad and another v. Ravi Kumar Anand and others,* AIR 1995 SC 2076: 1995 Supp (3) SCC 182: 1995 (4) SCC 182: 1995 All LJ (SC) 1764

Order 47, Rule 1.-Review.-Re-appreciation of evidence.-Permissibility.-Interference in review is permissible only if there is an error apparent on the face of record.-Such error should not require any long drawn process of reasoning on a point where there may conceivably be two opinions.-Re-appreciation of evidence with a view to find an alleged error for the invocation of powers of review is not permissible. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, C.P.C. It has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. *Smt.*

Meera Bhanja v. Smt. Nirmala Kumari Choudhury, AIR 1995 SC 455: 1995(1) SCC 170: 1994(4) Scale 985: 1994(7) JT 536: 1995(1) Mah LJ (SC) 825

Order 47, Rule 1.-Review.-Scope of.-Any other sufficient reason.-Meaning of.-The review is permissible on a reason sufficient on grounds or at least analogous to grounds specified in the provision. *Moran Mar Basselios Catholicos and another v. Most Rev. Mar Poulose Athanastus and others,* AIR 1954 SC 526: 1954 Ker LJ 385: 1954 SCJ 736: 1955(1) SCR 520

Order 47, Rule 1.-Review.-Scope of.-Review of the judgment of the second appellate Court whereby it set-aside the previous judgment as also concurred judgment of Court below and remanded the suit to the Court on first instance without even framing any issue for retrial.-Directions given for fresh disposal in accordance with law. *Soundararaj v. Devasahayam and others,* AIR 1984 SC 133: 1984 Supp. SCC 235: 1984(1) SCR 497: 1983(2) Scale 846: 1984(10) All LR 37

Order 47, Rule 1.-Review.-Scope of.-Suit for specific performance decreed, granting alternate relief of refund of amount paid under contract.-Review by the Court that the amount directed to be refunded, was lying in deposit in another suit therefore decree was erroneous.-The amount deposited in pursuance to the contract in question.-Decree not erroneous.-Interference in review not proper.-Order, set aside. *M/s. Avijit Tea Co. Pvt. Ltd. v. M/s. Terai Tea Co. and others,* AIR 1997 SC 11: 1996(10) SCC 174: 1996(6) Scale 237: 1996(6) AD (SC) 598: 1997(1) Mah. LR 631: 1997(1) Cal.LT 103

Order 47, Rule 1.-Review.-Scope of.-The review petition rejected for want of jurisdiction.-While dismissing the petition strictures passed against the Advocate General .-Use of intemperate comments should be avoided.-Adverse comments directed to be expunged from the record. The Judges Bench is a seat of power. Not only do judges have power to make binding decisions, their decisions legitimate the use of power by other officials. The Judges have the absolute and unchallengeable control of the Court domain. But they cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses. We concede that the Court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct.Learned Judge having held that the High Court has no jurisdiction to entertain the review petition ought not to have commented on the professional conduct of the appellant and that too without an opportunity for him. We regard to note that the observations made and aspersions cast on the professional conduct of the appellant are not only without jurisdiction, but also they are wholly and utterly unjustified and unwarranted. *A.M. Mathur v. Pramod Kumar Gupta,* AIR 1990 SC 1737: 1990(2) SCC 533: 1990(2) SCR 110: 1990(1) JT 545

Order 47, Rule 1.-Review.-Setting aside of decree.-Effect of.-Decree passed in review supersede origi-nal decree. The effect of allowing an application for review of a decree is to vacate the decree passed. The decree that is subsequently passed on review, where it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one. *Shushil Kumar Sen v. State of Bihar,* AIR 1975 SC 1185: 1975(1) SCC 774: 1975(2) SCWR 111: 1975(3) SCR 942

Order 47, Rule 1(1).-Review.-Pendency of appeal.-Permissibility.-Appeal filed subsequent to filing of review petition.-The review is maintainable unless the appeal is disposed of prior to the disposal of review petition. The crucial date for determining whether or not the terms of Order XLVII, Rule 1(1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end. *M/s. Thungabhadra Industries Ltd. v. Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, Anantapur,* AIR 1964 SC 1372: 1964(1) SCWR 310: 1964(5) SCR 174

Order 47, Rule 6.-Application on writ proceedings.-Difference of opinion.-Petition required to be referred for the opinion of the third Judge as per the provisions of the letters patent.-Provisions of Code do not affect operation of letters patent.-Appeal arising out of writ proceedings need not be dismissed in terms of the provision. *Reliance Industries Ltd. v. Pravinbhai Jasbhai Patel & others,* AIR 1997 SC 3892: 1997(5) Scale 633: 1997(7) JT 618: 1997(2) Guj. LH 590

Schedule I.-Appendix A, Form No.48.-Concluded contract.-Necessity to plead. A plaint in a suit for specific per- formance should allege a concluded contract, see the Code of Civil Procedure 1st Schedule Appendix A, Form No. 48. The offer as well as the acceptance should precede the institution of the suit. However, the precise point does not arise in this case. O.S. No. 46 of 1957 was not a suit for specific performance of the contract. Before the present suit for specific performance of the contract was instituted, the offer had been withdrawn. *Visweswaradas Gokuldas v. B.K. Narayan Singh and another,* AIR 1969 SC 1157: 1969 (3) SCR 581: 1969(3) SCR 581: 1969(1) SCC 547
