Gundaji Satwaji Shinde v. *Ramchandra Bhikaji Joshi*

AIR 1979 SC 653

D.A. DESAI, J. – This appeal by certificate arises out of Special Civil Suit No. 39/66 filed by the appellant-original plaintiff for specific performance of a contract dated 15th December 1965 for sale of land admeasuring 45 acres 5 gunthas bearing Survey No. 2 situated in Sholapur Mouje Dongaon in Maharashtra State for a consideration of Rs. 42,000 out of which Rs. 5,000 were paid as earnest money and a further amount of Rs. 5,000 was paid on 22nd April 1966 when the period for performance of the contract for sale was extended by six months, which suit was dismissed by the trial Court and the plaintiff's First Appeal No. 117/68 was dismissed by the Bombay High Court.

2. Plaintiff claimed specific performance of a contract dated 15th December 1965 coupled with supplementary agreement dated 26th April 1966 for sale of agricultural land. This suit was resisted by the defendant, *inter alia*, contending that the land which was subject-matter of the contract was covered by the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 ("Tenancy Act.') and as the intending purchaser, the plaintiff was not an agriculturist within the meaning of the Act. S. 63 of the Tenancy Act prohibited him from purchasing the land and, therefore, as the agreement was contrary to the provisions of the Tenancy Act the same cannot be specifically enforced. The plaintiff sought to repeal the contention by producing a certificate Ext. 78 issued by the Mamlatdar certifying that the plaintiff was an agricultural labourer and the bar imposed by S. 63 of the Tenancy Act would not operate. Plaintiff also contended that if the Court does not take note of Ext. 78, an issue on the pleadings would arise whether the plaintiff is an agriculturist and in view of the provisions contained in S. 70(a) read with Ss. 85 and 85-A of the Tenancy Act the issue would have to be referred to the Mamlatdar for decision and the Civil Court would have no jurisdiction to decide the issue. The trial Court held that the certificate Ext. 78 had no evidentiary value and was not valid. On the question of the plaintiff being an agriculturist, the trial Court itself recorded a finding that the plaintiff was not an agriculturist. On the question of jurisdiction to decide the issue whether the plaintiff is an agriculturist, the trial Court was of the opinion that it being an incidental issue in a suit for specific performance of contract, which suit the Civil Court has jurisdiction to try, it will also have jurisdiction to decide the incidental or subsidiary issue and recorded a finding that the plaintiff was not an agriculturist. In accordance with these findings the plaintiff's suit was dismissed. In appeal by the plaintiff, the High Court agreed with the finding of the trial Court with regard to the validity of certificate Ext. 78. On the question of jurisdiction of the trial Court to decide the issue about the plaintiff being an agriculturist, the High Court agreed with the trial Court observing that Civil Court has undoubtedly jurisdiction to entertain a suit for specific performance, and while considering the main issue – whether specific performance should be granted or not, Civil Court will have to consider whether there are *prima facie* any facts on account of which granting of specific performance would result into a transaction forbidden by law and, therefore, civil court will have jurisdiction to decide the subsidiary issue whether the plaintiff is an agriculturist. The High Court accordingly dismissed the appeal while agreeing with the trial Court that the

plaintiff had failed to prove that he was an agriculturist and specific performance of contract for sale of agricultural land cannot be granted in his favour.

4. Section 2(2) of the Tenancy Act defines agriculturist to mean a person who cultivates land personally. The expression 'land' is defined in S. 2(8) to mean: (a) land which is used for agricultural purposes or which is so used but is left fallow and includes the sites of farm buildings appurtenant to such land; and (b) for purposes of sections including Sections 63, 64 and 84-C (i) the sites of dwelling houses occupied by agriculturists, agricultural labourers or artisans and land appurtenant to such dwelling houses; (ii) the sites of structures used by agriculturists for allied pursuits. Section 63 which forbids transfer of agricultural land to non-agriculturists, reads as under:

63. (1) Save as provided in this Act –

(a) no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue), gift, exchange or lease of any land or interest therein, or

(b) no mortgage of any land or interest therein, in which the possession of the mortgaged property is delivered to the mortgagee, shall be valid in favour of a person who is not an agriculturist or who being an agriculturist will after such sale, gift, exchange, lease or mortgage, hold land exceeding two-thirds of the ceiling area determined under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, or who is not an agriculturist labourer:

Provided that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage, on such conditions as may be prescribed.

The next important section in this context is S. 70 which defines duties and prescribes function of the Mamlatdar, the relevant portion of which reads as under:

70. For the purpose of this Act the following shall be the duties and functions to be performed by the Mamlatdar:

(a) to decide whether a person is an agriculturist; x x x x x

(mb) to issue a certificate under S. 84-A, and decide under Ss. 84-B or 84-C whether a transfer or acquisition of land is invalid and to dispose of land as provided in S. 84-C.

5. Section 85 bars jurisdiction of the Civil Courts to decide certain issues and S. 85-A provides for reference of issues required to be decided under the Tenancy Act to the competent authority set up under the Tenancy Act. They are very material for decision of the point herein raised and they may be reproduced in extenso:

85. (1) No Civil Court shall have jurisdiction to settle, decide or deal with any question (including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him) which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the Maharashtra Revenue Tribunal in appeal or revision or the State Government in exercise of their powers of control.

(2) No order of the Mamlatdar, the Tribunal, the Collector or the Maharashtra Revenue Tribunal or the State government made under this Act shall be questioned in any Civil or Criminal Court.

Explanation – For the purpose of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Court Act, 1906.

85-A. (1) If any suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act, (hereinafter referred to as the "competent authority") the Civil Court shall stay the suit and refer such issues to such competent authority for determination.

(2) On receipt of such reference from the Civil Court, the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

Explanation– For the purpose of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Courts Act, 1906.

6. There is no controversy that the land purported to be sold by the contracts for sale of land Exts. 82 and 83 is land used for agricultural purposes and is covered by the definition of the expression 'land' in S. 2(8)(a). The plaintiff thus by the contracts for sale of land Exhibits 82 and 83 purports to purchase agricultural land. Section 63 prohibits sale of land, *inter alia*, in favour of a person who is not an agriculturist. If, therefore, the plaintiff wants to enforce a contract for sale of agricultural land in his favour he has of necessity to be an agriculturist. The defendant intending vendor has specifically contended that the plaintiff not being an agriculturist he is not entitled to specific performance of the contract. Therefore, in a suit filed by the plaintiff for specific performance of contract, on rival contentions a specific issue would arise whether the plaintiff is an agriculturist because if he is not, the Civil Court would be precluded from enforcing the contract as it would be in violation of a statutory prohibition and the contract would be unenforceable as being prohibited by law and, therefore, opposed to public policy.

7. The focal point of controversy is where in a suit for specific performance an issue arises whether the plaintiff is an agriculturist or not, would the Civil Court have jurisdiction to decide the issue or the Civil Court would have to refer the issue under S. 85-A of the Tenancy Act to the authority constituted under the Act, viz., Mamlatdar.

8. Uninhibited by the decisions to which our attention was invited, the matter may be examined purely in the light of the relevant provisions of the statute. Section 70(a) constitutes the Mamlatdar a forum for performing the functions and discharging the duties therein specifically enumerated. One such function of the Mamlatdar is to decide whether a person is an agriculturist. The issue arising before the Civil Court is whether the plaintiff is an agriculturist within the meaning of the Tenancy Act. It may be that jurisdiction may be conferred on the Mamlatdar to decide whether a person is an agriculturist within the meaning of the Tenancy Act but it does not *ipso facto* oust the jurisdiction of the Civil Court to decide that issue if it arises before it in a civil suit. Unless the Mamlatdar is constituted an exclusive forum to decide the question hereinabove mentioned conferment of such jurisdiction would

not oust the jurisdiction of the Civil Court. It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied [see ***Secretary of State* v. *Mask,*** AIR 1940 PC 105]. However, by an express provision contained in S. 85 the jurisdiction of the Civil Court to settle, decide or deal with any question which is by or under the Tenancy Act required to be settled, decided or dealt with by the competent authority is ousted. The Court must give effect to the policy underlying the statute set out in express terms in the statute. There is, therefore, no escape from the fact that the legislature has expressly ousted the jurisdiction of the Civil Court to settle, decide or deal with any question which is by or under the Tenancy Act required to be settled, decided or dealt with by any of the authorities therein mentioned and in this specific case the authority would be the Mamlatdar as provided in S. 70(a).

9. When the Tenancy Act of 1948 was put on the statute book, S. 85-A did not find its place therein. A question arose while giving effect to the provisions contained in Ss. 70 and 85 as to what should be done where in a suit in a Civil Court an issue arises to settle, decide or deal with which the jurisdiction of the Civil Court is ousted under S. 85. The Bombay High Court which had initially to deal with this problem, resolved the problem by holding that in such a situation the civil suit should be stayed and the parties should be referred to the competent authority under the Tenancy Act to get the question decided by the authority and in such decision being brought before the Civil Court, it will be binding on the Civil Court and the Civil Court will have to dispose of the suit in accordance therewith. While so resolving the problem immediately facing the Court, an observation was made that provision should be introduced in the Tenancy Act for enabling the Civil Court to transfer the proceeding to the competent authority under the Tenancy Act having jurisdiction to decide the issue and in respect of which the jurisdiction of the Civil Court is barred [See ***Dhondi Tukaram Mali* v. *Dadoo Piraji Adgale,*** AIR 1954 Bom. 100]. The Legislature took note of this suggestion and promptly introduced S. 85-A in the Tenancy Act by Bombay Act XIII of 1956. The legislative scheme that emerges from a combined reading of Ss. 70, 85 and 85-A appears to be that when in a civil suit properly brought before the Civil Court an issue arises on rival contentions between the parties which is required to be settled, decided or dealt with by a competent authority under the Tenancy Act, the Civil Court is statutorily required to stay the suit and refer such issue or issues to such competent authority under the Tenancy Act for determination. On receipt of such reference from the Civil Court the competent authority shall deal with and decide such issues in accordance with the provisions of the Tenancy Act and shall communicate its decision to the Civil Court and such court shall thereupon dispose of the suit in accordance with the procedure applicable thereto. To avoid any conflict of decision arising out of multiplicity of jurisdiction by Civil Court taking one view of the matter and the competent authority under the Tenancy Act taking a contrary or different view, an express provision is made in S. 85(2) that no order of the competent authority made under the Act shall be questioned in any Civil Court. To complete the scheme, sub-sec. (2) of Section 85-A provides that when upon a reference a decision is recorded by the competent authority under the provisions of the Tenancy Act and the decision is communicated to the Civil Court, such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto. Thus, the finding of the competent authority under the Tenancy Act is made binding on the

Civil Court. It would thus appear that the jurisdiction of the Civil Court to settle, decide or deal with any issue which is required to be settled, decided or dealt with by any competent authority under the Tenancy Act is totally ousted. This would lead to inescapable conclusion that the Mamlatdar while performing the function and discharging duties as are conferred upon him by S. 70, would constitute an exclusive forum, to the exclusion of the Civil Court, to decide any of the questions that may arise under any of the sub-clauses of S. 70. Section 70(a) requires the Mamlatdar to decide whether a person is an agriculturist. Therefore, if an issue arises in a Civil Court whether a person is an agriculturist within the meaning of the Tenancy Act, the Mamlatdar alone would have exclusive jurisdiction under the Tenancy Act to decide the same and the jurisdiction of the Civil Court is ousted. The Civil Court as required by a statutory provision contained in Section 85-A, will have to frame the issue and refer it to the Mamlatdar and on the reference being answered back, to dispose of the suit in accordance with the decision recorded by the competent authority on the relevant issue. To translate it into action, if the Mamlatdar were to hold that the plaintiff is not an agriculturist, obviously his suit for specific performance in the Civil Court would fail because he is ineligible to purchase agricultural land and enforcement of such a contract would be violative of statute and, therefore, opposed to public policy.

10. The High Court was of the view that the jurisdiction of the Civil Court to settle, decide or deal with any question which arises under the Tenancy Act and which is required to be settled, decided or dealt with by the competent authority under the Tenancy Act would alone be barred under S. 85. Proceeding therefrom, the High Court as of the opinion that if an issue arises in a properly constituted civil suit which the Civil Court is competent to entertain, an incidental or subsidiary issue which may arise with reference to provisions of the Tenancy Act, the jurisdiction of the Civil Court to decide, the same would not be ousted because the issue is not required to be decided or dealt with under the Tenancy Act. This view overlooks and ignores the provision contained in Section 85-A. There can be a civil suit properly constituted which the Civil Court will have jurisdiction to entertain but therein an issue may arise upon a contest when contentions are raised by the party against whom the civil suit is filed. Upon such contest, issues will have to be determined to finally dispose of the suit. If any such issue arises which is required to be settled, decided or dealt with by the competent authority under the Tenancy Act, even if it arises in a civil suit, the jurisdiction of the Civil Court to settle, decide and deal with the same would be barred by the provision contained in Section 85 and the Civil Court will have to take recourse to the provisions contained in S. 85-A for reference of the issue to the competent authority under the Tenancy Act. Upon a proper construction the expression "any issues which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issues under this Act" in S. 85-A would only mean that if upon assertion and denial and consequent contest an issue arises in the context of the provisions of the Tenancy Act and which is required to be settled, decided and dealt with by the competent authority under the Tenancy Act, then notwithstanding the fact that such an issue arises in a properly constituted civil suit cognizable by the Civil Court, it would have to be referred to the competent authority under the Tenancy Act. Any other view of the matter would render the scheme of Ss. 85 and 85-A infructuous and defeat the legislative policy [see ***Bhimaji Shanker* v. *Dundappa Vithappa,*** AIR 1966 SC 166, 169]-. The construction suggested by the respondent that the bar would only operate if such an issue

arises only in a proceeding under the Tenancy Act, could render S. 85-A infructuous or inoperative or otiose. Neither the Contract Act nor the Transfer of Property Act nor any other statute except the Tenancy Act prohibits a non-agriculturist from buying agricultural land. The prohibition was enacted in S. 63 of the Tenancy Act. Therefore, if a person intending to purchase agricultural land files a suit for enforcing a contract entered into by him and if the suit is resisted on the ground that the plaintiff is ineligible to buy agricultural land, not for any other reason except that it is prohibited by S. 63 of the Tenancy Act, an issue whether plaintiff is an agriculturist would directly and substantially arise in view of the provisions of the Tenancy Act. Such an issue would indisputably arise under the Tenancy Act though not in a proceeding under the Tenancy Act. Now, if S. 85 bars the jurisdiction of the Civil Court to decide or deal with an issue arising under the Tenancy Act and if S. 85-A imposes an obligation on the Civil Court to refer such issue to the competent authority under the Tenancy Act, it would be no answer to the provisions to say that the issue is an incidental issue in a properly constituted civil suit before a Civil Court having jurisdiction to entertain the same. In fact, S. 85-A comprehends civil suits which Civil Courts are competent to decide but takes note of the situation where upon a contest an issue may arise therein which would be required to be settled, decided or dealt with by the competent authority under the Tenancy Act, and, therefore, it is made obligatory for the Civil Court not only not to arrogate jurisdiction to itself to decide the same treating it as a subsidiary or incidental issue, but to refer the same to the competent authority under the Tenancy Act. This is an inescapable legal position that emerges from a combined reading of Ss. 85 and 85-A. This can be clearly demonstrated by an illustration. Plaintiff may file a suit on title against a defendant for possession of land on the allegation that defendant is a trespasser. The defendant may appear and contend that the land is agricultural land and he is a tenant. The suit on title for possession is clearly within the jurisdiction of the Civil Court. Therefore, the Civil Court would be competent to entertain the suit. But upon the defendant's contest the issue would be whether he is a tenant of agricultural land. Sec. 70(a)(ii) read with Ss. 85 and 85-A would preclude the Civil Court from dealing with or deciding the issue. In a civil suit nomenclature of the issue as principal or subsidiary or substantial or incidental issue is hardly helpful because each issue, if it arises, has to be determined to mould the final relief. Further, Ss. 85 and 85-A oust jurisdiction of Civil Court not in respect of civil suit but in respect of questions and issues arising therein and S. 85-A mandates the reference of such issues as are within the competence of the competent authority. If there is an issue which had to be settled, decided or dealt with by competent authority under the Tenancy Act, the jurisdiction of the Civil Court, notwithstanding the fact that it arises in an incidental manner in a civil suit, will be barred and it will have to be referred to the competent authority under the Tenancy Act. By such camouflage of treating issues arising in a suit as substantial or incidental or principal or subsidiary, Civil Court cannot arrogate to itself jurisdiction which is statutorily ousted. This unassailable legal position emerges from the relevant provisions of the Tenancy Act.

11. Turning to some of the precedents to which our attention was invited, it would be advantageous to refer to the earliest decision of the Bombay High Court which had the opportunity to deal with the scheme of law under discussion in ***Trimbak Sopana Girme*** **v.** ***Gangaram Mhatarbe Yadav*** [AIR 1953 Bom. 241]. In that case plaintiff filed a suit against the defendant for actual possession on the allegation that the defendant was a trespasser and

the defendant contested the suit contending that he was a protected tenant within the meaning of the Tenancy Act. The trial Court came to the conclusion that an issue would arise whether the defendant was a protected tenant and such an issue was triable by the Mamlatdar under Section 70(b) of the Tenancy Act, and the trial Court had no jurisdiction to try the issue. Accordingly the trial Court ordered the plaintiff to present the suit to the proper court. It may be noticed that at the relevant time S. 85-A was not introduced in the Tenancy Act. In an appeal by the plaintiff the appellate court reversed the finding that a suit on title for possession alleging that the defendant was a trespasser was a properly constituted civil suit and if in such a suit defendant raises a contention that he is a protected tenant it would be a subsidiary issue and would not oust the jurisdiction of the Court because if the Civil Court proceeding with the suit comes to the conclusion that the defendant is a trespasser it would be fully competent to dispose of the suit. The defendant carried the matter to the High Court and Chagla, C.J., analysing the scheme of Ss. 70 and 85 of the Tenancy Act, held that in order to avoid the conflict of jurisdiction and looking to the scheme of the sections, the legislature has left to the Mamlatdar to decide the issue whether the defendant is a protected tenant or not and it implies that he must decide that the defendant is not a trespasser in order to hold that he is a tenant or protected tenant and that he must also hold that he is a trespasser in order to determine that he is not a tenant or a protected tenant, and even while strictly construing the provisions of a statute ousting the jurisdiction of the Civil Court, the conclusion is inescapable that all questions with regard to the status of a party, when the party claims the status of a protected tenant, are left to be determined by the Revenue Court and the jurisdiction of the Civil Court is ousted.

12. This very contention kept on figuring before the Bombay High Court and J.C. Shah, J. in one of the Second Appeals before him analysed some conflicting decisions bearing on the interpretation of Ss. 70 and 85 specifically with regard to the ouster of jurisdiction of Civil Court to settle, decide or deal with those questions which are required to be settled, decided or dealt with by the competent authority under the Tenancy Act, and referred the matter to a Division Bench. The Division Bench in ***Dhondi Tukaram Mali***, while affirming the ratio in ***Trimbak Sopana Girme*** further observed that the legislature should by specific provision provide for transfer of such suits where issues arise in respect of which the competent authority under the Tenancy Act is constituted a forum of exclusive jurisdiction so as to avoid the dismissal of the suit by the Civil Court or being kept pending for a Long time till the competent authority disposes of the issue which it alone is competent to determine. The legislature took note of this decision of the Bombay High Court and introduced S. 85-A by Bombay Act XIII of 1956 which came into force from 23rd March 1956.

13. In ***Bhimji Shanker Kulkarni***, this very question arose in a suit filed by the plaintiff for possession of the suit property on redemption of a mortgage and taking of accounts on the allegation that defendant No. 1 was a usufructuary mortgagee under a mortgage deed, dated 28th June, 1945. The defendants pleaded that the transaction of June 28, 1945 was an advance lease and not a mortgage, and they were protected tenants within the meaning of the Tenancy Act. The trial Court passed a decree holding that the transaction evidenced by the deed is a composite document comprising of a mortgage and a lease and on taking accounts of the mortgage debt it is found that plaintiff owed nothing to the defendants on the date of the suit and the mortgage stood fully redeemed. A further direction in the decree was that the plaintiff

is at liberty to seek his remedy for possession of the suit lands in the revenue courts. The plaintiff carried the matter in appeal to the appellate court who partly allowed the appeal affirming that the mortgage is satisfied and nothing is due under the mortgage and the direction of the trial Court that plaintiff was at liberty to seek his remedy for possession of the suit lands in the revenue courts was confirmed and the rest of the decree, namely, that the document Ext. 43 evidencing the transaction was a composite document showing a mortgage and a lease was set aside and a direction was given that the record and proceedings do go back to the trial court who should give three months' time to the plaintiff for filing proper proceedings in the Tenancy Court for determining as to whether defendant 1 is a tenant. Some consequential order was also made. The plaintiff carried the matter in second appeal to the High Court of Mysore which, while dismissing the appeal observed that the Civil Court had no jurisdiction to determine the nature of the transaction when the contention was that it evidenced advance lease followed by the tenancy of defendant No. 1 and, therefore, the only proper direction is the one given by the trial Court to refer the issue to the Mamlatdar as to whether the defendant is a lessee under Exhibit 43 and on the reference being answered back, the suit should be disposed of in accordance therewith. The plaintiff brought the matter before this Court. This Court in terms approved the decision of the Bombay High Court in ***Dhondi Tukaram Mali***, observing as under:

> In ***Dhondi Tukaram*** case the Court expressed the hope that the legislature would make suitable amendments in the Act. The Bombay Legislature approved of the decision, and gave effect to it by introducing S. 85-A by the amending Bombay Act XIII of 1956. Section 85-A proceeds upon the assumption that though the Civil Court has otherwise jurisdiction to try a suit, it will have no jurisdiction to try an issue arising in the suit, if the issue is required to be settled, decided or dealt with by the Mamlatdar or other competent authority under the Act, and on that assumption, S. 85-A provides for suitable machinery for reference of the issue to the Mamlatdar for his decision. Now, the Mamlatdar has jurisdiction under S. 70 to decide the several issues specified therein "for the purposes of this Act," and before the introduction of Section 85-A, it was a debatable point whether the expression "for the purposes of this Act" meant that the Mamlatdar had jurisdiction to decide those issues only in some proceeding before him under some specific provision of the Act, or whether he had jurisdiction to decide those issues even though they arose for decision in a suit properly cognisable by a Civil Court, so that the jurisdiction of the Civil Court to try those issues in the suit was taken away by S. 85 read with S. 70. Dhondi Tukaram's case settled the point, and held that the Mamlatdar had exclusive jurisdiction to decide those issues even though they arose for decision in a suit properly cognisable by a Civil Court. The result was somewhat startling, for normally the Civil Court has jurisdiction to try all the issues arising in a suit properly cognisable by it. But having regard to the fact that the Bombay Legislature approved of Dhondi Tukaram's case and gave effect to it by introducing S. 85-A, we must hold that the decision correctly interpreted the law as it stood before the enactment of S. 85-A. It follows that independently of S. 85-A and under the law as it stood before S. 85-A came into force, the Courts below were bound to refer to the Mamlatdar the decision of the issue whether the defendant is a tenant.

14. It would thus appear that even when a properly constituted suit is brought to the Civil Court having jurisdiction to try the same, *prima facie*, on a contention being raised by the

defendant an issue may arise which the Civil Court would not be competent to try and the legislature stepped in to avoid the conflict of jurisdiction by introducing Section 85-A making it obligatory upon the Civil Court to refer such an issue to the competent authority under the Tenancy Act. Any controversy that such an issue is a primary issue or a subsidiary issue and hence triable by Civil Court must be said to have been resolved by laying down that the Civil Court will have no jurisdiction to try the same even if such an issue arose in a properly constituted civil suit cognisable by the Civil Court. And the ratio of the decision is that a contention raised by the defendant may have the necessary effect to oust the jurisdiction of the Civil Court in respect of the contention which is to be disposed of before the suit can be disposed of one way or the other.

15. In ***Ishverlal Thakorelal* v. *Motibhai Nagjibhai*** [AIR 1966 SC 459], the plaintiff appellant had filed a suit against the defendant respondent in the Civil Court for possession of agricultural land and mesne profits. The defendant contended that he was a tenant who was entitled to the protection of the Tenancy Act in view of the proviso to S. 43-C of the Tenancy Act despite the fact that at the relevant time the suit land was not governed by the provisions of the Tenancy Act. The trial Court decreed the suit but in first appeal the District Judge reversed the decree of the trial Court and dismissed the suit as in his view under the proviso to S. 43-C incorporated in the Tenancy Act by Bombay Act XIII of 1956 the respondent continued to enjoy the protection of the Tenancy Act and the Civil Court had no jurisdiction to grant a decree for possession of the land in dispute. A second appeal to the High Court by the original plaintiff was dismissed in limine and the matter came up before this Court by special leave. This Court first affirmed that whatever may have been the position before Act XIII of 1956, the legislature has unequivocally expressed an intention that even in a suit properly instituted in a Civil Court, if any issue arises which is required to be decided by the revenue Court, the issue shall be referred for trial to that Court and the suit shall be disposed of in the light of the decision. The Legislature has clearly expressed itself that issues required under Act 67 of 1948, viz. Tenancy Act, to be decided by a revenue Court, even if arising in a civil suit, must be decided by the revenue Court and not by the Civil Court. The view expressed by the Bombay High Court in ***Pandurang Hari* v. *Shanker Maruti*** [(1960) 62 Bom LR 873], and the Gujarat High Court in ***Kalicharan Bhajanlal Bhayya* v. *Raj Mahalaxmi*** [(1963) 4 Guj LR 145], that in such suit the Civil Court is competent to adjudicate upon the issues which are by Act 67 of 1948 required to be decided by the revenue Court, was disapproved. This Court held that the question whether the Court held that the question whether the defendant being a tenant on the day on which the Tenancy Act was put into operation and whether he retained the protection in view of the proviso to S. 43-C was within the exclusive jurisdiction of the Mamlatdar under the Tenancy Act and, therefore, the District Judge was in error in dismissing the suit. It was necessary for him to refer the very question for determination to the competent authority under the Tenancy Act and it was not open to him to dispose of the suit. Accordingly the appeal was allowed and the matter was remanded to the District Court with a direction that it should restore the appeal to its original number and proceed according to law. This decision does not depart from the ratio in ***Bhimji Shanker Kulkarni*** case [AIR 1966 SC 166].

16. It was, however, said that a suit for specific performance of a contract for sale of land is cognizable by the Civil Court and its jurisdiction would not be ousted merely because

contract, if enforced, would violate some provisions of the Tenancy Act. If contract when enforced would violate some provisions of the Tenancy Act it may be that the competent authority under the Tenancy Act may proceed to take action as permissible under the law but the Court cannot refuse to enforce the contract. And while so enforcing the contract the Court need not refer any subsidiary issue to the competent authority under the Tenancy Act because if there is any violation of the Tenancy Act the same would be taken care of by the competent authority under the Tenancy Act in view of the power conferred upon the Mamlatdar under Section 84-C of the Tenancy Act. A brief resume of the facts in ***Jambu Rao Satappa*** v. ***Neminath Appayya*** [AIR 1968 SC 1358] is necessary to grasp the ratio of this decision. In a suit for specific performance the defendant contended that if the contract is enforced it would violate S. 35 of the Tenancy Act in that the plaintiff's holding after the appointed day would exceed the ceiling and the acquisition in excess of the ceiling is invalid. A contention appears to have been raised that the question whether an acquisition in excess of the ceiling would be invalid would be within the exclusive jurisdiction of the Mamlatdar under S. 70 (mb) and that the Civil Court cannot decide or deal with this question and a reference ought to have been made to the Mamlatdar. Negativing this contention it was observed that the Civil Court had jurisdiction to entertain and decree a suit for specific performance of agreement to sell land. If upon the sale being completed it would violate some provision of the Tenancy Act an equiry has to be made under S. 84-C and S. 84-C provides that if an acquisition of any land is or becomes invalid under any of the provisions of the Tenancy Act, the Mamlatdar may *suo motu* inquire into the question and decide whether the transfer of acquisition is or is not valid. This inquiry has to be made after the acquisition of the title pursuant to a decree for specific performance. It is in the context of these facts that it was held that even though Civil Court has no jurisdiction to determine whether the acquisition would become invalid but there is nothing in S. 70 or any other provision of the Act which excludes the Civil Court's jurisdiction to decree specific performance of a contract to transfer land which would be anterior to the acquisition. While disposing of this contention this Court took note of the fact that the transfer may not be invalid at all because the purchaser may have already disposed of his prior holding and it was further observed that when the scheme of the Act is examined it becomes clear that the legislature has not declared the transfer or acquisition invalid, for S. 84-C provides that the land in excess of the ceiling shall be at the disposal of the Government when an order is made by the Mamlatdar. The invalidity of the acquisition is, therefore, only to the extent to which the holding exceeds the ceiling prescribed by law and involves the consequence that the land shall vest in the Government. It would thus transpire that after the acquisition is completed, the question may arise whether ceiling has been exceeded and in that event the Mamlatdar in a *suo motu* inquiry can declare the transfer invalid to the extent the holding exceeds the ceiling. The distinguishing feature of the present case is that S. 63 bars purchase of agricultural land by one who is not an agriculturist and, therefore, the disqualification is at the threshold and unless it is crossed the Court cannot decree a suit for specific performance of contract for sale of agricultural land and in order to dispose of the contention which stands in the forefront a reference to the Mamlatdar under Section 70 read with Ss. 85 and 85-A is inevitable. Therefore, there is no conflict between the decision in ***Kulkarni*** case and ***Jamburao*** case not the latter decision overrules the earlier one. In fact,

Kulkarni's case was not referred to in Jamburao's case because the question before the Court was entirely different from the one in Kulkarni's case.

17. In ***Musamiya Imam Haider Bax Razvi* v. *Rabari Govindbhai Ratnabhai*** [AIR 1969 SC 439] the question that came up for consideration of this Court was whether when in a suit in the Civil Court for possession of agricultural land a contention is raised that defendant has become a statutory owner on the tillers' day under S. 32 of the Tenancy Act implying that he was a tenant on 1st April 1957, would the Civil Court have jurisdiction to decide the question of past tenancy in the context of S. 70 of the Tenancy Act? The contention was negatived observing that S. 70 imposes a duty on the Mamlatdar to decide whether a person is a tenant but the sub-section does not cast a duty upon him to decide whether a person was or was not a tenant in the past, whether recent or remote. Approaching from this angle, it was held that the contention whether a defendant has become a statutory owner on the tillers' day involving the question of past tenancy was not within the exclusive jurisdiction of the Mamlatdar and, therefore, the Civil Court has jurisdiction to decide the question. In the context of the language employed in S. 70(b) which, as it then stood, did not confer jurisdiction on the Mamlatdar to decide the question of past tenancy, it can be said that the Civil Court's jurisdiction to decide the same was not ousted. It appears that the question was argued in the context of S. 70 only and has been answered in the context of the language employed in Section 70(b) only. Otherwise, the question whether a person has become a statutory owner on the tillers' day, i.e. on 1st April 1957 which would imply whether the person so contending was a tenant of the land on 1st April 1957 and hence would become owner of the land by operation of law, was exclusively within the purview of the Tribunal set up under S. 67 in Chap. VI of the Tenancy Act. S. 67 imposes a duty on the State Government to set up Agricultural Land Tribunal for each taluka or mahal or for such area as the State Government may think fit. Section 68 prescribes the duties of the Tribunal which *inter alia* include the duty to decide any dispute under Sections 32 to 32-R (both inclusive). A dispute under S. 32 would comprehend whether the plaintiff was the owner of the land on the tillers' day i.e. 1st April 1957 and the person claiming to have become a statutory owner by operation of law on that day should of necessity be a tenant and that this question would be within the exclusive jurisdiction of the Tribunal as provided by S. 68. Section 85 refers to the Tribunal meaning Agricultural Land Tribunal to be a competent authority to settle, decide and deal with the question set out in S. 68 and it would have exclusive jurisdiction to settle, decide and deal with the same. No submission was made in Mussamiya's case with reference to the provisions contained in Chapter VI and especially S. 68 and, therefore, that decision cannot lend support to the submission that past tenancy being a subsidiary issue, as such was within the competence of the Civil Court.

17-A. A question similar to the one under discussion in the context of provisions contained in Ss. 132, 133 and 142(1)(a) of Mysore Land Reforms Act, 1961, came up before this Court very recently in ***Noor Mohd. Khan Ghouse Khan Soudagar* v. *Fakirappa Bharmappa Machenahalli*** [AIR 1978 SC 1217]. The majority decision, after approving ***Kulkarni*** [AIR 1966 SC 166], and distinguishing ***Musamiya*** and referring to ***Dhondi Tukaram*** held that a question arose during the pendency of the suit and the execution proceeding whether by the final allotment of the land to the appellant, respondent No. 1 has ceased to be a tenant in view of Section 52 of the Transfer of Property Act. This question

according to the opinion of the majority fell squarely and exclusively within the jurisdiction of the revenue authorities and the Civil Court had no jurisdiction to decide it and a reference to the competent authority was inevitable, and no discretion was left in the Civil Court in this behalf. So observing, the majority upheld the decision of High Court which had set aside the decree of the trial Court awarding possession because in the opinion of the High Court no actual delivery of possession can be given against the person claiming to be a tenant unless the requirements of the Mysore Land Reforms Act, 1961, were satisfied. It may be noticed that the scheme of the provisions in Mysore Land Reforms Act, 1961, under discussion in the decision were in *pari materia* with the scheme of Ss. 70, 85 and 85-A of the Tenancy Act.

18. Thus, both on principle and on authority there is no escape from the conclusion that where in a suit properly constituted and cognizable by the Civil Court upon a contest an issue arises which is required to be settled, decided or dealt with by a competent authority under the Tenancy Act, the jurisdiction of the Civil Court to settle, decide or deal with the same is not only ousted but the Civil Court is under a statutory obligation to refer the issue to the competent authority under the Tenancy Act to decide the same and upon the reference being answered back, to dispose of the suit in accordance with the decision of the competent authority under the Tenancy Act.

19. If, plaintiff sued for specific performance of a contract for sale of agricultural land governed by the provisions of the Tenancy Act in the Civil Court and the defendant appeared and raised a contention that in view of the provisions contained in S. 63 of the Tenancy Act the plaintiff being not an agriculturist he is barred from purchasing the land, the issue would arise whether the plaintiff is an agriculturist. Such an issue being within the exclusive jurisdiction of the Mamlatdar, it is incumbent upon the Civil Court to refer the issue to the competent authority under the Tenancy Act and the Civil Court has no jurisdiction to decide or deal with the same. That issue arises in the suit from which the present appeal arises and both the trial Court and the High Court were in error in clutching at a jurisdiction which did not vest in them and, therefore, on this ground alone this appeal will succeed.

* * * * *

Indian Bank v. *Maharashtra State Co-Op. Marketing Federation Ltd.*

AIR 1998 SC 1952

G.T. NANAVATI, J. – 2. The question which arises for consideration in these appeals is whether the bar to proceed with the trial of subsequently instituted suit, contained in Section 10 of the Code of Civil Procedure, 1908 (the 'Code') is applicable to summary suit filed under Order 37 of the Code.

3. The respondent Federation applied to the appellant Bank on 5-6-1989 to open an Irrevocable Letter of Credit for a sum of Rs. 3,78,90,000/- in favour of M/s. Shankar Rice Mills. Pursuant to that request the Bank opened an Irrevocable Letter of Credit on 6.6.1989. The agreed arrangement was that the documents drawn under the said Letter of Credit when tendered to the appellant Bank were to be forwarded to the Federation for their acceptance and thereafter the Bank had to make payments to M/s. Shankar Rice Mills on behalf of the Federation. On 6.2.1992 the Bank filed Summary Suit No. 500 of 1992 in the Bombay High Court under Order 37 of the Code against the Federation for obtaining a decree of Rs. 4,96,58,160/- alleging that the said amount has become recoverable under the said Letter of Credit. The Bank took out summons for judgment (No. 278 of 1992). The Federation appeared before the Court and took out Notice of Motion seeking stay of the summary suit on the ground that it has already instituted a suit being Suit No. 400 of 1992 against the Bank for recovery of Rs. 3,70,52,217.88 prior to the filing of the summary suit.

4. A learned Single Judge of the Bombay High Court, who heard the summons for judgment and the Notice of Motion, held that the concept of trial is contained in Section 10 of the Code is applicable only to a regular/ordinary suit and not to a summary suit filed under Order 37 of the Code and, therefore, further proceedings under Summary Suit No. 500 of 1992 were not required to be stayed. The learned Judge was also of the view that there was no merit in the defence raised by the Federation. He, therefore, granted leave to the Federation to defend the suit conditionally upon the Federation depositing Rs. 4 crores in the Court. The summons for judgment was disposed of accordingly and the Notice of Motion was dismissed.

5. Aggrieved by the order of the learned Single Judge in summons for judgment the Federation filed Appeal No. 953 of 1994 before the Division Bench of the High Court; and against the order passed on Notice of Motion it preferred Appeal No. 954 of 1994. The Division Bench was of the view that the word "trial" in Section 10 has not been used in a narrow sense and would mean entire proceedings after the defendant enters his appearance, held that Section 10 of the Code applies to a summary suit also. It also held that the summary suit filed by the Bank being a subsequently instituted suit was required to be stayed. It allowed both the appeals, set aside the orders passed by the learned Single Judge and stayed the summary suit till the disposal of the prior suit filed by the Federation.

6. The submission of the learned counsel for the appellant was that the view taken by the learned Single Judge was correct and Division Bench has committed an error of law in taking a contrary view. It was his contention that if Section 10 is made applicable to summary suits also the very object of making a separate provision for summary suits will be frustrated. The learned counsel for the respondent, on the other hand, supported the view taken by the Division Bench.

7. Section 10 of the Code prohibits the Court from proceeding with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit provided other conditions mentioned in the section are also satisfied. The word 'trial' is no doubt of a very wide import as pointed out by the High Court. In legal parlance it means a judicial examination and determination of the issue in civil or criminal Court by a competent Tribunal. According to ***Webster Comprehensive Dictionary***, International Edition, it means the examination, before a tribunal having assigned jurisdiction, of the facts or law involved in an issue in order to determine that issue. According to Stroud's Judicial Dictionary (5th Edition), a 'trial' is the conclusion, by a competent tribunal, of questions in issue in legal proceedings, whether civil or criminal. Thus in its widest sense it would include all the proceedings right from the stage of institution of a plaint in a civil case to the stage of final determination by a judgment and decree of the Court. Whether the widest meaning should be given to the word 'trial' or that it should be construed narrowly must necessarily depend upon the nature and object of the provision and the context in which it is used.

8. Therefore, the word "trial" in Section 10 will have to be interpreted and construed keeping in mind the object and nature of that provision and the prohibition to 'proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit.' The object of the prohibition contained in Section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matters in issue. The provision is in the nature of a rule of procedure and does not affect the jurisdiction of the Court to entertain and deal with the later suit nor does it create any substantive right in the matters. It is not a bar to the institution of a suit. It has been construed by the Courts as not a bar of the passing of interlocutory orders such as an order for consolidation of the later suit with the earlier suit, or appointment of a Receiver or an injunction or attachment before judgment. The course of action which the Court has to follow according to Section 10 is not to proceed with the 'trial' of the suit but that does not mean that it cannot deal with the subsequent suit any more or for any other purpose. In view of the object and nature of the provision and the fairly settled legal position with respect to passing of interlocutory orders it has to be stated that the word 'trial' in Section 10 is not used in its widest sense.

9. The provision contained in Section 10 is a general provision applicable to all categories of cases. The provision contained in Order 37 apply to certain clauses of suits. One provides a bar against proceeding with the trial of a suit, the other provides for granting of quick relief. Both these provisions have to be interpreted harmoniously so that the objects of both are not frustrated. This being the correct approach and as the question that has arisen for consideration in this appeal is whether the bar to proceed with the trial of subsequently instituted suit contained in Section 10 of the Code is applicable to a summary suit filed under Order 37 of the Code, the words 'trial of any suit' will have to be construed in the context of the provisions of Order 37 of the Code. Rule 2 of Order 37 enables the plaintiff to institute a summary suit in certain cases. On such a suit being filed the defendant is required to be served with a copy of the plaint and summons in the prescribed form. Within 10 days of service the defendant has to enter an appearance. Within the prescribed time the defendant has to apply for leave to defend the suit and leave to defend may be granted to him unconditionally or

upon such terms as may appear to the Court or Judge to be just. If the defendant has not applied for leave to defend, or if such an application has been made and refused, the plaintiff becomes entitled to judgment forthwith. If the conditions on which leave was granted are not complied with by the defendant then also the plaintiff becomes entitled to judgment forthwith. Sub-rule (7) of Order 37 provides that save as provided by that order the procedure in summary suits shall be the same as the procedure in suits instituted in the ordinary manner. Thus in classes of suits where adopting summary procedure for deciding them is permissible the defendant has to file an appearance within 10 days of the service of summons and apply for leave to defend the suit. If the defendant does not enter his appearance as required or fails to obtain leave the allegations in the plaint are deemed to be admitted and straightaway a decree can be passed in favour of the plaintiff. The stage of determination of the matter in issue will arise in a summary suit only after the defendant obtains leave. The trial would really begin only after leave is granted to the defendant. This clearly appears to be the scheme of summary procedure as provided by Order 37 of the Code.

10. Considering the objects of both the provisions, i.e. Section 10 and Order 37 wider interpretation of the word "trial" is not called for. We are of the opinion that the word 'trial' in Section 10 in the context of a 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.

11. In our opinion, the Division Bench of the Bombay High Court was in error in taking a different view. It had relied upon the decision of this Court in ***Harish Chandra* v. *Triloki Singh*** [AIR 1957 SC 444]. That was a case arising under the Representation of People's Act and, therefore, it was not proper to apply the interpretation of word 'trial' in that case while interpreting Section 10 in the context of Order 37 of the Code.

12. We, therefore, allow these appeals, set aside the impugned judgment of the Division Bench of the High Court and restore the order passed by the learned Single Judge.

* * * * *

Iftikhar Ahmed v. *Syed Meharban Ali*

AIR 1974 SC 749

K.K. MATHEW, J. – In this appeal, by special leave, the question for consideration is whether the High Court of Allahabad was right in setting aside the decree passed by the District Judge, Meerut, in appeal, setting aside an award passed by the arbitrator appointed under the Uttar Pradesh Consolidation of Holdings Act, 1953 (the Act).

The appellants are the legal representatives of Ishtiaq Ahmed. In the consolidation proceedings under the Act with respect to the properties in question which originally beLonged to Buniyad Ali, dispute arose between Ishtiaq Ahmed on the one hand and Meharban Ali and Kaniz Fatima on the other hand as regards the title to them. Meharban Ali and Kaniz Fatima claimed that they were co-bhumidars of the properties aLong with Ishtiaq Ahmed. Ishtiaq Ahmed contended that all the assets of Buniyad Ali were inherited by his son Aftab Ali and after the death of Aftab Ali in 1910 and his widow in 1925, be became the exclusive owner of the properties as the other heirs had relinquished their rights in them. Ishtiaq Ahmed also claimed title to the properties by adverse possession. As the dispute between the parties was concerned with the title to the properties, the consolidation Officer referred the matter to the Civil Judge, Meerut who referred the same to an arbitrator appointed under the Act. The arbitrator held that Meharban Ali and Kaniz Fatima had no title and so were not co-bhumidars of the properties with Ishtiaq Ahmed. For reaching this conclusion the arbitrator mainly relied on a judgment of the High Court of Allahabad which, according to the arbitrator, operated as *res judicata* between the parties with respect to the title to the properties.

3. Both the parties filed objections to the award before the learned II Civil Judge, Meerut. He held that the judgment of the High Court relied on by the arbitrator did not operate as *res judicata* between the parties as regards the title to the properties and that the decision of the arbitrator, based as it was on that judgment operating as *res judicata*, was manifestly wrong and the award was consequently vitiated by an error of law apparent on the face of the award. He, therefore, set aside the award and remitted the case to the arbitrator for a fresh decision.

4. The arbitrator, Mr. B.P. Gupta considered the case. He came to the conclusion on the basis of the oral and documentary evidence, that the parties were co-bhumidars of the properties except in respect of 9 bighas 3 biswas and determined their shares in the properties. The arbitrator was of the view that the judgment of the High Court was not *res judicata* as regards the title of the parties to the properties.

Against this award, Ishtiaq Ahmed filed objections before the II Civil Judge, Meerut. The Civil Judge considered the objections and found that there was no manifest error or illegality in the award and he confirmed the award.

5. Ishtiaq Ahmed preferred an appeal from this decision before the District Judge. Ishtiaq Ahmed died during the pendency of the appeal and his legal representatives, the present appellants, prosecuted the appeal. The District Judge held that the award suffered from an error of law apparent on the face of the record in that the arbitrator ignored the judgment of the High Court which operated as *res judicata* as regards the title of the parties to the

properties. He, therefore, allowed the appeal and set aside the decree appealed from and remitted the case to the arbitrator for a fresh decision.

The respondents filed a revision before the High Court against the decision of the District Judge and the High Court reversed the decision and restored the decree passed by the Civil Judge confirming the award.

6. Mr. Goel, appearing for the appellants submitted that the High Court went wrong in reversing the decree of the District Judge. He argued that the award was vitiated by an error of law apparent on the face of the record as the award proceeded on the basis that the judgment of the High Court did not operate as *res judicata* in respect of the title of the parties to the properties, and therefore, the decision of the District Judge setting aside the award was correct.

7. Now, let us consider the nature of the judgment passed by the High Court and see whether it operated as *res judicata* in respect of the question of title of the parties to the properties and whether there was any manifest error of law apparent on the face of the award. That judgment related to the properties in dispute and was passed in second appeal from a decree in a suit (Suit No. 600 of 1934) instituted by Meharban Ali, Kaniz Fatima and Ishtiaq Ahmed for a declaration that the decree obtained in O.S. No. 128 of 1929 by Ishari Prasad, the defendant in that suit on the foot of a mortgage deed dated November 5, 1925 executed in his favour by Matlub-un-nissa did not affect the shares of Meharban Ali and Kaniz Fatima in the mortgaged properties and that the mortgage, and the decree obtained thereon were invalid to the extent of their shares in the properties. Ishari Prasad, the defendant in that suit, contended that Matlub-un-nissa, the mortgage alone was entitled to the properties mortgaged and that the decree obtained by him on the mortgage was valid. In substance, the contention of Ishari Prasad was that Meharban Ali and Kaniz Fatima had no title to the properties as the latter and the former's mother had relinquished their shares and that the title to the properties vested exclusively in the mother of Ishtiaq Ahmed, namely, Matlub-un-nissa. The trial Court passed a decree dismissing the suit holding that Kaniz Fatima and Meharban Ali's mother relinquished their shares in the properties and that Matlub-un-nissa, the mortgagor, alone was entitled to the properties and, therefore, the mortgage, and the decree based thereon were valid. The plaintiffs in the suit (Suit No. 600 of 1934) preferred an appeal from the decree. That was dismissed. The decree dismissing the appeal was confirmed by the High Court in the second appeal filed by them.

8. There can be no doubt that by the written statement, Ishari Prasad, the mortgagee, denied the title of Kaniz Fatima and Meharban Ali to the properties and set up the contention that Matlub-un-nissa, the mortgagor, from whom Ishtiaq Ahmed traced his title, alone was entitled to the properties. There was, therefore, an actual conflict of interest between Ishtiaq Ahmed on the one hand and Kaniz Fatima and Meharban Ali on the other, and it was necessary to decide the conflict in order to give relief to the defendant (Ishari Prasad) and the Court decided that the properties beLonged exclusively to the mortgagor, the mother of Ishtiaq Ahmed. The effect of the judgment is that Kaniz Fatima and Meharban Ali failed to establish their contention that they had title to the properties, and, the question is, could they be allowed to agitate the same question?

9. Now it is settled by a large number of decisions that 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.

In ***Chandu Lal* v. *Khalilur Rahman*** [AIR 1950 PC 17], Lord Simonds said:

> It may be added that 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. In considering any question of *res judicata* we have to bear in mind the statement of the Board in ***Sheoparsan Singh* v. *Ramnandan Prasad Narayan Singh*** [AIR 1916 PC 78] that the rule of *res judicata* "while founded on ancient precedent is dictated by a wisdom which is for all time" and that the application of the rule by the Courts "should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."
>
> The *raison d'etre* of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest, and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule. [***Ram Bhaj* v. *Ahmed Said Akhtar Khan***, AIR 1938 Lah 571].

In the award, the arbitrator has stated that the judgment of the High Court in the second appeal would not operate as *res judicata* as regards the title to the properties but was only a piece of evidence. The arbitrator came to the conclusion that the respondents were in joint possession of the properties and, therefore, there was no ouster. If the judgment operated as *res judicata*, the respondents had no title to the properties. There was no finding by the arbitrator that by adverse possession they had acquired title to the properties at any point of time. The question which was referred to the arbitrator was the dispute between the parties as regards the title to the properties. If the judgment of the High Court operated in law as *res judicata*, it would be an error of law apparent on the face of the award if it were to say that the judgment would not operate as *res judicata*. The District Judge was, therefore, right in holding that the award was vitiated by an error of law apparent on its face in that it was based on the proposition that the judgment of the High Court would not operate as *res judicata* on the question of title to the properties. If an award sets forth a proposition of law which is erroneous, then the award is liable to be set aside under Section 30 of the Arbitration Act. This Court has held that the provisions of the Arbitration Act will apply to proceedings by an arbitrator under the Act [see ***Charan Singh* v. *Babulal,*** AIR 1967 SC 57].

10. It might be recalled that the II Civil Judge set aside the first award and remitted the case to the arbitrator for passing a fresh award under Section 16 of the Arbitration Act. That was only on the basis that the arbitrator committed an error of law in relying upon the

judgment of the High Court as finally determining the title to the properties. As no appeal under Section 39 of the Arbitration Act lay from an order remitting an award to an arbitrator under Section 16 of the Arbitration Act, Ishtiaq Ahmed could not have challenged the order. There is, therefore, no reason why the appellants should be precluded from challenging the correctness of that order in this appeal and getting relief on that basis.

11. We set aside the order of the High Court and allow the appeal. In the circumstances we think it would be an empty formality to restore the decision of the District Judge and remit the case again to the arbitrator. We restore the award dated March 30, 1959, passed by Mr. K.C. Govil, the first arbitrator.

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State of U.P. **v.** *Nawab Hussain*

AIR 1977 SC 1680

SHINGHAL, J. - Respondent Nawab Hussain was a confirmed Sub-Inspector of Police in Uttar Pradesh. An anonymous complaint was made against him and was investigated by Inspector Suraj Singh who submitted his report to the Superintendent of Police on February 25, 1954. Two cases were registered against him under the Prevention of Corruption Act and the Penal Code. They were also investigated by Inspector Suraj Singh, and the respondent was dismissed from service by an order of the Deputy Inspector-General of Police dated December 20, 1954. He filed an appeal, but it was dismissed on April 17, 1956. He then filed a writ petition in the Allahabad High Court for quashing the disciplinary proceedings on the ground that he was not afforded a reasonable opportunity to meet the allegations against him and the action taken against mm was mala fide. It was dismissed on October 30, 1959. The. respondent then tiled a suit in the Court of Civil Judge, Etah, on January 7, 1960, in which he challenged the order of his dismissal on the ground, inter alia, that he had been appointed by the Inspector-General of Police and that the Deputy Inspecor-General of Police was not competent to dismiss him by virtue of the provisions of Article 311(1) of the Constitution. State of Uttar Pradesh traversed the claim in the suit on several grounds, including the plea that the suit was barred by res judicata as "all the matters in issue in this case had been raised or ought to have been raised both in the writ petition and special appeal". The trial court dismissed the suit on July 21, 1960, mainly on the ground that the Deputy Inspecor-General of Police would be deemed to be the plaintiff's appointing authority. It however held that the suit was not barred by the principle of res judicata. The District Judge upheld the trial court's judgment and dismissed the appeal on February 15, 1963. The respondent preferred a second appeal which has been allowed by the impugned judgment of the High Court dated March 27, 1968, and the suit has been decreed. The appellant State of Uttar Pradesh has therefore come up in appeal to this Court by special leave.

2. The High Court has taken the view that the suit was not barred by the principle of constructive res judicata and that the respondent could not be dismissed by an order of the Deputy Inspector-General of Police as he had been appointed by the Inspector-General of Police. As we have reached the conclusion that the High Court committed an error of law in deciding the objection regarding the bar of res judicata, it will not be necessary for us to examine the other point.

3. The principle of estoppel *per rem judicatam* is a rule of evidence. As has been stated in ***Marginson* v. *Blackburn Borough Council***, 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 the 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 vitality 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.

4. But 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 choose 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 and Somervell, L.J., has answered it as follows in ***Greenhalgh* v. *Mallard***:

> I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has some times been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle.

5. These simple but efficacious rules of evidence have been recognised for long, and it will be enough to refer to this Court's decision in ***Gulabchand Chhotatal Parikh* v. *State of Bombay*** for the genesis of the doctrine and its development over the years culminating in the present Section 11 of the Code of Civil Procedure, 1908. The section, with its six explanations, covers almost the whole field, and has admirably served the purpose of the doctrine. But it relates to suits and former suits, and has, in terms, no direct application to a petition for the issue of a high prerogative writ. The general principles of res judicata and constructive res judicata have however been acted upon in cases of renewed applications for a writ. Reference in this connection may be made to ***ex parte Thompson***. There A.J. Stephens moved for a rule calling upon the authorities concerned to show cause why a mandamus should not issue. He obtained a rule nisi, but it was discharged as it did not appear that there had been a demand and a refusal. He applied again saying that there had been a demand and a refusal since then. Lord Denman, C.J., observed that as Stephens was making an application which had already been refused, on fresh materials, he could not have "the same application repeated from time to time" as they had "often refused rules" on that ground. The same view has been taken in England in respect of renewed petitions for certiorari, quo warranto and prohibition, and, as we shall show, that is also the position in this country.

6. We find that the High Court in this case took note of the decisions of this Court in ***L. Janakirama Iyer* v. *P.M. Nilakanta Iyer***; ***Devilal Modi* v. *Sales Tax Officer***, ***Ratlam*** and ***Gulabchand Chhotalal Parikh* v. *State of Bombay*** and reached the following conclusion:

> On a consideration of the law as laid down by the Supreme Court in the above three cases I am inclined to agree with the alternative argument of Sri K.C. Saxena, learned Counsel for the plaintiff-appellant, that the law as declared by the Supreme Court in regard to the plea of res judicata barring a subsequent suit on the ground of dismissal of a prior writ petition under Article 226 of the Constitution is that only that issue between the parties will be res judicata which was raised in the earlier writ petition, and was decided by the High Court after contest. Since no plea questioning the validity of the dismissal order based on the incompetence of the Deputy Inspector-General of Police was raised in the earlier writ petition filed by the plaintiff in the High Court under Article 226 of the Constitution and the parties were never at issue on it and the High Court never considered or decided it, I think it is competent for the plaintiff to raise such a plea in the subsequent suit and bar of res judicata will not apply.

We have gone through these cases. ***Janakirama Iyer*** was a case where the suit which was brought by Defendants 1 to 6 was withdrawn during the pendency of the appeal in the High Court and was dismissed. In the mean time a suit was filed in a representative capacity under Order 1 Rule 8 CPC One of the defences there was the plea of *res judicata*. The suit was decreed. Appeals were filed against the decree, but the High Court dismissed them on the ground that there was no bar of res judicata. When the matter came to this Court it was "fairly conceded" that in terms Section 11 of the Code of Civil Procedure could not apply because the suit was filed by the creditors Defendants 1 to 6 in their representative character and was conducted as a representative suit, and it could not be said that Defendants 1 to 6 who were plaintiffs in the earlier suit and the creditors who had brought the subsequent suit were the same parties or parties who claimed through each other. It was accordingly held that where Section 11 was thus inapplicable, it would not be permissible to rely upon the general doctrine of res judicata, as the only ground on which res judicata could be urged in a suit could be the provisions of Section 11 and no other. That was therefore quite a different case and the High Court failed to appreciate that it had no bearing on the present controversy.

7. The High Court then proceeded to consider this Court's decisions in ***Devilal Modi*** case and ***Gulabchand*** case. ***Gulabchand*** was the later of these two cases. The High Court has interpreted it to mean as follows:

> It was held that the decision of the High Court on a writ petition under Article 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. As appears from the report the above was the majority view of the Court and the question whether the principles of constructive res judicata can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceedings was left open. The learned Judges took care to observe that they made it clear that it was not necessary and they had not considered that the principles of constructive res judicata could be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so raised therein.

As we shall show, that was quite an erroneous view of the decision of this Court on the question of constructive res judicata. It will help in appreciating the view of this Court correctly if we make a brief reference to the earlier decisions in ***Amalgamated Coalfields Ltd.* v. *Janapada Sabha, Chhindwara*** and ***Amalgamated Coalfields Ltd.* v. *Janapada Sabha Chhindwara***, which was also a case between the same parties. In the first of these cases a writ petition was filed to challenge the coal tax on some grounds. An effort was made to canvass an additional ground, but that was not allowed by this Court and the writ petition was dismissed. Another writ petition was filed to challenge the levy of the tax for the subsequent periods on grounds distinct and separate from those which were rejected by this Court. The High Court held that the writ petition was barred by res judicata because of the earlier decision of this Court. The matter came up in appeal to this Court in the second case. The question which directly arose for decision was whether the principle of constructive res judicata was applicable to petitions under Articles 32 and 226 of the Constitution and it was answered as follows:

> It is significant that the attack against the validity of the notices in the present proceedings is based on grounds different and distinct from the grounds raised on the earlier occasion. It is not as if the same ground which was urged on the earlier occasion is placed before the Court in another form. The grounds now urged are entirely distinct, and so the decision of the High Court can be upheld only if the principle of constructive res judicata can be said to apply to writ petitions filed under Article 32 or Article 226. In our opinion, constructive res judicata which is a special and artificial form of res judicata enacted by Section 11 of the Civil Procedure Code should not generally be applied to writ petitions filed under Article 32 or Article 226. We would be reluctant to apply this principle to the present appeals all the more because we are dealing with cases where the impugned tax liability is for different years.

It may thus appear that this Court rejected the application of the principle of constructive res judicata on the ground that it was a "special and artificial form of res judicata" and should not generally be applied to writ petitions, but the matter did not rest there. It again arose for consideration in ***Devilal Moali*** case. Gajendragadkar, J., who had spoken for the Court in the second case of the ***Amalgamated Coalfields Ltd***. spoke for the Court in that case also. The petitioner in that case was assessed to sales tax and filed a writ petition to challenge the assessment. The petition was dismissed by the High Court and he came in appeal to this Court. He sought to make some additional contentions in this Court, but was not permitted to do so. He therefore filed another writ petition in the High Court raising those additional contentions and challenged the order of assessment for the same year. The High Court dismissed the petition on merits, and the case came up again to this Court in appeal. The question which specifically arose for consideration was whether the principle of constructive res judicata was applicable to writ petitions of that kind. While observing that the rule of constructive res judicata was "in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure", this Court declared the law in the following terms:

> This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the

> same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred.

While taking that view, Gajendragadkar, C.J., tried to explain the earlier decision in ***Amalgamated Coalfields Ltd.*** **v.** ***Janapada Sdbha, Chhindwara*** and categorically held that the principle of constructive res judicata was applicable to writ petitions also. As has been stated, that case was brought to the notice of the High Court, but its significance appears to have been lost because of the decisions in ***Janakirama Iyer*** **v.** ***P.M. Nilakanta Iyer*** and ***Gulabchand*** case. We have made a reference to the decision in ***Janakirama Iyer*** case which has no bearing on the present controversy, and we may refer to the decision in ***Gulabchand*** case as well. That was a case where the question which specifically arose for consideration was whether a decision of the High Court on merits on a certain matter after contest, in a writ petition under Article 226 of the Constitution, operates as res judicata in a regular suit with respect to the same matter between the same parties. After a consideration of the earlier decisions in England and in this country, Raghubar Dayal, J., who spoke for the majority of this Court, observed as follows:

> These decisions of the Privy Council well lay down that the provisions of Section 11 CPC are not exhaustive with respect to an earlier decision in a proceeding operating as res judicata in a subsequent suit with respect to the same matter inter parties, and do not preclude the application to regular suits of the general principles of res judicata based on public policy and applied from ancient times.

He made a reference to the decision in ***Daryao*** **v.** ***State of U.P.*** on the question of res judicata and the decisions in ***Amalgamated Coalfields Ltd.*** **v.** ***Janapada Sabha Chhindwara*** and ***Devilal Modi*** case and summarised the decision of the Court as follows:

> As a result of the above discussion, we are of opinion that the provisions of Section 11 CPC 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.

He however went on to make the following further observation:

> We may make it clear that it was not necessary, and we have not considered whether the principles of constructive res judicata can be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding was not so raised therein.

It was this other observation which led the High Court to take the view that the question whether the principle of constructive res judicata could be invoked by a party to a subsequent suit on the ground that a plea which might or ought to have been raised in the earlier proceeding but was not so raised therein, was left open. That, in turn, led the High Court to the conclusion that the principle of constructive res judicata could not be made applicable to a writ petition, and that was why it took the view that it was competent for the plaintiff in this case to raise an additional plea in the suit even though it was available to him in the writ petition which was filed by him earlier but was not taken. As is obvious, the High Court went wrong in taking that view because the law in regard to the applicability of the principle of constructive res judicata having been clearly laid down in the decision in ***Devilal Modi*** case, it was not necessary to reiterate it in ***Gulabchand*** case as it did not arise for consideration there. The clarificatory observation of this Court in ***Gulabchand*** case was thus misunderstood by the High Court in observing that the matter had been "left open" by this Court.

8. It is not in controversy before us that the respondent did not raise the plea, in the writ petition which had been filed in the High Court, that by virtue of clause (1) of Article 311 of the Constitution he could not be dismissed by the Deputy Inspecor-General of Police as he had been appointed by the Inspecor-General of Police. It is also not in controversy that that was an important plea which was within the knowledge of the respondent and could well have been taken in the writ petition, but he contended himself by raising the other pleas that he was not afforded a reasonable opportunity to meet the case against him in the departmental inquiry and that the action taken against him was mala fide. It was therefore not permissible for him to challenge his dismissal, in the subsequent suit, on the other ground that he had been dismissed by an authority subordinate to that by which he was appointed. That was clearly barred by the principle of constructive res judicata, and the High Court erred in taking a contrary view.

9. The appeal is allowed, the impugned judgment of the High Court dated March 27, 1968, is set aside and the respondent's suit is dismissed. In the circumstances of the case, we direct that the parties shall pay and bear their own costs.

* * * * *

C.A. Balakrishnan v. *Commissioner, Corporation of Madras*

AIR 2003 Mad. 170

A. KULASEKARAN, J. – In this writ petition, the petitioner seeks for the issuance of writ of mandamus to the respondents to restore possession of the premises to the petitioner housing 'Udipi Canteen' in the Rippon Building Compound, Madras 3 and also for an order awarding exemplary costs and damages computed at the rate of Rs. 500/- per day from 25.5.1995 till restoration of possession.

2. The case of the petitioner was that he was a lessee in respect of a canteen premises to an extent of 1839 sq. feet of land and building thereon comprised in R.S. 1269 PT located within Rippon Building complex for a monthly rent of Rs. 766.25. The said rent was fixed by the Corporation Special Officer in Resolution No. 4945/93 dated 16.12.1993 in modification of the earlier rent of Rs. 200/- fixed by Resolution 225/89 dated 14.3.1989. The lessee code number is 420. A demand notice dated 31.3.1989 was sent to the petitioner by the Corporation for payment of arrears totalling Rs. 36,780/- at the revised rate of Rs. 766.25 retrospectively from 1.4.1989. The petitioner has paid the said arrears in two instalments and to continue to pay the monthly rent periodically. The petitioner was running the said canteen under the name and style of "Udipi Canteen." Originally, one Seetharama Uduppa was the lessee under the respondent, subsequently, petitioner's father became the lessee. After his father, the petitioner was running the said canteen for about 16 years which catered the needs of the employees in the Rippon Building.

3. On 23.1.1985, the petitioner has applied for No Objection Certificate from the District Revenue Officer enabling him to obtain Police Licence for running the said canteen and the certificate dated 16.3.1995 was issued by the District Revenue Officer. The petitioner has also obtained necessary certificate from the Labour Officer of that area to engage workers not exceeding 20 persons for the said business. The receipts were issued by the respondent for rents paid by the petitioner in his name. When things are such, on 25.5.1995 at about 12.30 p.m. peak hours of lunch, the Junior Engineer of the respondent Corporation, without any notice or warning, came to his canteen ordered the workers and the customers to leave. Eatables and milk worth more than Rs. 6000/-, Tea, Coffee, Horlicks, Beetal nuts and other materials worth about Rs. 20,000/- were lying in the hotel, but the said person had arbitrarily locked the canteen and affixed seal on it. The petitioner has issued lawyer's notice dated 27.5.1995 to the respondent narrating the said illegal action of the Junior Engineer and demanded for restoration of possession and payment of damages. During the period, the High Court was on vacation, the petitioner has also filed suit in O.S. No. 3743 of 1995 before the City Civil Court for mandatory injunction and for restoration of possession. The City Civil Court by order dated 10.7.1995 ordered the delivery of movables without ordering restoration of possession. Later, the suit was also decreed as ex parte in favour of the petitioner.

4. Mr. A. Sadanand, the learned counsel appearing for the petitioner has submitted that resorting to a suit during vacation would not disentitle the petitioner in filing the writ petition as he sought for enforcement of guaranteed right and protection from arbitrary action of the respondent. It is argued by the learned counsel that the petitioner was a statutory tenant of the Corporation in accordance with the Tamil Nadu Lease and Rent Control Act, the illicit action

according to the counsel which was commando action violative of fundamental rights guaranteed under the Constitution. Having been given No-objection certificate for obtaining Police licence, the respondent was estopped from dispossession the petitioner without any notice. According to the learned counsel, notice under Section 374 of the Madras City Municipal Corporation Act, has four modes each after exhausting the other in the serial order of Section 374(a) to (d), but, none of the four modes of service of notice was followed by the respondent before locking the premises. No inspection preceded the said commando action. The learned counsel submitted that no notice to the petitioner or to the previous licenssee, Seetharam Uduppa was issued prior to the action. Denial of natural justice vitiated the action of the respondent. The learned counsel also further canvassed under Tamil Nadu Public Health Act, 1939, a licence granted under Section 107(A) can be cancelled under Section 107(B) only after the notice. The learned counsel further submitted that there are two elements in the episode, namely, (i) Lessee's right, (ii) The licensee's right, both the rights are guaranteed by the respective statutes, which was taken away by the respondent, flouting the provisions of the law.

5. Mrs. P. Bagyalakshmi, the learned counsel appearing for the respondent based on the counter argued that the petitioner has filed O.S. No. 3743 of 1995 on the file of the City Civil Court, Chennai in which he filed I.A. No. 8055/95 praying for removal of the lock put up and also for direction to supply the electricity and to hand over the possession back to the petitioner so as to run the canteen business was heard and dismissed. Another I.A. No. 8056/95 for direction to appoint an Advocate Commissioner to take the inventory of the entire articles which were lying inside the building has also been dismissed. Another application in I.A. No. 8054/95 seeking an injunction restraining the respondent from in any manner interfering with the petitioner's possession and enjoyment of hotel premises was also dismissed on 10.7.1995, but only ordered delivery of movables in the canteen. It is submitted by the learned counsel for the respondent that the said suit was later decreed ex parte. According to the learned counsel for the respondent that having resorted to invoke jurisdiction of a competent Civil Court, the writ under Art. 226 of the Constitution of India for seeking the similar relief is not at all maintainable. According to the learned counsel that the petitioner is an unauthorised occupant of the premises in question. He was not a licensee to run the canteen or a lessee to occupy the premises, as such he had no right to remain in the premises. It is contended by the learned counsel that originally Seetharama Uduppa is the licensee to run the canteen. Under Section 357 of the City Municipal Corporation Act, the said Seetharama Uduppa was granted licence up to the year 1996. The canteen was inspected by the Assistant HealthOfficer-3 and Zonal Officer-3 of the respondent Corporation on 15.5.1995 and found some defects as follows:

(i) White Wash not done.

(ii) Residual chlorine was not found in the drinking water.

(iii) Drainage system was not adequately provided and over flow of sewerage water in front of the canteen was noticed.

(iv) Food handlers certificate for the workers were not obtained from the Medical Officer, Corporation of Madras.

(v) Boiling water, sterilisation was not done, and

(vi) The canteen and entire place was kept in an unhygienic condition.

In view of the said irregularities, a notice was issued to the licensee, Seetharama Uduppa under Section 379(A) of the Madras City Municipal Corporation Act which was refused to receive by the petitioner and hence the same was served by affixture on 26.5.1995 as the defects pointed out on 15.5.1995 were not rectified and hence the premises was sealed on 26.5.1995 and also the licence granted to Seetharama Uduppa for the year 1995-96 was also revoked. No licence was granted to the petitioner at any point of time, the revocation of licence has not been challenged by the said Seetharama Uduppa. The demand notice for the payment of arrears towards the monthly rent was made in the name of the petitioner by the Subordinate Official, the said demand made by the Subordinate Official is not on the basis of any orders of the Commissioner, Corporation of Madras as such the demand made by the officials were unauthorised, therefore the petitioner cannot claim any right as a licensee to run the canteen or as a lessee of the premises. The Commissioner of Corporation has not issued any No-objection certificate to the petitioner. It was also denied by the learned counsel for the respondent that on 25.5.1995, at about 12.30 p.m. the Junior Engineer, Corporation of Madras locked and sealed the premises without notice or warning either to the petitioner or to Seetharama Uduppa as incorrect. The said Seetharama Uduppa has already been served with the notice as he has failed to rectify the defects, the premises was sealed on 26.5.1995. At the time of closure, no eatables were kept inside the canteen. The No-objection certificate not issued by the Commissioner, Corporation of Madras, but only the District Revenue Officer (Land and Estate Department) who is not a competent authority to issue such a certificate. Hence, it did not bind the Corporation of Madras since the petitioner was neither a licensee nor a lessee, the writ petition is unsustainable in law.

6. The prayer in this writ petition is for the issuance of a writ of mandamus directing the respondent to restore the possession of the premises to the petitioner and pass such further or other orders including an order awarding exemplary costs and damages at the rate of Rs. 500/- per day from 25.5.1995 till restoration of possession. It is admitted fact that the petitioner herein has filed O.S. No. 3743 of 1995 for mandatory injunction of restoration of possession of the premises which is also the subject matter of the writ petition. It is also brought to the notice of this Court that the petitioner has filed I.A. No. 8055/95 for a interim relief of restoration of possession and for removal of the lock, I.A. No. 8056/95 to appoint an Advocate Commissioner to take inventory of the entire articles which were inside the canteen and I.A. No. 8054/95 restraining the respondents from interfering with the petitioner's peaceful possession. All the said interim applications were dismissed on 10.7.1995. However, the petitioner was permitted to take delivery of the movables kept in the canteen by an order dated 10.7.1995. Admittedly, the petitioner has not filed any appeal against the orders in the said I.A's. The writ petition was filed by the petitioner on 1.8.1995. Even after filing the writ petition, the petitioner has not chosen to withdraw the said suit. Now, it is reported that the said suit was decreed ex parte in favour of the petitioner. In the given circumstance, the writ petition is maintainable or not; has to be decided as the same is raised by the respondent as preliminary objection. If the said objection is sustained, it is unnecessary to decide the other issues involved in this case.

7. Whether Order II, Rule 2 applies to the writ petitions or not? The principle underlying Order II, Rule 2 being based upon public policy. A person who files a suit seeking certain

relief in respect of a cause of action and who is precluded from instituting another suit for seeking other reliefs in respect of same cause of action under Order II, Rule 2, CPC.

It is evident from Order II, Rule 2, C.P.C. that the suit shall include the whole claim, the relinquishment of part of claim is not permissible and omission to sue for one several reliefs also prohibited. Hence, once a suit is filed for certain relief in respect of a cause of action, the person who has filed is precluded from instituting another suit for certain other reliefs with respect to the same cause of action. Hence, the same person cannot be allowed to invoke the writ jurisdiction of this Court for obtaining the very same reliefs. Indeed, if second suit is barred, a writ petition would equally be barred, public policy underlying Order II, Rule 2, CPC is attracted with equal vigour in this situation also.

Apex Court of India in ***Devilal* v. *Sales Tax Officer, Ratlam*** [AIR 1965 SC 1150], has held in page No. 1153 as follows:

> Consideration of public policy and the principle of the finality of judgments are important constituents of the rule of law, and they cannot be allowed to be violated just because a citizen contends that his fundamental rights have been contravened by an impugned order and wants liberty to agitate the question about its validity to by filing one writ petition after another….If constructive *res judicata* is not applied to such proceedings a party can file as many writ petitions as he likes and take one or two points every time. That clearly is opposed to considerations of public policy on which *res judicata* is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by this Court would also be materially affected. We are, therefore, satisfied that the second writ petition filed by the appellant in the present case is barred by constructive *res judicata*.

The above said decision was followed by the Division Bench of the Andhra Pradesh High Court in ***K. Madhadeva Sastry* v. *Director, Post Graduate Centre, Anantapur*** [AIR 1982 AP 176, paras. 11 and 13]:

> 11. Now, so far as the second situation is concerned here too there cannot be any doubt about the general principle that Order II, Rule 2 would apply. A person who files a suit seeking certain relief in respect of a cause of action and who is precluded from instituting another suit for seeking other reliefs with respect to the same cause of action, cannot be allowed to invoke the writ jurisdiction of this Court for obtaining the very same reliefs. Indeed, if a suit is barred, a writ petition would equally be barred, public policy underlying Order II, Rule 2, CPC is attracted with equal vigour in this situation as well.
>
> 13. Another factor to be borne in mind is that by 1962, the Supreme Court had not even clarified the position about the applicability of the rule of constructive *res judicata* in writ proceedings. Indeed, the very applicability of the rule of *res judicata* in writ proceedings came to be raised and discussed from ***Daryao*** case [AIR 1961 SC 1457]. It is only later that the Supreme Court clarified in ***Devilal* v. *Sales Tax Officer, Ratlam*** [AIR 1965 SC 1150] that the rule of constructive *res judicata* also applies to writ proceedings. It observed (at p. 1153).

In view of the above said decisions of the Apex Court as well as the Division Bench of the Andhra Pradesh High Court, the present writ petition is hit by Order II, Rule 2, CPC. For the reasons mentioned *supra*, the above writ petition is dismissed.

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Bharat Nidhi Ltd. **v.** *Megh Raj Mahajan*

AIR 1967 Del. 22

S.K. KAPUR, J. – On 24th August, 1949, Bharat Nidhi Limited then known as Bharat Bank Limited, the plaintiff-appellant, filed a suit against Megh Raj Mahajan, defendent-respondent for recovery of Rs. 61,194/2/- being the debit balance in the cash credit account with the plaintiff. On 20th December 1949, the Senior Subordinate Judge, Sialkot, decreed the suit and the present suit for recovery of Rs. 63,004-15-0 was filed on 12th June, 1954, on the basis of the judgment of the Senior Subordinate Judge, Sialkot. The judgment and decree were passed ex-parte and there is an observation in the decree that "a summon was duly served upon the defendant, notwithstanding which he has not appeared to defend the suit." It may be pointed out at this stage that it is from this observation that the trial Court concluded that the defendant had been properly served with a notice issued by the Sialkot Court. From this finding the learned counsel for the appellant wants us to deduce that the defendant was physically in Pakistan when he was served the notice and when the action was commenced. He then bases an argument on the physical presence of the defendant on the date of the suit, which shall be dealt with later, that the decree of the foreign Court was enforceable in India. There appears to be no warrant for this contention because a defendant may be duly served even outside Pakistan.

The only question that arises is: whether the judgment and decree were nullity having been passed by a foreign Court? The answer will primarily depend on whether the defendant was a non-resident foreigner qua the Sialkot Courts on the relevant date. There has been some controversy at the bar as to what the relevant date is. According to Mr. Yogeshwar Dayal, the learned counsel for the appellant the relevant date would be the date of the commencement of the action, while Mr. Whig, the learned counsel for the defendant, maintains that the crucial date is the date of the decree. It is not disputed that the defendant never submitted to the jurisdiction of the Sialkot Court. It is also not disputed that both on the date of the institution of the action and on the date of the judgment the Sialkot Court was a foreign Court. The question, therefore, is: was the defendant a non-resident foreigner qua Pakistan Courts on the relevant dates? In paragraph 4 of the plaint as originally filed there was no allegation about the domicile, nationality or residence of the defendant. In reply to paragraph 4 in the written-statement the defendant categorically stated -

> It is denied that the amount, if any, to the plaintiff was payable at Sialkot, or any other place in Pakistan on the 24th August, 1949 when the defendant had since Long before ceased to reside or carry on business in Sialkot and had actually migrated to India and had become an Indian national.

The plaintiff filed his replication to the said written-statement and while dealing with paragraph 4 of the written-statement, said –

> Allegations in para 4 which are contrary to the facts mentioned in para 4 of the plaint are not admitted to be correct and are denied.

It necessarily follows that the statement of the defendant about his having actually migrated to India permanently and become an Indian national was not denied. Although there

was no change so far as paragraph 4 is concerned, but says Mr. Yogeshwar Dayal that no replication having been filed to the amended written-statement the admission in the replication should not bind the plaintiff. It appears that amendment of the plaint was made because in the original plaint the plaintiff had sought to enforce the foreign decree and an objection was taken up by the defendant that judgment of a foreign Court and not the decree should be the basis of a suit under section 13, Civil Procedure Code. The plaintiff, therefore, amended his plaint by adding the word "judgment" before decree in the relevant paragraph of the plaint. For the purpose of the present controversy that makes no difference and I do not think Mr. Yogeshwar Dayal is right in his contention. In my opinion, paragraph 4 of the replication to the first written-statement filed by the plaintiff would for the purpose of the present dispute, operate as an admission.

2. Mr. Yogeshwar Dayal then pointed out that the burden of issue (iiA), which read – "whether the Sialkot Court had no jurisdiction to pass this decree for the reasons mentioned in paras 4, 12 and 13 of the written-statement" was on the defendant and the parties at the time of framing issues do not appear to have taken any notice of the admission. Even if that be so, the defendant could very well rely on the admission for proving one of the facts having a bearing on the issue. That, however, is not the end of the matter. The defendant appeared as his own witness as D.W. 5 and stated –

> Prior to Partition I was residing at Sialkot. I migrated to India in the beginning of the month of September 1947 due to civil disturbances. I left Sialkot for good. Thereafter I settled in India. I got myself registered as a displaced person in India ... I have never been to Pakistan or Sialkot thereafter.

There is admittedly no refusal to this evidence of the defendant and I have no hesitation in accepting the statement. It would follow that the defendant was resident of Sialkot till September 1947, he shifted in September 1947 to the territories comprised in India after 15th August, 1947, became a permanent domicile and resident thereof with no intention of going back to Pakistan, and never went to Pakistan after September, 1947. Consequently, both on the date of the institution of the suit in Sialkot and on the date of the judgment the defendant was a domicile and resident of India. Under Article 5 of the Constitution as well, which according to the decision of their Lordships of the Supreme Court in ***Mohamed Reza* v. *State of Bombay*** [AIR 1966 SC 1436], came into force on 21.11.1949, read with section 3(28) of the General Clauses Act, the defendant would be a citizen of India. The defendant not having submitted to the jurisdiction of the Sialkot Court in a personal action against him, a decree pronounced in absentem would be an absolute nullity.

Mr. Yogeshwar Dayal relying on the above quoted observation in the decree passed by the Sialkot Court about the defendant having been duly served says that it must be presumed that the defendant was served with the summons in the Sialkot suit when physically present in Pakistan and such presence was enough to render the foreign decree and the judgment valid and binding on the defendant. Mr. Yogeshwar Dayal contends that a foreign judgment obtained against a non-resident foreigner can be enforced if the defendant is present within the jurisdiction on the date of the institution of the proceedings even though his presence may be for only a short time. It is not necessary to resolve this controversy because the evidence of

the defendant as D.W. 5 clearly establishes that he never visited Pakistan after September, 1947. As I have said earlier, the observation in the Sialkot decree would be justified even if the defendant had been served in any territory outside Pakistan. From the evidence it must be held that the defendant was neither a national, nor domicile, nor a citizen, nor a resident of Pakistan either on the date of the commencement of the suit or on the date of the decree. he did not submit to the jurisdiction of the Pakistan Courts and he was not served while present in Pakistan. In these circumstances, the decree must be held to be a nullity not enforceable in India under section 13 of the Civil Procedure Code. This appeal must, therefore, fail and is dismissed.

* * * * *

Y. Narasimha Rao v. *Y. Venkata Lakshmi*

[1991] 2 SCR 821

P.B. SAWANT, J. - The 1st appellant and the 1st respondent were married at Tirupati on February 27, 1975. They separated in July 1978. The 1st appellant filed a petition for dissolution of marriage in the Circuit Court of St. Louis County Missouri, USA. The 1st respondent sent her reply from here under protest. The Circuit Court passed a decree for dissolution of marriage on February 19, 1980 in the absence of the 1st respondent.

2. The 1st appellant had earlier filed a petition for dissolution of marriage in the sub-Court of Tirupati being O.P. No. 87/76. In that petition, the 1st appellant filed an application for dismissing the same as not pressed in view of the decree passed by the Missouri Court. On August 14, 1991 the learned sub-Judge of Tirupati dismissed the petition.

3. On November 2, 1981, the Ist appellant married the 2nd appellant in Yadgirigutta. Hence, 1st respondent filed a criminal complaint against the appellants for the offence of bigamy. It is not necessary to refer to the details of the proceedings in the said complaint. Suffice it to say that in that complaint, the appellants filed an application for their discharge in view of the decree for dissolution of marriage passed by the Missouri Court. By his judgment of October 21, 1986, the learned Magistrate discharged the appellants holding that the complainant, i.e., the 1st respondent had failed to make out a *prima facie* case against the appellants. Against the said decision, the 1st respondent preferred a Criminal Revision Petition to the High Court and the High Court by the impugned decision of April 18, 1987 set aside the order of the Magistrate holding that a photostat copy of the judgment of the Missouri Court was not admissible in evidence to prove the dissolution of marriage. The Court further held that since the learned Magistrate acted on the photostat copy, he was in error in discharging the accused and directed the Magistrate to dispose of the petition filed by the accused, i.e., appellants herein for their discharge, afresh in accordance with law. It is aggrieved by this decision that the present appeal is filed.

4. It is necessary to note certain facts relating to the decree of dissolution of marriage passed by the Circuit Court of St. Louis County Missouri, USA. In the first instance, the Court assumed jurisdiction over the matter on the ground that the 1st appellant had been a resident of the State of Missouri for 90 days next preceding the commencement of the action and that petition in that Court. Secondly, the decree has been passed on the only ground that there remains no reasonable likelihood that the marriage between the parties can be preserved, and that the marriage is, therefore, irretrievably broken". Thirdly, the 1st respondent had not submitted to the jurisdiction of the Court. From the record, it appears that to the petition she had filed two replies of the same date. Both are identical in nature except that one of the replies begins with an additional averment as follows: "without prejudice to the contention that this respondent is not submitting to the jurisdiction of this hon'ble court, this respondent submits as follows". She had also stated in the replies, among other things, that (i) the petition was not maintainable, (ii) she was not aware if the first appellant had been living in the State of Missouri for more than 90 days and that he was entitled to file the petition before the Court, (iii) the parties were Hindus and governed by Hindu Law and they were married at Tirupati in India according to Hindu Law, (iv) she was an Indian citizen and was not

governed by laws in force in the State of Missouri and, therefore, the Court had no jurisdiction to entertain the petition, (v) the dissolution of the marriage between the parties was governed by the Hindu Marriage Act and that it could not be dissolved in any other way except as provided under the said Act, (vi) the Court had no jurisdiction to enforce the foreign laws and none of the grounds pleaded in the petition was sufficient to grant any divorce under the Hindu Marriage Act.

Fourthly, it is not disputed that the 1st respondent was neither present nor represented in the Court and the Court passed the decree in her absence. In fact, the Court has in terms observed that it had no jurisdiction "in personam" over the respondent or minor child which was born out of the wed-lock and both of them had domiciled in India. Fifthly, in the petition which was filed by the Ist appellant in that Court on October 6, 1980, besides alleging that he had been a resident of the State of Missouri for 90 days or more immediately preceding the filing of the petition and he was then residing at 23rd Timber View Road, Kukwapood, in the County of St. Louis, Missouri, he had also alleged that the Ist respondent had deserted him for one year or more next preceding the filing of the petition by refusal to continue to live with the appellant in the United States and particularly in the State of Missouri. On the other hand, the averments made by him in his petition filed in the court of the Subordinate Judge, Tirupati in 1978 shows that he was a resident of Aprtment No. 414, 6440, South Claiborn Avenue, New Orleans, Louisiana, United States and that he was a citizen of India. He had given for the service of all notices and processes in the petition, the address of his counsel Shri PR Ramachandra Rao, Advocate, 16-11-1/3, Malakpet, Hyderabad-500 036. Even according to his averments in the said petition, the Ist respondent had resided with him at Kuppanapudi for about 4 to 5 months after the marriage. Thereafter she had gone to her parental house at Relangi, Tanuka Taluk, West Godavari District. He was, thereafter, sponsored by his friend Prasad for a placement in the medical service in the United States and had first obtained employment in Chicago and thereafter in Oak Forest and Greenville Springs and ultimately in the Charity Hospital in Louisiana at New Orleans where he continued to be employed. Again according to the averments in the said petition, when the Ist respondent joined him in the United States, both of them had stayed together as husband and wife at New Orleans. The Ist respondent left his residence in New Orleans and went first to Jackson, Texas and, thereafter, to Chicago to stay at the residence of his friend, Prasad. Thereafter she left Chicago for India. Thus it is obvious from these averments in the petition that both the Ist respondent and the Ist petitioner had last resided together at New Orleans, Louisiana and never within the jurisdiction of the Circuit Court of St. Louis County in the State of Missouri. The averments to that effect in the petition filed before the St. Louis Court are obviously incorrect.

5. Under the provisions of the Hindu Marriage Act, 1955 (hereinafter referred to as the "Act") only the District Court within the local limits of whose original civil jurisdiction (i) the marriage was solemnized, or (ii) the respondent, at the time of the presentation of the petition resides, or (iii) the parties to the marriage last resided together, or (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at the time, residing outside the territories to which the Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive, has jurisdiction to entertain the petition. The Circuit Court of St. Louis County, Missouri had, therefore, no jurisdiction to entertain the petition according to

the Act under which admittedly the parties were married. Secondly, irretrievable breakdown of marriage is not one of the grounds recognised by the Act for dissolution of marriage. Hence, the decree of divorce passed by the foreign court was on a ground unavailable under the Act.

6. Under Section 13 of the Code of Civil Procedure 1908 (hereinafter referred to as the "Code"), a foreign judgment is not conclusive as to any matter thereby directly adjudicated upon between the parties if (a) it has not been pronounced by a Court of competent jurisdiction; (b) it has not been given on the merits of the case; (c) it is founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable; (d) the proceedings are opposed to natural justice, (e) it is obtained by fraud, (f) it sustains a claim founded on a breach of any law in force in India.

7. As pointed out above, the present decree dissolving the marriage passed by the foreign court is without jurisdiction according to the Act as neither the marriage was celebrated nor the parties last resided together nor the respondent resided within the jurisdiction of that Court. The decree is also passed on a ground which is not available under the Act which is applicable to the marriage. What is further, the decree has been obtained by the Ist appellant by stating that he was the resident of the Missouri State when the record shows that he was only a bird of passage there and was ordinarily a resident of the State of Lousiana. He had, if at all, only technically satisfied the requirement of residence of ninety days with the only purpose of obtaining the divorce. He was neither domiciled in that State nor had he an intention to make it his home. He had also no substantial connection with the forum. The Ist appellant has further brought no rules on record under which the St. Louis Court could assume jurisdiction over the matter. On the contrary, as pointed out earlier, he has in his petition made a false averment that the Ist respondent had refused to continue to stay with him in the State of Missouri where she had never been. In the absence of the rules of jurisdiction of that court, we are not aware whether the residence of the Ist respondent within the State of Missouri was necessary to confer jurisdiction on that court, and if not, of the reasons for making the said averment.

8. Relying on a decision of this Court in ***Smt. Satya* v. *Teja Singh*** [(1975) 2 SCR 1971], it is possible for us to dispose of this case on a narrow ground, viz., that the appellant played a fraud on the foreign court representing to it incorrect jurisdiction facts. For, as held in that case, residence does not mean a temporary residence for the purpose of obtaining a divorce but habitual residence or residence which is intended to be permanent for future as well. We refrain from adopting that course in the present case because there is nothing on record to assure us that the Court of St. Louis does not assume jurisdiction only on the basis of a mere temporary residence is for the purpose of obtaining divorce. We would, therefore, presume that the foreign court by its own rules of jurisdiction had rightly entertained the dispute and granted a valid decree of divorce according to its law. The larger question that we would like to address ourselves to is whether even in such cases, the Courts in this country should recognise the foreign divorce decrees.

9. The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. In addition, some rules

have also been evolved by judicial decisions. In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and interstate succession etc. the problem in this country is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens. The distinction between matters which concern personal and family affairs and those which concern commercial relationships, civil wrongs etc. is well recognised in other countries and legal systems. The law in the former area tends to be primarily determined and influenced by social, moral and religious considerations, and public policy plays a special and important role in shaping it. Hence, in almost all the countries the jurisdictional, procedural and substantive rules which are applied to disputes arising in this area are significantly different from those applied to claims in other areas. That is as it ought to be. For, no country can afford to sacrifice its internal unity, stability and tranquility for the sake of uniformity of rules and comity of nations which considerations are important and appropriate to facilitate international trade, commerce, industry, communication, transport, exchange of services, technology, manpower etc. This glaring fact of national life has been recognised both by the Hague Convention of 1968 on the Recognition of Divorce and Legal Separations as well as by the Judgments Convention of the European Community of the same year. Article 10 of the Hague Convention expressly provides that the contracting States may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy. The Judgments Convention of the European Community expressly excludes from its scope (a) status or legal capacity of natural persons, (b) rights in property arising out of a matrimonial relationship, (c) wills and succession, (d) social security and (e) bankruptcy. A separate convention was contemplated for the last of the subjects.

10. We are in the present case concerned only with the matrimonial law and what we state here will apply strictly to matters arising out of and ancillary to matrimonial disputes. The Courts in this country have so far tried to follow in these matters the English rules of Private International Law whether common law rules or statutory rules. The dependence on English Law even in matters which are purely personal, has however time and again been regretted. But nothing much has been done to remedy the situation. The labours of the Law Commission poured in its 65th Report on this very subject have not fructified since April 1976, when the Report was submitted. Even the British were circumspect and hesitant to apply their rules of law in such matters during their governance of this country and had left the family law to be governed by the customary rules of the different communities. It is only where there was a void that they had stepped in by enactments such as the Special Marriage Act, Indian Divorce Act, Indian Succession Act etc. In spite, however, of more than 43 years of independence we find that the legislature has not thought it fit to enact rules of Private International Law in this area and in the absence of such initiative from the legislature the courts in this country have been forced to fall back upon precedents which have taken their inspiration, as stated earlier, from the English rules. Even in doing so they have not been uniform in practice with the result that we have some conflicting decisions in this area.

11. We cannot also lose sight of the fact that today more than ever in the past, the need for definitive rules for recognition of foreign judgments in personal and family matters, and particularly in matrimonial disputes has surged to the surface. Many a man and woman of this land with different personal laws have migrated and are migrating to different countries either

to make their permanent abode there or for temporary residence. Likewise there is also immigration of the nationals of other countries. The advancement in communication and transportation has also made it easier for individuals to hop from one country to another. It is also not unusual to come across cases where citizens of this country have been contracting marriages either in this country or abroad with nationals of the other countries or among themselves, or having married here, either both or one of them migrate to other countries. There are also cases where parties having married here have been either domiciled or residing separately in different foreign countries. This migration, temporary or permanent, has also been giving rise to various kinds of matrimonial disputes destroying in its turn the family and its peace. A large number of foreign decrees in matrimonial matters is becoming the order of the day. A time has, therefore, come to ensure certainty in the recognition of the foreign judgments in these matters. The minimum rules of guidance for securing the certainty need not await legislative initiative. This Court can accomplish the modest job within the framework of the present statutory provisions if they are rationally interpreted and extended to achieve the purpose. It is with this intention that we are undertaking this venture. We are aware that unaided and left solely to our resources the rules of guidance which we propose to lay down in this area may prove inadequate or miss some aspects which may not be present to us at this juncture. But a beginning has to be made as best as one can, the lacunae and the errors being left to be filled in and corrected by future judgments.

12. We believe that the relevant provisions of Section 13 of the Code are capable of being interpreted to secure the required certainty in the sphere of this branch of law in conformity with public policy, justice, equity and good conscience, and the rules so evolved will protect the sanctity of the institution of marriage and the unity of family which are the corner stones of our societal life.

Clause (a) of Section 13 states that a foreign judgment shall not be recognised if it has not been pronounced by a court of competent jurisdiction. We are of the view that this clause should be interpreted to mean that only that court will be a court of competent jurisdiction which the Act or the law under which the parties are married recognises as a court of competent jurisdiction to entertain the matrimonial dispute. Any other court should be held to be a court without jurisdiction unless both parties voluntarily and unconditionally subject themselves to the jurisdiction of that court. The expression "competent court" in Section 41 of the Indian Evidence Act has also to be construed likewise.

Clause (b) of Section 13 states that if a foreign judgment has not been given on the merits of the case, the courts in this country will not recognise such judgment. This clause should be interpreted to mean (a) that the decision of the foreign court should be on a ground available under the law under which the parties are married, and (b) that the decision should be a result of the contest between the parties. The latter requirement is fulfilled only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the court and contests the claim, or agrees to the passing of the decree with or without appearance. A mere filing of the reply to the claim under protest and without submitting to the jurisdiction of the court, or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the Court, should not be considered as a decision on the merits of the case. In this respect the general rules of the acquiescence to the

jurisdiction of the Court which may be valid in other matters and areas should be ignored and deemed inappropriate.

The second part of clause (c) of Section 13 states that where the judgment is founded on a refusal to recognise the law of this country in cases in which such law is applicable, the judgment will not be recognised by the courts in this country. The marriages which take place in this country can only be under either the customary or the statutory law in force in this country. Hence, the only law that can be applicable to the matrimonial disputes is the one under which the parties are married, and no other law. When, therefore, a foreign judgment is founded on a jurisdiction or on a ground not recognised by such law, it is a judgment which is in defiance of the Law. Hence, it is not conclusive of the matters adjudicated therein and, therefore, unenforceable in this country. For the same reason, such a judgment will also be unenforceable under clause (f) of Section 13, since such a judgment would obviously be in breach of the matrimonial law in force in this country.

Clause (d) of Section 13 which makes a foreign judgment unenforceable on the ground that the proceedings in which it is obtained are opposed to natural justice, states no more than an elementary principle on which any civilised system of justice rests. However, in matters concerning the family law such as the matrimonial disputes, this principle has to be extended to mean something more than mere compliance with the technical rules of procedure. If the rule of *audi alteram partem* has any meaning with reference to the proceedings in a foreign court, for the purposes of the rule it should not be deemed sufficient that the respondent has been duly served with the process of the court. It is necessary to ascertain whether the respondent was in a position to present or represent himself/herself and contest effectively the said proceedings. This requirement should apply equally to the appellate proceedings if and when they are filed by either party. If the foreign court has not ascertained and ensured such effective contest by requiring the petitioner to make all necessary provisions for the respondent to defend including the costs of travel, residence and litigation where necessary, it should be held that the proceedings are in breach of the principles of natural justice. It is for this reason that we find that the rules of Private International Law of some countries insist, even in commercial matters, that the action should be filed in the forum where the defendant is either domiciled or is habitually resident. It is only in special cases which is called special jurisdiction where the claim has some real link with other forum that judgment of such forum is recognised. This jurisdiction principle is also recognised by the Judgments Convention of this European Community. If, therefore, the courts in this country also insist as a matter of rule that foreign matrimonial judgment will be recognised only if it is of the forum where the respondent is domiciled or habitually and permanently resides, the provisions of clause (d) may be held to have been satisfied.

The provision of clause (e) of Section 13 which requires that the courts in this country will not recognise a foreign judgment if it has been obtained by fraud, is self-evident. However, in view of the decision of this Court in ***Smt. Satya* v. *Teja Singh***, it must be understood that the fraud need not be only in relation to the merits of the matter but may also be in relation to jurisdictional facts.

13. From the aforesaid discussion the following rule can be deduced for recognising foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court

as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

The aforesaid rule with its stated exceptions has the merit of being just and equitable. It does no injustice to any of the parties. The parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to bypass it by subterfuges as in the present case. The rule also has an advantage of rescuing the institution of marriage from the uncertain maze of the rules of the Private International Law of the different countries with regard to jurisdiction and merits based variously on domicile, nationality, residence – permanent or temporary or *ad hoc* forum, proper law etc. and ensuring certainty in the most vital field of national life and conformity with public policy. The rule further takes account of the needs of modern life and makes due allowance to accommodate them. Above all, it gives protection to women, the most vulnerable section of our society, whatever the strata to which they may beLong. In particular it frees them from the bondage of the tyrannical and servile rule that wife's domicile follows that of her husband and that it is the husband's domiciliary law which determines the jurisdiction and judges the merits of the case.

14. Since with regard to the jurisdiction of the forum as well as the ground on which it is passed the foreign decree in the present case is not in accordance with the Act under which the parties were married, and the respondent had not submitted to the jurisdiction of the court or consented to its passing, it cannot be recognised by the courts in this country and is, therefore, unenforceable.

15. The High Court, as stated earlier, set aside the order of the learned Magistrate only on the ground that the photostat copy of the decree was not admissible in evidence. The High Court is not correct in its reasoning. Under Section 74(1)(iii) of the Indian Evidence Act (the "Act") documents forming the acts or records of the acts of public judicial officers of a foreign country are public documents. Under Section 76 read with Section 77 of the Act, certified copies of such documents may be produced in proof of their contents. However, under Section 86 of the Act there is a presumption with regard to the genuineness and accuracy of such certified copy only if it is also certified by the representative of our Central Government in or for that country that the manner in which it has been certified is commonly in use in that country for such certification.

Section 63(1) and (2) read with Section 65(e) and (f) of the Act permits certified copies and copies made from the original by mechanical process to be tendered as secondary evidence. A photostat copy is prepared by a mechanical process which in itself ensures the accuracy of the original. The present photostat copies of the judicial record of the Court of St.

Louis is certified for the Circuit Clerk by the Deputy Clerk who is a public officer having the custody of the document within the meaning of Section 76 of the Act and also in the manner required by the provisions of the said section. It is inadmissible because it has not further been certified by the representative of our Central Government in the United States as required by Section 86 of the Act. The expression "certified copy" of a foreign judgment in Section 14 of the Code has to be read consistent with the requirement of Section 86 of the Act.

16. While, therefore, holding that the document is not admissible in evidence for want of the certificate under Section 86 of the Act and not because it is a photostat copy of the original as held by the High Court, we uphold the order of the High Court also on a more substantial and larger ground as stated in paragraph 14 above. Accordingly, we dismiss the appeal and direct the learned Magistrate to proceed with the matter pending before him according to law as expeditiously as possible, preferably within four months from now as the prosecution is already a decade old.

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SETTLEMENT OF DISPUTE (ADR)

Ajit Ranjan v. *State*

2007 RLR 539

MUKUL MUDGAL, J. *(ORAL)* – This is one of the numerous writs of habeas corpus which are filed in this Court by a husband seeking custody of his wife who had married him and was not thereafter permitted to return to the company of the husband by the relatives of the wife. The changing social scenario in this country is leading to a situation where there are more inter caste and inter-religion marriages as in the present case which meet with the societal and familial resistance.

2. Any change in the social and family structure would naturally meet with resistance. Increasing awareness, exposure, mobility and education is bringing about more interaction between diverse sections of the populace leading to better understanding and tolerance of other castes and religions. Such interaction leads to friendship, familiarity, love and in some cases matrimony. Love marriages are frequently performed in the absence of and without the blessings of the parents, by the lovelorn couple quietly, in the presence of friends and well wishers.

3. Circumstances compel the couple and in particular the wife not to immediately reveal her nascent matrimonial status to her parents and such revelation, accidental or otherwise, of the not so public marriage brings about an outburst of indignation and anger leadning to social and physical restraints on the wife/daughter, leading to ostracisation of the husband and denial of access to the married couples.

4. This Court has been treating such cases emanating from habeas corpus petitions to be cases which represent a social rather than a criminal problem. Notices are issued to the State and without treating the parents of the girl or the girl to be in the position of accused persons and enquiry into the status of the marriage is sought from the State.

5. We have noted the positive role played by the State and the Delhi Police authorities in handling such socially sensitive matters in an enlightened manner and treating the married couple and both set of parents not as accused but the victims of social circumstances. We are confident that this procedure of treating a social problem in the proper perspective can and must continue and direct accordingly.

6. This Court has been sending such disputes when not resolved straightaway in court, to the process of mediation in this court. There has been a significant success in resuming the matrimonial status after the mediator's efforts or in any event of an amicable parting of ways. This process of mediation in matrimonial matters has thus avoided prolix litigation which embitters the relationship between an estranged couple and their families further and puts an avoidable burden on the legal system. On many occasions while the statement of the wife in court has been, as in the present case, that she does not wish to go back to the husband; before a trained mediator, and after a session of counselling with and without the family, the response in to the contrary and restoration husband is sought by the parties and granted by

this court. The role of the Mediation Centre of this Court in the present case has thus ensured that not only a couple is reunited but several potential civil and criminal proceedings are avoided. We appreciate the work put in by the Mediation Centre. We have been informed that substantial number of matrimonial matters, referred to Mediation Centre, are being resolved. We have also been informed that the other Mediation Centres in the city are achieving significant rates of success in amicably resolving such disputes.

7. A Report has been filed by the learned mediator where she has recorded a settlement in mediation that the petitioner and his wife Sunita Sharma now wish to live together as husband and wife. The said part of the record of this case. The mediation report is sealed and is also to form part of the record of this case. Some allegations were made against the Respondent No. 5 and 6 by the petitioner for which he has tendered apology in the Mediation Cell as recorded in the Settlement Agreement in Paragraph C. Some statements about the unsavoury conduct before the Mediator by respondents 5 and 6 have also been received. Though there was some acrimony, but we are happy to note that the respondents 5 and 6 have accepted the apology tendered by the petitioner and now the respondent No. 5 and 6 undertake not to interfere in the married life of the petitioner and his wife.

8. In this view of the matter, while accepting the terms of the settlement and taking them on record, we appreciate the role played by the learned counsel for the parties before the Mediator. This is the kind of active and positive participation we except form the learned members of the bar of this Court, to provide for satisfactory and early solution of complicated matrimonial disputes. Since the petitioner has withdrawn his allegations against the respondents 5 and 6, the respondents 5 and 6 also stated that they will not interfere with the married life of the petitioner and his wife. We, however, hope that time will heel the wounds and the relationship between the respondents and the petitioner and his wife shall become harmonious at some points of time. The writ petition is accordingly disposed of along with the pending applications.

9. All criminal cases filed by petitioner and the respondents in the present case if still pending shall stand withdrawn forthwith.

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B.P.M. Sevamandir v. *A.M. Kutty Hassan*

2009 RLR 123 (SC)

R.V.RAVEENDRAN, J.- 2. The appellants were the defendants in a suit for declaration and mandatory injunction. Having lost before the thai court and the first appellate court, the appellants filed a second appeal before the High Court of Kerala on 6.2.2005. The appeal was admitted and an interim stay of execution was granted in the said appeal on 1.6.2005. The pending second appeal was referred to the Lok Adalat organized by the Kerala High Court Legal Services Committee on 25.5.2007. Before the Lok Adalat, parties apparently arrived at a tentative settlement. The Lok Adalat consisting of two retired Judges of the High Court purported to pass the following 'award dated 25.5.2007 in the appeal:

AWARD

"Counsel for the parties and the appellants and respondent present.

The parties have settled the dispute and agreed to file a memorandum of settlement before the High Court to obtain orders for disposal of this appeal and for refund of court fee. A plan of the property is produced by the appellant and it is received. The plan used will form part of this order. The appellant will vacate the buildings in plot A to the respondent on or before 31.7.2007. On such surrender, plot B will belong to the appellant and A compromise deed to this effect will be drawn by the parties and file before the court.'

3. The appellants allege that the parties could not finalise the terms of settlement as it was found that there was no access to the portion to which they had to move, and therefore no compromise petition was drawn up or filed. As the settlement was not reported, the High Court, by order dated 10.4.2008 made a second reference to the Lok Adalat. The parties and counsel again appeared before Lok Adalat. Further negotiations were unsuccessful and the Lok Adalat sent the following failure report dated 3.4.2008 to the court:

"We have discussed the matter with the counsel and their parties and considering the nature of demand made by the appellants, there is no chance of settlement."

4. The second appeal was thereafter listed for the fInal hearing on 19.8.2008 before a learned Single Judge. When the matter reached hearing in the post-lunch session, an advocate attached to the office of the appellants' counsel submitted that the appeal was to be argued by his colleague Mrs. Santa, that due to personal inconvenience she could not be present during that session, and that therefore the matter may be adjourned to the next day. The learned Single Judge rejected the request and dismissed the appeal. The operative portion of the order dated 19.8.2008 is extracted below:

"I see no reason why any further adjournment is to be granted in the appeal of 2005 when the parties are willfully abstaining from arriving at any settlement despite anaward passed at the Adalath on agreement. In the result, Idisrniss this appeal for default."

5. The very next day, that. is on 20.8.2008, an application was filed for restoration of the appeal supported by the affidavit of the counsel (Mrs. Saritha) giving the following reason for her absence at the post-lunch session on 19.8.2008:

> *"I am an advocate attached to the* office of *the counsel for the petitioner. I was entrusted to argue the aforementioned second appeal and I was prepared for the same since the matter was listed. The case was taken up as item no.504 in Court I-C in the afternoon session on 19.8.2008. I was present in the court in the forenoon session and unfortunately developed severe ear pan and had to leave the court. I had entrusted my colleague* to *appear before the Hon'ble Court and requested a day's adjournment on account of this personal inconvenience and he had submitted the same."*

The said application was dismissed by the learned Single Judge on 29.8.2008. The relevant portion of the said order is extracted below:

> *"The order passed on 25.5.2007 by the mediators show that the parties and already settled the dispute and they only wanted to file a memorandum of settlement before this Court to obtain orders disposing of the appeal refunding court fee and it is after having agreed to the terms as stated in the award that untenable and unreasonable contentions are advanced now and that too comingforward with a petition to restore the appeal when the appeal itself was dismissed for reason of absence of counsel. I see no reason to allow the MJC in the circwnstances, so as to enable a cantankerous litigant to continue prot racting the litigation even after an award is passed at the Ada! at."*

6. The said orders dated 19.8.2008 and 29.8.2008 of the High Court are challenged in these appeals by special leave. We have heard Sri P.Krishiia Murthy, learned senior counsel for appellants and Sri C.S.Rajan, learned senior counsel for respondent.

7. It is unfortunate that the learned members of the Lok Adalat and the learned Single Judge totally lost sight of the purpose and scope of Lok Adalats. We may conveniently recall what this Court has said about the scope of Lok Adalats, (after referring to the relevant provisions of the Legal Services Authorities Act, 1987), in ***State of Punjab* v. *Jalour Singh*** [2008 (2) SCC 660]

> *"8. It is evident from the* s *"Id provisions that Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines a reference on the basis of a compromise or settlement between the parties at its instance, and put its seal of confirmation by making an award in terms of the compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law. No Lok Adalat has the power to "hear" parties to adjudicate cases* as *a court does. It discusses the subject matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok Adalats are guided by principles of justice, equity, fair play. When the LSA Act refers to 'determination' by the Lok Adalat and 'award' by the Lok Adalat, the said Act does not contemplate nor require*

an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The 'award' of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely administrative act of incorporating the terms of settlement or compromise agreed by parties in presence of the Lok Adalat, in the form of an executable order under signature and seal of Lok Adalat.

8. When a case is referred to the Lok Adalat for settlement, two courses are open to it : (a) if a compromise or a settlement is arrived at between the parties, to make an award, incorporating such compromise or settlement (which when signed by the parties and countersigned by the members of the Lok Adalat, has the force of a decree); or (b) if there is no compromise or settlement, to return the record with a failure report to the court. There can be no third hybrid order by the Lok Adalat containing directions to the parties by way of final decision, with a further direction to the parties to settle the case in terms of such directions. In fact, there cannot be an 'award when there is no settlement. Nor can there be any 'directions' by the Lok Adalat determining the rights/obligations/title of parties, when there is no settlement. The settlement should precede the award and not vice versa. When the Lok Adalat records the minutes of a proceeding referring to certain terms and directs the parties to draw a compromise deed or a memorandum of settlement and file it before the court, it means that there is no final or concluded settlement and the Lok Adalat is only making tentative suggestions for settlement; and such a proceeding recorded by the Lok Adalat, even if it is termed as an 'award', is not an 'award of the Lok Adalat.

9. Although the members of Lok Adalats have been doing a commendable job, sometime they tend to act as Judges, forgetting that while functioning as members of Lok Adalats, they are only statutory conciliators and have no judicial role. Any overbearing attitude on their part, or any attempt by them to pressurize or coerce parties to settle matters before the Lok Adalat (by implying that if the litigant does not agree for settlement before the Lok Adalat, his case will be prejudiced when heard in court), will bring disrepute to Lok Adalats as an alternative dispute resolution process (for short 'ADR process') and will also tend to bring down the trust and confidence of the public in the Judiciary.

10. In this case the proceedings dated 25.5.2007 is termed as an 'award'. It is also described as an 'order' and 'directs' the appellant to vacate certain buildings on or before 31.7.2007 and further directs that on such surrender, another portion shall belong to the appellants. Such an 'award' could have been made by the Lok Adalat only when there was a final settlement between the parties. The procedure adopted by the Lok Adalat on 25.5.2007, was clearly erroneous and illegal. The learned counsel for the respondent stated that the Lok Adalat followed the said procedure of passing an 'Award dated 25.5.2007 and directing parties to file a compromise in the court, only to enable the appellants to get refund of court fee. We fail to understand how the question of refund of court fee can have any bearing on the compliance with the statutory requirements relating to a settlement and award by a Lok Adalat.

11. Such strange orders by Lok Adalats are the result of lack of appropriate rules or guidelines. Thousands of Lok Adalats are held all over the country every year. *Many members of Lok Adalats are not judicially trained. There is no fixed procedure for the LokAdalats and each Adalat adopts its own procedure.* Different formats are used by different Lok Adalats when they settle the matters and make awards. We have come across Lok Adalats passing orders', issuing directions' and even granting declaratory relief, which are purely in the realm of courts or specified Tribunals, that too when there is no settlement. As an award of a Lok Adalat is an executable decree, It is necessary for the Lok Adalats to have an uniform procedure, prescribed Registers and standardized formats of awards and permanent record of the awards, to avoid misuse or abuse of the ADR process. We suggest that the National Legal Services Authority as the apex body, should issue uniform guidelines for the effective functioning of the Lok Adalats. The principles underlying following provisions in the Arbitration and Conciliation Act, 1996 relating to conciliators, may also be treated as guidelines to members of Lok Adalats, till uniform guidelines are issued S.67 relating to role of conciliators; S.75 relating to confidentiality; and S.86 relating to admissibility of evidence in other proceedings.

12. Lok Adalats should also desist from the temptation of finding fault with any particular litigant, or making a record of the conduct of any litigant during the negotiations, in their failure report submitted to the court, lest it should prejudice the mind of the court while hearing the case. For instance, the observation in the failure report dated 3.4.2008 of the Lok Adalat in this case (extracted in para 3 above) that there is no chance of settlement on account of the nature of demands made by the appellants", implied that such demands by the appellant were unreasonable. This apparently affected the mind of the learned Single Judge who assumed that the appellants were cantankerous, when the second appeal and application for restoration came up for hearing before the court.

13. We may now turn to the role of courts with reference to Lok Adalats. Lok Adalats is an alternative dispute resolution mechanism. Having regard to section 89 of Code of Civil Procedure, it is the duty of court to ensure that parties have recourse to the Alternative Dispute Resolution (for short ADR') processes and to encourage litigants to settle their disputes in an amicable manner. But there should be no pressure, force, coercion or threat to the litigants to settle disputes against their wishes. Judges also require some training in selecting and referring cases to Lok Adalats or other ADR processes. Mechanical reference to unsuited mode of ADR process may well be counter productive. A plaintiff who comes to court alleging unlawful encroachment by a neighbour may well ask what kind of settlement he should have with an encroacher in a Lok Adalat. He cannot obviously be asked to sacrifice a part of his land for purposes of amicable settlement thereby perpetuating the illegality of an encroachment. A plaintiff alleging fraud and forgery of documents against a defendant may well ask what settlement he can have with a fraudster or forger through ADR process as any settlement may mean yielding to or accepting fraud or forgery.

14. When a case is to be heard and decided on meritsby a court, the conduct of the party before the Lok Adalat or other ADR for, howsoever stubborn or unreasonable, is totally irrelevant. A court should not permit any prejudice to creep into its judicial mind, on account of what it perceives as unreasonable conduct of a litigant before the Lok Adalat. Nor can its

judgment be affected' by the cantankerous conduct of a litigant. It cannot carry 'ill-will' against a litigant, because he did not settle his case. It is needless to remind the oath of office, which a Judge takes when assuming office. He is required to perform his duties without fear or favour, affection or ill-will. Any settlement before the Lok Adalat should be voluntary. No party can be punished for failing to reach the settlement before the Lok Adalat. Section 20(5) of the Act statutorily recognizes the right of a party whose case is not settled before the Lok Adalat to have his case continued before the court and have a decision on merits. Any admission made, any tentative agreement reached, or any concession made during the negotiation process before the Lok Adalat cannot be used either in favour of a party or against a party when the matter comes back to the court on failure of the settlement process. To deny hearing to a party on the ground that his behaviour before the Lok Adalat was cantankerous or unreasonable would amount to denial of justice. When deciding a matter on merits of a case, if a court carries any prejudice against a party on account of his conduct before an ADR forum, it will violate the inviolable guarantee against prejudice or bias in decision making process. Such conduct can neither be permitted nor be tolerated and requires to be strongly deprecated. Every Judge should constantly guard against prejudice, bias and prejudging, in whatever form. Judges should not only be unbiased, but seem to be unbiased. Judiciary can serve the nation only on the trust, faith and confidence of the public in its impartiality and integrity.

15. When a counsel who is ready in the pre-lunch session, seeks accommodation the post-lunch session on the ground of sudden illness or physical ailment, the court cannot refuse a short accommodation and dismiss the appeal on the ground that his client was cantankerous an unreasonable before the Lok Adalat. The two issues have no relation to each other and such dismissal can only be attributed to prejudice. The observation by the High Court that the parties having arrived at a settlement before the Lok Adalat, could not refuse to file a compromise petition in court, is also erroneous. If there was a final settlement before the Lok Adalat, there would have been an award and there was no need for the matter to come before court for further hearing. If parties St that before the Lok Adalat that they enter into an agreement and file it before the court, it only means that there was on a tentative settlement before the Lok Adalat.

16. In view of the above, the appeals at allowed. The impugned orders of the High Court are set aside. The second appeal restored to the file of the High Court for being disposed of on merits in accordance with law. We request the Hon. Chief Justice to assign the appeal to some other learned Judge of the High Court. Whatever is state above is not intended to be a reflection of the judicial integrity of the learned Judge nor intended to impute any personal prejudice or bias.

* * * * *

Chunilal V. Mehta & Sons Ltd. **v.** *Century Spn. & Mfg. Co. Ltd.*

AIR 1962 SC 1314

J.R. MUDHOLKAR, J. – This is an appeal by special leave against the judgment of the High Court of Bombay in an appeal from the judgment of a single judge of that Court. The claim in appeal before the High Court was for about 26 lakhs of rupees. Being aggrieved by the decision of the High Court, the appellant applied for a certificate under Art. 133(1)(a) of the Constitution. The judgment of the High Court in appeal was in affirmance of the judgment of the learned single Judge dismissing the appellant's suit for damages and, therefore, it was necessary for the appella nt to establish that a substantial question of law was involved in the appeal. On behalf of the appellant it was contended that the question raised concerned the interpretation to be placed on certain clauses of the managing agency agreement upon which their claim in the suit was founded and that as the interpretation placed by the appeal court on those clauses was erroneous and thus deprived them of the claim to a substantial amount the matter deserved to be certified by the High Court under Art. 133(1)(a) of the Constitution. The learned Judges dismissed the application without a judgment apparently following their previous decision in ***Kaikhushroo Pirojsha Ghiara* v. *C.P. Syndicate Ltd.*** [AIR 1949 Bom. 134]. The appellants, therefore, moved this Court under Art. 136 of the Constitution for grant of special leave which was granted. In the application for special leave the appellant had raised a specific contention to the effect that the view taken by the High Court with regard to the application for certificate under Art. 133(1)(a) of the Constitution was wrong, that the appellant was entitled to appeal to this Court as a matter of right and that while considering the appeal this question should also be decided. The appellant pointed out that the view taken by the Bombay High Court on the point as to what is a substantial question of law runs contrary to the decision of the Privy Council in ***Raghunath Prasad Singh* v. *Deputy Commissioner of Partabgarh*** [AIR 1927 PC 110] and the decision of some High Courts in India and that, therefore, it is desirable that this Court should pronounce upon the question in this appeal and set the matter at rest. We think that it is eminently desirable that the point should be considered in this appeal.

2. It is not disputed before us that the question raised by the appellant in the appeal is one of law because what the appellant is challenging is the interpretation placed upon certain clauses of the managing agency agreement which are the foundation of the claim in the suit. Indeed it is well settled that the construction of a document of title or of a document which is the foundation of the rights of parties necessarily raises a question of law.

3. The next question is whether the interpretation of a document of the kind referred to above raises a substantial question of law. For, Art. 133(1) provides that where the judgment decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred to in sub-cl. (c), an appeal shall lie to this Court if the High Court certifies that the appeal involves some substantial question of law. To the same effect are the provisions of S. 110 of the Code of Civil Procedure. In the old Judicial Commissioner's Court of Oudh the view was taken that a substantial question of law meant a question of general importance. Following that view its successor, the Chief Court of Oudh, refused to grant a certificate to one Raghunath Prasad Singh whose appeal it had dismissed.

The appellant, therefore, moved the Privy Council for special leave on the ground that the appeal raised a substantial question of law. The Privy Council granted special leave to the appellant and while granting it made the following observations in their judgment:

> Admittedly here the decision of the Court affirmed the decision of the Court immediately below, and, therefore, the whole question turns upon whether there is a substantial question of law. There seems to have been some doubt, at any rate in the old Court of Oudh, to which the present Court succeeded, as to whether a substantial question of law meant a question of general importance. Their Lordships think it is quite clear – and indeed it was conceded by Mr. De Gruyther – that that is not the meaning, but that "substantial question of law" is a substantial question of law as between the parties in the case involved.

Then their Lordships observed that as the case had occupied the High Court for a very Long time and on which a very elaborate judgment was delivered the appeal on its face raised as between the parties a substantial question of law. This case is reported in 54 Ind App 126: (AIR 1927 PC 110). What is a substantial question of law as between the parties would certainly depend upon the facts and circumstances of every case. Thus, for instance, if a question of law had been settled by the highest court of the country the question of law however important or difficult it may have been regarded in the past and however much it may affect any of the parties would cease to be a substantial question of law. Nor again, would a question of law which is palpably absurd be a substantial question of law as between the parties. The Bombay High Court, however, in their earlier decision already adverted to have not properly appreciated the test laid down by the Privy Council for ascertaining what is a substantial question of law. Apparently the judgment of the Privy Council was brought to their notice for though they do not make a direct reference to it, they have observed as follows:

> The only guidance that we have had from the Privy Council is that substantial question is not necessarily a question which is of public importance. It must be a substantial question of law as between the parties in the case involved. But here again it must not be forgotten that what is contemplated is not a question of law alone; it must be a substantial question. One can define it negatively. For instance, if there is a well established principle of law and that principle is applied to a given set of facts, that would certainly not be a substantial question of law. Where the question of law is not well settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law which would require a final adjudication by the highest Court. One of the points which the learned Judges of the Bombay High Court had to consider in this case was whether the question of the construction to be placed upon a decree was a substantial question of law. The learned Judges said in their judgment that the decree was undoubtedly of a complicated character but even so they refused to grant a certificate under S. 110 of the Code of Civil Procedure for appeal to the Federal Court because the construction which the Court was called upon to place on the decree did not raise a substantial question of law. They have observed that even though a decree may be of a complicated character what the Court has to do is to look at its various provisions and

draw its inference therefrom. Thus, according to the learned Judges merely because the inference to be drawn is from a complicated decree no substantial question of law would arise. Apparently in coming to this conclusion they omitted to attach sufficient weight to the view of the Privy Council that a question of law is "a substantial question of law" when it affects the rights of the parties to the proceeding. Further the learned Judges seem to have taken the view that there should be a doubt in the mind of the Court as to the principle of law involved and unless there is such doubt in its mind the question of law decided by it cannot be said to be "a substantial question of law" so as to entitle a party to a certificate under S. 110 of the Code of Civil Procedure. It is true that they have not said in so many words that such a doubt must be entertained by the Court itself but that is what we understand their judgment to mean and in particular the last sentence in the portion of their judgment which we have quoted above.

4. As against the view taken by the Bombay High Court there are two decisions of the High Court in India to which reference was made before us. One is ***Dinkarrao* v. *Rattansey***, [AIR 1949 Nag 300]. In that case applying the Privy Council decision the High Court held that a question of law is substantial as between the parties if the decision turns one way or another on the particular view taken of the law. If the view taken does not affect the decision then it cannot be substantial as between the parties; but it would be otherwise if it did, even though the question may be wholly unimportant to others. It was argued before the High Court on the basis of certain decisions that no question of law can be substantial within the meaning of Section 110 of the Code of Civil Procedure unless the legal principles applied in the case are not well defined or unless there can be some reasonable divergence of opinion about the correctness of the view taken and unless the case involves a point of law such as would call for fresh definition and enunciation. Adverting to those cases Bose, C.J., (as he then was) who delivered the judgment of the Court observed as follows:

In the first case cited, it was also held that a misapplication of principles of law does not arise any substantial question of law so as to attract the operation of S. 110

There can be no doubt that that is a view which has been held by various High Courts in India, but the decisions cited omit to consider two decisions of their Lordships of the Privy Council on this very point which, in our opinion, very largely modify the views taken in the cases cited and which of course it is impossible for us to ignore.

Referring to the Privy Council case the learned Chief Justice observed as follows:

In the Lucknow case the only question was whether the defendant there obtained an absolute interest or a limited interest under a will. That again was a question which was of no interest to anyone outside the parties to the suit. Nevertheless, their Lordships considered in both cases that the questions were substantial questions of law because they were substantial as between the parties. We can only consider this to mean that a question of law is substantial as between the parties if the decision turns one way or another on the particular view taken of the law. If it does not affect the decision then it cannot be substantial as between the parties. But if it substantially

affects the decision then it is substantial as between the parties though it may be wholly unimportant to others.

It may be that in the case before them, the Nagpur High Court was justified in granting a certificate because one of the points involved was the construction of a deed of compromise and the High Court had interpreted that deed differently from the court below. But it seems to us that some of the observations of Bose C.J., are a little too wide. We are prepared to assume that the learned Chief Justice did not intend to say that where a question of law raised is palpably absurd it would still be regarded as a substantial question of law merely because it affects the decision of the case one way or the other. But at the same time his observation that the view taken in the cases cited before him requires to be modified in the light of the Privy Council decision would imply that a question of law is deemed to be a substantial question of law even though the legal principles applicable to the case are well defined and there can be no reasonable divergence of opinion about the correctness of the view taken by the High Court. If we have understood the learned Chief Justice right then we think that he has gone further than was warranted by the decision of the Privy Council in ***Raghunath Prasad Singh*** case [AIR 1927 PC 110].

5. The other case relied upon was ***R. Subba Rao*** **v.** ***N. Veeraju*** [AIR 1951 Mad. 969 (FB)]. In that case the test of the kind suggested by Bose C.J. was rejected on the ground that logically it would lead to the position that even a palpably absurd plea raised by a party would involve a substantial question of law because the decision on the merits of the case would be directly affected by it. What was, however, said was that when a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law.

6. We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

7. Applying these tests it would be clear that the question involved in this appeal, that is, the construction of the Managing Agency agreement is not only one of law but also it is neither simple nor free from doubt. In the circumstances we have no hesitation in saying that the High Court was in error in refusing to grant the appellant a certificate that the appeal

involves a substantial question of law. It has to be borne in mind that upon the success of the failure of the contention of the parties, they stand to succeed or fail with respect to their claim for nearly 26 lakhs of rupees.

8. Now as to the merits. The relevant facts may be briefly stated. Chunilal Mehta and Co., Bombay were appointed Managing Agents of the respondent company for a term of 21 years by an agreement dated June 15, 1933. By a resolution passed by the respondent company in October 1945, Chunilal Mehta and Co. were permitted to assign the benefits of the aforesaid agreement to the present appellant, Sir Chunilal V. Mehta and Sons Ltd. On April 23, 1951 the Board of Directors of the Company terminated the agreement of 1933 and passed a resolution removing the appellants as Managing Agents on April 23, 1951. The appellant thereupon filed a suit on the original side of the Bombay High Court claiming Rs. 50 lakhs by way of damages for wrongful termination of the agreement. Eventually with the permission of the Court it amended the plaint and claimed instead Rs. 28,26,804. The Company admitted before the Court that the termination of the appellants' employment was wrongful and so the only question which the learned Judge before whom the matter went had to decide was the quantum of damages to which the appellant was entitled. This question depended upon the construction to be placed upon cl. 14 of the Managing Agency agreement.

9. That clause runs thus:

> In case the Firm shall be deprived of the office of Agents of the Company for any reason or cause other than or except those reasons or causes specified in Clause 15 of these presents the Firm shall be entitled to receive from the Company as compensation or liquidated damages for the loss of such appointment a sum equal to the aggregate amount of the monthly salary of not less than Rs. 6,000 which the Firm would have been entitled to receive from the Company, for and during the whole of the then unexpired portion of the said period of 21 year if the said Agency of the Firm had not been determined.

In order to appreciate the arguments advanced before us it would, however, be desirable to reproduce the two earlier clauses, cls. 10 and 12. They run thus:

> 10. The Company shall pay to the Firm by way of remuneration for the services to be performed by the Firm as such agents of the Company under this Agreement a monthly sum of Rs. 6,000 provided that if at the close of any year it shall be found that the total remuneration of the firm received in such year shall have been less than 10 per cent of the gross profits of the Company for such year the Company shall pay to the Firm in respect of such year such additional sum by way of remuneration as will make the total sum received by the Firm in and in respect of such year equal to 10 per cent of the gross profits of the Company in that year. The first payment of such remuneration shall be made on the first day of August 1933.
>
> 12. The said monthly remuneration or salary shall accrue due from day to day but shall be payable by the company to the Firm monthly, on the first day of the month immediately succeeding the month in which it shall have been earned.

10. The learned trial Judge upon the interpretation placed by him on cl. 14 awarded to the appellant a sum of Rs. 2,34,000, calculating the amount at Rs. 6,000 p.m. for the unexpired

period of the term of the Managing Agency agreement and also awarded interest thereon. Now according to Mr. Palkhivala for the appellants, the interpretation placed upon cl. 14 by the trial judge and the appeal Court is erroneous in that it makes the words "not less than" in cl. 14 redundant. Learned counsel contends that on a proper construction of cl. 14 the appellants are entitled to compensation computed on the basis of the total estimated remuneration under cl. 10 for the unexpired period. Under that cause, he contends the appellants are entitled to 10% of the profits of the company subject to a minimum of Rs. 6,000 p.m. Alternatively learned counsel contends that cl. 14 is not exhaustive of the appellants right to compensation and the right to be compensated in respect of contingent remuneration based on 10% of profits is left untouched by that clause.

11. A perusal of cl. 14 clearly shows that the parties have themselves provided for the precise amount of damages that would be payable by the Company to the Managing Agents if the Managing Agency agreement was terminated before the expiry of the period for which it was made. The clause clearly states that the Managing Agents shall receive from the Company as compensation or liquidated damages for the loss of appointment a sum equal to the aggregate amount of the monthly salary of not less than Rs. 6,000 for and during the whole of the unexpired portion of the term of agency. Now, when parties name a sum of money to be paid as liquidated damages they must be deemed to exclude the right to claim as unascertained sum of money as damages. The contention of learned counsel is that the words "not less than" appearing before "Rs. 6,000" in cl. 14 clearly bring in cl. 10 and, therefore, entitle the appellant to claim 10% of the estimated profits for the unexpired period by way of damages. But if we accept the interpretation, it would mean that the parties intended to confer on the Managing Agents what is in fact a right conferred by S. 73 of the Contract Act and the entire clause would be rendered otiose. Again the right to claim liquidated damages is enforceable under S. 74 of the Contract Act and where such a right is found to exist no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they, at the same time intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach. Learned counsel contends that upon this view the words "not less than" would be rendered otiose. In our opinion these words, as rightly pointed out by the High Court, were intended only to emphasise the fact that compensation will be computable at an amount not less than Rs. 6,000 p.m. Apparently, they thought it desirable to emphasise the point that the amount of Rs. 6,000 p.m. was regarded by them as reasonable and intended that it should not be reduced by the court in its discretion.

12. Mr. Palkhivala argued that what the appellants were entitled to was remuneration and remuneration meant nothing but salary. The two words, according to him, have been used interchangeably in the various clauses of the agreement. If, therefore, salary in cl. 14 is the same as remuneration, which according to him it is, then as indicated in cl. 10 it would mean 10% of the gross profits of the Company subject to a minimum of Rs. 6,000 p.m. In support of the argument that the two words wherever used in the agreement mean one and the same thing learned counsel relies on cl. 12 which says that the monthly remuneration or salary shall accrue due from day to day. Then undoubtedly the two words clearly mean the same thing.

But from a perusal of the clause it would appear that remuneration there could mean nothing other than Rs. 6,000 p.m. For, that clause provides that the amount shall accrue from day to day and be payable at the end of the month in which it had been earned. Now, whether a company had made profits or not and if so what is the extent of the profits is determinable only at the end of its accounting year. To say, therefore, that the remuneration of 10% of the gross profits accrues from day to day and is payable every month would be to ignore the nature of this kind of remuneration. Therefore, in our opinion, when the remuneration and salary were equated in cl. 12 nothing else was meant but Rs. 6,000 and when the word salary was used in cl. 14 we have no doubt that only that amount was meant and no other. It may be that under cl. 10 the appellant was entitled to additional remuneration in case the profits were high up to a limit of 10% of the gross profits. That was a right to claim something over and above Rs. 6,000 and could be characterised properly as additional remuneration and not fixed or normal remuneration which alone was apparently in the minds of the parties when they drew up cl. 14. In our opinion, therefore, the High Court was right in the construction placed by it upon the clause.

13. Coming to the alternative argument of Mr. Palkhivala, we appreciate that the right which the appellant had of claiming 10% of profits was a valuable right and that but for cl. 14 he would have been entitled in a suit to claim damages estimated at 10% of the gross profits. We also appreciate his argument that a party in breach should not be allowed to gain by that breach and escape liability to pay damages amounting to a very much larger sum than the compensation payable under cl. 14 and that we should so interpret cl. 14 as to keep alive that right of the appellants. Even so, it is difficult upon any reasonable construction of cl. 14 to hold that this right of the appellants were intended by the parties to be kept alive. If such were the intention of the parties clearly there was no need whatsoever of providing for compensation in cl. 14. If that clause had not been there the appellant would indeed have been entitled to claim damages at the rate of 10% for the entire period subject to minimum of Rs. 6,000 p.m. On the other hand it seems to us that the intention of the parties was that if the appellants were relieved of the duty to work as Managing Agents and to put in their own money for carrying on the duties of managing agents they should not be entitled to get anything more than Rs. 6,000 p.m. by way of compensation. Clause 14 as it stands deals with one subject only and that is compensation. It does not expressly or by necessary implication keep alive the right to claim damages under the general law. By providing for compensation in express terms the right to claim damages under the general law is necessarily excluded and, therefore, in the face of that clause it is not open to the appellant to contend that that right is left unaffected. There is thus no substance in the alternative contention put forward by the learned counsel.

Accordingly we affirm the decree of the High Court and dismiss the appeal with costs.

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Koppi Setty v. *Ratnam* v. *Pamarti Venka*

2007 RLR 27 (NSC)

Appellant filed SLP in Supreme Court that High Court had no jurisdiction to set aside concurrent findings the Courts below U/S 100 of CPC and that also without formulating substantial question which is mandatorily required under the amended S. 100 of CPC. Provision was amended because of report of Law Commission in 1973. Report said that any rational system of law should have only hearings on questions of facts, one by trial court and the other by 1st appellate Court as a search for absolute truth must be put under some reasonable restraint to reconcile it with the doctrine of finality. Finality is absolutely necessary to give certainty to law to avoid delay. All would agree that at a certain stage questions of facts decided by the courts should be allowed to rest without further appeal. It may be harsh to some litigants but is necessary in the larger interest. An unqualified right of first appeal may be necessary for the satisfaction of a defeated litigant but a wide right of 2nd appeal is more a luxury. Allowing 2nd appeal only on question of law is for having uniformity on legal issues in the whole State whose decisions on questions of law is binding on all subordinate Court, tribunals and authorities in the State and thus facilitates the predication of law. There are huge arrears in High Courts. Primary cause is the laxity with which 2nd appeals are admitted without serious scrutiny of law. It is the bounden duty of High Courts to admit 2nd appeal within scope of S. 100, CPC. which has been drastically curtailed and narrowed down. Now High Courts have jurisdiction only in a case where substantial questions of law are involved and those questions have been clearly formulated in the Memo of Appeal. At the time of admission of appeal High Court must formulate questions of law & appeal can be decided only on those questions. Legislative intent was clear as it never wanted 2nd appeal to become "third trial on facts" or "one more dice in the gamble." A class of Judges had been believing that when there had been serious mis-appreciation of facts by lower court it is their duty to interfere in the interest of justice forgetting that justice has to be administered in accordance with law. Even a critical examination of S. 100 would not support interference of facts. It was concluded that "It is a mater of common experience in this court that despite clear enunciation of law in a catena of decisions of this Court, a large number of cases are brought to our notice where High Court u/s 100, CPC are disturbing the concurrent findings of facts without formulating the substantial question of law. We have cited only some cases and these can be easily multiplied further to demonstrate that this Court is further to demonstrate that this court is compelled to interfere in a large number of cases decided by High Courts U/S 100, CPC. Eventually this Court has to set aside these judgements of High courts and remit said cases for de novo deciding same after formulating, substantial questions of law. Unfortunately several years are lost in the processes. Litigants find it both extremely expensive and time consuming. This is one of reasons of delay in the administration of justice in civil matter. Case remitted for early decision.

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Gill & Co. **v.** *Bimla Kumari Jolly*

1986 RLR 370

J.D. JAIN, J. - 1. The facts giving rise to this second appeal by the tenant M/s. Gill and Company Pvt. Ltd. appellant No 1, and Sohan Lal Ahuja, appellant No 2 succinctly are that the premises in question viz, a portion of property No. A-41. Kirti Nagar, New Delhi were let to appellant No. 1 (hereinafter referred to as "the tenant company") at the rate of Rs. 750.00 per month way back in 1966. Sohan Lal Ahuja, appellant No. 2 was employed with appellant No. 1 as Manager at Delhi and he was put into occupation of the same for residence in his capacity as Manager. On 12th February 1975, the respondent landlady moved an application for eviction of the appellants on the grounds of (a) non-payment of rent ;(b) mis-user, (c) bonafide requirement as residence for herself and members of her family ; and (d) Sub-letting, assignment or parting with possession of the demised premises by appellant No. I in favour of appellant No. 2. The eviction petition was contested hotly by the appellants on various grounds. Eventually, however, an order of eviction was made by an Additional Rent Controller, Delhi on 20th November 1979 only on the ground that appellant No. 1 had parted with possession of the premises in question in favour of appellant No. 2 without the consent of the respondent landlady. The eviction petition on grounds falling under Clauses (c) & (e) of the proviso to Sub-section (1) of Section 14 of the Delhi Rent Control Act ("the Act") was, however, dismissed. As regards the ground of non-payment of rent despite due service of notice of demand on appellant No. 1, the Additional Rent Controller found that there was a default on the part of appellant No. 1 in the payment of rent for the period with effect from 1st August 1974 onwards but the tenant was entitled to benefit of the provisions embodied in Section 14(2) of the Act as he had duly complied with an order made earlier by the Additional Rent Controller under Section 15(1) of the Act. Feeling aggrieved by the said order, the appellants preferred an appeal but met with no success, the same having been dismissed by the Rent Control Tribunal vide his judgment dated 9th February 1983. Still not satisfied they have come up in second appeal to this Court.

2. The learned counsel for the appellants has not assailed the order of the Rent Control Tribunal and for that matter the order of the Additional Rent Controller as regards the ground of eviction under Clause (a) of the proviso to Section 14(1) of the Act. Obviously they felt content with the relief awarded to them under Section 14(2) of the Act, it being a case of first default. So, the only ground which survives for determination by this Court is with regard to the Sub-letting, assignment or parting with possession of the premises in question by appellant No. 1 in favour of appellant No. 2. It may be pertinent to state here that appellant no. 2 had been occupying the premises in question in his capacity as Manager of appellant No 1 and Delhi from the very inception of the tenancy. Admittedly, the head office of appellant No. 1 is at Bombay and they were still carrying on their business from there. The cause of action for eviction on ground under clause (b) of the proviso to Section 14(1) allegedly arose because the service of appellant No. 2 was terminated on 31st March 1972 but he was allowed to continue in occupation of the premises in question unauthorisedly by appellant No 1 even thereafter. The stand of the appellants, however, is that even after the termination of service of appellant No. 2 as Manager of appellant No. 1, the former continued to act as their local

representative at Delhi and negotiated many a business deal on behalf of appellant No. 1 with several parties and as such his occupation of the premises in question was permissive and the legal possession thereof vested in and remained with appellant No. 1 at all material times.

3. During the pendency of the first appeal, the appellants made an application dated 24th March 1981 under Order XLI Rule 27 read with Section 151, Code of Civil Procedure ('the Code') for permission to produce some additional evidence viz. documents and accounts books etc. It was stated that the trial Court had arrived at the finding that appellant No. 1 had Sub-let, assigned or otherwise parted with possession of the premises to appellant No. 2 primarily for the reason that the appellants did not produce the relevant records and documents despite their having been served with a notice dated 7th March 1978 purporting to be under Order XII Rule 8 of the Code read with Section 66 of the Evidence Act (copy marked XI) but such notice was never served on appellant No. 1 and as such the trial Court was in error in assuming that the records and documents mentioned in the notice marked 'XI' had been with-held deliberately, and, therefore, the presumption that if produced, the same would not have supported the case of the appellants, would be well warranted. Secondly, it was asserted that the office premises of appellant No. 1 at Bombay were raided by the Income-tax Department in August 1976 and the entire record pertaining to the employment, payment of salary and wages and books of account etc. pertaining to the years 1971, 1972 and 1973 onwards were seized and taken away by the said department and were still in their custody. They further averred that for the purpose of Delhi office, appellant No. 1 had maintained an account in the name of appellant No. 2 in the Central Bank of India, Kirti Nagar and the appellants had already produced evidence to the effect that all the moneys in the said account were received from appellant No. 1 and were disbursed by appellant No. 2. in whose name the account stood, according to the needs of the business. So, they sought to produce the pass books in respect of the said account and some statements of account of Delhi office of the years 1972, 1973 and 1974, the copies of which were found lying in some very old papers.

4. The application for production of additional evidence was opposed tooth and nail by the respondent who pointed out that reliance was never placed by the appellants on any of the documents sought to be produced by them at the appellate stage. Further, no effect was made to produce the said evidence or cause the same to be produced through income-tax department although several opportunities were afforded to the appellants for producing their evidence. It was further contended that whatever evidence was sought to be produced by the appellants was allowed by the trial Court and they could not make any grievance with regard to the same. Thus, according to them, the fault, if any, in not producing the said documents was of the appellants themselves and they were simply adopting dilatory tactics and to fill up the gaps in their evidence which they deliberately omitted to produce in the trial Court. On a consideration of the matter the learned Rent Control Tribunal disallowed the said application for reasons stated in the impugned order itself.

5. The learned counsel for the appellants, has, therefore, submitted at the very outset that the order of the learned Rent Control Tribunal rejecting the application of the appellants for producing additional evidence is not sustainable, being bad at law. He has urged that they awoke to the dire need of producing additional evidence only when they found that the

Additional Rent Controller had wrongly admitted evidence of the respondent- landlady with regard to the service of alleged notice under Order XII Rule 8 of the Code read with Section 66 of the Evidence Act although no such notice was ever served upon appellant No. 2. He has pointed out that the documents marked X1, X2 and X3 which are copies of the notice under Order XII Rule 8 of the Code, postal receipt and A.D. receipt respectively, were not tendered in evidence by the respondent-landlady at any proper stage of the trial and it was only during the cross-examination of appellants' witness S.L Ahuja that they were shown to him and he was confronted with the same. Thus, according to him, these documents were not duly proved. Further, the appellants were not afforded any opportunity to lead any evidence in rebuttal thereof. I shall deal with this aspect of the matter a little later but the crucial question at present is whether the learned Tribunal was justified in rejecting the prayer of the appellants for producing additional

6. The general rule is that an appellate court shall decide an appeal on the evidence led by the parties before the lower Court and shall not admit additional evidence for the purpose of disposal of an appeal. Rule 27 of Order XLI of the Code opens with the words, "The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court." However, it empowers the Appellate Court to admit additional evidence in appeal under certain circumstances specified therein, namely, (i) where the lower Court has improperly refused to admit evidence ; (ii) where such additional evidence was not within the knowledge of the party or could not after the exercise of due diligence be produced by him at the time when the lower Court passed the decree ; or (iii) where the Appellate Court itself requires the evidence (a) to enable it to pronounce the judgment, or (b) for any other substantial cause. This provision has been repeatedly considered by the Privy Council as well as the Supreme Court and the law as to the reception of evidence not produced before the trial Court is now well settled. The discretion given to the Appellate Court to receive and admit additional evidence is not arbitrary but is judicial one circumscribed by the limitations specified in Rule 27 itself. Evidently it is not a case where the lower Court had improperly refused to admit evidence. It was never tendered. Likewise, it is not the case of the appellants that the additional evidence sought to be produced by them at the appellate stage was not within their knowledge or that the same could not be produced after exercise of due diligence They were well aware that their records had been seized by the income-tax department and, therefore, it was open to them to requisition the records from the said department by summoning the concerned official. No such effort seems to have been made. Indeed, the learned counsel for the appellants frankly conceded that they woke up to the need for producing additional evidence because of the finding of the trial Court that they did not produce the same despite service of notice under Order XII Rule 8 of the Code on them. Indeed, the documents sought to be placed on record and proved by way of additional evidence are not the ones of from amongst these which had been seized by the income-tax department, rather it would appear from a perusal of the affidavit dated 20th March 1981 of the Secretary of appellant No. 1 and the application itself that these documents are being produced from their own possession because the documents seized by the income-tax department had not been released till the date of the application under Order XLI Rule 27 of the Code to them. So, the only question which falls for consideration is whether the additional

evidence was required by the Appellate Court for enabling it to pronounce judgment or was there any other substantial cause for allowing the same.

7. In ***Parsotim Thakur*** **v.** ***Lal Mohar Thakur*** [AIR 1931 PC 143], the Judicial Committee observed that:

> THE provisions of Section 107 as elucidated by Order XLI Rule 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak pans of his case and fill up omissions in the Court of appeal. Under Rule 27, Clause (1) (b) it is only where, the Appellate Court "requires" it (i.e. finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in cither case it must be the Court that requires it. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent.

8. Reliance is, however, placed by the learned counsel for the appellants on the decision of the Supreme Court in ***K. Venkataramiah*** **v.** ***A. Seetharama Reddy*** wherein the Supreme Court held that:

> THERE may well be cases where even though the Court finds that it is able to pronounce judgment, on the state of 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. Such requirement of the court is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence.

9. It is, therefore, urged that the Rent Control Tribunal ought to have allowed additional evidence on the ground of substantial cause as postulated in Rule 27 (1) (b) of Order XLI of the Code. However, this argument is totally misconceived inasmuch as it overlooks the fact that the requirement of law is not that the Court should readily permit a party to fill up the lacuna in the evidence which it deliberately chose not to produce at the trial stage. The basic idea underlying the above observations of the Supreme Court is that in case the Court feels that the evidence already on record suffers from such inherent obscurity or ambiguity that it should be cleared, if possible, by production of additional evidence, it may require production of such evidence. But it is not permissible to do so merely because the additional evidence may help the Appellate Court to pronounce judgment in a particular way. A five Judges Bench of the Supreme Court elucidated the legal position further in ***The Municipal Corporation of Greater Bombay*** **v.** ***Lala Pancham***, saying that:

> BUT the requirement of the said 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 appellate 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 entitle 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.

10. It may be noticed that in ***K. Venkataramiah,*** the Supreme Court declined to re-assess the need for additional evidence saying that:

> THE requirement, it has to be remembered, was the requirement of the High Court, and it will not be right for us to examine the evidence to find out whether we would have required such additional evidence to enable us to pronounce judgment.

11. So, it was primarily for the Appellate Court to decide whether it required the additional evidence for pronouncing the judgment in a more satisfactory way or not and it would not be just and proper for this Court to examine for itself and come to its own conclusion whether the Appellate Court did require additional evidence to steer clear of any ambiguity or obscurity from which the evidence existing on record suffered, if at all. The plea, that the importance of the documents was not realized by the appellants before the finding of the trial Court with regard to the withholding of those documents despite service of notice under Order XII Rule 8 of the Code and the adverse inference drawn against the appellants by the said Court would not bring the case within the expression "other substantial cause" in Order XII Rule 27 (1) (b) of the Code. Indeed, as shall be presently seen, the evidence already on record is quite sufficient for recording a proper and satisfactory judgment.

12. Apart from the consideration referred to above this must weigh with an Appellate Court for permitting additional evidence, it goes without saying that the new evidence sought to be adduced should have direct and important bearing on the main issue in the case. So, in order to satisfy myself of this aspect of the matter I have looked into additional evidence sought to be produced by the appellants and I find that apart from the pass books pertaining to Central Bank Account No. 3184 which stood in the name of Sohan Lal Ahuja, Appellant No. 2, statements of account of cash book relating to Delhi office for the period April 1972 to January 1974 and a couple of letters, all other documents pertained to the period 1976 to 1978 .By and large they consisted of correspondence between appellant No. 1 and appellant No. 2 etc. Certainly any evidence with regard to dealings between the appellants inter-se subsequent to the filing of the eviction petition would have no bearing on the point in issue because there is a lurking danger of self-serving evidence being created by the parties in order to holster up their case to the prejudice of the opposite party. As for the pass books and statements of account, the appellants have already placed on record some documents to countenance their stand that account No. 3184 which was admittedly in the name of Sohan Lal Ahuja was being operated solely for the purposes of appellant No. 1. Some letters have been placed on record to show there remittances were made of various amounts by appellant No. 1 to the said account from time to time. So, there is absolutely no justification for permitting the additional evidence, which was admittedly in the possession of the appellants, on the flimsy ground that they did not realise their importance till adverse finding was given by the trial Court; for the reasons stated above. Hence, I find absolutely no justification for taking a view different from that of the learned Rent Control Tribunal in this behalf.

13. As regards the service of notice under Order XII Rule 8 of the Code read with Section 66 of the Evidence Act, there is considerable force in the submission of the learned counsel for the appellants that both the courts below slipped into a grave error in assuming that the said notice was duly served on appellant No. 1. Postal receipt marked 'X2' and the acknowledgement receipt marked 'X3' would no doubt show that a letter addressed to appellant No. 1 at their correct address of Bombay was sent by registered A.D. post and the same was duly delivered to someone on behalf of the addressee. This certainly raises a presumption in favour of official acts having been duly performed not only under Section 114 (f) of the Evidence Act but also under Section 27 of the General Clauses Act. Indeed, raising of such a presumption under Section 27 of the General Clauses Act would appear to be mandatory in view of the words "the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post" appearing in the said Section. These receipts were put to Shri Ahuja, appellant No. 2 when he was in the witness box and he denied receipt of any such notice. However, he could not say whose signatures appear on the acknowledgement receipt "X3". No doubt, presumption arising under both Section 114, illustration (f) of the Evidence Act and Section 27 of the General Clauses Act is rebuttable one but it is well settled that mere denial of service without anything more is not enough to discharge the onus which lies on the addressee to disprove the receipt of letter and he must prove some circumstances which would show that the notice never reached the addressee. Reference in this context may be made with advantage to ***Madan Lal Sethi* v. *Amar Singh Bhalla*** [1980 (2) RCJ 543], in which it was held by Sultan Singh, J that mere denial by the tenant does not rebut the presumption raised under Section 114, illustration (f) of the Indian Evidence Act. The tenant must produce some other evidence to show that the usual course of the post was interrupted by disturbances .So, no exception can be taken to the presumption raised by the learned Rent Controller and for that matter sent the Tribunal with regard to the delivery of a letter sent to appellant No. 1 by registered A.D. post vide X2 & X3. However, the critical question which would still arise is whether it could be further inferred from this mere fact that notice, of which copy is marked X1, was sent in the said envelope to appellant No 1. There is not an iota of evidence with regard to the same as the said notice was produced at the stage of cross-examination of Ahuja and it was then placed on record. Neither the respondent nor any other witness testified to the fact that the registered envelope contained the original document, of which marked X 1 is a copy. Evidently it was incumbent on the appellants to adduce evidence to the effect that the registered letter contained the notice of which X 1 is the copy. Hence, both the courts below slipped into a grave error in presuming that the notice marked XI was contained in the registered letter which was delivered to appellant No. I vide acknowledgement receipt marked X3. If that be so, no adverse inference can be drawn against the appellants that they withheld the documents which they were called upon to produce vide notice marked Xl probably because the said documents, if produced, would not have supported the case of the appellants.

14. Finding himself in this predicament, the learned counsel for the respondent chose to fall back upon the rule of best evidence and urged that even if notice marked XI was not

served on appellant No. 1, it was the bounden duty of the appellants to produce all the relevant material in their power and possession irrespective of the abstract doctrine of onus of proof. Reliance in this context is placed on ***Gopal Krishnaji Ketkar* v. *Mohamed Haji Latif***, in which it was held that even if the burden of proof does not lie on the party the Court may draw an adverse inference if he withholds important document in his possession which can throw light on the facts at issue. Said the Supreme Court:

> IT is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

15. So, it will have to be seen whether having regard to the facts and circumstances of the case such a presumption would be well warranted against the appellants in the instant case.

16. That brings me to the merits of the ease, viz. the most crucial question : whether appellant No. 1 can be said to have sublet, assigned or parted with possession of the premises in question in favour of appellant No. 2 as contemplated in Clause (b) of the proviso to Sub-section (1) of Section 14 of the Act. The distinction between the three expressions "sublet", "assigned" and "otherwise parted with possession" appearing in the aforesaid clause has been clearly brought out by a Division Bench of this Court in ***Hazari Lal & Ram Babu* v. *Gian Ram*** [1972 RCR 74], as under :

> CLAUSE (b) to the proviso to Sub-section (1) of the Delhi Rent Control Act uses three expressions, namely “Sub-let”, “assigned” and “otherwise parted with possession" of the whole or any part of the premises without obtaining the consent in writing of landlord. These three expressions deal with three different concepts and apply to different circumstances. In Sub-letting there should exist the relationship of the landlord and tenant as between the tenant and his Sub-tenant and all the incidents of letting or tenancy have to be found, namely, the transfer of an interest in the estate, payment of rent and the right to possession against the tenant in respect of the premises Sub-let. In assignment, the tenant has to divest himself of all the rights that he has as a tenant. The expression “parted with possession” undoubtedly postulates the parting with legal possession. Parting with possession means giving possession to persons other than those to whom possession has been given by the main lease and “the parting with possession” must have been by the tenant. The mere user by other persons is not parting with possession, so long as the tenant retains the legal possession himself or, in other words, there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to claim possession from his guest who does not pay him any rent or other consideration, it would not be possible to say that the tenant has parted with possession even though for the duration of his stay, the guest has been given the exclusive use of the whole or a part of the tenancy premises. If the tenant has a right to disturb the possession of his guest at any time, he cannot be said to have parted with the possession of the tenancy premises. The mere fact that the tenant himself is not in physical possession of the tenancy premises for any period of time would not amount to parting with the possession so

long as, during his absence, the tenant had a right to return to the premises and be in possession thereof. A mere privilege or license to use the whole or a part of the demised premises which privilege or license can be terminated at the sweet will and pleasure of the tenant at any time would not amount to parting with possession. The divestment or abandonment of the right to possession is necessary in order to invoke the clause of parting with possession.

17. It has, therefore, to be seen whether inference of Sub-letting, assignment or parting with possession of the premises by appellant No. 1 in favour of appellant No. 2 can be validly drawn having regard to the material on record. It is common ground between the parties that the premises were taken on rent by appellant No. 1 way back in 1966 and appellant No. 2 has been in occupation of the same ever since the inception of the tenancy. He was then looking after the business of appellant No. I at Delhi in his capacity as Manager of appellant No. 1. In other words, his possession over the premises was in his capacity as their employee. So, it may well be regarded as service license. A servant in occupation of premises belonging to his master may be a tenant of a licensee. Lord Justice Denning explained the legal position in this respect as follows in ***Torbett*** **v.** ***Faulkner*** [(1952) 2 TLR]:

> PREVIOUSLY the holding of a servant was classified either as a service occupation or as a service tenancy. There was no third category. But nowadays, it is recognized that there is an intermediate position. He may be a licensee. A service occupation is, in truth, only one form of license. It is a particular kind of license whereby a servant is required to live in the house in order the better to do his work. But it is now settled that there are other kinds of license which a servant may have. A servant may in some circumstances be a licensee even though he is not required to live in the house, but is only permitted to do so because of its convenience for his work [See ***Ford*** **v.** ***Longford*** (1949) 65 The Times L R. 138. per Lord Justice ***Azquith and Webb. Ltd*** **v.** ***Webb*** (unreported, October 24, 1951)]and even though he pays the rates, ***Gorham Contractors Ltd.*** **v.** ***Field*** (unreported March 26, 1952), and even though he has exclusive possession Cobb v. Lane [(1952) 1 the Times L.R. 1037]. If a servant is given a personal privilege to stay in a house for the greater convenience of his work, and it is treated as part and parcel of his remuneration, then he is a licensee, even though the value of the house is quantified in money; but he is given an interest in the land, separate and distinct from his contract of service, at a sum properly to be regarded as a rent, then he is a tenant, and none the less a tenant because he is also a servant. The distinction depends on the truth of the relationship and not on the label which the parties choose to put upon it.[See ***Facchini*** **v.** ***Bryson***, (1952) 1 The Times L.R. 1386].

18. This statement of law was quoted with approval by the Supreme Court in ***B.M. Lall*** **v.** ***M/s. Dunlop Rubber Co. (India) Ltd.*** The Supreme Court elucidated the legal position saying that the test of exclusive possession is not conclusive and a servant in occupation of premises belonging to his master may be a tenant or licensee. The service occupation is a particular kind of license whereby a servant is required to live in the premises for the better performance of his duties. The Supreme Court further said, "now it is well settled law that a servant may be a licensee though he may not be in service occupation. Hence, the service license as

distinguished from a service tenancy can exist even though the servant has exclusive possession of the premises." Applying this criterion to the facts of the instant case, it would undoubtedly appear that the occupation of the premises in question by Ahuja, who was Manager of appellant No. 1 at the time of inception of the tenancy and who had apparently negotiated the tenancy in question, was in the nature of the service license. It is not the case of the appellants that the occupation was tantamount to service tenancy. Indeed such a plea may have been self-defeating & suicidal. If that were so, the license automatically came to an end on the termination of service of appellant No. 2 in March 1972, it being only a personal privilege to occupy the premises for the greater convenience of his work. It may be noticed in this context that in ***B.M. Lull*** case under the standard form of agreement of license the occupation of the officer was to cease not only on the termination of his employment but also on his transfer from Calcutta and on his death. For obvious reasons a service license cannot survive the termination of service of the concerned servant and, therefore, he has to surrender vacant possession of the premises in his occupation on the termination of his service. Admittedly, this was not done in the instant case. So, the crucial question for determination would be whether continuation of occupation of the premises in question by appellant No. 2 even after March 1972 was a mere license, it being purely a personal privilege or whether it amounts to Sub-letting, assignment or parting with possession thereof by appellant No. 1.

19. The law is well settled that a person who is let into exclusive possession is *prima facie* to be considered to be a tenant. Nevertheless, he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a license merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only. It is equally well settled that the initial burden lies on the landlord to establish that any of the conditions mentioned in Clauses (a) to (1) of the proviso to Section 14(1) exists. The power of the Controller to pass an order for recovery of possession of the premises under Clause (b) depends upon the fact whether the premises in question have been sub-let, assigned or otherwise parted with possession thereof. Since the factum of appellant No. 2 being in exclusive possession of the premises in question subsequent to the termination of his service is not in dispute, it will *prima facie* warrant an inference that there has been a transfer of possession. Hence, the onus will shift on the appellants within whose special knowledge the facts explaining the manner in which such possession has been transferred and they have to discharge the burden of proving such facts which would negative the assumption of Sub-letting, assignment or parting with possession of the premises in question. In the words of I.D. Dua, J. (as His Lordship then was):

> A landlord is almost always a stranger to agreements of Sub-letting between his tenant and sub-lessee and he has generally to rely on attending circumstances to establish sub-letting by necessary inference. It must be very rarely that direct evidence of subletting without the landlord's consent, whether in the form of a lease deed or of testimony of witnesses in whose presence the sub-lease is created, can come to the hands of the landlord. The proof of sub-letting thus depends upon the probability of the premises having been sub-let, and all that is required, is material

on which the Court can, like a prudent person guided by his own experience and judgment, regard being had to the ordinary course of human conduct, reasonably act upon the supposition that the premises have been sub-let. [Kishan Chand v. Kundal Lal, 1967 (69) PLR (SN) 95]

20. Reference in this context may also be made to ***Abdul Azia* v. *Mohd. Taqub***, (1971 RCJ 492), ***Abu* v. *Chekkyil Poonambath Beebi*** [1970 RCJ 970] and ***Dharam Chand* v. *Kasturi Lal*** [1977 (2) RCJ 276]. The gist of all these authorities is that the burden of proof in civil proceedings is not something static that it keeps on changing on the proof of certain facts from which the court can legitimately draw an inference of subletting. Hence, it is for the appellants to prove the facts within their special knowledge and to establish that appellant No. 2, whose presence in the premises in question is admitted, is neither a sub-tenant nor an assignee nor a person in whose favour possession of the premises has been parted with. As shall be presently seen, the learned Rent Control Tribunal has been rightly guided by this principle of law and he has come to the right conclusion that the appellants have failed to establish by preponderance of probabilities that appellant No. 1 still retains and he has not divested itself of the legal possession of the premises in question.

21. It bears repetition that the stand of the appellants precisely is that after appellant No. 2 ceased to be in the employment of appellant No. 1 he was acting as a local representative of the latter at Delhi. According to appellant No. 2 who appeared in the witness box for himself as also on behalf of appellant No 1. flaunting, as he did, special power of attorney dated 11th January 1979 Ex. RW 4/1 executed by appellant No. 1 in his favour that after leaving the service of appellant No. 1 he was serving as their sole representative at Delhi in negotiating various transactions and business deals and he was earning brokerage as well as commission from appellant No. 1. He further asserted that he was not paying any rent or remuneration for the use of the premises in question to appellant No. I and the rent of the premises were being paid by him all along on behalf of appellant No. 1. He also explained that he was operating an account being Account No 3184 with the Central Bank of India, Najafgarh Road Branch, New Delhi, in his own name but the said account pertained wholly and solely to the business of appellant No 1 and he was being reimbursed for all the amounts disbursed by him from time to time by appellant No. 1. It would, no doubt, appear from certain correspondence which has come on record that appellant No. 2 was working in representative capacity on behalf of appellant No. I in negotiating certain business deals. For instance, vide letter dated 28th April 1972, Ex. RW4/24, the Delhi Cloth & General Mills intimated appellant No. I that appellant No. 2 had left some samples of Greek and Turkish cotton with them. The opening words of the letter "Your Shri Sohan Lal" are obviously indicative of the fact that he acted on behalf of appellant No. 1. Further, vide letter dated Ist June 1973, Ex. RW4/42, appellant No. 1 informed the Delhi Cloth & General Mills that Ahuja was company's business representative in Delhi for the period Ist April 1973 to 1st March 1974 and they had authorized him to negotiate matters with them i.e. D.C.M.relating to sale of cotton. Ex. PW4/25 is letter dated 13th November 1975 written by appellant No. 2 to Ahuja informing them that they had dispatched certain samples to him and they would appreciate his advice in due course whether the cotton had tested satisfactorily for requirements. The words "We have dispatched to your goodselves" with which the letter opens are very pertinent to note. They are obviously meant

to convey that dealings between the parties were not as between an employer and a servant but between two independent businessmen. Likewise, vide letter dated 19th December 1973 Ex. RW4/26. appellant No. 2 wrote to Ahuja to ask the Mills mentioned therein to send them their formal application for sale promotion addressed to the Indian Cotton Mills Federation, Bombay. Ex. RW4/27 is yet another letter dated 22nd January 1974 vides which appellant No. 1 sent a copy of the telex sent by them to the S.T.C., New Delhi and requested Ahuja to contact the S T.C. and try to find out their reaction and if possible, get their counter offer and let them i.e. appellant No. 1, know. There are some more letters placed on record which are almost on the same lines and they cumulatively tend to show that appellant No. 1 used to do odd jobs for appellant No. 2 and he even represented the latter while negotiating certain business deals. However, as pointed out by the learned Rent Control Tribunal for reasons best known to them they have not brought any material on record to prove what were the terms and conditions on which appellant No. 2 was functioning on behalf of appellant No. 1 subsequent to March 1972. Indeed, appellant No. 1 did not even think it advisable to examine one of its directors or senior officials to throw light on the true nature of relations between the appellants interse subsequent to March 1972. The evidence produced by the appellants does not even remotely indicate that the possession of appellant No. 2 over the premises in question was pursuant to the terms and conditions on which he was working for appellant No. 1 and that it was purely a personal privilege of appellant No. 2 for the better performance of the duties on behalf of appellant No. 1. It is true that some letters have been placed on record which will indicate that certain sums for money have been remitted by bank drafts or telegraphic transfers from the Bombay bank account of appellant No. 1 to account No. 3184 of appellant No. 2 with Central Bank of India, Najafgarh Road Branch, but those payments are perfectly in conformity with the nature of the jobs and services which appellant No. 2 was performing and rendering to appellant No. 1 subsequent to March 1972. On his own showing appellant No. 2 used to receive remuneration and brokerage etc. from appellant No. 1 for the work done by him. It is also admitted by him that be was doing his own business as a broker in the name of M/s. Eskay Cotton Links. However, he denied that he was carrying on the said business at the premises in question. This contention of his is apparently negatived by letter dated 25th January 1975, Ex. R13 addressed by appellant No. 1 to M/s. Eskay Cotton Links, A-41, Kirti Nagar. No explanation or evidence in rebuttal thereof except bare denial has come on record. The least he could do was to disclose the particular of the premises where he was running his aforesaid business.

22. On the other hands, the learned counsel for respondent has adverted to some documentary evidence which goes to show that serious differences had arisen between the parties and as a sequel thereto appellant No. 1 even informed the respondent that they would be vacating the premises in question on 31st January 1975. To narrate the events in a proper sequence it may be stated that notice dated 11th November, 1974 Ex. AW3/3 was sent by the respondent to appellant No. 1 intimating that they had not paid rent with effect from 1st August 1974 and thus a sum of Rs. 3,000/-had fallen due from them. They also informed appellant No. 1 that the tenancy was being terminated with effect from 31st December 1974. In reply to the said notice, a telegram dated 6th January 1975 Ex. AW3/7 was sent by appellant No. 1 to the respondent informing them that they would be vacating the premises on 31st January 1975. They also instructed Ahuja to inform the respondent accordingly. This

telegram was confirmed by appellant No. 1 vide letter dated 8th January 1975, Ex. AW3/8 and they reiterated that they would be vacating the premises in question on 31st January 1975 Its copy too was sent to Ahuja. However, vide their telegram dated 23rd January 1975 appellant No. 1 withdrew their commitment and they informed the respondent vide their letter dated 22nd January 1975, Ex. AW3/9 that their previous telegram and letter had been issued inadvertently, improperly and under a misapprehension. They further stated that the appellant would not be vacating the premises in question on 31st January 1975 as wrongly advised to her i.e. the respondent. Thus, they revoked the telegram and the letter Ex. AW3/7 and AW3/8 respectively. Another significant offshoot of this correspondence was that appellant No. 2 wrote a letter to the husband of the respondent who was then in Kuwait on 2nd January 1975, Ex. R 7, which reads as under: "On your last visit here, I told you that I have developed some differences with my Company and I may have to vacate your house shortly. Now a sort of settlement with the Company has arrived at according to which they have offered me that choice to retain this house of the Company may keep it for its own use. I can have the house only if you transfer the rent receipts in my name."

23. It is thus manifest that on account of some serious differences having arisen between the appellants inter se, appellant No. 1 had decided to surrender vacant possession of the premises in question to the respondent on 31st January 1975. However, they seem to have patched up their differences and come to an amicable settlement. It is anybody's guess what the differences were and how they were resolved. It was certainly incumbent upon the appellants to place on record all the relevant facts in order to show that under the terms and conditions of the settlement only a personal privilege to occupy the premises in question was granted by appellant No. 1 to appellant No. 2 and that the former did not divest itself totally of control over and legal possession of the premises in question. Hence, the initial presumption of parting with possession of the premises in question in favour of appellant No. 2 remains absolutely unrebutted and I find no cogent ground to take a different view of the matter on the basis of the material on record and interfere with the concurrent findings of the courts below. The language of Section 14(1) is wide enough not only to include any sub-lease but even assignment or any other mode by which possession of the tenanted premises is parted. Needless to say that power of attorney Ex. PW4/1 which is of a much later date is of hardly any consequence and can have no possible bearing on the point in issue. I may also advert in this context to the interdict contained in Sub-section (2) Section 39 of the Act which debars an appeal from an order made by the Tribunal unless it involves some substantial question of law. In other words, the jurisdiction of the High Court in second appeal is confined to determination of substantial question of law and not to reverse the findings of fact. Hence, the High Court in second appeal cannot re-appreciate the evidence and interfere with the findings of fact reached by the lower appellant Court, unless of course, it can be shown that there was an error of law in arriving at it or that it was based on no evidence at all or was arbitrary, unreasonable or perverse.[See ***Vinod Kumar* v. *Ajit Singh Ahluwalia,*** 1969(1) RCR 181], wherein it was held that the High Court was incompetent to re-assess the evidence afresh and it was bound by the decision of the Tribunal on questions of fact.

24. The upshot of the whole discussion, therefore, is that this appeal is devoid of any merit. It is accordingly dismissed with costs.

Shivajirao Nilangekar Patil **v.** *Dr. Mahesh Madhav Gosavi*

AIR 1987 SC 294

S. MUKHARJI, J. –1.The first appeal was filed by the appellant Shivajirao Nilangekar Patil who was at the relevant time the Chief Minister of the State of Maharashtra and the second one was filed by Dr. Mahesh Madhav Gosavi, the applicant in the original writ petition out of which appeal ultimately came to the Division Bench of the Bombay High Court resulting in Civil Appeal No. 216 of 1986.

2. The controversy in this case centers round the conduct, if any, of the appellant in the first appeal in the M.D. Theory Examination in the discipline of Gynecology and Obstetrics held by the University of Bombay on 14th to 17th October, 1985. In that subject, the practical examination was held by the University at K.E.M. Hospital, Bombay. The total number of candidates registered for the examination was 52 of which 5 remained absent. One Dr. Mahesh Madhav Gosavi, original petitioner, who was at the relevant time Assistant Medical Officer of K.E.M. Hospital, Bombay was the petitioner. He and Smt. Dr. Chandrakala Patil alias Dawale, a Junior Assistant Medical Officer in the said K.E.M. Hospital, Bombay, who was respondent No. 4 to the original petition and one Dr. Mrs. Smita Thakkar who was respondent No. 5 were three candidates amongst others who had appeared for the examination. One Dr. M.Y. Rawal was the head of the Department of Gynecology and Obstetrics in the said hospital and was the convenor of the Board for the said examination. Respondent No. 4 of the original petition, Smt. Chandrakala Patil is the daughter of the appellant, the erstwhile Chief Minister of Maharashtra. The appellant was at the relevant time the Chief Minister of Maharashtra.

3. On 15th November, 1985, a circular was issued by the University of Bombay convening a meeting of local examiners for the finalisation of M.D. results on 18th November, 1985. On the said 18th November 1985, the meeting was attended only by Dr. Rawal as Dr. Mukherjee, another co-examiner was not available at Bombay. On 30th November, 1985 the result of M.D. Examination was declared. Out of the 47 candidates who had appeared for the examination, 34 candidates were declared successful including Dr. Chandrakala Patil alias Dawale and Dr. Mrs. Smita Thakkar. The petitioner, Dr. Gosavi was declared to have failed.

4. Upon these, a petition was filed by Dr. Gosavi under Article 226 of the Constitution of India in the High Court of Bombay.

5. Our attention was drawn to the fact that in the affidavit in support of the petition one Dr. Manikant Mishra had stated that he had approached Dr. Rawal to find out whether his wife had appeared in the said M.D. Examination and it was alleged that on this occasion he had over-heard certain alleged conversation between Dr. Rawal and Smt. Chandrakala Patil, daughter of the Chief Minister. It transpired that Mrs. Kalpana Misra, wife of the said Manikant Misra was not even registered as a candidate.

6. In the petition under Article 226 of the Constitution filed before the High Court of Bombay on 16th January 1986 Dr. Gosavi challenged the results declared in the said examination. The petitioner had claimed that he had been working as a junior Assistant Medical Officer and that he had done his housemanship in the Department of Obstetrics and Gynecology at K.E.M. Hospital, respondent No. 2, i.e. Dr. Rawal was the Head of the

Department of the same. It was further the case of the petitioner that due to some reasons the petitioner had no good terms with the said respondent No. 2. The petitioner had passed the MBBS examination in April, 1981 and after completion of internship got registration for M.D. (Obstetrics and Gynecology) in June, 1982. It was further the case of the petitioner that the petitioner had completed all the requirements and conditions for appearing for the M.D. examination. The petitioner stated that the University had declared examination program and the petitioner thereafter had appeared for the said M.D. examination in the month of October/November, 1985.

7. There are several allegations made by the petitioner about the irregularities and it was further alleged, *inter alia*, that the grade sheets were manipulated and tampered with as a result of which the said Dr. Chandrakala Patil and Dr. Smita Thakkar were passed by respondent No. 2, Dr. Rawal at the instance and behest of the respondent No. 3 in that petition, the appellant in the first appeal, being the Chief Minister of Maharashtra at the relevant time. He prayed that the record of grade sheets submitted to the University of Bombay by all the four examiners of M.D. in Obstetrics and Gynecology examination, necessary papers and rules and regulations, should be produced and to set aside the result of the M.D. examination to the extent that those students who had secured P minus grade be disqualified. It was further asked to declare those students who secured up to any number of P minus to be passed. A prayer was made in the writ petition filed in the High Court for producing grade sheets.

8. The petitioner incidentally verified the petition stating that the contents of paragraphs 1 to 22 and paragraphs 24 to 30 were true to his own knowledge while various other relevant paragraphs were verified as information received from reliable sources but the source was not disclosed. In these circumstances the petitioner claimed that the results declared in respect of some of the candidates declared failed should have been declared passed. The allegations had been made against the appellant in paragraphs 14 and 25 of the petition. In paragraph 14 it was alleged that after these irregularities came to light, the petitioner in the original petition had started enquiring as to the way in which respondent No. 2 had committed these irregularities. The petitioner thereafter learnt that one Shree P.K. Shah who happened to be a good friend of Dr. M.Y. Rawal, respondent No. 2 in the original petition and also happened to be a good friend of respondent No. 1 as they were together as the Assistant Medical Officers at K.E.M. Hospital, Bombay. The petitioner also learnt that the said Dr. P.K. Shah and Dr. M.Y. Rawal though not permitted by Rules and Regulations had been practicing in Zaveri Clinic for Dr. C.L. Zaveri, since Long time, and thus they became close friends. It is also learnt that on behalf of Dr. (Mrs.) Chandrakala Patil, who is the daughter of the erstwhile Chief Minister of Maharashtra the said P.K. shah met respondent No. 2 and requested him that Dr. (Mrs.) Chandrakala Patil had appeared several times for M.D. Examination (Obs. & Gyn.), but could not get through and therefore she should be shown some favour. It was learnt that the respondent No. 2 informed the said Dr. P.K. Shah that he would definitely favour Dr. Mrs. Chandrakala Patil if she failed, provided the Chief Minister himself phoned him personally. The respondent No. 2 also told the said Dr. P.K. Shah that he would come to know about the result only after the submission of the grade sheet to the University because thereafter only one would know the position with regard to the names of the students who

have failed and till that time he would not know. It was further stated that it was learnt that the respondent No. 2 also informed the said Dr. P.K. Shah that he would take the risk only if the Chief Minister gave him a telephone ring otherwise he would not. It was alleged that the respondent No. 3 in the original petition and the appellant herein after receiving the message from the respondent No. 4 and from Dr. P.K. Shah accordingly contacted respondent No. 2 and requested him to favour his daughter.

9. In paragraph 25 of the petition, the petitioner stated as follows:

> The petitioner states that on the basis of information from reliable sources, the petitioner has made allegations on Chief Minister of Maharashtra, therefore, he has been made respondent No. 3 in this writ petition.

10. These were the only allegations upon which the petition was factually based. The necessary verification has been set out hereinabove. The appellant Shri Shivajirao Nilangekar Patil filed an affidavit denying the allegations in paragraphs 14 and 25 of the application stating that he had played no part in the said examination as alleged or otherwise. It was also stated in the aforesaid affidavit that the petitioner has not disclosed the 'so-called' reliable sources of information. No affidavit was filed by the petitioner himself. The alleged source of information was not disclosed at any time. As mentioned hereinbefore an affidavit was filed by one Dr. Manikant Mishra on 28th February, 1986 in support of the allegations. Further affidavit was sought to be tendered on behalf of the petitioner to the learned Single Judge regarding certain additional facts after the final hearing had started before the learned Single Judge of the High Court of Bombay. It may be mentioned as a matter of historical record that Dr. M.S. Gore, Vice-Chancellor of University of Bombay resigned.

11. The learned Single Judge by his judgment held that the evidence of the petitioner as well as of Dr. Misra were unsatisfactory and unreliable. Reference was made to the submissions of the petitioner's counsel relying under section 114 of the Evidence Act. In para 18 of the judgment it was held that it could be reasonably inferred that altering and tampering of the grade-sheets were done by Dr. Rawal at the behest of respondents Nos. 3 and 4. On 7th March, 1986 the day after the judgment, the appellant Shivajirao Nilangekar Patil resigned as the Chief Minister of State of Maharashtra in view of the judgment. It may be mentioned that on or after 14th April, 1986 certain affidavits were sought to be filed on behalf of the petitioner in pending appeals purporting to rely upon certain allegations in writ petition No. 1709 of 1985 filed by Sub-Inspector Lambe challenging the order of transfer and also an article which had appeared in ***INDIA TODAY***.

12. The Division Bench of the Bombay High Court rejected the prayer to adduce the additional evidence. We have perused the nature of the additional evidence which were sought to be adduced as is apparent from the special leave application by Dr. Gosavi, the original petitioner in the writ petition and the respondent in the first appeal herein. These deal with the alleged involvement of the erstwhile Chief Minister of Maharashtra in the matter of the careers of his son, his daughter-in-law and in respect of transfer of one Inspector Lambe. As the additional evidence was not admitted and the appellant in the first appeal herein had no opportunity to deal with the same, it would not be fair to take these allegations into consideration. But these, if true, make dismal reading and give a sordid picture of the state of administration prevailing at that time in the State of Maharashtra. But as the High Court did

not admit these, perhaps because these were belated and perhaps would have unnecessarily prolonged the trial and were not directly connected with the immediate issues before the High Court, this Court in the exercise of its jurisdiction under Article 136 of the Constitution would not interfere with the decision of non-admission of these additional evidence and say no more.

13. On 16th June, 1986, the Division Bench of the Bombay High Court in appeal No. 216 of 1986 delivered judgment holding in para 35 of the judgment that the conclusion arrived at against Shri Nilangekar Patil was to be regarded merely as an adverse comment and not as a finding of fact. To that extent the finding of the learned single Judge was upset. The second appeal has been preferred by the original petitioner against the appellant challenging the findings respectively. In the appeal by the original petitioner an affidavit had been filed in this case claiming the right to adduce additional evidence.

14. The controversy before this court is rather narrow namely; was there justification for the remarks made by the learned Trial Judge against the appellant Patil in his judgment to the extent that manipulations in the grade-sheets of M.D. examination was done at the behest of the appellant, the then Chief Minister of Maharashtra to help respondent No. 4 to pass the M.D. examination? Can the same be justified either as a finding of fact or as a comment? In order to consider the same the (illegible) must be examined in little detail.

15. The learned single Judge noted that 37 candidates had been declared successful including respondent No. 4 being Chandrakala Patil and respondent No. 5 Dr. Mrs. Smita Thakkar. The other respondents Nos. 6 to 15 mentioned hereinbefore were other successful candidates whose result came to be nullified and made subject to re-examination by the judgment of the learned single Judge. We are not concerned with this aspect or with them any more. The petitioner had claimed that he had wrongly been declared as failed. The petitioner stated that he had some doubts as to whether his code number was properly decoded and he made various other allegations. The petitioner complained and the gravemen of his charges was that there were large number of irregularities in the declaration of result and mark-sheet was tampered in favour of respondent No. 4 Chandrakala Patil who is the daughter of the erstwhile Chief Minister and that Dr. Rawal was instrumental in tampering with the result which was done at the behest of the then Chief Minister. The learned Judge came to the conclusion that Dr. Rawal alone was responsible for tampering with and altering the tabulated grade-sheet of theory examination. After discussing all these aspects in detail at the concluding paragraph 15 of the judgment, the learned Judge had observed that he had no hesitation in concluding that Dr. Rawal was responsible for manipulating the result by tampering with and altering the grade-sheet so as to favour respondent No. 4 and respondent No. 5 in the writ petition namely Chandrakala Patil and Dr. Smita Thakkar.

16. The next question, and which is the main issue before us, to which the learned Judge's attention was drawn was whether the manipulation was done by Dr. Rawal at the instance of or behest of respondent No. 3, the appellant herein, the then Chief Minister of Maharashtra. The learned Judge discussed the evidence in great detail. The allegations in respect of the same are contained in paragraph 14 of the petition which have been set out hereinabove.

17. The learned Judge noted after setting out the gist of the allegation in paragraph 14 of the petition that the averments made in that paragraph were wholly unsatisfactory and

insufficient because the petitioner to the writ petition and the respondent herein had not disclosed from whom he had learnt what he had averred. We are in entire agreement with the conclusion of the learned single Judge. Indeed, this aspect was not disputed by any of the parties before us. The learned single Judge further noted that the allegations were not only denied by Dr. Rawal, Dr. Shah and Chandrakala Patil but also by the Chief Minister, the appellant, on oath by filing affidavit. Dr. Shah had claimed that he had never contacted Dr. Rawal in connection with the examination of respondent No. 4 and so was the claim of respondent No. 4 and of Dr. Rawal. The appellant in his affidavit dated 26th January, 1986 had stated that Dr. Shah did not send any message nor did he contact Dr. Rawal at any stage. An effort was made by the original petitioner, respondent herein to establish by direct evidence the link between Dr. Rawal and respondent No. 4 by relying upon the evidence of one Dr. Mishra sworn on 28th February, 1986. Dr. Mishra had claimed that his wife who is a doctor had left home to appear in M.D. examination in November, 1985, but subsequently the wife declined to answer as to whether she had appeared or not. Dr. Mishra claimed that he went to Dr. Rawal to enquire and he noticed that respondent No. 4 was sitting in the doctor's chamber. Dr. Mishra claimed that he over-heard Dr. Rawal telling respondent No. 4 about her poor performance in the examination and suggested that he could do something only if her father, the Chief Minister, gave any message. The learned single Judge observed in his judgment the less said about this affidavit was better. The learned Judge further observed that it was impossible to place any reliance on the evidence of Dr. Mishra as it was not known how he came to contact the original petitioner-respondent herein or why he did not choose to file affidavit till 28th February, 1986. Dr. Rawal had denied in his evidence that this Mishra came to see him and pointed out that on that relevant date, that he was heavily occupied and he had hardly any time to contact any visitor. Smt. Chandrakala Patil also denied the meeting that transpired between her and Dr. Rawal. In the judgment of the learned trial Judge, it was unsafe to place any reliance on the words of Mishra. We respectfully agree.

18. The learned Judge observed that it, in the facts and circumstances of this case, could reasonably be inferred that the alteration was done at the behest of Nilangekar Patil, erstwhile Chief Minister and her daughter, Chandrakala Patil. It could not be overlooked, according to the learned Judge, that only these three were interested in securing favourable result at the examination. According to the learned Judge there were two contingencies which had to be taken into consideration. The first was that respondent No. 4, Smt. Chandrakala Patil, might have used the name of her father, the erstwhile Chief Minister to secure favourable result from Dr. Rawal and secondly, the appellant, the erstwhile Chief Minister might have used his office to obtain a favourable result for his daughter. Learned counsel on behalf of the original petitioner had urged before learned trial single Judge that the third contingency could not be overlooked that it was probable that Dr. Rawal on his own did all these. Learned trial Judge rejected the third contingency as wholly improbable. He was of the view that Dr. Rawal was an experienced examiner and he was not young or immature and it was impossible to accept the view that a person like Dr. Rawal would proceed to do a criminal act and tamper with the record of the examination on his own with a view merely to please the people in power. No sane person, according to learned Judge, was likely to take such risk unless he was prompted to do so and given an assurance of protection by the persons in power. The learned Judge was of the view that the risk involved in what Dr. Rawal had done was so enormous that it was

difficult to conceive that he did it on his own. It was further urged by learned counsel before learned trial Judge that respondent No. 4, Chandrakala Patil had failed in the examination on three previous occasions when her father was Law Minister and yet previously the said Nilangekar Patil, respondent No. 3 had not used his influence and power, therefore, it was difficult to accept the position that he would do it on this occasion. This hypothetical question, according to the learned trial Judge, overlooked the fact that every examiner was not necessarily obliging or subservient as Dr. Rawal was. The learned Judge, therefore, concluded that the corollary of this finding was that Dr. Rawal had done it at the behest of either the appellant Nilangekar Patil or Chandrakala Patil or both of them. Then the learned Judge passed some strictures on Dr. Rawal and suggested some punishment and gave certain directions about examination of 12 other candidates whose results were also affected by the conduct of Dr. Rawal. As these appeals are not concerned with the same, it is not necessary to refer to these. The learned Judge directed that the result declared on 30th November, 1985 in respect of respondents No. 4 to 15 be revoked and that there should be fresh examination by the other examiners. These appeals are also not concerned with such direction.

19. These appeals came up before a Division Bench consisting of Kania, Ag. C.J. and Shah J,. of the Bombay High Court. By a judgment delivered on 16th June, 1986, these appeals were disposed of. So far as appeal No. 214 of 1986 by Dr. Rawal was concerned, the Division Bench found that some of the remarks against Dr. Rawal were too harsh and the punishment was too severe. They directed that enquiry be held against him. So far as appeal No. 215 of 1986 preferred by Chandrakala Patil was concerned, the same was dismissed with no order as to costs. No appeal had been preferred to this Court from the said decision. So far as appeal No. 216 of 1986 before the Division Bench was concerned, the learned Judges pointed out after discussing the evidence and the principles of law that there was no direct evidence that the alterations in the grades of Chandrakala Patil were made at the instance of the appellant. According to the Division Bench, the reasoning of the learned trial Judge in coming to the conclusion that respondents Nos. 3 and 4 to the original petition were responsible for getting Dr. Rawal to alter the grades aforesaid were based on certain contingencies. According to the Division Bench the reasoning adopted by the learned trial Judge were too tenuous for the conclusion based on such reasoning to amount to a positive finding. The Division Bench observed that merely because respondent No. 3 in the original petition had held a position of great power and would have been happy to see that his daughter respondent No. 4 had passed the M.D. examination, it was little difficult to conclude as a finding of fact that he must have influenced respondent No. 2 to alter the grades of his daughter. The learned Division Bench noted that it was true that a seasoned examiner like Dr. Rawal would not have taken the risk involved in altering the grades except under a great pressure or persuasion. The position that grades were altered was upheld by the Division Bench. The Division Bench, however, was of the opinion that there might have been various motives which might have induced Dr. Rawal to take the risk and alter the grades. The Division Bench observed that theoretically it was possible to conclude as was urged by Mr. Dhanuka, the learned counsel, that the respondent No. 4 might have used the name of her father and persuaded Dr. Rawal to alter the grades or some other influential person might have intervened and persuaded Dr. Rawal to alter the grades on the footing that respondent

No. 3 would be very happy to see his daughter passed and would reward Dr. Rawal or take care of him or there might be some other inducement. However, the Division Bench was of the view that in all probability Dr. Rawal would not have acted unless he had made him assured that the appellant in the first appeal was behind the person who persuaded him to alter the grades. In the view of the Division Bench therefore the conclusion of the learned trial Judge that the grades of respondent No. 4 must have been altered by respondent No. 2 at the instance of respondent No. 3 by using his official position under a promise of protection was certainly not one which could properly amount to a finding. The Division Bench further observed that the evidence in support of such a conclusion is too slender to support a finding of such gravity. The Division Bench was of the view that merely because the appellant held a position of great prestige and power, it could not be said that the action of Dr. Rawal must have been induced by him and in fact when allegation of this type is made against anyone holding a position of prestige and power, it was necessary that the evidence should be closely examined before holding such allegation well-founded. The Division Bench in its exhaustive judgment noted various decisions of this Court as well as of the English Courts. The Division Bench also upheld the finding of the learned single Judge that there was tampering with the grade sheets. The Division Bench also upheld the finding that Dr. Rawal was mainly responsible for the same. The setting aside of the results of Smt. Chandrakala Patil and Smt. Smita Thakkar was also upheld. So far as the learned trial Judge held that the same was done at the behest of the erstwhile Chief Minister, the same was not upheld as a finding of fact but remarks to that fact made by the learned trial Judge were not interfered with. An affidavit was filed claiming the right to adduce certain additional evidence and introducing certain writings from the magazine India Today etc. Such additional evidence was sought to be introduced as part of the claim of public interest litigation because it involved the conduct of the Chief Minister in respect of the affairs of the University. Such claim for introduction of additional evidence was, however, not entertained by the Division Bench. The Division Bench, however, in its judgment noted that the appellant was party to the writ petition and had an opportunity of explaining and defending himself. There were materials on record bearing on his conduct justifying the remarks which the Division Bench characterised as comments and not findings. A prayer was made before the Division Bench for deletion of such remarks. The Division Bench was of the view that as the appellant had opportunity to meet such remarks and such remarks were made upon hearing of the petition the question as to the conduct of the appellant in the episode was a matter of argument and it naturally fell for consideration before the Court. Judging the conduct of respondent No. 2, i.e. Dr. Rawal the part played by the appellant, erstwhile Chief Minister naturally fell for consideration. If the finding of the learned trial Judge, according to the Division Bench, was looked upon as mere adverse comments and not as a finding as such, there could not be any objection to the same. The Division Bench was further of the view that the circumstances noted by the learned Judge against the appellant Nilangekar Patil, aforesaid, formed a reasonable and cogent basis for adverse comment on his conduct. However, the Division Bench made it clear that these were merely in the nature of adverse comments and based on the material on record and at the hearing of a proceeding which involved the taking of evidence merely on affidavits. According to the Division Bench, a fuller enquiry might lead to a conclusion that the comment was not justified. In view of this, the Division Bench had asked the learned counsel

for the appellant Shri Dhanuka, whether the appellant desired that there should be a full-fledged factual enquiry into the charges of the alteration of the grades of respondent No. 4 having been altered as aforesaid with a view to pass respondent No. 4, Smt. Chandrakala Patil and further that this was done at the instance of the erstwhile Chief Minister. The Division Bench noted that the appellant made no request for any such enquiry and he was merely taking a stand on he footing that the evidence on record did not justify any conclusion being arrived at or a comment being made against respondent No. 3. The Division Bench suggested that even at that stage, if the appellant wanted a full-fledged enquiry and requested the University to hold the same, the University might hold such an enquiry into the results of M.D. examination in Gynecology and Obstetrics held in November 1985, particularly in respect of the results of respondents Nos. 4 and 5, but if such an enquiry was held, the person designated to hold the enquiry should be selected with the consent of the Chief Justice of the Bombay High Court.

20. Two appeals – one arising out of Special Leave Petition (Civil) No. 7568 of 1986 filed by Shivajirao Nilangekar Patil against the alleged adverse remarks and the other arising out of Special Leave Petition (Civil) No. 10665 of 1986 by the original petitioner are before this Court. There is an application for introduction of additional evidence.

21. There are three points involved in these two appeals. Firstly, we have to determine in the appeal by the appellant, Nilangekar Patil, the erstwhile Chief Minister of Maharashtra, whether the observations made by the Division Bench about the comments on the conduct of the Chief Minister were justified or not or should be expunged. Secondly, and connected with the first question is the question whether the Division Bench of the Bombay High Court was right in upsetting the finding that the tampering with the grade-sheets was done at the behest of the Chief Minister was a finding based on no evidence; and thirdly whether, in the facts and circumstances of the case, the court was justified in refusing to admit additional evidence and whether we should at this stage admit additional evidence.

22. The additional evidence as we have mentioned hereinbefore consists of certain report in India Today and certain other Magazines and certain affidavits. The basic principle of admission of additional evidence is that the person seeking the admission of addition evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance. Secondly, the party affected by the admission of additional evidence should have an opportunity to rebut such additional evidence. Thirdly, that additional evidence was relevant for the determination of the issue. The additional evidence sought to be introduced mainly consist of alleged instances when the Chief Minister on previous occasions had in respect of some criminal proceedings and other matters pending used his influence to drop those proceedings. Now about these, these are controversial allegations. There is no satisfactory explanation that this so-called material in the form of additional evidence could not have been obtained before the institution of the petition in the High Court. To this Mr. Tarkunde's submission was that it was difficult to gather evidence against a Chief Minister in office but as the case had gathered momentum, people had come in and after decision of the learned trial Judge, the Chief Minister had resigned and there was an atmosphere of belief for offering to adduce evidence which people were hesitant to give before that. We are of the opinion that at this belated stage there was not sufficient material

ground on which additional evidence should be admitted for the determination of the issues involved in these appeals.

23. In the appeal filed by the original petitioner Dr. Mahesh Madhav Gosavi, it was submitted that there were sufficient materials upon which the conclusion arrived at by the learned trial Judge that the tampering was done at the behest of the erstwhile Chief Minister and the Division Bench was in error in deciding that that was not the finding of fact. Mr. Tarkunde conceded, and in our opinion rightly, that the view of the Division Bench that the observation of the learned single Judge that tampering of the grade-sheets in M.D. examination was done at the behest of the Chief Minister was in the nature of a comment and not a finding was a distinction without any difference. We are of the opinion that he is right in this submission. We are also of the opinion that the Division Bench was right in holding that there was no direct evidence. We are conscious that in a situation of this type it is difficult to obtain direct evidence.

24. So far as admission of additional evidence is concerned, we are unable to accept the position that such additional evidence should have been admitted in order to show the nature of the conduct of the Chief Minister in other cases in similar situations.

25. The admissibility of evidence as to 'similar fact' has been considered by the courts. In this connection it may be instructive to refer to the observations of Lord Denning in ***Mood Music Publishing Co. Ltd.* v. *De Wolfe Ltd.*** [(1976) 1 All ER 763, 766] to the following effect:

> The admissibility of evidence as to 'similar facts' has been much considered in the criminal law. Some of them have reached the highest tribunal, the latest of them being ***Boardman* v. *Director of Public Prosecutions*** [(1974) 3 All ER 887]. The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice; and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it.

26. On this aspect Cross On Evidence, Sixth Edition page 346 has observed that although in some early civil cases in England rejected similar fact evidence as *res inter alios acta*, it was soon accepted that the rule of exclusion was certainly no stricter than that in criminal cases. The real question was whether there was a special rule of exclusion at all, or whether it were not rather a question of simple relevance in each case. The learned author noted that in more recent time, there has been a further relaxation of the exclusionary rules in civil cases. Cross at page 346/347 further noted that the aforesaid observations of Lord Denning might be interpreted as applying in civil cases a similar sort of balancing approach to the rules for the admissibility of similar fact evidence as applied in criminal cases. The factors to be weighed were however different on account of the peculiar position of the accused in criminal cases. The learned author noted that there was very high authority accounting for the existence of an

exclusionary discretion in criminal cases solely by reference to the accused's vulnerability to prejudice.

27. Applying the aforesaid principles to the facts as we have mentioned hereinbefore, we are of the opinion that the allegations of alleged conduct of the appellant in similar cases would not be a safe basis upon which to admit additional evidence, in this case having regard to the issues involved and nature of the issues involved in these matters and at the stage when these were sought to be introduced.

28. In support of the appellant in Civil Appeal arising out of Special Leave Petition No. 7568 of 1986, Dr. Singhvi submitted that the petitioner/appellant had suffered and would continue to suffer serious civil consequences on account of findings or adverse comments or strictures made by the learned single Judge. It was in those circumstances that this appeal had been filed. He specially referred to the observations of the learned single Judge about the affidavit in support of these allegations. He also relied on the observation of Dr. Mishra's affidavit and the adverse comments made by the learned single Judge on Dr. Mishra's affidavit. He also referred to the finding of the Division Bench that the petitioner had no personal knowledge of this incident nor had he disclosed the source of the information. That the petitioner had filed the affidavit of one Manikant Misra and then drew our attention to the various allegations and infirmities of the affidavit and specially relied on the various motives which might have induced Dr. Rawal, Respondent No. 2 in the original petition to take the risk and alter the grades and also he referred us to the finding at page 132 of the Paper Book of the Division Bench that the evidence was much too slender in support of the charge against the appellant. He emphasized that these appeals arose out of exercise of extraordinary jurisdiction by the civil court, not by trial on examination and cross-examination of evidence but an exercise of extraordinary jurisdiction on the basis of the affidavit, and the court should insist that there should be 'commensurate' proof for judicial certitude and that the distinction between 'finding' and 'adverse comment' was a distinction without any difference because it was throughout recognized as a finding.

29. The Division Bench in Appeal No. 216 of 1985 has held that the conclusion arrived at against Shri Nilangekar Patil was a comment and not a finding of fact. Dr. Singhvi referred extensively to the affidavit of Dr. Mishra and comments of learned single Judge and the Division Bench as to how unreliable such affidavit was.

30. It was submitted that in view of the infirmities of the affidavit of Dr. Mishra upon which the original petitioners, Dr. Mahesh Madhav Gosavi based his own petition was of such an unreliable credence that the courts should not have entertained the application. The Division Bench was unable to accept that position. We are in agreement with the Division Bench.

31. The Division Bench noted that this Court had in the case of ***State of Uttar Pradesh*** **v.** ***Mohammad Naim*** had exhaustively dealt with the limitation in making these remarks, i.e. (1) whether a party whose conduct in question was before the court had an opportunity of explaining or defending himself; (2) whether there was evidence on record bearing on that conduct justifying the remarks; (3) whether it was necessary for the decision of the case as an integral part thereof to refer to that conduct; and (4) the observations must be judicial in

nature. These tests, the Division Bench observed were satisfied in respect of the remarks made by the learned single Judge. The Division Bench was of the view that the circumstances relied before the learned single Judge formed a reasonable and cogent basis for the adverse comments on the conduct of the appellant herein in the first appeal. However, the Division Bench made it clear that it was merely in the nature of an adverse comment based on the material on record and at the hearing of a proceeding which involved the taking of evidence merely on affidavit. A fuller enquiry might lead to a conclusion that the comment was not justified. In that view of the matter the Division Bench asked the learned counsel whether the appellant in the first appeal desired that there should be a full-fledged factual enquiry into the charge of the grades of respondent No. 4 having been altered as aforesaid. Such enquiry, however, must be done by a body, the Division Bench suggested, nominated by the Chief Justice of Bombay High Court. Counsel for the appellant in the first appeal before us made no request for such an enquiry before the High Court. In other words, he was not willing to invite an enquiry to clear his image.

32. Shri Tarkunde, appearing on behalf of the respondent in the first appeal and appellant in the second one, submitted before us that there was sufficient substantial evidence before the learned single Judge to come to the conclusion that the tampering was done at the behest of the erstwhile Chief Minister of Maharashtra. He submitted it was a finding of fact based on substantial evidence and there was clear material as such evidence. He further submitted that in a matter of this nature where public interest was involved namely, state of affairs in the University of Bombay in respect of a high degree in the medicine and in which the conduct of the Chief Minister was involved, public interest demanded that the High Court should have investigated the matter even though there might be some infirmities in the affidavit supporting the petition. He submitted that in this case that after the initiation of the proceedings, public interest was involved and the High Court was justified in entertaining the application. He, therefore, submitted that second appeal arising out of Special Leave Petition No. 10665 of 1986 should be allowed. He further submitted that in a case of this nature, additional evidence should have been admitted. It was further submitted by Mr. Karanjawala, counsel, that even if this Court was inclined to accept that there was no distinction between a comment and a conclusion of fact in view of the facts disclosed in this case, this Court in exercise of its judicial discretion under Article 136 of the Constitution should not interfere in the facts and circumstances of this case. He urged that neither the cause of justice nor public interest demanded interference under Article 136 of the Constitution. It is true that exercise of the power under Article 136 of the Constitution is discretionary.

33. There is no question in this case of giving any clean chit to the appellant in the first appeal before us. It leaves us a great deal of suspicion that tampering was done to please Shri Patil or at his behest. It is true that there is no direct evidence. It is also true that there is no evidence to link him up with tampering. Tampering is established. The relationship is established. The reluctance to face a public enquiry is also apparent. Apparently Shri Patil, though holding a public office does not believe that "Caesar's wife must be above suspicion." The erstwhile Chief Minister in respect of his conduct did not wish or invite an enquiry to be conducted by a body nominated by the Chief Justice of the High Court. The facts disclose a sorry state of affairs. Attempt was made to pass the daughter of the erstwhile Chief Minister

who had failed thrice before by tampering the record. The person who did it was an employee of the Corporation. It speaks of a sorry state of affairs and though there is no distinction between comment and a finding and there is no legal basis for such a comment, we substitute the observations made by the aforesaid observations as herein.

34. This Court cannot be oblivious that there has been a steady decline of public standards or public morals and public morale. It is necessary to cleanse public life in this country along with or even before cleaning the physical atmosphere. The pollution in our values and standards is an equally grave menace as the pollution of the environment. Where such situations cry out the Courts should not and cannot remain mute and dumb.

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REVIEW OF JUDGMENT

Haridas Das **v.** *Smt. Usha Rani Banik*

2006 (3) SCALE 287

ARIJIT PASAYAT, J. - 1. Challenge in this appeal is to the order passed by a learned Single Judge of the Gauhati High Court on an application for review under Order XLVII Rule 1 of the Code of Civil Procedure, 1908 (in short the 'CPC'). The application was filed by respondent No. 1 for review of the judgment and order dated 21.8.2002 passed in Second Appeal No. 12 of 1993. The Second Appeal was allowed by the High Court by the judgment and order, reversing the judgment and order passed in Title Appeal No. 6/90 and affirming the judgment and decree dated 19.1.1989 passed in Title Suit No. 2 of 1987.

2. Reference to the factual background, as projected by the appellant in some detail would be necessary because the High Court has referred to the factual background to modify the judgment passed by the High Court in the Second Appeal and directing its dismissal. As a consequence the judgment and decree passed by the First Appellate Court was affirmed and that of the learned Munsif in the Title Suit was reversed.

3. One Kalipada Das , (respondent No. 1 in the review petition) the original owner of the suit property, entered into an oral agreement with the appellant on 19.8.1982 and on the same day, the appellant paid a sum of Rs. 14,000/- towards the agreed consideration of Rs. 46,000/- to sell his portion of the suit property, with a dwelling house standing thereon. The possession of the suit property was also handed over to the appellant, with a promise that a sale deed would be executed in favour of the appellant within three years. Again on 23.8.1982 the appellant paid a further sum of Rs. 31,000/. In essence Rs. 45,000/- was paid leaving only a nominal sum of Rs. 1,000/- to be paid at the time of execution of the sale deed.

4. As the time for execution of the sale deed was nearing, the appellant learnt that the said Kalipada Das with a view to defeat the appellant's right was trying to sell part of the property to one Chunnilal Deb and to mortgage part of the suit property with the Housing Board of Karimganj. He started openly threatening the appellant to dis-possess him of the suit property. The appellant paid the balance amount of Rs.1,000/- and asked Kalipada to execute the registered sale deed in his favour in respect of the property. In view of threatened dispossession, the appellant with a view to protect his possession of the suit property filed Title Suit No. 201/85 along with connected Miscellaneous Case No. 65/85, inter alia, seeking confirmation of possession over the suit land and premises, and for permanent injunction restraining Kalipada Das from dispossessing the appellant and from selling the suit property to any third party. In the said plaint the appellant exclusively reserved his right to file another suit for getting the sale deed executed.

5. By an interim order Kalipada Das was directed to maintain status quo in respect of the suit property. The suit was dismissed for default, but later was restored by an order passed by learned Munsif. The appellant filed another suit being Title Suit No. 1 of 1986 (re-numbered as 13/90) for specific performance of the agreement for sale and for the execution of the proper deed of sale in respect of the suit property.

6. During the pendency of the said proceedings, Kalipada Das executed and registered a sale deed in favour of one Usha Rani Banik, defendant No. 3 - Respondent No. 1 herein, while the possession of the suit property still remained with the appellant. Immediately thereafter, the appellant filed Title Suit No. 2 of 1987 for cancellation of the said sale deed as the same was illegal, fraudulent and void. The respondent No. 1 also filed a suit being Title Suit No. 22/87 for declaration of her title to the suit property on the basis of the sale deed.

7. Title Suit No. 2 of 1987 filed by the appellant was decreed whereby the sale deed executed in favour of the Respondent No. 1 was cancelled. Against the said decree, the respondent No. 1 preferred an appeal before learned District Judge, Karimganj, which was allowed setting aside the decree passed in Title Suit No. 2 of 1987. The appellant preferred Second Appeal No. 12 of 1993 before the High Court. The Second Appeal was allowed restoring the judgment and decree passed in Title Suit No. 2 of 1987.

8. By the impugned order as noted above the High Court held that no leave under Order II Rule 2 CPC was obtained by the respondent in Title Suit No. 201 of 1985. Therefore, the Title Suit No. 1 of 1986 filed for specific performance of the agreement for sale of land is hit by the provisions of Order II CPC. According to the High Court this is a case where review was permissible on account of some mistake or error apparent on the face of the record.

9. In support of the appeal learned counsel for the appellant submitted that the order of the High Court is clearly erroneous completely overlooking the scope and ambit of Order XLVII Rule 1 CPC. The parameters required for bringing in application of the said provision are absent in the present case. On behalf of the respondent No. 1 one Apu Banik claiming to be the Power of Attorney Holder stated that the High Court was justified in reviewing the order in the Second Appeal and the order does not suffer from any infirmity. He filed written argument signed by Usha Rani Banik stating that whatever was to be stated is contained in written argument. [*The court quoted Order XLVII Rule 1.*]

10. In order to appreciate the scope of a review, Section 114 of the CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the Court since it merely states that it "may make such order thereon as it thinks fit." The parameters are prescribed in Order XLVII of the CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict. This is amply evident from the explanation in Rule 1 of the Order XLVII which states that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the Court should exercise the power to review its order with the greatest circumspection. This Court in ***Thungabhadra Industries Ltd.*** **v.** ***The Government of Andhra Pradesh*** represented by the

Deputy Commissioner of Commercial Taxes, Anantapur (AIR 1964 SC 1372) held as follows:

> 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 characterized 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. Where without any elaborate argument one could point to the error and say here is a substantial point of law which states 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.

11. In ***Meera Bhanja* v. *Smt. Nirmala Kumari Choudary,*** it was held that:

> It is well settled law that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1, CPC. In connection with the limitation of the powers of the Court under Order XLVII, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of ***Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma*** speaking through Chinnappa Reddy, J. has made the following pertinent observations:
>
> It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to be exercise of the power of review. The power of review may be exercised on the discovery of new and important matter of evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merit. That would be in the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of error committed by the Subordinate Court.

12. A perusal of the Order XLVII, Rule 1 show that review of a judgment or an order could be sought : (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of record or any other sufficient reason.

13. In ***Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma*** [AIR 1979 SC 1047] this Court held that there are definite limits to the exercise of power of review. In that case, an application under Order XLVII, Rule 1 read with Section 151 of the Code was filed which

was allowed and the order passed by the judicial Commissioner was set aside and the writ petition was dismissed. On an appeal to this Court it was held as under:

> It is true as observed by this Court in ***Shivdeo Singh*** **v.** ***State of Punjab*** [AIR 1963 SC1908] there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter of evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.

14. The judgment in ***Aribam*** case has been followed in the case of ***Smt. Meera Bhanja***. In that case, it has been reiterated that an error apparent on the face of the record for acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. The following observations in connection with an error apparent on the face of the record in the case of ***Satyanarayan Laxminarayan Hegde*** **v.** ***Mallikarjun Bhavanappa Tiruymale*** were also noted:

> An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ.

15. It is also pertinent to mention the observations of this Court in the case of ***Parsion Devi*** **v.** ***Sumiri Devi***. Relying upon the judgments in the cases of ***Aribam*** and ***Smt. Meera Bhanja*** it was observed as under :

> Under Order XLVII, Rule 1, CPC a judgment may be open to review inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1, CPC. In exercise of the jurisdiction under Order XLVII, Rule 1, CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise.

16. A Constitution Bench of this Court in the case of ***Pandurang Dhondi Chougule* v. *Maruti Hari Jadhav*** has held that the issue concerning *res judicata* is an issue of law and, therefore, there is no impediment in treating and deciding such an issue as a preliminary issue. Relying on the aforementioned judgment of the Constitution Bench, this Court has taken the view in the case of ***Meharban* v. *Punjab Wakf Board*** and ***Harinder Kumar*** that such like issues can be treated and decided as issues of law under Order XIV, Rule 2(2) of the Code. Similarly, the other issues concerning limitation, maintainability and Court fee could always be treated as preliminary issues as no detail evidence is required to be led. Evidence of a formal nature even with regard to preliminary issue has to be led because these issues would either create a bar in accordance with law in force or they are jurisdictional issues.

17. When the aforesaid principles are applied to the background facts of the present case, the position is clear that the High Court had clearly fallen in error in accepting the prayer for review. First, the crucial question which according to the High Court was necessary to be adjudicated was the question whether the Title Suit No. 201 of 1985 was barred by the provisions of Order II Rule 2 CPC. This question arose in Title Suit No. 1 of 1986 and was irrelevant so far as Title Suit No. 2 of 1987 is concerned. Additionally, the High Court erred in holding that no prayer for leave under Order II Rule 2 CPC was made in the plaint in Title Suit No. 201 of 1985. The claim of oral agreement dated 19.8.1982 is mentioned in para 7 of the plaint, and at the end of the plaint it has been noted that right to institute suit for specific performance was reserved. That being so the High Court has erroneously held about infraction of Order II Rule 2 CPC. This was not a case where Order II of Rule 2 CPC has any application.

18. The order of the High Court is clearly contrary to law as laid down by this Court. The judgment of the High Court in review application is set aside. Consequently, judgment and order passed in the Second Appeal stand restored. Appeal is allowed with no order as to costs.

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ENLARGEMENT OF TIME

Mahant Ram Das v. *Ganga Das*

AIR 1961 SC 882

M. HIDAYATULLAH, J. – The appellant who was plaintiff in a title suit in the Court of the Subordinate Judge II, Gaya, has appealed against the dismissal of his suit by the High Court at Patna, with a certificate from that Court. In the suit he had asked for a declaration that he was nominated Mahant of Moghal Juan Sangat by his Guru, Mahanth Gulab Das by a registered deed dated October 21, 1944, and that he had thus the right to manage the Sangat and other off-shoots thereof. His suit was dismissed by the trial Judge on May 31, 1947. He then appealed to the High Court at Patna, and on November 26, 1951, the appeal was decided in his favour on condition that he paid court-fee on the amended relief of possession of properties involved in the suit, for which purpose the case was sent to the Court of First Instance for determining the value of the properties and for fixing the amount of court-fee to be paid. After the report from the Subordinate Judge was received, the case was placed for final orders before the High Court. V. Ramaswami, J. and C.P. Sinha, J. (as they then were) held that the valuation for the purpose of the suit was Rs. 12,178-4-0, and that ad valorem court-fee was payable on it. They, therefore, made a direction as follows:

> The High Court office will calculate the amount of court-fee payable on the valuation we have given and communicate to the counsel for plaintiff-appellant what is the amount of the court-fee he has got to pay both on the plaint and on the memorandum of appeal. We grant the plaintiff three months time to pay the court-fee for the Trial Court and also for the High Court. The time will be computed from the date counsel for appellant is informed of the calculation by the Deputy Registrar of the High Court. If the amount is not paid within the time given, the appeal will stand dismissed. If the court-fee is paid within the time given, the appeal will be allowed with costs and the suit brought by the plaintiff will stand decreed with costs and the plaintiff will be granted a decree declaring….

2. The office of the High Court gave intimation on April 8, 1954 that the deficit court-fee payable was Rs. 1,987-8-0. The time was to expire on July 8, 1954, but the appellant was not able to find the money. It appears that the appellant's advocate in the High Court asked the case to be mentioned before the Vacation Judge on July 8, 1954, so that a request for extension of time could be made. No Division Bench, however, was sitting on that date and the appellant filed an application on July 8, 1954, requesting that he be allowed to pay Rs. 1,400 immediately, and the balance within a month thereafter. This application was placed before a Division Bench consisting of Ramaswami and Ahmad, JJ., when the following order was passed:

> This application for extension of time must be dismissed. By virtue of the order of the Bench dated the 30th March, 1954, the appeal has already stood dismissed as the amount was not paid within the time given." The appellant then moved an application under S. 151, which was rejected by Imam, C.J. and Narayan, J., on

> September 2, 1954. They, however, felt that the proper remedy was review. The appellant then filed another petition under S. 151, read with O. 47, R. 1 of the Code of Civil Procedure, setting out the reasons why he was unable to find the money. He stated that he was seriously ill, and though he had attempted to raise a loan, he was unable to get sufficient money, as the grain market had slumped suddenly, and people were unable to advance money. He offered to pay the deficit court-fee within such further time as the High Court might fix.

3. This application for review was heard on September 27, 1955, by Ramaswami and Sinha, JJ. They first considered it from the viewpoint of Order 47, Rule 1 of the Code of Civil Procedure, and held that the application did not fall within the Order. The argument of counsel that time could have been extended under S. 148 or S. 149 of the Code of Civil Procedure was also not accepted. The learned Judges held that these sections applied only to cases which were not finally disposed of, and that time under them could be extended only before the final order was actually made. The request to extend the time under the inherent powers of the Court was also rejected for the same reason. Ramaswami, J., concluded his order by saying:

> I have considerable sympathy towards the plaintiff petitioner who has placed himself in an unfortunate position, but we must be careful not to allow our sympathy to affect our judgment. To quote the language of Farwell, J. in another context 'sentiment is a dangerous will-o-the-wisp to take as a guide in the search for legal principles' (Latham v. R. Johnson and Nephew Ltd., 1913-1 KB 398)

In the result, the petition was dismissed, but without costs.

4. The appellant then moved the High Court for a certificate, and the case was heard by K.K. Banerji and R.K. Chaudhary, JJ. Though the decree was one of affirmance, the learned Judges fortunately found it possible to grant a certificate and the present appeal has been filed.

5. The case is an unfortunate and unusual one. The application for extension of time was made before the time fixed by the High Court for payment of deficit court-fee had actually run out. That application appears not to have been considered at all, in view of the peremptory order which had been passed earlier by the Division Bench hearing the appeal, mainly because on the date of hearing of the petition for extension of time, the period had expired. The short question is whether the High Court in the circumstances of the case, was powerless to enlarge the time, even though it had peremptorily fixed the period for payment. If the Court had considered the application and rejected it on merits, other considerations might have arisen; but the High Court in the order quoted, went by the letter of the original order under which time for payment had been fixed. Section 148 of the Code, in terms, allows extension of time even if the original period fixed has expired, and S. 149 is equally liberal. A fortiori, those sections could be invoked by the applicant, when the time had not actually expired. That the application was filed in the vacation when a Division Bench was not sitting should have been considered in dealing with it even on July 13, 1954, when it was actually heard. The order, though passed after the expiry of the time fixed by the original judgment, would have operated from July 8, 1954. How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with events that might arise in between, it

is not necessary to decide in this appeal. These orders turn out, often enough to be inexpedient. 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 can not 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. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding, even though a final order had been passed. We need cite only one such case, and that is ***Lachmi Narain Marwari* v. *Balmakund Marwari*** [AIR 1924 PC 198]. No doubt, as observed by Lord Philimore, we do not wish to place an impediment in the way of Courts in enforcing prompt obedience and avoidance of delay, any more than did the Privy Council. But we are of opinion that in this case the Court could have exercised its powers first on July 13, 1954, when the petition filed within time was before it, and again under the exercise of its inherent powers, when the two petitions under S. 151 of the Code of Civil Procedure were filed. If the High Court had felt disposed to take action on any of these occasions, Ss. 148 and 149 would have clothed them with ample power to do justice to a litigant for whom it entertained considerable sympathy, but to whose aid it erroneously felt unable to come.

In our opinion, the High Court was in error on both the occasions. Time should have been extended on July 13, 1954, if sufficient cause was made out and again, when the petitions were made for the exercise of the inherent powers. We, therefore, set aside the order of July 13, 1954, and the orders made subsequently. We need not send the case back for the trial of the petition made on July 8, 1954 because that would be only productive of more delay. None has appeared to contest the appeal in this Court. We have perused the application and the affidavit, and we are satisfied that sufficient cause had been made out for extension of time. We, accordingly, set aside the dismissal of the appeal and the suit, and grant the appellant two months' time from today for payment of the deficit court-fee. We only hope that after the lesson which the appellant has learnt, he will not ask the Court perhaps vainly, to show him any more indulgence. There will be no order about costs in this Court, as the appeal was heard ex parte.

* * * * *

Samarendra Nath Sinha **v.** *Krishna Kumar Nag*

AIR 1967 SC 1440

J.M. SHELAT, J. – One Sambhu Charan Das and Sannyashi Charan Das owned 2 bighas and 18 cottahs of land with a construction standing thereon, situate in Salkiah, District Howrah. By a deed of mortgage by conditional sale dated June 2, 1933 the said owners mortgaged the said property to secure repayment of Rs. 2,750 advanced to them by Panchu Gopal Srimani, then a minor through his mother, Prabhavati Dassi as his certified guardian. The said mortgage inter alia provided that if the mortgage amount was not repaid by the due date i.e., April 14, 1935, the mortgage would be considered as a deed of absolute sale and the mortgagee would be entitled to take possession of the property. On June 18, 1934 the mortgagors assigned their right, title and interest in the said property to one Satchidananda Hazra. As the said mortgagors or the said Hazra failed to pay the said mortgage amount on the due date, the mortgagee filed a suit on July 17, 1945 for enforcement of his rights impleading the two mortgagors and the said Hazra as defendants. In that plaint the mortgagee prayed for a decree for Rs. 5,426-10-6, being the amount then due under the said mortgage and for fixing the time for payment of the said amount. The plaint also contained a prayer that on failure to pay the decretal amount within the time fixed by the Court, "the right of the defendants to redeem the mortgage may be annulled and a decree may be passed giving possession of the mortgaged property." The mortgagors filed a written statement claiming that they should be permitted to pay the mortgage amount by installments as provided by the Bengal Money Lenders Act. The said Hazra also filed a written statement alleging that he was a *bona fide* purchaser without notice of the said mortgage. The two mortgagors did not contest the suit and it was only Hazra who contested it contending also that as the loan under the said mortgage was advanced by the guardian of the said Panchu, then a minor, without obtaining sanction of the District Judge, the said mortgage was null and void.

2. The Trial Court rejected these contentions and passed a preliminary decree on December 23, 1946. The said decree *inter alia* provided that mortgage amount due was Rs. 5,426-10-6 and that if the said amount together with costs of the suit was not paid by the defendants within six months from the date of the decree the plaintiff would be at liberty to apply for a final decree. Though the suit was a foreclosure suit the preliminary decree passed by the Trial Court was one under O. 34, R. 4(1) of the Code of Civil Procedure inasmuch as it provided that in default of payment as aforesaid the plaintiff would be at liberty to apply to the Court for a final decree for sale and that if the sale proceeds on such sale were not sufficient for payment of the decretal amount the plaintiff would be at liberty to apply for a personal decree against the defendants for the balance. Against the said preliminary decree the said Hazra filed an appeal in the High Court at Calcutta raising two contentions, (1) that the said mortgage was void on account of sanction not having been obtained by the guardian of the mortgagee before advancing the said loan, and (2) that he should be permitted to pay the decretal amount by instalments. The High Court negatived these contentions and by its judgment and decree dated March 22, 1951 dismissed the said appeal and the suit was sent back to the Trial Court for passing a final decree.

3. While the said appeal was pending the respondent obtained a money decree against the said Hazra and commenced execution proceedings against him. An attachment was levied on the said mortgaged property and thereafter on June 23, 1950 the right, title and interest of the said Hazra was put up for sale. The respondent was the auction purchaser and the Court confirmed the said sale by an order dated February 15, 1951. The said auction sale was in respect of 1 bigha and 2 cottahs out of the said mortgaged property. According to the respondent he was given possession of the said property on May 3, 1951.

4. On March 1, 1954, the said mortgagee, Panchu Gopal Srimani, applied for a final decree in the said suit. Pending this application, he assigned his right in the said decree in favour of the appellants on May 31, 1954. On July 1, 1954 the appellants applied to the Trial Court for being substituted in place of the said Panchu Shrimani. The Trial Court directed notices to be issued on the defendants, that is, the said two mortgagors and the said Hazra and they having raised no objection, the Court by an order dated January 5, 1955 ordered substitution and then passed a final decree. The said decree, after reciting that the said decretal amount was not paid within the time appointed by the defendants or any other person entitled to redeem the said mortgage, provided as follows:

> And, it is, hereby, ordered and declared that the defendant and all persons claiming through or under him are absolutely debarred and foreclosed of and from all rights of redemption of and in the property in the aforesaid preliminary decree mentioned… and that the defendant shall deliver to the plaintiff quiet and peaceful possession of the said mortgaged property.

5. On April 19, 1955 the appellants applied for and obtained possession of the said mortgaged property. According to the respondent, however, he learnt about the possession of the said mortgaged property having been delivered to the appellants for the first time on May 25, 1955 and thereupon filed an application under O. 21, R. 100 of the Code for restoration of possession to him. On September 27, 1955 the Trial Court rejected that application. The respondent then filed on January 3, 1956 a Revision Application against the said dismissal. On August 23, 1955 the respondent filed a second application under Section 151 of the Code for setting aside the said final decree. On the same day he also filed an appeal in the High Court being Appeal No. 285 of 1956 against the said filed decree but without impleading the said mortgagors or the said Hazra, who still was partially interested in the equity of redemption in the said property. In the meantime, the Trial Court dismissed the respondent's application under Section 151 by its order dated February 14, 1956. The High Court also by its order dated May 12, 1961 discharged Civil Rule No. 2 of 1956 issued in the revision application filed by the respondent against the dismissal of his application under O. 21, R. 100.

6. Appeal No. 285 of 1956 came on for hearing on May 12, 1961 before a Division Bench of the High Court. The High Court set aside the final decree observing:

> It is common case that the preliminary decree was for sale. The prayer by the respondents was for a final decree in terms of the preliminary decree. This was allowed, but the final decree as drawn up turned out to be one for foreclosure. It is this disconformity between the preliminary decree and the final decree which is being challenged by the appellant.

The High Court ordered:

> We should in the result set aside the final mortgage decree and allow the appeal by remitting the matter back to the Court below to be dealt with in accordance with law. The appellant is given liberty to participate in the matter.

7. It is manifest that the High Court's judgment meant that the respondent had sufficient interest to maintain the said appeal and participate in the proceedings before the Trial Court on the said remand for considering the question whether the said preliminary decree should be altered or not and if not whether the respondent had still the right to redeem the said mortgage, though the time for payment fixed under the said preliminary decree had expired, that is, six months from December 23, 1946, Long before the respondent became a purchaser of part of the said equity of redemption on February 15, 1951. There is no dispute that the valuation test for a certificate is satisfied in the present case. The judgment and decree passed by the High Court is also not one of affirmance as the High Court set aside the first final decree. There can be no dispute also that the question whether the appellant who was the auction-purchaser *pendente lite* had the locus standi to maintain the appeal was finally decided and he was given liberty to participate in the proceedings for correcting the preliminary decree and was enabled thereby to contend that he was still entitled to redeem the said mortgage and retain possession of the mortgaged property. The Trial Court was bound to allow him to participate in those proceedings as the High Court's judgment specifically directed it to deal with the case in accordance with the directions contained in the said judgment. The judgment and the decree of the High Court thus, besides setting aside the said final decree meant that the respondent had still sufficient interest entitling him to challenge the appellants' claim to have a final foreclosure decree and to maintain that the question of redemption was still open and he had the right to redeem the mortgaged property.

8. Counsel for the respondent however contended that the certificate granted by the High Court was not competent and was liable to be vacated as the judgment passed by the High Court was not a judgment, decree or final order inasmuch as what the High Court had done was only to remand the case to the Trial Court and the Trial Court had yet to decide the question whether a final decree for foreclosure should be passed or whether the final decree should be one for sale enabling the respondent to redeem the said mortgage. In support of his contention he relied on ***Sardar Syedna Tahar Saifuddin Saheb* v. *State of Bombay*** [AIR 1958 SC 253] where this Court held that the certificate granted therein was incompetent as it could not be granted in respect of an interlocutory finding. The order appealed against in that case was a decision as to the validity of the Bombay Prevention of Excommunication Act, 1949 (Bombay XLII of 1949). That being one of the several issues the decision did not dispose of the suit as the rest of the issues still remained to be tried and it was for this reason that it was held that the said order was not a judgement, decree or final order. ***Jethanand and Sons* v. *State of Uttar Pradesh*** [AIR 1961 SC 794] was again a case of remand directing the Trial Court to frame fresh issues and give opportunity to the parties to produce evidence. In fact it was an order for a Trial de novo on fresh pleadings and on all issues that might arise on such pleadings. Evidently any decision given by the High Court in the course of its order would not be binding on the Trial Court as the case had to be tried afresh by it. In these

circumstances it was held that the order of remand was not a judgment, decree or final order as it did not amount to a final decision relating to the rights of the parties in dispute.

9. In our opinion, these decisions cannot help Mr. Chatterjee as the position here is not the same as in those two decisions. The High Court has given its judgment and in pursuance thereof passed a decree setting aside the said final decree. If the High Court had held that the respondent in the circumstances of the case had no right to maintain his appeal, the final decree would have become a concluded decree and his right of redemption, if any, would have been totally extinguished. It is true that the High Court remitted the case to the Trial Court but it was obviously not an order of remand simpliciter. The decision of the High Court was not on a preliminary issue leaving undecided other issues to be tried by the Trial Court. It will be observed that the respondent was not a party to the suit – he could not be because when the preliminary decree was passed he was not on the scene. Though he became an auction-purchaser while the appeal against the preliminary decree was pending, he did not apply for being brought on record. The appellants or their predecessors-in-title would not be aware of his purchase and therefore could not implead him in the suit or in the appeal. The respondent filed his appeal against the said final decree and two questions arose in that appeal: (1) whether being a purchaser *pendente lite* he had *locus standi* to file an appeal and challenge the final decree, and (2) whether the Trial Court had jurisdiction to pass the final decree which was not in conformity with the preliminary decree. The judgment of the High Court is unfortunately laconic and one wishes that the learned Judges had taken us a little more into confidence by giving some reasons at least. Nonetheless, it is clear that they decided both the questions by holding that the respondent had still sufficient interest in the matter and therefore had *locus standi* and by setting aside the final decree and directing the Trial Court to decide the question as to whether it could correct the said preliminary decree in accordance with the directions given by them they had held that the respondent was entitled to participate in those proceedings and plead that the final decree should be one for sale and consequently he was entitled to redeem the said mortgage. There can be no question that the two questions raised in the appeal before the High Court were disposed of finally inasmuch as the said final decree was set aside as not being valid and binding on the respondent and the question of redemption by him which was extinguished by that final decree was reopened entitling the respondent to contend that he had the right to redeem and to hold the said property. In these circumstances, the preliminary objection raised by Mr. Chatterjee cannot be sustained and the certificate must be held to be competent.

10. On merits, two questions were raised: (1) whether the Trial Court was competent to pass a final decree for foreclosure though the preliminary decree was for sale, and (2) whether the respondent had the right to contend that he was entitled to redeem the said mortgage in view of the fact that he was the execution purchaser of part of the equity of redemption *pendente lite*.

11. 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.

"Every Court," said Bowen L.J. in ***Mellor* v. *Swire*** [(1885) 30 Ch.D. 239], "has inherent power over its own records so long as those records are within its power and that

it can set right any mistake in them. An order even when passed and entered may be amended by the Court so as to carry out its intention and express the meaning of the court when the order was made."

12.In ***Janakirama Iyer* v. *Nilakanta Iyer*** [AIR 1962 SC 633] the decree as drawn up in the High Court had used the words "*mesne profits*" instead of "net profits". In fact the use of the words "*mesne profits*" came to be made probably because while narrating the facts, these words were inadvertently used in the judgment. This court held that the use of the words "*mesne profits*" in the context was obviously the result of inadvertence in view of the fact that the decree of the Trial Court had specifically used the words "net profits" and therefore the decretal order drawn up in the High Court through mistake could be corrected under Sections 151 and 152 of the Code even after the High Court had granted certificate and appeals were admitted in this court before the date of the correction. It is true that under O. 20, R. 3 of the Code once a judgment is signed by the Judge, it cannot be altered or added to but the rule expressly provides that a correction can be made under Section 152. The Rule does not also affect the court's inherent power under Section 151. 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.

13. As already pointed out, the mortgage in question was one by conditional sale empowering the mortgagee to take possession of the mortgage security if the monies due thereunder were not paid by the due date. The suit filed by the mortgagee was also for a foreclosure decree. The tenor of the judgment of the Trial Court shows that the court meant to pass such a foreclosure decree especially as the plaint contained no prayer for a decree for sale or for a personal decree against the mortgagors or the said Hazra if the sale proceeds were found insufficient. The written statements of the defendants did not raise any contention against the mortgagees' right for a foreclosure decree, their defence being only that they were entitled to pay the mortgage amount by installments. There can therefore be little doubt that the court had no occasion to pass a preliminary decree for sale and that it was through an accidental slip or inadvertence that in the penultimate part of its judgment the court used the phraseology proper in a mortgage decree for sale. Once this error had crept in the judgment it was repeated in the preliminary decree and this error was not even noticed by the High Court when it dismissed Hazra's appeal and confirmed that decree. The error was later on noticed by the appellants as is seen from the order passed by the Trial Court dismissing the respondent's application under Section 151 for setting aside the final decree. That order states that the Subordinate Judge who tried the suit through oversight passed a preliminary decree for sale overlooking the fact that it was a suit for foreclosure and possession, that it was also apparent that this mistake of the Trial Court went un-noticed in the High Court which confirmed the decree of the Trial Court and:

> Therefore, this court, when it passed the final decree being apprised of the apparent mistake in the form of the preliminary decree, corrected the initial mistake and did justice by passing a final decree for foreclosure and for possession which was the only scope of

> the suit. This being the position the Trial Court had the power under Section 151 and Section 152 to correct its own error which had crept in the judgment and the preliminary decree and pass a proper final decree for foreclosure as intended by it.

14. Mr. Chatterjee, however, raised two contentions: (1) that a judgment or decree cannot be varied when it correctly represents what the court decided though it may be wrong nor can the operative or substantive part of the judgment be varied and a different one substituted, and (2) that a judgment or decree cannot be varied where there has been intervention of rights of third parties based on the existence of the decree and ignorance of the mistake therein. In such a case the exercise of power to correct the mistake would be inequitable or inexpedient.

15. No one can quarrel with these propositions. But considering the nature of the mortgage, the cause of action and the prayers in the suit, the absence of any contest as regards that cause of action and the prayers, and the tenor of the judgment until it came to its penultimate part, there can be no doubt that the intention of the Trial Court was to pass a preliminary decree for foreclosure as prayed for and that was what the court had decided. It was therefore through an accidental slip that in that final part of the judgment the Subordinate Judge used the phraseography used in a preliminary decree for sale. Therefore, there is no question of a wrong judgment having been passed by the Judge or the preliminary decree correctly representing that which was wrongly decided by the Judge. If that had been so, neither the judgment nor the decree could be corrected and the obvious remedy would be by way of an appeal. In ***Barhamdeo Singh* v. *Harmonoge Singh*** [AIR 1914 Cal 220] though only one of the defendants appeared and contested the suit the order made was that "the suit be decreed with costs." This was allowed to be altered on the ground that it was contrary to the intention of the court, that such an intention had to be gathered from the judgment as a whole and that the decree following the concluding portion of the judgment awarding costs against all the defendants was not in accord with the true intention of the court.

16. The second contention is based on the observations of Lord Herschell in ***Hatton* v. *Harris*** [1892 AC 547, 558] where he stated:

> that there may possibly be cases in which an application to correct an error of this description would be too late. The rights of third parties may have intervened, based upon the existence of the decree and ignorance of any circumstances which would tend to show that it was erroneous, so as to disentitle the parties to the suit or those interested in it to come at so late a period and ask for the correction to be made.

It is true that respondent purchased part of the equity of redemption from his judgment-debtor, Hazra, after the preliminary decree was passed. It is also true that that decree was not in the form of a foreclosure decree but of a mortgage decree for sale. But according to Lord Herschell's observations, the intervening interest of third parties must be based on the existence of the decree and ignorance of any circumstances which would tend to show that it was erroneous. No such thing has happened and indeed it was never the case of the respondent that he purchased the interest of the said Hazra because he was aware that a preliminary decree for sale has been passed and that under the decree he would be entitled to redeem the mortgaged property or that he was ignorant of the mistake in that decree. That being the position it is difficult to see how the case of 1892 AC 547 (*supra*) can apply to the present case. In this view, the Trial Court had the power to correct the accidental slip which

had crept in its judgment and correct that error by passing the final decree in accordance with its true intention. The final decree was passed after notice to the mortgagors and the said Hazra and after hearing them. The respondent was not made a party to that application as the appellants were never made aware of his purchase. The respondent also had not cared to be brought on record in substitution of or in addition to the said Hazra from whom he derived his interest in the equity of redemption. In our view, both the contentions raised by the respondent in this behalf must be rejected.

17. What then is the position of the respondent once it is held that the final decree for foreclosure was validly passed by the Trial Court? Could he challenge that decree in an appeal against it in the High Court on the basis that he was entitled to redeem the said mortgage? Section 91 of the Transfer of Property Act provides that besides the mortgagor any person other than the mortgagee who has an interest in or charge upon the property mortgaged or in or upon the right to redeem the same may redeem or institute a suit for redemption of such mortgaged property. Such a right is based on the principle that he steps in the shoes of his predecessor-in-title, and has therefore the same rights which his predecessors-in-title had before the purchase. Under Section 59-A of the Act also all persons who derive title from the mortgagor are included in the term "mortgagor" and therefore entitled to redeem. But under Section 52 which incorporates the doctrine of *lis pendens*, during the pendency of a suit in which any right to an immovable property is directed and specifically in question such a property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose. Under the Explanation to that section the pendency of such a suit commences from the date of its institution and continues until it is disposed of by a final decree or order and complete satisfaction or discharge of such a decree or order has been obtained. The purchaser pendente lite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well illustrated in ***Radhamadhub Holdar* v. *Monohur***, [(1888) 15 Ind App. 97 (PC)], where the facts were almost similar to those in the instant case. It is true that Section 52 strictly speaking does not apply to involuntary alienation such as court sales but it is well established that the principle of *lis pendens* applies to such alienation. It follows that the respondent having purchased from the said Hazra while the appeal by the said Hazra against the said preliminary decree was pending in the High Court, the doctrine of *lis pendens* must apply to his purchase and as aforesaid he was bound by the result of that suit. In the view we have taken that the final foreclosure decree was competently passed by the Trial Court, his right to equity of redemption was extinguished by that decree and he had therefore no Longer any right to redeem the said mortgage. His appeal against the said final decree was misconceived and the High Court was in error in allowing it and in passing the said order of remand directing the Trial Court to reopen the question of redemption and to allow the respondent to participate in proceedings to amend the said preliminary decree.

18. In the result, we allow the appeal, set aside the judgment and decree passed by the High Court and restore the judgment and decree passed by the Trial Court.

Dwarka Das v. *State of M.P.*

(1999) 3 SCC 500

R.P. SETHI, J. – In response to the tenders invited by the respondent-State, the appellant herein was allotted the work for the construction of a hostel for 100 boys at Polytechnic Ujjain for which agreement was executed between the parties on 26.12.1960. The entire work was required to be completed within 29 months with further condition that 1/4th of the work was to be completed within 5 months, half the work to be completed within 10 months and 3/4th work was to be completed within 15 months. The work order was issued to the appellant on 26.12.1960 who started construction on 28.12.1960. The Superintending Engineer is alleged to have obstructed the progress of the work with the result that the work could not be completed within the time schedule. The contract executed between the parties was rescinded by the respondents vide letter dated 19.6.1961 on the ground that the appellant had not completed even 10 per cent of the work despite lapse of more than 9 months. The appellant, however, contended that the termination of the contract was in breach thereof. He claimed Rs. 20,000 as damages for breach of contract besides claiming other amounts payable by the respondent to him. Suit for recovery of Rs. 32,000 filed by the appellant was decreed with a direction that the appellant would also be entitled to future interest @ 6 per cent per annum.

2. After the decree of the trial court the appellant filed an application under Section 152 of the CPC praying for awarding of interest from the date of the suit till the date of the decree by correcting the judgment and decree on the ground that non-awarding of interest *pendente lite* was an accidental omission. The trial court allowed this application and directed the correction of the judgment and decree by awarding interest *pendente lite.*

3. Aggrieved by the judgment and decree of the trial court, the respondent-State filed First Appeal No. 86 of 1973 and against the order passed in application under Section 152, Revision Application No. 145 of 1974. The High Court, vide the order impugned herein, partly allowed the appeal by holding the respondent-State liable to pay only a sum of Rs. 4783.33 to the plaintiff with interest at the rate of 6 per cent per annum. Civil Revision No. 145 of 1974 was allowed and the order of the trial court granting interest *pendente lite* was set aside.

4. Section 152 CPC provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders of errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the court or the tribunal becomes *functus officio* and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omission sought to be corrected, which goes to the merits of the case, is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the section cannot be pressed into service to correct an omission, which is intentional, however erroneous that may be. It has been noticed

that the courts below have been liberally construing and applying the province of Sections 151 and 152 of the CPC even after passing of effective orders in the *lis* pending before them. No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. In the instant case, the Trial Court had specifically held 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 insofar 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 vide order dated 30.11.1973. The High Court was, therefore, justified in setting aside the aforesaid order by accepting the revision petition filed by the State.

5. The reliance of the learned counsel for the appellant on ***Jainab Bai*** case [(1969 MPLJ 716]is misplaced inasmuch as in that case the aggrieved party had sought for award of interest after the decree by filing the application under Section 152 CPC and under Order 47 Rule 1 of the CPC. The Division Bench relied upon the decision of the Madras High Court in ***Thiruganavalli Ammal* v. *P. Venugopala Pillai*** [AIR 1940 Mad 29] wherein it was held that where a mistake had occurred in the decree in spite of mention of the future interest in the judgment, the Court had the power to rectify the mistake and if it occurred in the decree because of omission of it in the judgment, the mistake could not be corrected. We agree with the view taken by the Madras High Court but cannot subscribe to the general observations made by the Madhya Bharat High Court in ***Jainab Bai*** case. In ***Maharaj Puttu Lal* v. *Sripal Singh***, the Court had awarded the *mesne profits* to the decree-holder by correction upon satisfaction that the plaintiff had specifically claimed such profits and its pleader was admitted to have made an oral statement requesting the Court to determine the amount of *mesne profits* in the execution department which was accepted but not mentioned in the decree sheet. Under the facts and circumstances of that case the Court held that such being an accidental omission the same could be corrected in exercise of the powers vested in the Court under Section 152 of the CPC.

6. In ***Firozshaw*** *case* future interest was allowed by the Court on being satisfied that the omission in the decree was accidental and that no grounds existed for the defendant therein to resist the claim of the decree-holder. The ***W.B. Financial Corpn***. *case* (*supra*) does not in any way help the appellant inasmuch as in that case the scope of Section 152 was not at all considered as the only point decided was that a plaintiff is entitled as of right to the grant of interest under Section 34 of the CPC. In view of what we have held in this case regarding the ambit and scope of Section 152 of the CPC, we are of the opinion that the view of the Madhya Bharat High Court cannot be held to be based upon sound principles.

7. The claim of the petitioner for payment of Rs. 20,000 as damages on account of breach of contract committed by the respondent-State was disallowed by the High Court as the appellant was found to have not placed the material on record to show that he had actually suffered any loss on account of the breach of contract. In this regard, the appellate court observed:

> It is not his case that for due compliance of the contract he had advanced money to the laborers or that he had purchased materials or that he had incurred any obligations and

> on account of breach of contract by the defendants he had to suffer loss on the above and other heads. Even in regard to the percentage of profit he did not place any material on record but relied upon assessment of the profits by the Income Tax Officer while assessing the income of the contractors from building contracts.

Such a finding of the appellate court appears to be based on wrong assumptions. The appellant had never claimed Rs. 20,000 on account of alleged actual loss suffered by him. He had preferred his claim on the ground that had he carried out the contract, he would have earned profit of 10% on Rs. 2 lakhs which was the value of the contract. This Court in ***A.T. Brij Paul Singh*** **v.** ***State of Gujarat*** [(1984) 4 SCC 59] while interpreting the provisions of Section 73 of the Contract Act, 1872 has held that damages can be claimed by a contractor where the Government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed: (SCC pp. 64-65, paras 10-11)

> What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.
>
> Now if it is well established that the respondent was guilty of breach of contract inasmuch as the recission of contract by the respondent is held to be unjustified, and the plaintiff-contractor would be entitled to damage by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the works contract, the damages for loss of profit can be measured.

To the same effect is the judgment in ***Mohd. Salamatullah*** **v.** ***Govt. of A.P.*** [AIR 1977 SC 1481]. After approving the grant of damages in case of breach of contract, the Court further held that the appellate court was not justified in interfering with the finding of fact given by the trial court regarding quantification of the damages even if it was based upon guesswork. In both the cases referred to hereinabove, 15% of the contract price was granted as damages to the contractor. In the instant case, however, the trial court had granted only 10% of the contract price which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial court regarding breach of contract by specifically holding that "we, therefore, see no reason to interfere with the finding recorded by the trial court that the defendants by rescinding the agreement committed breach

of contract." It follows, therefore, as and when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate court was, therefore, not justified in disallowing the claim of the appellant for Rs. 20,000 on account of damages as expected profit out of the contract which was found to have been illegally rescinded.

10. The appellate court further slashed the other claims of the appellant and held him entitled to the payment of Rs. 4783.33 only. The learned counsel for the appellant has been very fair to concede that such finding returned by the appellate court is reasonable and that the appellant would not insist upon the payment of further amount and be satisfied with the amount decreed by the High Court in addition to the sum of Rs. 20,000 claimed as damages.

11. Under the circumstances, this appeal is partly allowed modifying the judgment decrees of the courts below and holding the appellant-plaintiff entitled to the grant of decree to the extent of Rs. 24,783.33 with future interest at 6% per annum payable from the date of decree till realization.

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AMENDMENT OF PLEADINGS

Jai Jai Ram Manohar Lal **v.** *National Bldg. Material Supply*

AIR 1969 SC 1267

J.C. SHAH, J. – On March 11, 1950, Manohar Lal s/o. Jai Jai Ram commenced an action in the Court of the Subordinate Judge, Nainital, for a decree for Rs. 10,139/12 being the value of timber supplied to the defendant - the National Building Material Supply, Gurgaon. The action was initiated in the name of "Jai Jai Ram Manohar Lal" which was the name in which the business was carried on. The plaintiff Manohar Lal subscribed his signature at the foot of the plaint as "Jai Jai Ram Manohar Lal, by the pen of Manohar Lal", and the plaint was also similarly verified. The defendant by its written statement contended that the plaintiff was an unregistered firm and on that account incompetent to sue.

2. On July 18, 1952, the plaintiff applied for leave to amend the plaint. Manohar Lal stated that "the business name of the plaintiff is Jai Jai Ram Manohar Lal and therein Manohar Lal the owner and proprietor is clearly shown and named. It is a joint Hindu family business and the defendant and all knew it that Manohar Lal whose name is there aLong with the father's name is the proprietor of it. The name is not an assumed or fictitious one. The plaintiff on those averments applied for leave to describe himself in the cause title as "Manohar Lal proprietor of Jai Jai Ram Manohar Lal" and in paragraph 1 to state that he carried on the business in timber in the name of Jai Jai Ram Manohar Lal. Apparently no reply was filed to this application by the defendant. The Subordinate Judge granted leave to amend the plaint. He observed that there was no doubt that the real plaintiff was Manohar Lal himself, that it was Manohar Lal who intended to file and did in fact file the action, and that the amendment was intended to bring what in effect had been done in conformity with what in fact should have been done."

3. The defendant then filed a supplementary written statement raising two additional contentions – (1) that Manohar Lal was not the sole owner of the business and that his other brothers were also the owners of the business, and (2) that in any event the amendment became effective from July 18, 1952, and on that account the suit was barred by the law of limitation.

4. The Trial Judge decreed the claim for Rs. 6,568/6/3. Against that decree an appeal was preferred to the High Court of Allahabad. The High Court being of the view that the action was instituted in the name of a "non-existing person" and Manohar Lal having failed to aver in the application for amendment that action was instituted in the name of "Jai Jai Ram Manohar Lal" on account of some bona fide mistake or omission, the Subordinate Judge was incompetent to grant leave to amend the plaint. The High Court after making an extensive quotation from the judgment of this Court in ***Purushottam Umedbhai and Co.*** **v.** ***Messrs. Manilal and Sons*** [AIR 1961 SC 325] observed that the action could not be instituted by the plaintiff in the business name; it should have been instituted in the name of the Karta of the Hindu undivided family in his representative capacity or else all the members of the joint family must join as plaintiffs. The Court then observed:

> The suit instituted by the joint Hindu family business in the name of an assumed business title was a suit by a person, who did not exist and was, therefore, a nullity. Hence there could be no amendment of the description of such a plaintiff who did not exist in the eye of law. The Court below was in obvious error in thinking otherwise and allowing the name of Manohar Lal to be added as proprietor of the original plaintiff Jai Jai Ram Manohar Lal, which was neither a legal entity nor an existing person who could have validly instituted the suit.

The High Court was also of the opinion that the substitution of the name of Manohar Lal as a plaintiff during the pendency of the action took effect from July 18, 1952, and the action must be deemed to be instituted on that date: the amendment could not take effect retrospectively and on the date of the amendment the action was barred by the law of limitation. The plaintiff has appealed to this Court with special leave.

5. The order passed by the High Court cannot be sustained. Rules of 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 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 compensated 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. In ***Amulakchand Mewaram* v. *Babulal Kanalal*** [AIR 1933 Bom. 304], Beaumont, C.J., in delivering the judgment of the Bombay High Court set out the principles applicable to cases like the present and observed:

> [T]he question whether there should be an amendment or not really turns upon whether the name in which the suit is brought is the name of a non-existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, *prima facie*, there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs.

In ***Amulakchand Mewaram*** case [AIR 1933 Bom 304], a Hindu undivided family sued in its business name. It was not appreciated at an early stage of the suit that in fact the firm name was not of a partnership, but was the name of a joint Hindu family. An objection was raised by the defendant that the suit as filed was not maintainable. An application to amend the plaint, by substituting the names of the three members of the joint family for the name of the family firm as plaintiffs, was rejected by the Court of first instance. In appeal the High Court observed that a suit brought in the name of a firm in a case not within Order 30, Civil Procedure Code being in fact a case of misdescription of existing persons, leave to amend ought to have been given.

6. This Court considered a somewhat similar case in ***Purushottam Unedbhai*** case. A firm carrying on business outside India filed a suit in the firm name in the High Court of Calcutta for a decree for compensation for breach of contract. The plaintiff then applied for amendment of the plaint by describing the names of all the partners and striking out the name

of the firm as a mere misdescription. The application for amendment was rejected on the view that the original plaint was no plaint in law and it was not a case of misnomer or misdescription, but a case of a non-existent firm or a non-existent person suing. In appeal, the High Court held that the description of the plaintiff by a firm name in a case where the Code of Civil Procedure did not permit a suit to be brought in the firm name should properly be considered a case of description of the individual partners of the business and as such a misdescription, which in law can be corrected and should not be considered to amount to a description of a non-existent person. Against the order of the High Court an appeal was preferred to this Court. This Court observed (at p. 994):

> 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 misdescribing 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 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 purpose 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.

These cases do no more than illustrate the well-settled rule that all amendments should be permitted as may be necessary for the purpose of determining the real question in controversy between the parties, unless by permitting the amendment injustice may result to the other side.

7. In the present case, the plaintiff was carrying on business as commission agent in the name of "Jai Jai Ram Manohar Lal." The plaintiff was competent to sue in his own name as Manager of the Hindu undivided family to which the business beLonged; he says he sued on behalf of the family in the business name. 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.

8. 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.

9. In our view, the order passed by the Trial Court in granting the amendment was clearly right, and the High Court was in error in dismissing the suit on a technicality wholly unrelated to the merits of the dispute. Since all this delay has taken place and costs have been thrown away, because the defendant raised and persisted in a plea which had no merit even after the amendment was allowed by the Trial Court, he must pay the costs in this Court and the High Court. The appeal is allowed and the decree passed by the High Court is set aside. It appears that the High Court has not dealt with the appeal on the merits. The proceedings will stand remanded to the High Court for disposal according to law on the merits of the dispute between the parties.

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M/s. Ganesh Trading Co. v. *Moji Ram*

AIR 1978 SC 484

M.H. BEG, C.J. – This appeal by special leave indicates how, despite the settled practice of this Court not to interfere, as a general rule, with orders of an interlocutory nature, such as one on an application for the amendment of a plaint, this Court feels compelled, in order to promote uniform standards and views on questions basic for a sound administration of justice, and, in order to prevent very obvious failures of justice, to interfere even in such a matter in a very exceptional case such as the one now before us seems to us to be.

2. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take.

Order 6, Rule 4 indicates cases in which particulars of its pleading must be set out by a party. And, Order 6, Rule 6 requires only such conditions precedent to be distinctly specified in a pleading as a party wants to put in issue. Order 6, Rule 5 provides for such "further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading ...." as the Court may order, and "upon such terms, as to costs and otherwise, as may be just." Order 6, Rule 7, contains a prohibition against departure of proof from the pleadings except by way of amendment of pleadings. After some provisions relating to special cases and circumstances, and for signing, verification and striking out of pleadings, comes Order 6, Rule 17 which reads as follows:

> 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 just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

4. It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so Long as remedial steps do not unjustifiably injure rights accrued.

5. 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 averment 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 pleadings 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.

6. In the case before us, the appellant-plaintiff M/s. Ganesh Trading Co., Karnal, had filed a suit "through Shri Jai Prakash," a partner of that firm, based on a promissory note, dated 25 August, 1970, for recovery of Rs. 68,000/-. The non-payment of money due under the promissory note was the real basis. The suit was filed on 24th August, 1973, just before the expiry of the period of limitation for the claim for payment. The written statement was filed on 5th June, 1974, denying the assertions made in the plaint. It was also asserted that the suit was incompetent for want of registration of the firm and was struck by the provisions of Section 69 of the Indian Partnership Act.

7. On 31st August, 1974, the plaintiff filed an amendment application wherein it was stated that the plaintiff had "inadvertently omitted certain material facts which are not (now?) necessary to incorporate in the plaint so as to enable the Hon'ble Court to consider and decide the subject-matter of the suit in its true perspective and which it is necessary to do in order to meet ends of justice." It was explained there that the omission consisted of a failure to mention that the plaintiff firm, Ganesh Trading Co. Karnal, had been actually dissolved on 15th July, 1973, on which date a deed of dissolution of the firm was executed. The Trial Court had refused to allow the amendment by its order dated 8th April, 1975, on the ground that it amounted to the introduction of a new cause of action.

8. On a revision application before the High Court, the High Court observed:

> The suit originally instituted was filed on behalf of a firm through one of the partners in the amendment prayed for, a new claim is being sought to be laid on the basis of new facts.

It examined the new averments relating to the shares of the partners and the execution of the deed of dissolution of the firm on 15th July, 1973. It then said:

> It is on the basis of these averments that the title of the suit is sought to be changed from M/s. Ganesh Trading Company, Karnal, through Shri Jai Prakash, son of Shri Hari Ram, resident of Railway Road, Karnal, to dissolved firm through Shri Jai Prakash son of Shri Hari Ram, resident of Railway Road, Karnal, ex-partner of the said firm. It would be seen that the change in the heading of the suit is not being sought merely on the ground of mis-description or there being no proper description,

> the cause of action remaining the same, but on the other hand, the change in the heading of the plaint has been sought on the basis of the new facts prayed, to be allowed to be averred in the amended plaint, for which new basis has been given alleging the dissolution of the partnership on a date before the suit was filed in the Court.

9. We are unable to share the view taken by the High Court. The High Court had relied on ***A.K. Gupta & Sons Ltd.*** **v.** ***Damodar Valley Corporation*** [AIR 1967 SC 96]. In that case, the plaintiff had sought a declaration of his rights under the terms of a contract. The suit was decreed. But as the first appellate Court had reversed the decree on the ground that Sec. 42 of the Specific Relief Act barred the grant of a mere declaratory decree in such a case, the appellant had sought leave, by filing an amendment application in its second appeal before the High Court seeking to add a relief to recover such monies as may be found due to him on proper accounting. By a majority, the view expressed by this Court was that the amendment should be allowed although the Court affirmed the principle that, as a rule, a party should not be allowed by means of an amendment, to set up a new cause of action particularly when a suit on the new case or cause of action is barred by time.

10. On that occasion, this Court had also referred to ***Charan Das*** **v.** ***Amir Khan*** (AIR 1921 PC 50) and ***L.J. Leach & Co. Ltd.*** **v.** ***Jardine Skinner & Co.*** [AIR 1957 SC 357] to hold that "a different or additional approach to the same facts" could be allowed by amendment even after the expiry of the statutory period of limitation. It had pointed out that the object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcoming. It also said that no question of limitation, strictly speaking, arose in such cases because what was sought to be brought in was merely a clarification of what was already there. It said (at p. 98):

> 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' as was said in ***Cooke*** **v.** ***Gill*** (1873) 8 CP 107 (116), in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means a new claim made on a new basis constituted by new facts. Such a view was taken in ***Robinson*** **v.** ***Unicos Property Corporation Ltd.***, 1962-2 All ER 24 and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words 'new case' have been understood to mean 'new set of ideas,' ***Dornan*** **v.** ***J.W. Ellis and Co. Ltd.*** [1962-1 All ER 303]. This also means to us to be a reasonable view to take. 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.

11. The High Court had also referred to ***Jai Jai Ram Manohar Lal*** **v.** ***National Building Material Supply, Gurgaon*** [AIR 1969 SC 1267] but had failed to follow the principle which was clearly laid down in that case by this Court. There, the plaintiff had instituted a suit in the name of Jai Jai Ram Manohar Lal which was the name in which the business of a firm was carried on. Later on, the plaintiff had applied to amend the plaint so that the description may

be altered into "Manohar Lal Proprietor Jai Jai Ram Manohar Lal." The plaintiff also sought to clarify paragraph 1 of the plaint so that it may be evident that "Jai Jai Ram Manohar Lal" was only the firm's name. The defendant pleaded that Manohar Lal was not the sole proprietor. One of the objections of the defendant in that case was that the suit by Manoharlal as sole owner would be time barred on 18th July, 1952, when the amendment was sought. In that case, the High Court had taken the hyper-technical view that Jai Jai Ram Manohar Lal being "a non-existing person" the Trial Court could not allow an amendment which converted a non-existing person into a "person" in the eye of law so that the suit may not be barred by time. This Court while reversing this hyper-technical view observed (at p. 1269):

> Rules of 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 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 compensated 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.

12. ***Purushottam Umedbhai and Co.* v. *Manilal & Sons*** [AIR 1961 SC 325] was a case of a partnership firm where this Court pointed out that Sec. 4 of the Partnership Act uses the term "firm" or the "firm name" as "a compedious description of all the partners collectively." Speaking of the provisions of Order 30, Civil Procedure Code this Court said there (at 328):

> The introduction of this provision in the Code was an enabling one which permitted partners constituting a firm to sue or be sued in the name of the firm. This enabling provision, however, accorded no such facility or privilege to partners constituting a firm doing business outside India. The existence of the provisions of O. XXX in the Code does not mean that a plaint filed in the name of a firm doing business outside India is not a suit in fact by the partners of that firm individually.

13. We think that the view expressed by Narula, C.J. in ***Mohan Singh* v. *Kanshi Ram*** [1976 Cur LJ 135 (Punj)] which was dissented from by the Division Bench of the High Court is correct. In that case, the learned Judge had rightly followed the principles laid down by this Court in ***Jai Jai Ram Manohar Lal*** and had also agreed with the view taken in ***Ippili Satyanarayana* v. *The Amadalavalsa Cooperative Agricultural and Industrial Society Ltd.*** [AIR 1975 AP 22], where it held that the defendant was not prejudiced by the amendment of the description at all.

14. In the case before us also, 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. Indeed, 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.

15. We also agree with the view taken by the Nagpur High Court in ***Agarwal Jorawarmal* v. *Kasam*** [AIR 1937 Nag. 314] where Vivian Bose, J. said (at p. 315):

> It is argued on behalf of the defendants that O. 30, R. 1, Civil P.C. indicates that a suit can be filed in the name of the firm by some of the partners only if the partnership is existing at the date of filing of the suit. The argument has no force in view of the finding that the firm was not dissolved by reason of the insolvency of one of its partners. But even if it has been dissolved, the effect of dissolution is not to render the firm non-existent. It continues to exist for all purposes necessary for its winding up. One of these is of course the recovery of moneys due to it by suit or otherwise.

16. We think that the amendment sought does not alter the cause of action. It only brings out correctly the capacity of the plaintiff suing. It does not change the identity of the plaintiff who remains the same.

17. The result is that we allow this appeal and set aside the orders of the High Court and the Trial Court. We allow the amendment application and send back the case to the Trial Court.

* * * * *

Dalip Kaur **v.** *Major Singh*

AIR 1996 P & H 107

R.P. SETHI, J. - In a suit for possession of land measuring 21 kanals 10 marlas and for permanent injunction restraining the defendants from alienating the land by way of sale, exchange, gift etc., the plaintiff filed an application under Order 6, Rule 17 of the Code of Civil Procedure, 1908 seeking amendment of the plaint by making a prayer for declaring the judgment and decree dated 20-7-1993 passed in Civil Suit No. 135 of 6-2-1990 entitled ***Major Singh* v. *Balbir Kaur*** as null and void and ineffective against the rights of the plaintiff. The application for amendment was dismissed mainly on the ground that the same has been filed without explaining the alleged inordinate delay. It was further held that the proposed amendment of the plaint was likely to change the foundation of the suit by introducing the distinct cause of action.

3. The purpose and object of Order 6, Rule 17, C.P.C. is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice on the basis of guidelines laid down by various High Courts and the Hon'ble Supreme Court of India. It was held in AIR 1967 SC 96, AIR 1974 SC 1126, AIR 1978 SC 484 that the object of the rule was to decide the rights of the parties and not to punish them for their mistakes, by allowing the amendment of the pleadings in the appropriate cases. The exercise of such far-reaching discretionary power is governed by judicial considerations and wider the discretion, greater has to be the care and circumspection on the part of the Court. On the basis of the different judgments it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings:

(i) All amendments should be allowed which are necessary for determination of the real controversies in the suit;

(ii) the proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original lis was raised;

(iii) inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment.

(iv) proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;

(v) amendment of a claim or relief barred by time should not be allowed;

(vi) no amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;

(vii) no party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;

(viii) the delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;

(ix) error or mistake which if not fraudulent should not be made on ground for rejecting the application for amendments of pleadings.

4. It is true that amendment cannot be claimed as a matter of right and under all circumstances. The circumstances under which the prayer for amendment of the pleadings is to be allowed, as indicated hereinabove, are general and not exhaustive. The circumstances may differ from case to case and it would depend upon the facts of each individual case keeping in view the object that the Courts are to do substantial justice and not to punish a party on technical grounds. If the result of the application is only to force a party to start fresh litigation, such an approach must be discouraged and the parties allowed to litigate in the same lis with respect to the subject matter of the dispute without changing its basic character of the nature of the litigation.

5. It has been conceded by the learned counsel for the respondents that the plaintiff can file a fresh suit challenging the judgment and decree dated 20-7-1993 passed in Civil Suit No. 135 of 6-2-1990. It follows, therefore, that the relief claimed is not barred by time and by the proposed amendment no vested right of the respondent would be taken away. The amendment does not defeat any legal right allegedly having accrued to the opposite party and the delay in filing the petition for amendment can properly be compensated by costs. Keeping in view the principles required to be kept in mind while dealing with the application for amendment as enumerated herein above, I am of the opinion that the Court below was not justified in rejecting the application of the petitioner-plaintiff vide the order impugned in this petition. The delay in seeking amendment could well be compensated by awarding costs.

6. Under the circumstances, the order impugned in the revision petition is set aside and the plaintiff is permitted to amend the plaint subject to payment of Rs. 1000/- as costs.

* * * * *

B.K. Narayana Pillai **v.** *Parameswaran Pillai*

(2000) 1 SCC 712

SETHI, J. - 2. The respondent-plaintiff filed a suit against the appellant-defendant praying for the grant of mandatory and prohibitory injunction seeking eviction allegedly on the ground of his being a licensee. In the written statement filed the appellant herein pleaded that he was not a licensee but a lessee. During the trial of the suit the appellant filed an application for amendment of the written statement to incorporate an alternative plea that in case the Court found that the defendant was a licensee, he was not liable to be evicted as according to him the licence was irrevocable. He further wanted to add a plea that the first and second prayers in the plaint were barred by limitation and that as acting upon the licence he has executed works of permanent nature and incurred expenses in execution of the same, his licence cannot be revoked by the grantor under Section 60(*b*) of the Indian Easements Act, 1882. The prayer was rejected by the trial court as also by the High Court on the ground that the proposed amendment was mutually destructive which, if allowed, would amount to permitting the defendant to withdraw the admission allegedly made by him in the main written statement.

3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigation.

4. This Court in ***A.K. Gupta & Sons Ltd.* v. *Damodar Valley Corpn***. [AIR 1967 SC 96] held:

> "The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred: ***Weldon* v. *Neal*** [(1887) 19 QBD 394]. But it is also well recognised that 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: See ***Charan Das* v. *Amir Khan*** [AIR 1921 PC 50] and ***L.J. Leach and Co. Ltd.* v. *Jardine Skinner and Co.*** [AIR 1957 SC 357]'

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 [***Cropper* v. *Smith*** (1884) 26 Ch.D. 700] and secondly, that 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

(***Kisandas Rupchand* v. *Rachappa Vithoba Shilwant*** [ILR (1909) 33 Bom 644] approved in ***Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil*** [AIR 1957 SC 363]).

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' as was said in ***Cooke* v. *Gill*** [(1873) 8 CP 107] in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in ***Robinson* v. *Unicos Property Corpn. Ltd.*** [(1962) 2 All ER 24 (CA)] and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words 'new case' have been understood to mean 'new set of ideas': ***Dornan* v. *J.W. Ellis and Co. Ltd.*** [(1962) 1 All ER 303 (CA)]. This also seems to us to be a reasonable view to take. 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."

Again in ***Ganga Bai* v. *Vijay Kumar*** [(1974) 2 SCC 393], this Court held:

> "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."

In ***Ganesh Trading Co.* v. *Moji Ram*** [(1978) 2 SCC 91], it was held:

> "*4*. It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued."

The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as the question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the

other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates (*sic* results) in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.

5. In this appeal the appellant-defendant wanted to amend the written statement by taking a plea that in case he is not held a lessee, he was entitled to the benefit of Section 60(*b*) of the Indian Easements Act, 1882. Learned counsel for the appellant is not interested in incorporation of the other pleas raised in the application seeking amendment. The plea sought to be raised is neither inconsistent nor repugnant to the pleas already raised in defence. The alternative plea sought to be incorporated in the written statement is in fact the extension of the plea of the respondent-plaintiff and rebuttal to the issue framed regarding liability of the appellant of being dispossessed on proof of the fact that he was a licensee liable to be evicted in accordance with the provisions of law. The mere fact that the appellant had filed the application after a prolonged delay could not be made a ground for rejecting his prayer particularly when the respondent-plaintiff could be compensated by costs. We do not agree with the finding of the High Court that the proposed amendment virtually amounted to withdrawal of any admission made by the appellant and that such withdrawal was likely to cause irretrievable prejudice to the respondent.

6. It has been stated on behalf of the respondent at the Bar that the appellant having not come to the Court with clean hands is not entitled to any discretionary relief. It is contended that the appellant has not paid any licence fee as per the terms of the additional licence granted in his favour. It has been stated that in case the appeals are allowed the appellant-defendant be directed to pay all the arrears of the licence fee. We find substance in the submission made on behalf of the respondents.

7. Under the circumstances, the appeals are allowed by setting aside the orders impugned. The appellant-defendant is permitted to amend the written statement to the extent of incorporating the plea of his entitlement to the benefit of Section 60(*b*) of the Indian Easements Act, 1882 only subject to his paying all the arrears on account of licence fee and costs assessed at Rs. 3000 within a period of one month from the date the parties appear in the trial court. The payment and receipt of the arrears of licence fee shall be without prejudice to the rights of the parties which may be adjudicated by the trial court. Costs of the appeals are made easy.

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REJECTION OF PLAINT

Saleem Bhai v. *State of Maharashtra*

AIR 2003 SC 759

S.S.M. QUADRI, J. - 2. These appeals arise from the common order of the High Court of Madhya Pradesh [Indore Bench] in Civil Revision Petition Nos. 256 of 2002 and 257 of 2002 dated 7th May, 2002.

3. These cases have a chequered history but in the view we have taken, we do not consider it necessary to refer to the facts in any detail. Suffice it to say that Respondent No. 7 in the appeal arising out of S.L.P. (C) No. 13234 of 2002 and the sole respondent in the appeal arising out of S.L.P. (C) 14577 of 2002 filed suits in February, 2002, cut of which these appeals arise. The eight defendant in the suits is the appellant in these two appeals. The said respondents-plaintiffs in the suits claimed, inter alia, the following relief:

> (2). That it be declared that the Judgment and Decree passed by the III Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No. 147 of 1967, Judgment and Decree passed by IV Additional District Judge, Nagpur in regular Civil Appeal No. 16 of 1987, and approving the same in the Judgment and Decree passed by the Hon'ble Bombay High Court, Bench at Nagpur in Second Appeal No. 132 of 1992, and while maintaining this Judgment and Decree, Judgment and order passed by the Hon'ble Supreme Court in Special Leave petition (Civil) No. 25004/96 and in Review Petition No. 1075/97 and order passed in various Revenue case No. 8/1996-97, are illegal, not in existence, null and void and are not within the jurisdiction and therefore are not binding on the plaintiff.

4. The appellant filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, 'the C.P.C.') in the suits praying the court to dismiss the suits on the ground stated therein. Before us, it is stated that the plaint is liable to be rejected under Clauses (a) and (d) of Rule 11 of Order VII C.P.C. While so, the said respondents also filed the application under Order VIII Rule 10 C.P.C. to pronounce judgment in the suits as the appellant did not file his written statement. There was also an application by the appellant under Section 151 C.P.C. praying the court to decide first the application under Order VII Rule 11 C.P.C. By order dated 8th December, 2001, the learned Trial Judge dismissed the application under Order VIII Rule 10 as well as the application filed under Section 151 C.P.C. Insofar as the application under Order VII Rule 11 C.P.C. is concerned, the learned Judge directed the appellant to file his written statement. Aggrieved thereby, the appellant filed afore-mentioned revision petitions before the High Court of Madhya Pradesh [Indore Bench]. On May 7, 2002, the High Court, while confirming the order of the learned Trial Judge reiterated the direction given by the learned Trial Judge that the appellant should file his written statement and observed that the trial court shall frame issues of law and facts arising out of pleadings and that the trial court should record its finding on the preliminary issue in accordance with law before proceeding to try the suit on facts. It is against this order of the High Court that the present appeals have been preferred.

5. Mr. T.R. Andhyarujina, learned senior counsel appearing for the appellant in the appeal arising out of S.L.C. (C) No. 13234 of 2002 and Mr. R.F. Nariman, learned senior counsel appearing for the appellant in the appeal arising out of S.L.P. (C) No. 14577 of 2002 have contended that having regard to the very nature of the relief claimed by the plaintiffs, the plaints are liable to be rejected under Order VII Rule 11 C.P.C. and that the court ought to have considered the said application or merits instead of giving direction to file written statement which would amount to not exercising the jurisdiction vested in the court. It is further contended that the High Court also did not appreciate that the plaints do not show any cause of action and that the plaint ought to have been rejected as the suit is barred by the principles of res judicata and lis pendense.

6. Mr. K.K. Venugopal, learned senior counsel appearing for the respondents, on the other hand, drew our attention to various orders passed in earlier proceedings to show that the subject-matter of the property, items 51 and 52 of the relinquishment deed were not the suit properties in the earlier judgments, including the order passed by this Court and, therefore, neither the principle of res judicata nor the principle of lis pendense is attracted.

7. The short common question that arises for consideration in these appeals is, whether an application under Order VII Rule 11 C.P.C. ought to be decided on the allegations in the plaint and filing of the written statement by the constesting defendant is irrelevant and unnecessary.

9. A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any state of the suit - before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under Clauses (a) and (d) of Rule 11 of Order VII C.P.C., the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects.

10. We are, therefore, of the view that for the afore-mentioned reasons, the common order under challenge is liable to be set aside and we, accordingly, do so. We remit the cases to the trial court for deciding the application under Order VII Rule 11 C.P.C. on the basis of the averments in the plaint, after affording an opportunity of being heard to the parties in accordance with law.

11. The civil appeals are, accordingly, allowed.

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APPEARANCE/NON-APPEARANCE OF PARTIES - CONSEQUENCES

Sangram Singh v. *Election Tribunal, Kotah*

AIR 1955 SC 425

[The second respondent Bhurey Lal filed an election petition under Section 100 of the Representation of the People Act against the appellant Sangram Singh and two others for setting aside Sangram Singh's election. The proceedings commenced at Kotah and after some hearings the Tribunal made an order on 11-12-1952 that the further sittings would be at Udaipur from 16th to 21st March, 1953. It was discovered later that the 16th was a public holiday, so on 5-1-1953 the dates were changed to "from the 17th March onwards" and the parties were duly notified. On the 17th the appellant did not appear nor did any of the three counsel whom he had engaged, so the Tribunal proceeded ex parte after waiting till 1.15 p.m. The Tribunal examined Bhurely Lal and two witnesses on the 17th, five more witnesses on the 18th and on the 19th the case was adjourned till the 20th. On the 20th one of the appellant's three counsel, Mr. Bharat Raj, appeared but was not allowed to take any part in the proceedings because the Tribunal said that it was proceeding ex parte at that stage. Three more witnesses were then examined. On the following day, the 21st, the appellant made an application asking that the ex parte proceedings be set aside and asking that he be allowed to cross-examine those of Bhurely Lal's witnesses whose evidence had already been recorded].

VIVAN BOSE, J. – 7. The Tribunal heard arguments and passed an order the same day rejecting the application on the ground that the appellant had:

> "failed to satisfy ourselves that there was any just or unavoidable reason preventing the appearance of Respondent 1 himself or of any of his three learned advocates between the 17th and the 19th of March, 1953",

and it added:

> "at all events, when para 10 of the affidavit makes it clear that Shri Bharatraj had already received instructions to appear on 17-3-1953 there was nothing to justify his non-appearance on the 18th and 19th of March, 1953, if not, on the 17th as well".

8. The appellant thereupon filed a writ petition under Article 226 of the Constitution in the High Court of Rajasthan and further proceedings before the Tribunal were stayed.

9. The High Court rejected the petition on 17-7-1953 on two grounds:

(1) "In the first place, the Tribunal was the authority to decide whether the reasons were sufficient or otherwise and the fact that the Tribunal came to the conclusion that the reasons set forth by counsel for the petitioner were insufficient cannot be challenged in a petition of this nature." and

(2) "On the merits also, we feel no hesitation in holding that counsel for the petitioner were grossly negligent in not appearing on the date which had been fixed for hearing, more than two months previously."

Five months later, on 16-12-1953, the High Court granted a certificate under Article 133(1)(c) of the Constitution for leave to appeal to this Court.

10. The only question before the High Court was whether the Tribunal was right in refusing to allow the appellant's counsel to appear and take part in the proceedings on and after the 20th of March, 1953, and the first question that we have to decide is whether that is sufficient ground to give the High Court jurisdiction to entertain a writ petition under Article 226 of the Constitution. That, in our opinion, is no Longer res integra. The question was settled by a Bench of seven Judges of this Court in ***Hari Vishnu* v. *Ahmad Ishaque*** [AIR 1955 SC 233, 249] in these terms:

> "Certiorari will also be issued when the court or tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice."

That is exactly the position here.

11. It was urged that that cannot be so in election matters because of Section 105 of the Representation of the People Act of 1951, a section which was not considered in the earlier case. It runs thus:

> "Every order of the tribunal made under this Act shall be final and conclusive."

It was argued that neither the High Court nor the Supreme Court can itself transgress the law in trying to set right what it considers is an error of law on the part of the court or tribunal whose records are under consideration. It was submitted that the legislature intended the decisions of these tribunals to be final on all matters, whether of fact or of law, accordingly, they cannot be said to commit an error of law when, acting within the ambit of their jurisdiction, they decide and lay down what the law is, for in that sphere their decisions are absolute, as absolute as the decisions of the Supreme Court in its own sphere. Therefore, it was said, the only question that is left open for examination under Article 226 in the case of an Election Tribunal is whether it acted within the scope of its jurisdiction.

12. But this, also, is no Longer open to question. The point has been decided by three Constitution Benches of this Court. In ***Hari Vishnu* v. *Ahmad Ishaque***, the effect of Section 105 of the Representation of the People Act was not considered, but the Court laid down in general terms that the jurisdiction under Article 226 having been conferred by the Constitution, limitations cannot be placed on it except by the Constitution itself: see pages 238 and 242. Section 105 was, however, considered in ***Durga Shankar Mehta* v. *Raghuraj Singh*** [AIR 1954 SC 520, 522] and it was held that that section cannot cut down or affect the overriding powers of this Court under Article 136. The same rule was applied to Article 226 in ***Raj Krushna Bose* v. *Binod Kanungo*** [(1954) SCR 913] and it was decided that Section 105 cannot take away or whittle down the powers of the High Court under Article 226. Following those decisions we hold that the jurisdiction of the High Court under Article 226 is not taken away or curtailed by Section 105.

13. The jurisdiction which Articles 226 and 136 confer entitles the High Courts and this Court to examine the decisions of all tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a

moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal. It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is vis-à-vis all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review under Articles 226 and 136. Therefore, the jurisdiction of the High Courts under Article 226 with that of the Supreme Court above them remains to its fullest extent despite Section 105.

14. That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised aLong recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a board and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.

15. We now turn to the decision of the Tribunal. The procedure of these tribunals is governed by Section 90 of the Act. The portion of the section that is relevant here is sub-section (2) which is in these terms:

> Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Act 5 of 1908) to the trial of suits.

16. Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

17. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

18. The existence of such a principle has been doubted, and in any event was condemned as unworkable and impractical by O'sullivan, J. in ***Harriram* v. *Pribhdas*** [AIR 1945 Sind. 98]. He regarded it as an indeterminate term "liable to cause misconception" and his views were shared by Wanchoo, C.J. and Bapna, J. in Rajasthan: ***Sewa Ram* v. *Misrimal*** [AIR 1952 Raj. 12]. But that a law of natural justice exists in the sense that a party must be heard in a court of law, or at any rate be afforded an opportunity to appear and defend himself, unless there is express provision to the contrary, is, we think, beyond dispute. See the observations of the Privy Council in ***Balakrishna Udayar* v. *Vasudeva Ayyar*** [ILR 40 Mad. 793] and especially in ***T.M. Barret* v. *African Products Ltd.*** [AIR 1928 PC 261] where Lord Buckmaster said:

> "[N]o forms or procedure should ever be permitted to exclude the presentation of a litigant's defence."

Also ***Hari Vishnu*** case which we have just quoted.

In our opinion, Wallace, J. was right in ***Venkatasubbiah*** v. ***Lakshminarasimham*** [AIR 1925 Mad. 1274] in holding that:

> One cardinal principle to be observed in trials by a court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing.

and that:

> It follows that a party should not be deprived of that right and in fact the court has no option to refuse that right, unless the Code of Civil Procedure deprives him of it.

19. Let us now examine that Code; and first, we will turn to the body of the Code. Section 27 provides that

> Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim.

Section 30 gives the court power to

> (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid.

Then come the penalties for default. They are set out in Section 32 but they are confined to cases in which a summons have been issued under Section 30. There is no penalty for a refusal or an omission to appear in response to a summons under Section 27. It is true certain consequences will follow if a defendant does not appear and, popularly speaking, those consequences may be regarded as the penalty for non-appearance, but they are not penalties in the true sense of the term. They are not punishments which the court is authorised to administer for disregard of its orders. The antithesis that Section 32 draws between Section 27 and Section 30 is that an omission to appear in response to a summons under Section 27 carries no penalty in the strict sense, while disregard of a summons under Section 30 may entail punishment. The spirit of this distinction must be carried over to the First Schedule. We deprecate the tendency of some Judges to think in terms of punishments and penalties

properly so called when they should instead be thinking of compensation and the avoidance of injustice to both sides.

20. We turn next to the Rules in the First Schedule. It is relevant to note that the Rules draw a distinction between the first hearing and subsequent hearings, and that the first hearing can be either (a) for settlement of issues only, or (b) for final disposal of the suit. First, there is Order 5 Rule 1:

> [A] summons may be issued to the defendant to appear and answer the claim on a day to be therein specified.

This summons must state whether the hearing is to be for settlement of issues only or for final hearing (Rule 5). If it is for final hearing, then (Rule 8):

> [I]t shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

Then comes Order 8, Rule 1 which expressly speaks of "the first hearing". Order 9 follows and is headed "Appearance of parties and consequence of non-appearance."

21. Now the word "consequence" as opposed to the word "penalty" used in Section 32 is significant. It emphasises the antithesis to which we have already drawn attention. So also in Rule 12 the marginal note is "Consequence of non-attendance" and the body of the Rule states that the party who does not appear and cannot show sufficient cause

> shall be subject to all the provisions of the foregoing Rules applicable to plaintiffs and defendants, respectively, who do not appear.

The use of the word "penalty" is scrupulously avoided.

22. Our attention was drawn to Rule 6(2) and it was argued that Order 9 does contemplate the imposition of penalties. But we do not read this portion of the Rule in that light. All that the plaintiff has to do here is to pay the costs occasioned by the postponement which in practice usually means the cost of a fresh summons and the diet money and so forth for such of the witnesses as are present; and these costs the plaintiff must pay irrespective of the result.

23. Rule 1 of Order 9 starts by saying:

> "On the day fixed in the summons for the defendant to appear and answer...."

and the rest of the Rules in that Order are consequential on that. This is emphasised by the use of the word "postponement' in Rule 6(1)(c), of "adjournment" in Rule 7 and of "adjournment" in Rule 1. Therefore, we reach the position that Order 9 Rule 6(1)(a), which is the Rule relied on, is confined to the first hearing of the suit and does not per se apply to subsequent hearings: see ***Sahibzada Zeinulabdin Khan*** **v.** ***Sahibzada Ahmed Raza Khan*** [5 IA 233].

24. Now to analyse Rule 6 and examine its bearing on the first hearing. When the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if it is proved that the summons was duly served–

> "(a) ...the court may proceed ex parte".

The whole question is, what do these words mean? Judicial opinion is sharply divided about this. On the one side is the view propounded by Wallace, J. in ***Venkatasubbiah* v. *Lakshminarasimham*** that *ex parte* merely means in the absence of the other party, and on the other side is the view of O'sullivan, J., in ***Hariram* v. *Pribhdas*** that it means that the court is at liberty to proceed without the defendant till the termination of the proceedings unless the defendant shows good cause for his non-appearance. The remaining decisions, and there are many of them, take one or the other of those two views.

25. In our opinion, Wallace, J. and the other Judges who adopt the same line of thought, are right. As we have already observed, 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 appear, 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 Rule 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 Rules 7 and 13 emphasises this.

26. Now, as we have seen, 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 because of the proviso to Order 15 Rule 3(1) which provides that that can only be done when

> "the parties or their Pleaders are present and none of them objects."

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 a command or order of the court and so can only be set aside by another order made and recorded with due formality.

27. Then comes Rules 7 which provides that if at an adjourned hearing the defendant appears and shows good cause for his "previous non-appearance", he can be heard in answer to the suit

> "as if he had appeared on the day fixed for his appearance".

This cannot be read to mean, as it has been by some learned Judges, 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.

28. We turn next to the adjourned hearing. That is dealt with in Order 17 Rule 1(1) empowers the court to adjourn the hearing and whenever it does so it must fix a day "for the

further hearing of the suit", except that once the hearing of the evidence has begun it must go on from day to day till all the witnesses in attendance have been examined unless the court considers, for reasons to be recorded in writing, that a further adjournment is necessary. Then follows Rule 2 –

> Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed 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.

29. Now Rule 2 only applies when one or both of the parties do not appear on the day fixed for the adjourned hearing. In that event, the court is thrown back to Order 9 with the additional power to make "such order as it thinks fit". When it goes back to Order 9 it finds that it is again empowered to proceed ex parte on the adjourned hearing in the same way as it did, or could have done, if one or other of the parties had not appeared at the first hearing, that is to say, the right to proceed ex parte is a right which accrues from day to day because at each adjourned hearing the court is thrown back to Order 9 Rule 6. 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.

30. But though he has the right to appear at an adjourned hearing, he has no right to set back the hands of the clock. Order 9 Rule 7 makes that clear. Therefore, unless he can show good cause, he must accept all that has gone before and be content to proceed from the stage at which he comes in. But what exactly does that import? To determine that it will be necessary to hark back to the first hearing.

31. We have already seen that when a summons is issued to the defendant it must state whether the hearing is for the settlement of issues only or for the final disposal of the suit (Order 5 Rule 5). In either event, Order 8 Rule 1 comes into play and if the defendant does not present a written statement of his defence, the court can insist that he shall, and if, on being required to do so, he fails to comply –

> "the court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit." (Order 8 Rule 10).

This invests the court with the widest possible discretion and enables it to see that justice is done to both sides; and also to witnesses if they are present: a matter on which we shall dwell later.

32. We have seen that if the defendant does not appear at the first hearing, the court can proceed ex parte, which means that it can proceed without a written statement; and Order 9 Rule 7 makes it clear that unless good cause is shown the defendant cannot be relegated to the position that he would have occupied if he had appeared. That means that he cannot put in a written statement unless he is allowed to do so, and if the case in one in which the court considers a written statement should have been put in, the consequences entailed by Order 8 Rule 10 must be suffered. What those consequences should be in a given case is for the court, in the exercise of its judicial discretion, to determine. No hard and fast rule can be laid down. In some cases an order awarding costs to the plaintiff would meet the ends of justice: an

adjournment can be granted or a written statement can be considered on the spot and issues framed. In other cases, the ends of justice may call for more drastic action.

33. Now when we speak of the ends of justice, we mean justice not only to the defendant and to the other side but also to witnesses and others who may be inconvenienced. It is an unfortunate fact that the convenience of the witness is ordinarily lost sight of in this class of case and yet he is the one that deserves the greatest consideration. As a rule, he is not particularly interested in the dispute but he is vitally interested in his own affairs which he is compelled to abandon because a court orders him to come to the assistance of one or other of the parties to a dispute. His own business has to suffer. He may have to leave his family and his affairs for days on end. He is usually out of pocket. Often he is a poor man living in an out of the way village and may have to trudge many weary miles on his feet. And when he gets there, there are no arrangements for him. He is not given accommodation; and when he reaches the court, in most places there is no room in which he can wait. He has to loiter about in the verandah or under the trees, shivering in the cold of winter and exposed to the heat of summer, wet and miserable in the rains: and then, after wasting hours and sometimes day for his turn, he is brusquely told that he must go back and come again another day. Justice strongly demands that this unfortunate section of the general public compelled to discharge public duties, usually at loss and inconvenience to themselves, should not be ignored in the overall picture of what will best serve the ends of justice and it may well be a sound exercise of discretion in a given case to refuse an adjournment and permit the plaintiff to examine the witnesses present and not allow the defendant to cross-examine them, still less to adduce his own evidence. It all depends on the particular case. But broadly speaking, after all the various factors have been taken into consideration and carefully weighed, the endeavour should be to avoid snap decisions and to afford litigants a real opportunity of fighting out their cases fairly and squarely. Costs will be adequate compensation in many cases and in others the court has almost unlimited discretion about the terms it can impose provided always the discretion is judicially exercised and is not arbitrary.

34. In the Code of 1859 there was a provision (Section 119) which said that –

> "No appeal shall lie from a judgment passed ex parte against a defendant who has not appeared."

The Privy Council held in ***Zeinulabdin Khan*** **v.** ***Ahmed Raza Khan*** that this only applied to a defendant who had not appeared at all at any stage, therefore, if once an appearance was entered, the right of appeal was not taken away. One of the grounds of their decision was that

> The general rule is that an appeal lies to the High Court from a decision of a civil or subordinate Judge, and a defendant ought not to be deprived of the right of appeal, except by express words or necessary implication.

The general rule, founded on principles of natural justice, that proceedings in a court of justice should not be conducted behind the back of a party in the absence of an express provision to that effect is no less compelling. But that apart, it would be anomalous to hold that the efficacy of the so-called ex parte order expends itself in the first court and that thereafter a defendant can be allowed to appear in the appellate court and can be heard and can be permitted to urge in that court the very matters he is shut out from urging in the trial

court; and in the event that the appellate court considers a remand necessary he can be permitted to do the very things he was precluded from doing in the first instance without getting the ex parte order set aside under Order 9 Rule 7.

35. Now this is not a case in which the defendant with whom we are concerned did not appear at the first hearing. He did. The first hearing was on 11-12-1952 at Kotah. The appellant (the first defendant) appeared through counsel and filed a written statement. Issues were framed and the case was adjourned till 16th March at Udaipur for the petitioner's evidence alone from 16th to 21st March. Therefore, Order 9 Rules 6 and 7 do not apply in terms. But we have been obliged to examine this Order at length because of the differing views taken in the various High Courts and because the contention is that Order 17 Rule 2 throws one back to the position under Order 9 Rules 6 and 7, and there, according to one set of views, the position is that once an ex parte "order" is "passed" against a defendant he cannot take further part in the proceedings unless he gets that "order" set aside by showing good cause under Rule 7. But that is by no means the case.

36. If the defendant does not appear at the adjourned hearing (irrespective of whether or not be 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 point is this: 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, inference may be called for.

37. The learned Judges who constituted a Full Bench of the Lucknow Chief Court ***Tulsha Devi*** **v.** ***Sri Krishna*** [AIR 1949 Oudh 59] thought that if the original ex parte order did not ensure throughout all future hearings it would be necessary to make a fresh ex parte order at each succeeding hearing. But this proceeds on the mistaken assumption that an ex parte order is required. 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 the absence, or whether it will adjourn the hearing; and it must necessarily record this fact at every subsequent bearing because it has to record the presence and absence of the parties at each hearing. With all due deference to the learned Judges who hold this view, we do not think this is a grave or a sound objection.

38. A much weightier consideration is that the plaintiff may be gravely prejudiced in a given case because, as the learned Rajasthan Judges point out, and as O'Sullivan, J. thought, when a case proceeds ex parte, the plaintiff does not adduce as much evidence as he would have if it had been contested. He contents himself with leading just enough to establish a prima facie case. Therefore, if he is suddenly confronted with a contest after he has closed his case and the defendant then comes forward with an army of witnesses he would be taken by surprise and gravely prejudiced. That objection is, however, easily met by the wide discretion that is vested in the court. If it has reason to believe that the defendant has by his conduct misled the plaintiff into doing what these learned Judges apprehend, then it might be a sound

exercise of discretion to shut out cross-examination and the adduction of evidence on the defendant's part and to allow him only to argue at the stage when arguments are heard. On the other hand, cases may occur when the plaintiff is not, and ought not to be, misled. If these considerations are to weigh, then surely the sounder rule is to leave the court with an unfettered discretion so that it can take every circumstance into consideration and do what seems best suited to meet the ends of justice in the case before it.

39. In the present case, we are satisfied that the Tribunal did not exercise its discretion because it considered that it had none and thought that until the ex parte order was set aside the defendant could not appear either personally or through counsel. We agree with the Tribunal, and with the High Court, that no good cause was shown and so the defendant had no right to be relegated to the position that he would have occupied if he had appeared on 17-3-1953, but that he had a right to appear through counsel on 20-3-1953 and take part in the proceedings from the stage at which they had then reached, subject to such terms and conditions as the Tribunal might think fit to impose, is, we think, undoubted. Whether he should have been allowed to cross-examine the three witnesses who were examined after the appearance of his counsel, or whether he should have been allowed to adduce evidence, is a matter on which we express no opinion, for that has to depend on whatever view the Tribunal in a sound exercise of judicial discretion will choose to take of the circumstances of this particular case, but we can find no justification for not at least allowing counsel to argue.

Now the Tribunal said on 23-3-1953:

> The exact stage at which the case had reached before us on the 21st of March, 1953 was that under the clear impression that Respondent 1 had failed to appear from the very first date of the final hearing when the ex parte order was passed, the petitioner must have closed his case after offering as little evidence as he thought was just necessary to get his petition disposed of ex parte. Therefore, to allow Respondent 1 to step in now would certainly handicap the petitioner and would amount to a bit of injustice which we can neither contemplate nor condone.

But this assumes that the petitioner was misled and closed his case "after offering as little evidence as he thought was just necessary to get his petition disposed of ex parte". It does not decide that that was in fact the case. If the defendant's conduct really gave rise to that impression and the plaintiff would have adduced more evidence than he did, the order would be unexceptional but until that is found to be the fact a mere assumption would not be a sound basis for the kind of discretion which the Court must exercise in this class of case after carefully weighing all the relevant circumstances. We, therefore, disagreeing with the High Court which has upheld the Tribunal's order, quash the order of the Tribunal and direct it to exercise the discretion vested in it by law aLong the lines we have indicated. In doing so the Tribunal will consider whether the plaintiff was in fact misled or could have been misled if he had acted with due diligence and caution. It will take into consideration the fact that the defendant did enter an appearance and did file a written statement and that issues were framed in his presence; also that the case was fixed for the "petitioner's" evidence only and not for that of the appellant; and that the petitioner examined all the witnesses he had present on the 17th and the 18th and did not give up any of them; that he was given an adjournment on 19-3-1953 for the examination witnesses who did not come on that date and that examined three

more on 20-3-1953 after the defendant had entered an appearance through counsel and claimed the right to plead; also whether, when the appellant's only protest was against the hearings at Udaipur on dates fixed for the petitioner's evidence alone, it would be legitimate for a party acting with due caution and diligence to assume that the order side had abandoned his right to adduce his own evidence should the hearing for that be fixed at some other place or at some other date in the same place.

[The Tribunal will also consider and determine whether it will be proper in the circumstances of this case to allow the appellant to adduce his own evidence. The Tribunal will now reconsider its orders of the 20th, the 21st and the 23rd of March, 1953 in the light of our observations and will proceed accordingly. The records will be sent to the Election Commission with directions to that authority to reconstitute the Tribunal, if necessary, and to direct it to proceed with this matter aLong the lines indicated above].

* * * * *

Rajni Kumar **v.** *Suresh Kumar Malhotra*

2003 (3) SCALE 434

S.S.M. QUADRI, J. – 2. In this appeal, from the Judgment and order of the High Court of Delhi in C.R. No. 138 of 2001 dated October 15, 2001, the short point that arises for consideration is: whether the High Court committed jurisdicitonal error in declining to set aside the ex parte decree on the application of the appellant under Rule 4 of Order 37, on the ground that he failed to disclose facts sufficient to entitle him to defend the suit.

4. The appellant-tenant had taken on rent residential flat No. C-470, Sarita Vihar, Ground Floor, New Delhi-110 044 from the respondent-landlord for a period of nine months under an agreement of lease reduced to writing on November 26, 1993. After the expiry of the term of tenancy she continued to occupy the said premises as tenant till January 11, 1997. Alleging that the appellant did not pay the electricity and water consumption charges for the period starting from November 26, 1993 to January 11, 1997, the respondent filed suit No. 597 of 1997 in the Court of Senior Civil Judge, Delhi, under Order 37 of Code of Civil Procedure (C.P.C.), for recovery of Rs. 33,661. On the ground that on April 21, 1999 summons for judgment was sent by registered post A.D. to the appellant pursuant to the order of the Court dated April 16, 1999 the Court drew inference of deemed service on him, proceeded with the case and decreed the suit ex parte on August 12, 1999. The appellant, however, filed application under Rule 4 of Order 37 C.P.C. in the trial Court to set aside the ex parte decree. On January 6, 2001, the application was dismissed as no special circumstances were stated in the petition both in record to there being illegality in deeming service of summons for judgment on the appellant as well facts sufficient to entitle him to defend the suit. Aggrieved by the order of the trial court, the appellant filed revision C.R. No. 138 of 2001 in the High Court, which was also dismissed on October 15, 2001. that order of the High Court is assailed in appeal before us.

5. Mr. A. Sharan, learned senior counsel appearing for the appellant, strenuously contended that there was no proof or record to show that any notice by registered post with acknowledgement due was issued to the appellant by the respondent who had taken the notice from the court but did not file any proof of issuing the notice to the appellant, therefore, there was special reason for the appellant not to appear in response to the summons for judgment. He argued that sufficient amount was deposited with the respondent as advance and that Order 37 C.P.C. was not applicable to the facts of the case, therefore, the appellant had good defence to the suit. The trial court as well as the High Court, submitted Mr. Sharan, erred in dismissing the application under Rule 4 of Order 37 C.P.C.

6. The respondent appeared in-person and argued his case with precision and perfection. He submitted that summons for judgment was issued on April 21, 1999 and that the court had rightly drawn presumption of service on the appellant; that nowhere in her application had the appellant stated anything about her defence to the suit and therefore the order under challenge was rightly passed by the courts below.

8. A careful reading of Rule 4 shows that it empowers, under special circumstances, the court which passed an ex parte decree under Order 37 to set aside the decree and grant one or

both of the following reliefs, if it seems reasonable to the court so to do and on such terms as the court thinks fit: (i) to stay or set aside execution, and (ii) to give leave to the defendant (a) to appear to the summons, and (b) to defend the suit.

9. The expression 'special circumstances' is not defined in C.P.C. nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extraordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstances. In an application under Order 37, Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extraordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre decree matters viz. to give leave to the defendant to appear to the summons and to defend the suit.

10. In considering an application to set aside ex parte decree, it is necessary to bear in mind the distinction between suits instituted in the ordinary manner and suits filed under Order 37, C.P.C. Rule 7 of Order 37 says that except as provided thereunder the procedure in suits under Order 37 shall be the same as the procedure in suits instituted in the ordinary manner. Rule 4 of Order 37 specifically provides for setting aside decree, therefore, provisions of Rule 13 of Order 9 will not apply to a suit filed under Order 37. In a suit filed in the ordinary manner a defendant has the right to contest the suit as a matter of course. Nonetheless he may be declared ex parte if he does not appear in response before framing issues; or during or after trial. Though addressing arguments is part of trial, one can loosely say that a defendant who remains absent at the stage of argument, is declared ex parte after the trial. In an application under Order 9 Rule 11, if a defendant is set ex parte and that order is set aside, he would be entitled to participate in the proceedings from the stage he was set ex parte. But an application under Order 9 Rule 13 could be filed on any of the grounds mentioned thereunder only after a decree is passed ex parte against defendant. If the court is satisfied that (1) summons was not duly served, or (2) he was prevented by sufficient cause from appearing when the suit was called for hearing, it has to make an order setting aside the decree against him on such terms as to cost or payment into court or otherwise as it thinks fit and thereafter on the day fixed for hearing by court, the suit would proceed as if no ex parte decree had been passed. But in a suit under Order 37 the procedure for appearance of defendant is governed by provisions of Rule 3 thereof. A defendant is not entitled to defend the suit unless he enters appearance within tens days of service of summons either in person or by a pleader and files in court an address for service of notices on him. In default of his entering an appearance, the plaintiff becomes entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, up to the date of the decree together with costs. The plaintiff will also be entitled to judgment in terms of sub-rule (6) of Rule 3. If the defendant enters an appearance, the plaintiff is required to serve on the defendant a summons for judgment in the prescribed form. Within ten days from the service of such summons for judgment, the defendant may seek leave of the court to defend the suit, which will be granted on disclosing such facts as may be deemed sufficient to

entitle him to defend and such leave may be granted to him either unconditionally or on such terms as the court may deem fit. Normally the court will not refuse leave unless the court is satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be put up is frivolous or vexatious. Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, no leave to defend the suit can be granted unless the admitted amount is deposited by him in Court. Inasmuch as Order 37 does not speak of the procedure when leave to defend the suit is granted, the procedure applicable to suits instituted in the ordinary manner, will apply.

11. It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable so to do, on such terms as court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs may be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.

12. Now averting to the facts of this case, though appellant has shown sufficient cause for his absence on the date of passing ex parte decree, he failed to disclose facts which would entitle him to defend the case. The respondent was right in his submission that in the application under Rule 4 of Order 37, the appellant did not say a word about any amount being in deposit with the respondent or that the suit was not maintainable under Order 37. From a perusal of the order under challenge, it appears to us that the High Court was right in accepting existence of special circumstances justifying his not seeking leave of the court to defend, but in declining to grant relief since he had mentioned no circumstances justifying any defence.

13. In this view of the matter, we do not find any illegality much less jurisdictional error in the order under challenge to warrant interference of this Court. Inasmuch as having regard to the provisions of Section 34 of the C.P.C. and the facts of the case that the liability does not arise out of a commercial transaction, we are of the view that the grievance of the appellant with regard to rate of interest is justified. We, therefore, reduce the rate of interest from 18 per cent to 6 per cent per annum.

14. We directed the appellant to deposit the decree amount to serve as security for the suit amount in the event of this Court granting him leave to defend the suit. Since that relief is not

granted to him, it will be open to him to withdraw the said amount or leave it adjusted in satisfaction of the decree. Subject to above modification of the order of the trial court as confirmed by the High Court the appeal is dismissed.

* * * * *

Bhanu Kumar Jain **v.** *Archana Kumar*

AIR 2005 SC 626

S.B. SINHA, J. - 2. The remedies available to a defendant in the event of an ex parte decree being passed against him in terms of Order 9 Rule 13 of the Code of Civil Procedure (the Code) and the extent and limitation thereof is in question before us in this appeal which arises out of a judgment and order dated 19-12-2002 passed by the High Court of Madhya Pradesh at Jabalpur in First Appeal No. 109 of 1986.

3. One Shri N.N. Mukherjee was the owner of the premises in suit. He died leaving behind his wife Smt Suchorita Mukherjee (original Defendant 1), son Shri P.P. Mukherjee (original plaintiff) and daughter Smt Archana Kumar (original Defendant 2). The family is said to be governed by Dayabhaga school of Hindu law. The original plaintiff filed a suit for partition in the year 1976. The original defendants filed their written statements. Respondent 2 herein, Surender Nath Kumar who is husband of Smt Archana Kumar, Respondent 1 herein also filed a written statement and counterclaim by setting up a plea of mortgage by deposit of title deeds in respect of property in suit said to have been created by his mother-in-law (original Defendant 1).

4. Smt Suchorita Mukherjee died on 15-9-1984 whereupon Respondent 1 herein was transposed as Defendant 1, whereas Respondent 2 was transposed as Defendant 2 therein. In the suit, Defendant 1 did not file any document. Respondent 2 also did not file any document in support of his purported counterclaim.

5. Having regard to the rival contentions raised in the pleadings of the parties, the following issues were framed:

> "1. (*a*) Whether partition of property owned by late Shri N.N. Mukherjee had taken place during his lifetime?
>
> (*b*) If so, what property was available for partition?
>
> (*c*) What were the shares allotted to the plaintiff and Defendant 1 in the said partition?
>
> (*d*) Whether the plaintiff had separated from his father during his lifetime and was in separate possession of his share in the property?
>
> 2. Whether the plaintiff is entitled to 1/2 share and separate possession of his share in the property described in para 3 of the plaint?
>
> 3. Whether the plaintiff is entitled to claim mesne profits for the income derived by Defendant 1 from the share in the property? If so, at what rate and to what sum?
>
> 4. Whether the claim in suit is barred by limitation?
>
> 5. Whether the decision in Civil Suit No. 63-A of 1972 decided on 22-11-1975 by IInd Civil Judge, Class II, Jabalpur will operate as res judicata in the present case?
>
> (*a*) Whether the suit is not maintainable as no relief has been sought against Defendant 2?

(*b*) Whether at the request of Defendant 1, Defendant 3 spent Rs 21,000 till 31-10-1974 on construction and alteration of the suit property and the interest as on 31-10-1974 came to Rs 10,000.00?

(*c*) Whether in order to secure the above amount Defendant 1 deposited the title deeds of the suit property with Defendant 2 and created a mortgage by deposit of title deeds in favour of Defendant 3 and the suit property stands mortgaged with Defendant 3?

(*d*) Whether Defendant 3 further spent Rs 9500 in the years 1976, 1977 and 1980 and Defendant 2 spent Rs 10,500.00?

(*e*) Whether Defendant 3 is entitled to get declaration shown as in paras 6(A), (B) and (C) of the written statement of Defendant 3?

(*f*) Whether the mother of Defendant 2 had made Will in favour of Defendant 2 and thus, after the death of the mother, Defendant 2 became absolute owner and the plaintiff has no right?

(*g*) Whether the plaintiff had already separated in the year 1951 and thus he has no right over the suit property?

6. Relief and costs?"

6. An additional issue was framed on 13-6-1985 and the case was fixed for evidence on 3-8-1985. On 3-8-1985 nobody was present on behalf of the defendant but the plaintiff's advocate was present whereupon, the case was directed to be placed after some time. At 2.35 p.m. a request was made for adjournment on the ground that the defendant could not come from Delhi whereafter an application was filed by the plaintiff that he had closed his evidence. It was further contended that the burden to prove the additional issue rested on the defendant and if any evidence is to be adduced, he should adduce evidence first. It appears that the plaintiff was also not cross-examined by Respondent 1 herein. As the plaintiff was attending to the court proceedings from Calcutta, a cost of Rs 200 was imposed on the defendants. It was further directed that if the costs were not paid, the right of cross-examination will be closed. The matter was again posted on 7-10-1985 on which day again the counsel for the defendant was not present. Even the costs awarded against them were not paid. Having regard to the fact that Respondent 1 herein was absent and did not cross-examine the plaintiff; the case was directed to be posted ex parte against her and the right of cross-examination was forfeited. The case was fixed for final argument on 11-10-1985. Yet again on 11-10-1985 the plaintiff was present but the defendants were not. Allegedly, owing to strike of the advocates, the case was adjourned for 14-10-1985. On 14-10-1985 the learned Judge fixed the case for 25-10-1985 for delivery of judgment. The judgment, however, was not pronounced on 25-10-1985. However, on the next date viz. 30-10-1985, an application was filed by the respondents herein purported to be in terms of Order 9 Rule 7 of the Code for setting aside the order dated 7-10-1985 whereby the suit was posted for ex parte hearing. The said application was rejected by an order dated 31-10-1985. A preliminary decree for partition, thereafter, was passed on 1-11-1985 in favour of the plaintiff.

7. An application under Order 9 Rule 13 of the Code was filed by the respondents herein on 5-11-1985 which was marked as Misc. Judicial Case No. 30 of 1985. The said application was dismissed by an order dated 15-1-1986 by the VIth Additional District Judge, Jabalpur

holding that the defendants failed to prove good and sufficient cause for their absence on 7-10-1985. An appeal marked as Misc. Appeal No. 19 of 1986 thereagainst in terms of Order 43 Rule 1(*d*) of the Code was filed on 30-1-1986 which was also dismissed.

8. A civil revision application was also filed challenging the order dated 31-10-1985 whereby and whereunder the respondents' application under Order 9 Rule 7 of the Code was dismissed. The said petition was also dismissed. Yet again a regular first appeal being No. 109 of 1986 was filed in the High Court. It is contended that Respondent 2 did not file any appeal against the rejection of his counterclaim. The said Misc. Appeal No. 19 of 1986 was dismissed by an order dated 5-4-1994 whereagainst a special leave petition was filed which also came to be dismissed as withdrawn by an order dated 16-12-1994. In the meanwhile, it appears that the original plaintiff transferred his right, title and interest in favour of the present appellant. The plaintiff died on 1-5-2001. By reason of the impugned judgment, the High Court allowed First Appeal No. 109 of 1986 holding:

> (*i*) That the trial Judge has grossly erred in law by proceeding ex parte against the defendants.
>
> (*ii*) The learned counsel further canvassed that Appellant 2 Surender Kumar, filed the counterclaim and therefore it was incumbent upon the learned trial Judge to decide the counterclaim filed by the defendant in view of the mandate contained in Order 8 Rule 6-D of the Code.

9. Mr Anoop G. Chaudhari, learned Senior Counsel appearing on behalf of the appellant would submit that as the counterclaim filed by the defendants under Order 8 Rule 6-D of the Code was dismissed by the learned trial Judge, the first appeal should not have been entertained by the High Court at the instance of Respondent 2 and, thus, the impugned judgment must be set aside.

10. The learned counsel would urge that the subject-matter of an application under Order 9 Rule 13 of the Code and the subject-matter of the appeal being same, it is against public policy to allow two parallel proceedings to continue simultaneously.

12. As regards the counterclaim of Respondent 2 herein, Mr Chaudhari would contend that the same was directed only against his mother-in-law being the original Defendant 1, and, thus, it could not have been enforced against the plaintiff. The learned counsel in this connection has drawn our attention to Issue 5 framed by the learned trial Judge. Drawing our attention to the judgment of the learned trial Judge, it was argued that the High Court committed a manifest error in coming to the conclusion that the learned trial Judge did not determine the counterclaim which in fact was done.

13. Mr Ranjit Kumar, learned Senior Counsel appearing on behalf of the respondents, on the other hand, would contend that the respondents were entitled to maintain an appeal against the ex parte decree in terms of Section 96(2) of the Code. The learned counsel would argue that the High Court in its impugned judgment having arrived at a conclusion that the suit was directed to be proceeded ex parte only against Respondent 1 and not against Respondent 2; he was entitled to raise a contention as regards the legality or validity of the order dated 31-10-1985. It was further submitted that in any event, the respondents herein were entitled to assail the judgment on merit of the matter. Drawing our attention to the provisions of Order 8 Rule

10 of the Code, the learned counsel would contend that even in a case where no written statement is filed, the court may direct the parties to adduce evidence in which event the court must pass a decree only upon recording a satisfaction that the plaintiff has been able to prove his case. If on the basis of the materials on record, Mr Ranjit Kumar would urge, the plaintiff fails to prove his case, the judgment would be subject to an appeal in terms of Section 96(2) of the Code which confers an unrestricted statutory right upon a party to a suit.

14. The learned counsel would further contend that the appellant herein has no locus standi to maintain this appeal as upon the death of the original plaintiff he was not substituted in his place. Mr Ranjit Kumar would submit that, in the event if it be held that the respondents are not entitled to question the order of the learned trial Judge to pass an ex parte decree against both the respondents, the matter may be remitted to the High Court for a decision on merit of the matter.

15. In reply, Mr Chaudhari would point out that only two contentions were raised before the High Court and its findings thereupon being ex facie erroneous, no purpose would be served by remitting the matter back to the High Court for determination of the merit of the matter. It was argued that the respondents have not raised any contention on merit of the matter and in any event, they having not adduced any evidence, there is no material on the record of the appeal enabling the court to determine the same on merit. It was further contended that even the deed in terms whereof the purported mortgage was created was not annexed with the written statement of Respondent 2 as it was mandatorily required under Order 8 Rule 1 of the Code, he cannot raise any contention on merit of the counterclaim and furthermore even no evidence was produced in support thereof.

16. Order 9 Rule 7 of the Code postulates an application for allowing a defendant to be heard in answer to the suit when an order posting a suit for ex parte hearing was passed, only in the event, the suit had not been heard; as in a case where hearing of the suit was complete and the court had adjourned a suit for pronouncing the judgment, an application under Order 9 Rule 7 would not be maintainable.

17. It is true that the suit was not directed to be heard ex parte against Respondent 2 herein but it remains undisputed that both the respondents filed application for setting aside the ex parte decree before the learned trial Judge, preferred appeal against the judgment dismissing the same as also filed a revision application against the order dated 31-10-1985 setting the suit for ex parte hearing. The said applications and appeal had been dismissed. Even a special leave petition filed was dismissed as withdrawn. In that view of the matter it is not permissible for the respondents now to contend that it was open to Respondent 2 to reagitate the matter before the High Court. The contention which has been raised by Respondent 2 before the High Court in the first appeal, furthermore, was not raised in the said application under Order 9 Rule 13 of the Code and even in the miscellaneous petition and the revision application filed in the High Court. Such a question having not been raised, in our opinion, the respondents disentitled themselves from raising the said contention yet again before the High Court in the first appeal.

24. An appeal against an ex parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(*i*) the materials on record brought on record in the ex parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(*ii*) the suit could not have been posted for ex parte hearing.

25. In an application under Order 9 Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an appellant to raise a contention as regards correctness or otherwise of an interlocutory order passed in the suit, subject to the conditions laid down therein.

28. It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside the ex parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions.

29. There is a distinction between "issue estoppel" and "res judicata". 30. Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord.

33. It is true that the Madras High Court in ***Badvel Chinna Asethu*** [AIR 1920 Mad 962] held that two alternative remedies in succession are not permissible stating:

> "Assuming that it is open to a defendant in the appeal against the ex parte decree to object to the decree on the ground that he had not sufficient opportunity to adduce evidence in a case where he did not choose to avail himself of the special procedure, it does not by any means follow that, where he did actually avail himself of the special procedure and failed, still it would be open to him to have the same question reagitated by appealing against the decree."

34. Oldfield, J. in his concurring judgment stated:

> "No case has been cited before us in which the question now under consideration, whether a party against whom a decree has been passed ex parte can proceed in succession under Order 9 Rule 13, as well as by taking objection to the order placing him ex parte in his appeal against the substantive decree has been dealt with. On principle it would appear that he could only do so at the expense of the rules as to res judicata; and there can be no reason why the adjudication on his application under Order 9 Rule 13, if there were one should not be conclusive against him for the purpose of any subsequent appeal. In the present case it is suggested that the facts that his application under Order 9 Rule 13, was not carried further than the District Munsif's Court and that he acquiesced in the District Munsif's unfavourable order, would make a difference to his right to appeal against the decree on this ground. The answer to this is that the District Munsif's order not having been appealed against, has become final. It seems to me that it would be a matter for great regret if a party could pursue both of two alternative remedies in succession and that the recognition of a right to do so would be a unique incident in our procedure. I am accordingly relieved to find that such a right has not been recognised by authority."

36. However, it appears that in none of the aforementioned cases, the question as regards the right of the defendant to assail the judgment and decree on merits of the suit did not (*sic*) fall for consideration. A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so.

37. We have, however, no doubt in our mind that when an application under Order 9 Rule 13 of the Code is dismissed, the defendant can only avail a remedy available thereagainst viz. to prefer an appeal in terms of Order 43 Rule 1 of the Code. Once such an appeal is dismissed, the appellant cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under Order 9 Rule 13, it may lead to conflict of decisions which is not contemplated in law.

38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in ***Rani Choudhury*** [(1982) 2 SCC 596], ***P. Kiran Kumar*** [(2002) 5 SCC 161] and ***Shyam Sundar Sarma*** **v.** ***Pannalal Jaiswal*** [(2005) 1 SCC 436].

39. We, therefore, are of the opinion that although the judgment of the High Court cannot be sustained on the premise on which the same is based, the respondents herein are entitled to

raise their contentions as regards merit of the plaintiff's case in the said appeal confining their contentions to the materials which are on record of the case.

40. We, however, do not agree with Mr Ranjit Kumar that the appellant herein has no locus standi to maintain this appeal. In terms of Order 22 Rule 10 of the Code he could have been substituted in place of the plaintiff. Even if he was not substituted in terms of the aforementioned provision, an application under Order 1 Rule 10 of the Code on his behalf was maintainable as he became the legal representative of the original plaintiff.

41. For the view we have taken, it is not necessary for us to examine the claim of the original plaintiff for partition of suit properties or claim of Respondent 2 herein as regards creation of a mortgage in relation thereto by original Defendant 1 and/or efficacy thereof. We refrain ourselves from even considering the submission of Mr Chaudhari to the effect that even otherwise Respondent 2 herein could not have raised a counterclaim in the partition suit vis-à-vis the plaintiff and the effect, if any, as regards his non-filing of an appeal relating to his counterclaim. We may notice that Mr Chaudhari has further contended that in terms of Order 17 Rule 2 of the Code in the event, in the suit which was adjourned and if on the date of adjourned date the defendant did not appear, the court has no other option but to proceed ex parte. The High Court, in our opinion, should be allowed to examine all aspects of the matter.

42. For the reasons aforementioned, we are of the opinion that although the judgment of the High Court is not sustainable as the reasons in support thereof cannot be accepted, the High Court for the reasons assigned hereinbefore must examine the respondents' claim on merits of the matter.

43. The appeal is, therefore, allowed, the impugned judgment is set aside and the case remitted to the High Court for consideration of the case of the parties on merit of the matter. As the suit is pending since 1976, we would request the High Court to dispose of the appeal at an early date and preferably within a period of three months from the date of communication of this order. No costs.

* * * * *

DEATH OF PARTIES

N. Khosla v. *Rajlakshmi (Dead)*

AIR 2006 SC 1249

H.K. SEMA, J. - 1. Dewan Niranjan Prasad was ex-Minister and a retired Senior Judge of the High Court of Patiala. He had an ancestral kothi known as `Nishkam' situated at 23, Bhupender Nagar Road, Patiala, Punjab. He had two sons, namely - Sh. K.J. Khosla and Sh. N. Khosla and three daughters namely Smt. Rajlakshmi (respondent No. 1 herein whose appeal stands abated), Smt. Nirmala and Smt. Saraswati. Since the kothi was an ancestral property, Dewan Niranjan Prasad and his two sons were the coparceners.

2. On 14.10.1956, Dewan Niranjan Prasad had gifted three plots of land forming part of the kothi in its rear portion to his three daughters with the consent of his wife - Smt. Amar Devi and his two sons. The said gift was duly recorded in the family year book known as "Dussehra Bahi." The said gift was conditional and the condition was that the beneficiaries would construct houses on the gifted plots and shall reside there. The said gift of plots to his three daughters was affirmed by Dewan Niranjan Prasad through a registered deed on 10.6.1961. However, possession was not delivered. In 1966 Smt. Saraswati died and was survived by her husband B.S. Talwani and sons, respondent No. 3.

3. As none of the three daughters, to whom the plots were gifted, took possession and constructed the houses, Dewan Niranjan Prasad revoked the Gift Deed and resumed the plots with the express consent of his daughters, Smt. Rajlakshmi, Smt. Nirmala and Sh. B.S. Talwani - husband of late Smt. Saraswati and paid Rs. 10,000/- to each of them in lieu of the said plots. Receipt of the amount as consideration for resumption of the said plots was also duly acknowledged by each of the beneficiaries. Thereafter, Dewan Niranjan Prasad partitioned the entire property "Nishkam" (including the plots earlier gifted to his daughters and then resumed by him) by allotting separate shares to his two sons, namely, S/Sh.K.J. Khosla and N. Khosla. The oral partition was recorded in writing in the memo of partition dated 6.12.1974. Dewan Niranjan Prasad died on 15.1.1975 leaving behind his two sons, two daughters and legal heirs of late Smt. Saraswati.

4. After the death of Dewan Niranjan Prasad, a dispute arose between his sons and daughters - namely Smt. Rajlakshmi, Smt. Nirmala and legal heirs of Smt. Saraswati regarding the rear part of the compound of the ancestral kothi called "Nishkam". Parties to the dispute by mutual consent and by an Arbitration Agreement dated 27.10.1978 referred the dispute to the sole Arbitrator, Dewan Ram Kishan Khosla, Sr. Advocate.

5. It appears that on 22.1.1977, the respondents fraudulently managed to get the mutation of the portion of the property in question recorded in the revenue records in their favour showing Dewan Niranjan Prasad, who had expired on 15.1.1975 and Smt. Saraswati, who had expired in 1966, as present and witnessing the said mutation.

6. The Arbitrator examined the contentious issues presented from both sides and after threadbare discussion delivered his award on 10.7.1979. The Arbitrator in his award found inter-alia that the gift in question in favour of daughters was revoked and the plots were

resumed by late Dewan Niranjan Prasad with the consent of the two daughters and Sh. B.S. Tawlani - husband of Smt. Saraswati in lieu of cash payment received by them. The Arbitrator also found that the mutation in favour of the respondents was obtained by fraudulent means and therefore, non-est.

7. On 1.8.1979, S/Sh. K.J. Khosla and N. Khosla, the two sons of Dewan Niranjan Prasad filed an application under Section 14 of the Arbitration Act, 1940 for making the award a Rule of the Court. It appears that on 24.5.1981, notice of the application was issued to the respondents who filed objections contending inter-alia that the award dated 10.7.1979 created, declared, assigned, limited or extinguished right, title and interest of the value of Rs. 100 and upwards to or in immovable property and, therefore, the award was compulsorily registrable under Section 17(1)(b) of the Registration Act, 1908 ('the Act') and since the award was not registered, it could not be made a rule of the Court. The Sub-Judge, by his order dated 25.5.1981 held that the award purports/operates to extinguish the rights of the daughters and create/declare rights, title and interest in the sons in immovable property, the value of which was more than Rupees One hundred only and thus, it compulsorily required registration under Section 17 of the Act. On this reasoning, the Sub-Judge declined to make the award as a rule of the Court. Aggrieved thereby, the two sons of Dewan Niranjan Prasad filed appeal before the Appellate Court, which was dismissed on 8.8.1983 holding the same view. Thereafter, a civil revision, namely revision No. 3064 of 1983 was preferred before the High Court, which was dismissed by the impugned order on 8.1.2001. Hence, the present appeal.

8. The High Court, in our view, erroneously dismissed the Civil Revision affirming the orders passed by the Trial court and Appellate Court. The High Court dismissed the civil revision with the following reasoning:

> (1) the award took away some rights from the sisters by giving a declaration that the donees did not comply with the condition of the gift and in this way, the sisters were divested of some rights and those rights were created for the first time in favour of the brothers by the award;
>
> (2) as the Arbitrator observed that the mutation of the land in favour of the daughters was of no value, it cannot be said in such a situation that the award only declared a pre-existing right in favour of the sons;
>
> (3) by the award itself, an adjudication has been made by the Arbitrator that the gift created by the father in favour of his daughters was not enforceable because it was never accepted by the donees and it was never acted upon as per the conditions of the gift. One of the conditions was that the daughters should construct their houses. Thus, the document of award declares and creates rights in favour of the brothers by taking it from the sisters and when those rights are created in present, then such document/award requires registration and such an award without registration cannot be acted upon as it does not confer any right, title or interest in favour of the brothers;
>
> (4) the rights were created for the first time through the award itself and, therefore, this award required registration;
>
> (5) the present award is a declaration vide which certain rights of the Respondents were extinguished and rights in favour of the Petitioner (and

Respondent No. 5) were created by making them the owners of the disputed plots by rejecting the defence and contentions of the sisters and thus the award is squarely covered by the provisions of Section 17(1)(b) of the Registration Act.

9. During the pendency of this appeal, an application was taken out for substitution of respondent No. 1 - Smt. Rajlakshmi by her legal representatives. This Court, on 11.7.2005 rejected the substitution application on ground of delay. Accordingly, the appeal stood abated as far as deceased respondent No. 1 is concerned. Therefore, the question whether on abatement of the appeal in respect of deceased respondent No. 1, the appeal is maintainable qua the other respondents also poses for consideration.

10. The questions posed for determination in this appeal are:

A. Whether with abatement of appeal in respect of deceased Smt. Rajlakshmi, the whole appeal qua other respondents abated or not?

B. Whether the award of the Arbitrator dated 10.7.1999 purports or operates to create, declare, assign, limit or extinguish in present or in future any right, title or interest of the value of one hundred rupees and upwards to or in immovable property which requires registration under Section 17(1)(b) of the Registration Act, 1908?

A. *Abatement of appeal in respect of deceased Smt. Rajlakshmi & maintainability of the appeal qua other respondents*

11. Mr. C.A. Sundram, learned Senior counsel, appearing on behalf of the appellant strenuously contended that the Gift Deed in respect of the daughters, which had been revoked, was distinct and separate and therefore, the decree is distinctly and severally executable on the abatement of appeal in respect of Smt. Rajlakshmi and, therefore, the appeal qua other respondents does not abate and is maintainable. Per contra, Mr.Manish Vasisth, learned counsel appearing on behalf of the respondents contended that the issue is common and when the appeal against one of the respondents abated, the whole appeal qua other respondents also abated.

12. To answer this question, we may refer to the Gift Deed dated 14.10.1956 executed by Dewan Niranjan Prasad. The aforesaid Gift Deed was entered in the Dussera Bahi of the family. The partition portion of the Gift Deed in the Dussera Bahi reads as under:

On this auspicious occasion, on my behalf and on behalf of both brothers I offer by way of present one piece of land in the rear portion of "Nishkam" to all the three sisters, which has a breadth of three hundred feet. All three sisters will get a front of 100 feet each. The length will be 150-160 feet i.e. up to the contractor's hut, that is up to the middle of the rons (walk) on which it stands. Bibi Saraswati's plot will be towards Narrn house, Nirmal's towards Lola Atka Rao and Raj's in the middle.

13. As already noticed, the Gift Deed was revoked by a memorandum dated 10.5.1971 and the two daughters and husband of the deceased daughter were paid Rs. 10,000/- each in lieu of the plots. It appears from the record that on 2.9.1971 Smt. Rajlakshmi and Sh. B.S. Talwani, husband of Smt. Saraswati had written a letter to Dewan Niranjan Prasad that they have received the full amount of Rs. 10,000/- as their share.

14. The facts, as adumbrated above, would clearly show that each of the daughters had a distinct and separate share by metes and bounds and also that each one of them had received Rs. 10,000/- in lieu of the plots of land and therefore, it cannot be held that abatement of respondent No. 1 would abate the appeal qua the other respondents.

15. In ***Sardar Amarjit Singh Kalra (Dead) by LRs.*** **v.** ***Pramod Gupta (Smt.)(Dead) by LRs.,*** a Constitution Bench of this Court, after considering various decisions held, at page 305 SCC, that whether an appeal partially abates on account of the death of one or the other party on either side has to be considered depending upon the fact as to whether the decree obtained is a joint decree or a severable one. It was further held that in case of a joint and inseverable decree if the appeal abated against one or the other, the same cannot be proceeded with further for or against the remaining parties as well. If otherwise, the decree is a joint and several or separable one, being in substance and reality a combination of many decrees, there can be no impediment for the proceedings being carried with among or against those remaining parties other than the deceased. Finally, this Court held in paragraph 34, at page SCC 307 as under:

34. In the light of the above discussion, we hold:-

(1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights the decree passed by the Court thereon is to be viewed in substance as the combination of several decrees in favour of the one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the Courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-a-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or

inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other.

16. In the case of ***Shahazada Bi* v. *Halimabi (since dead) By her LRs.***, during the pendency of the suit, defendant No. 4 had died. This Court, after considering various decisions of this Court on the provision of Order 22 Rule 4 C.P.C., held that the Rule does not provide that by the omission to implead the legal representatives of a defendant, the suit is abated as a whole. This Court further held that whether the defendant represented the entire interest or only a specific part is a fact that would depend on the circumstances of each case. If the interests of the co-defendants are separate, as in case of co- owners, the suit will abate only as regards the particular interest of the deceased party.

17. In that case the 4th defendant, who died on 8.5.87, was in possession of one of the seven rooms, which were let out to defendant No. 5. The trial court found different rooms to be in possession of different defendants who claimed to be tenants-in-common in possession of each of the seven rooms and therefore, in those circumstances, this Court held that the death of the 4th defendant would not abate the suit qua the other defendants.

18. Learned counsel for the respondents relied on the decision of this Court in ***Badni (Dead) by LRs.* v. *Siri Chand (Dead) by LRs.*** In that case the fact of adoption of one Ratan Singh, plaintiff was the common issue. The High Court dismissed the appeal on the ground that the legal heirs of one Shiv Lal, one of the appellants, were not brought on record. The High Court was also of the view that on abatement of Shiv Lal's appeal, other appeals also stood abated because of the common issue regarding the adoption of the plaintiff's pre-deceased interest (Ratan Singh). There cannot be two conflicting decrees. The adoption issue being common and decisive in all the appeals pending before the High Court, dismissing one appeal alone on the ground of abatement and allowing the other appeals on merits might result in conflicting decrees in case other appeals are accepted on merits. The facts of that case are not applicable to the facts of the case at hand. Here, no common issues among the sisters arise because as already said all the sisters had different and distinct share by metes and bounds. Therefore, the said decision is of no assistance to the respondents.

19. Learned counsel for the respondents also referred to the decision in ***Pandit Sri Chand* v. *Jagdish Parshad Kishan Chand.***. In that case the parties agreed to the decree jointly and severally and Basant Lal, one of the appellants died on 18.10.1962. The counsel also referred the case in ***Ram Sarup* v. *Munshi*** in which case the issue was a pre-emption decree which was indivisible. Both these cases are not applicable to the facts of the case in hand. In the facts and circumstances of the present case and the well settled position of law, as referred to above, we are of the view that the abatement of appeal in respect of Smt. Rajlakshmi would not abate the appeal qua other respondents. We hold that the appeal qua other respondents is maintainable.

B. ***Whether the award of the Arbitrator dated 10.7.1999 purports or operates to create, declare, assign, limit or extinguish in present or in future any right, title or interest of the value of one hundred rupees and upwards or in immovable property which requires registration under Section 17(1)(b) of the Act?***

20. We may first notice the provisions of Section 17(1)(b) of the Act:

> **17.** ***Documents of which registration is compulsory***.- (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:-
>
> (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property; (emphasis supplied)

21. Clause (b) of Section 17(1) enjoined registration of non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property. This section speaks of creating rights or extinguishing rights in present or in future. Any right created or extinguished in the past is conspicuously absent. The creation of any right or extinguishment of any right is expressly excluded by the Act itself.

22. It is contended by Mr. Sundram, learned Senior counsel for the appellant that the award of the Arbitrator does not create any right or extinguish any right in present or in future. He further submitted that the award of the Arbitrator noticed the pre-existing facts of a Gift Deed dated 14.10.1956 registered on 10.6.1961 and the revocation of Gift Deed on 10.5.1971 and payment of consideration amount received in lieu of gift of plot. He, therefore, argued that by no stretch of imagination it can be held that the award created any rights or extinguished any rights in present or in future which would require registration under the Act. Per contra, learned counsel for the respondents contended that the award created rights in favour of the sons and extinguished the rights of the daughters in the immovable property and therefore, the award would require registration under the Act.

23. To answer this question, it would be necessary to examine the award of the Arbitrator. Before we examine the award of the Arbitrator, we may at this stage notice the mutual agreement entered into between the parties referring the dispute to the Arbitrator. The dispute, which was referred to the Arbitrator by the parties, was with regard to Gift Deed and the resumption of the property gifted in favour of his three daughters - Smt. Rajlakshmi, Smt. Nirmala and Smt. Sarsaswati survived by her husband, B. C. Talwani. After the parties filed the written statements and documents in support of their respective claims, the Arbitrator framed the following issue:

> Whether the gift of the three plots in favour of the daughters still stand and was not revoked and the plots were not resumed by their father?

24. The Arbitrator, after examining the issues, came to the following conclusion:

> (1) That the gift was made in 1956 on condition that the daughters would build houses and settle there. No houses were built during this long period. Even the

possession was neither delivered by the donor nor was possession taken by the donees. A document dated 10.05.1971, Ex. K-5 is clear.

(2) That the gift was not acted upon even the Gift Deed remained in possession of the donor, their father throughout.

(3) That Dewan Niranjan Prasad the donor revoked the gift and resumed the three plots at the instance and with the consent of the donees, the daughters, who agreed to the resumption of the plots on the ground that the plots were not of any remuneration value and agreed to convert the plots into cash. They accepted the cash in lieu of the plots as mentioned in Ex. K04 and Ex. K-5 and in written statements.

(4) Smt. Nirmala's plea that Rs. 5000/- were paid back to her on account of the loan, advanced by her husband to Naval her brother, has not been substantiated. She did not mention in her letter dated 17.08.1973 Ex. K-2, that it was a loan. The other item of Rs. 5,000/- has also not been proved that it was due to her otherwise.

(5) The mutation of the land in favour of the daughters has no value. The entries are wrong. Dewan Niranjan Prasad and Smt. Saraswati, who are recorded as present, had died long before the mutation was sanctioned. No notice appears to have been issued to any party.

(6) That the execution of the Memorandum of Partition, which is a subsequent act of the Late Dewan Niranjan Prasad, impliedly shows also that the gift to the three daughters was revoked.

I give my award in favour of Shri Krishan Jiwan and Shri Naval Jiwan and hold that the gift was revoked and plots were resumed by the Late Dewan Niranjan Prasad at the instance and with the consent of the second part in lieu of cash payment received by them.

25. The award of the Arbitrator, as quoted above, would clearly show that by the award the Arbitrator simply recorded the finding on the basis of the pre-existing facts, namely, the Gift Deed, the revocation of the gift and the partition of the property between his sons subsequent to the revocation of Gift Deed. It is a declaration of pre-existing rights. It neither creates any right nor extinguishes any right in present or in future. What Section 17(1)(b) of the Act requires is the creation of rights by decree in present or in future. In the present case the award of the Arbitrator, as noted above, clearly delineated the pre-existing facts, on the basis of which the award was passed.

26. This Court in the case of ***Sardar Singh* v. *Krishna Devi (Smt.)*** held in paragraph 12 page 26 as under:

It is, thus, well settled law that the unregistered award per se is not inadmissible in evidence. It is a valid award and not a mere waste paper. It creates rights and obligations between the parties thereto and is conclusive between the parties. It can be set up as a defence as evidence of resolving the disputes and acceptance of it by the parties. If it is a foundation, creating right, title and interest in present or future or extinguishes the right, title or interest in immovable property of the value of Rs. 100 or above it is compulsorily registrable and non-registration render it inadmissible in evidence. If it contains a mere declaration of a pre-existing right, it is not creating a right, title and interest in present, in which event it is not a compulsorily registrable

instrument. It can be looked into as evidence of the conduct of the parties of accepting the award, acting upon it that they have pre-existing right, title or interest in the immovable property. (emphasis supplied)

27. To buttress his contention, learned counsel for the respondents has referred to the decision of this Court in ***Ratan Lal Sharma* v. *Purshottam Harit***. In that case the award expressly created or purported to create rights in immovable property in favour of the appellant, which required registration. This is not the position in the facts of the present case.

28. Looking at the award of the Arbitrator and the law laid down by this Court the arguments of learned counsel for the respondents that the award created any right or extinguished any right in present or in future which would require registration under the Act is noted only to rejected. In the result, all the decisions of the courts below are patently erroneous and are set aside. This appeal is allowed. The award of the Arbitrator is made the Rule of the Court.

29. It is clear from the record that Dewan Niranjan Prasad died on 15.1.1975 and Smt. Saraswati also in 1966. The respondents fraudulently obtained mutation on 22.1.1977 showing Dewan Niranjan Prasad and Smt. Saraswati as present. Fraud clocks everything. Fraud avoids all judicial acts. A decree obtained by playing fraud is a nullity and it can be challenged in any court, even in collateral proceedings. [See ***S.P. Chengalvaraya Naidu (Dead) By LRs.* v. *Jagannath (Dead) by LRs***].

30. It is open to the appellant to file a suit against the legal heirs of Smt. Rajlakshmi, whose appeal has been abated. If the suit is filed within two months from today, it shall not be dismissed as being barred by limitation. With the aforesaid directions, the appeal is allowed.

* * * * *

SUMMARY PROCEDURE

Santosh Kumar **v.** *Bhai Mool Singh*

AIR 1958 SC 321

VIVIAN BOSE, J. – [The defendants, Santosh Kumar and the Northern General Agencies, were granted special leave to appeal. The plaintiff filed the suit out of which the appeal arises on the basis of a cheque for Rs. 60,000 drawn by the defendants in favour of the plaintiff and which, on presentation to the Bank, was dishonoured.

The suit was filed in the Court of the Commercial Subordinate Judge, Delhi, under O. 37 of the Code of Civil Procedure. The defendant applied for leave to defend the suit under R. 3 of that Order. The learned trial Judge held that "the defence raised by the defendants raises a triable issue," but he went on to hold that the defendants "have not placed anything on the file to show that the defence was a *bona fide* one." Accordingly, he permitted the defendants "to appear and defend the suit on the condition of their giving security to the extent of the suit amount and the costs of the suit." The defendants applied for a review but failed. They then applied under Art. 227 of the Constitution to the Delhi Circuit Bench of the Punjab High Court and failed again. As a result, they applied here under Art. 136 and were granted special leave. At first blush, O. 37, R. 2(2) appears drastically to curtail a litigant's normal rights in a Court of justice, namely to appear and defend himself as of right, if and when sued, because it says that when a suit is instituted on a bill of exchange, hundi or a promissory note under the provisions of sub-r. (1) "[T]he defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so as to appear and defend." But the rigour of that is softened by R. 3(1) which makes it obligatory on the Court to grant leave when the conditions set out there are fulfilled. Clause (1) runs: "The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application." But no sooner is the wide discretion given to the Court in R. 2(2) narrowed down by R. 3(1) than it is again enlarged in another direction by R. 3(2) which says that: "Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit"].

The learned counsel for the plaintiff argues that the discretion so conferred by R. 3(2) is unfettered and that as the discretion has been exercised by the learned trial Judge, no appeal can lie against it unless there is a "grave miscarriage of justice or flagrant violation of law" and he quotes ***D.N. Banerji*** **v**. ***P.R. Mukherjee*** [AIR 1953 SC 58, 59] and ***Waryam Singh*** **v.** ***Amarnath*** [AIR 1954 SC 215].

1. Now what we are examining here are laws of procedure. The spirit in which questions about procedure are to be approached and the manner in which rules relating to them are to be interpreted are laid down in ***Sangram Singh*** **v.** ***Election Tribunal, Kotah*** [AIR 1955 SC 425, 429]:

Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.

Applied to the present case, these observations mean that though the Court is given a discretion it must be exercised along judicial lines, and that in turn means, in consonance with the principles of natural justice that form the foundations of our laws. Those principles, so far as they touch the present matter, are well known and have been laid down and followed in numerous cases.

2. The decision most frequently referred to is a decision of the House of Lords in England where a similar rule prevails. It is ***Jacobs* v. *Booth's Distillery Co.*** [(1901) 85 LT 262]. Judgment was delivered in 1901. Their Lordships said that 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.

3. The learned counsel for the plaintiff-respondent relied on ***Gopala Rao* v. *Subba Rao*** [AIR 1936 Mad 246]; ***Manohar Lal* v. *Nanhe Mal*** [AIR 1938 Lah. 548] and ***Shib Karan Das* v. *Mohammed Sadiq*** [AIR 1936 Lah. 584]. All that we need to say about them is that if the Court is of opinion that the defence is not bona fide, then it can impose conditions and is not tied down to refusing leave to defend. We agree with Varadachariar, J. in the Madras case that the Court has this third course open to it in a suitable case. But it cannot reach the conclusion that the defence is not bona fide arbitrarily. It is as much bound by judicial rules and judicial procedure in reaching a conclusion of this kind as in any other matter. It is unnecessary to examine the facts of those cases because they are not in appeal before us. We are only concerned with the principle.

4. 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. The object is explained in ***Kesavan* v. *South India Bank Ltd.*** [AIR 1950 Mad. 226], and is examined in greater detail in ***Sundaram Chettiar* v. *Valli Ammal***. 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.

5. Now, what is the position here? The defendants admitted execution of the cheque but pleaded that it was only given as collateral security for the price of goods which the plaintiff supplied to the defendants. They said that those goods were paid for by cash payments made from time to time and by other cheques and that therefore the cheque in suit had served its end and should now be returned. They set out the exact dates on which, according to them, the payments had been made and gave the numbers of the cheques.

6. This at once raised an issue of fact, the truth and good faith of which could only be tested by going into the evidence and, as we have pointed out, the learned trial Judge held that this defence did raise a triable issue. But he held that it was not enough for the defendants to back up their assertions with an affidavit; they should also have produced writings and documents which they said were in their possession and which they asserted would prove that the cheques and payments referred to in their defence were given in payment of the cheque in suit; and he said:

> "In the absence of those documents, the defence of the defendants seems to be vague consisting of indefinite assertions……."

This is a surprising conclusion. The facts given in the affidavit are clear and precise, the defence could hardly have been clearer. We find it difficult to see how a defence that, on the face of it, is clear becomes vague simply because the evidence by which it is to be proved is not brought on file at the time the defence is put in.

7. The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed to enter an appearance and defend the suit, and that the nature of the defence has to be determined at the time when the affidavit is put it. At that stage all that the Court has to determine is whether "if the facts alleged by the defendant are duly proved" they will afford a good, or even a plausible answer to the plaintiff's claim. Once the Court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted the normal procedure of a suit, so far as evidence and proof go, obtains.

8. The learned High Court Judge is also in error in thinking that even when the defence is a good and valid one, conditions can be imposed. As we have explained, the power to impose conditions is only there to ensure that there will be a speedy trial. If there is reason to believe that the defendant is trying to prolong the litigation and evade a speedy trial, then conditions can be imposed. But that conclusion cannot be reached simply because the defendant does not adduce his evidence even before he is told that he may defend the action.

9. We do not wish to throw doubt on those decisions which decide that ordinarily an appeal will not be entertained against an exercise of discretion that has been exercised along sound judicial lines. But if the discretion is exercised arbitrarily, or is based on a misunderstanding of the principles that govern its exercise, then interference is called for if there has been a resultant failure of justice. As we have said, the only ground given for

concluding that the defence is not bona fide is that the defendant did not prove his assertions before he was allowed to put in his defence; and there is an obvious failure of justice if judgment is entered against a man who, if he is allowed to prove his case, cannot but succeed. Accordingly, interference is called for here.

10. The appeal is allowed. We set aside the orders of the High Court and the learned trial Judge and remand the case to the first Court for trial of the issues raised by the defendants. The costs of the appellants in this Court will be paid by the respondent who has failed here.

* * * * *

M/s. Mechalec Engrs. & Manufacturers **v.** *M/s. Basic Equipment Corn.*

AIR 1977 SC 577

M.H. BEG, J. – 1.The plaintiff-respondent alleged to be a registered partnership firm filed a suit on 25th April, 1974, through Smt. Pushpa Mittal, shown as one of its partners, for the recovery of Rs. 21,265.28 as principal and Rs. 7655/- as interest at 12% per annum, according to law and Mercantile usage, on the strength of a cheque drawn by the defendant on 12th May, 1971, on the State Bank of India, which, on presentation, was dishonoured. The plaintiff alleged that the cheque was given as price of goods supplied. The defendant-appellant firm admitted the issue of the cheque by its Managing partner, but, it denied any privity of contract with the plaintiff firm. The defendant-appellant had its own version as to the reasons and purposes for which the cheque was drawn.

2. The suit was instituted under the provisions of Order 37, Civil Procedure Code so that the defendant-appellant had to apply for leave under Order 37, Rule 2 of the Code to defend. This leave was granted unconditionally by the trial Court after a perusal of the cases of the two sides.

3. The learned Judge of the High Court of Delhi had, on a revision application under Section 115, Civil Procedure Code, interfered with the order of the Additional District Judge of Delhi granting unconditional leave, after setting out not less than seven questions on which the parties were at issue. The learned Judge had, after discussing the cases of the two sides and holding that triable issues arose for adjudication, nevertheless concluded that the defences were not *bona fide*. He, therefore, ordered:

> For these reasons I would allow the revision petition and set aside the order of the trial court. Instead I would grant leave to the defendant on their paying into Court the amount of Rs. 21,265.28 together with interest at the rate of 6 per cent per annum from the date of suit till payment and costs of the suit (only court-fee amount at this stage and not the lawyer's fee). The amount will be deposited within two months. There will be no order as to costs of this revision.

4. The only question which arises before us in this appeal by special leave is: Could the High Court interfere in exercise of its powers under Section 115, Civil Procedure Code, with the discretion of the Additional District Judge, in granting unconditional leave to defend to the defendant-appellant upon grounds which even a perusal of the order of the High Court shows to be reasonable?

5. ***Santosh Kumar* v. *Bhai Mool Singh*** [AIR 1958 SC 321, 323] was a case where a cheque, the execution of which was admitted by the defendant, had been dishonoured. The defendant had set up his defence for refusal to pay. This Court noticed the case of ***Jacobs* v. *Booth's Distillery Co.*** [(1901) 85 LT 262], where it was held that whenever a defence raises a really triable issue, leave must be given. Other cases too were noticed there to show that this leave must be given unconditionally where the defence could not be shown to be dishonest in limine. This Court observed there:

> The learned counsel for the plaintiff-respondent relied on ***Gopala Rao* v. *Subba Rao*** [AIR 1936 Mad. 246], ***Manohar Lal* v. *Nanhe Lal*** [AIR 1938 Lah 548] and ***Shib Karan Das* v. *Mohammad Sadiq*** [AIR 1936 Lah 584]. All that we need say

about them is that if the Court is of opinion that the defence is not *bona fide*, then it can impose conditions and is not tied down to refusing leave to defend. We agree with Varadachariar J. in the Madras case that the Court has this third course open to it in a suitable case. But, it cannot reach the conclusion that the defence is not *bona fide* arbitrarily. It is as much bound by judicial rules and judicial procedure in reaching a conclusion of this kind as in any other matter.

6. We need not dilate on the well established principles repeatedly laid down by this Court which govern jurisdiction of the High Courts under Section 115, C.P.C. We think that these principles were ignored by the learned Judge of the High Court in interfering with the discretionary order after a very detailed discussion of the facts of the case by the learned Judge of the High Court who had differed in a pure question of fact – whether the defences could be honest and *bona fide*. Any decision on such a question, even before evidence has been led by the two sides, is generally hazardous. We do not think that it is fair to pronounce a categorical opinion on such a matter before the evidence of the parties is taken so that its effects could be examined. In the case before us, the defendant had denied, *inter alia*, liability to pay anything to the plaintiff for an alleged supply of goods. It is only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion by the trial Court to grant leave unconditionally may be questioned. In the judgment of the High Court we are unable to find a ground of interference covered by Section 115, C.P.C.

7. In ***Smt. Kiranmoyee Dassi* v. *Dr. J. Chatterjee*** [(1945) 49 CWN 246, 253], Das, J. after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37, C.P.C. in the form of the following propositions (at p. 253):

(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, shows such a state of facts as leads to the inference that at the trial of 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 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.

8. The case before us certainly does not fall within the class (e) set out above. It is only in that class of cases that an imposition of the condition to deposit an amount in Court before proceeding further is justifiable. Consequently, we set aside the judgment and order of the High Court and restore that of the Additional District Judge.

* * * * *

Oil & Natural Gas Corporation Ltd. **v.** *State Bank Of India, Overseas Branch, Bombay*

AIR 2000 SC 2548

S. RAJENDRA BABU, J. - 1.This appeal arises out of a suit filed to enforce a Bank Guarantee against the respondent under Order XXXVII C.P.C. The respondent filed an application seeking leave to defend the suit unconditionally. That application having been allowed this appeal is filed by special leave.

2. The appellant entered into a contract with a consortium of M/s. Saipem SPA/Snamprogetti of Italy for construction of a system of undersea pipelines known as the Gas Lift Pipelines. The work comprised of pre-engineering survey, design and engineering, procurement, wrap and coat, fabrication, transportation, laying, installation, testing and pre-commissioning of forty sub-marine pipeline segments of approximately total length of 181.8 kms. The contract price was to the tune of US $63,875,000 plus Indian Rs. 8, 06,00,000/-.

3. The scheduled completion date of the entire works subject to any requirements in the contract specifications as to the time of completion of any part of the work before completion of the whole, the whole of the work was to be completed by April 30, 1991. The contract also provided for levy of liquidated damages if the contractor failed to complete the entire works or any part thereof comprising the total turn key project before the respective scheduled completion date fixed for the entire works or part thereof at a rate equal to 3% of the total contract price for each month's delay subject to a maximum of 10% of the contract price. The contractor was obliged to furnish a bank guarantee to cover liquidated damages for an amount equivalent to 10% of the contract price not later than 4 months prior to the scheduled completion date. However, if the project's completion date slips beyond the scheduled completion date, the contractor shall get validity of said guarantee suitably extended. In case, the contractor fails to provide the guarantee for liquidated damages within the time stipulated therein, the appellants shall be entitled to encash the performance guarantee. All disputes arising out or in connection with the contract shall be settled in accordance with the laws of India and the exclusive jurisdiction of the courts in India. In compliance with this requirement, the contractor had furnished a bank guarantee from the State Bank of India, Overseas Branch, Bombay, to cover liquidated damages claim. That guarantee was for a sum of US $6,387,500 plus Indian Rs. 8,06,00,000/-. Through the said guarantee, the respondent Bank had unconditionally undertaken as under:

> Now, therefore, in consideration of the premises aforesaid and at the request of the contractor, we, State Bank of India, Overseas Branch, Bombay, Bank organized under the laws of India and having its registered/head office at Calcutta (“the Bank”) so as to bind ourselves and our successors and assignees, do hereby irrevocably and unconditionally undertake to pay to you, the Company, on demand in writing without demur or protest and irrespective of any contest or dispute between your goodselves and the contractor and without reference to the contractor, any sum of money at any time or from time to time demanded by the Company upto an aggregate limit of USD 6,387,500/- (US Dollars Six Million Three Hundred Eighty Seven Thousand and Five

Hundred only) plus NR 8,060,000/- (Indian Rupees Eight Million Sixty Thousand only) on account of any liquidated damages due from the contractor to the company. We further agree that as between us and the company for the purpose of this guarantee/undertaking, any notice of demand by the company towards liquidated damages and any amount claimed on account thereof, shall be final and binding as to the factum of the L.D. and the amount payable by us to the company hereunder relative thereto.

We further agree that this guarantee shall be governed by and construed in accordance with Indian laws. We further agreed that if the project completion date slips beyond schedule completion date because of whatsoever reason we shall extend validity of this guarantee suitably so as to keep it valid for 180 days beyond actual completion date.

We further confirm that this guarantee has been issued with the approval of Exchange Control Authorities in India and that the issuance of the guarantee is in order and in accordance with the laws and regulations in force in India.

4. As a result of protracted correspondence and extension or increase or decrease in value of Bank Guarantee the same was kept alive from time to time. On March 17, 1993 after taking into account the total delay of 306 days in completing the work, the appellant assessed the liquidated damages as US $ 4,320,432 plus Indian Rs. 55,15,959.00. Accordingly by letter dated March 17, 1993 the appellant advised the contractor to extend the bank guarantee for a further period of six months. The contractor was given certain options. The respondent Bank furnished an enhanced value of US $ 4,320,432 plus Indian Rs. 5,515,959/- with validity upto October 4, 1993 under a covering letter of the same date. The appellant by its letter dated September 13, 1993 advised the contractor to extend the validity of the bank guarantee and on September 23, 1993 the contractor got issued a notice through a lawyer for referring the dispute to arbitration and also appointed its arbitrator. Again the appellant on September 27, 1993 informed the respondent Bank that the contractor was separately advised vide its letter dated September 13, 1993 to extend the validity of the Bank Guarantee and in case the validity of the same is not extended on or before October 1, 1993, the said letter be treated as its notice invoking the said Bank Guarantee. The contractor as well as the Bank not having honoured the terms of the Bank Guarantee, the appellant once again asked the respondent Bank to credit the said guarantee along with interest from October 4, 1993. On December 3, 1993 the respondent Bank stated that (a) they have issued the guarantee in question in favour of ONGC against the counter guarantee of the Italian Bank Credito Italiano, Milan and the contractor obtained an order of injunction from an Italian Court restraining Credito Italiano from making any payment to the respondent Bank under the counter guarantee; (b) they are also considering the question of validity or otherwise of the appellant's demand for the guaranteed sum under the liquidated guarantee vide its letter dated September 27, 1993; (c) in terms of exchange control regulations, the rupee payment under the guarantee shall be made only on receipt of re-imbursement from the foreign bank in an approved manner; (d) since the matter is subjudice, the appellant should wait until the issue is resolved. In the meanwhile, apart from engaging in correspondence both the appellant and respondent appeared through counsel before the Italian Court. It was contended that the bank guarantee is autonomous,

unconditional and they are bound to honour the same irrespective of any counter guarantee they have from the Credito Italiano and that any proceeding with regard to enforcement of any such counter guarantee should not obstruct payment under the guarantee given by the respondent bank. The respondent Bank fearing that if the Italian Court order continuation of the restraint order, it would be difficult for them to get reimbursement from the Credito Italiano. In the alternative, they invited the court to restrain them so that they can avoid payment to the appellant under such guarantee and also an order directing the appellant not to request for payment from the respondent Bank under the said Bank Guarantee. The Italian Court on March 2, 1994 made an order which is as under:

> Credito Italiano, Milan branch, in the person of its legal representative and the State Bank of India overseas Branch, Bombay, to abstain from payment of any sum in execution of the agreement of guarantee/counter guarantee arising between the parties originating from relationship between Snam Progetti SPA and Saipem SPA on the one side and Oil & Natural Gas Commission on the other side arising from the Contract of the 6th March, 1990.

5. In the circumstances, aggrieved by the refusal to honour the bank guarantee, the appellant filed a summary suit under Order XXXVII of the Code of Civil Procedure before the High Court of Judicature at Mumbai praying for a decree in a sum of US $ 43,204,32 plus Indian Rs. 55,159,59 and interest on the said amount at the rate of 18% per annum and *pendente lite* interest till payment of realisation.

6. The High Court by order dated April 27, 1998 granted unconditional leave to defend the suit on the following terms (i) while invoking the Bank Guarantee, vide letter dated September 27,1993 the amount of liquidated damage was not stated; (ii) according to Bank Guarantee, a clear notice of demand towards liquidated damage was to be given; (iii) the notice dated September 27, 1993 was not a legal notice to communicate the liquidated damages, and (iv) arbitration proceedings is pending and the Italian Court is also seized of the matter. Aggrieved by that order, the appellant has filed this appeal by special leave.

7. Shri Ashok H. Desai, the learned senior advocate appearing for the appellant, submitted that none of the grounds stated by the High Court could provide enough basis for granting an unconditional leave to defend. After a survey of the decisions of this Court, law as applied in England in ***Elian and Rabbath* v. *Matsas and Matsas*** [(1966) 2 Lloyd's Rep. 495, CA] and a few American decisions, this Court in ***Svenska Handelsbanken* v. *Indian Charge Chrome,*** declared the law that "in case of confirmed Bank Guarantee/irrevocable Letters of Credit it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be as established fraud. There should be prima facie case of fraud and special equities in the four of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee. Only in the event of fraud or irretrievable injustice the court would be entitled to interfere in a transaction involving a bank guarantee and under no other circumstances." In that case, the contention put forth before the court was regarding liquidated damages. The respondent had to prove that liquidated damages quantified the same before invoking the guarantee. It was also contended that the invocation of the guarantee relating to advance and liquidated damages was after the expiry of the period. In the absence

of an averment relating to fraud or irretrievable injustice, the court held that the appellant will be able to claim relief before arbitration by way of damages or amounts wrongly recovered and irretrievable injustice can be said to exist. The learned single Judge also held that the first respondent by separate letter dated September 14, 1994 and May 10, 1994 addressed to the Bank while requesting to extend the bank guarantee specifically stated that if it was not so done, the communication should be treated as notice for encashment of the bank guarantee and these communications addressed to the respective banks prior to the guarantee would serve the purpose of notice to the banks and so it cannot be held that the invocation was after the date of expiry of the said guarantees.

8. The same is the principle stated by this Court in ***Hindustan Steelworks Construction Ltd.*** **v.** ***Tarapore and Co.*** It is held therein that encashment of an unconditional bank guarantee does not depend upon the adjudication of disputes. No distinction can also be made between bank guarantee for due performance of a work contract and a guarantee given towards security deposit for a contract or any other kind of guarantee. Where the beneficiary shall be the sole judge on the question of breach of primary contract the bank shall pay the amount covered by the guarantee on demand without a demur. In the absence of a plea of fraud, guarantee had to be given effect to.

9. Though these two decisions pertain to grant of injunction for enforcement of bank guarantee, the principle stated therein could be extended to understand the nature of defence raised by the respondent Bank in the present case. Whether the respondent Bank could at all raise such a defence which is totally untenable. In the light of what is stated above, in the absence of a plea relating to fraud, much less of a finding thereto, we find that the court could not have stated that the defence raised by the respondent Bank on the grounds set forth earlier is sufficient to hold that unconditional leave should be granted to defend the suit. In the arbitration proceedings that were pending it was certainly open to the parties concerned to adduce proper evidence and establish as to what are the liquidated damages that are payable and if any excess amount had been paid, the same would be recovered.

10. So far as the order made by the Italian Court for not enforcing the bank guarantee is concerned, it must be stated that the said order arose out of the counter guarantee with which the appellant had nothing to do. In this context, it is brought to our notice that the Foreign Exchange Manual, 1999 provided as under:

> Reserve Bank has likewise granted general permission to authorised dealers vide the above Notification to give guarantees in favour of persons resident in Indian in respect of any debt or other obligation or liability of a person resident outside India subject to such instructions as may be issued by Reserve Bank from time to time. Authorised dealers may accordingly give, on behalf of their overseas Head Offices/branches/correspondents or a bank of international repute guarantees/ performance bonds in favour of residents of India in connection with genuine transactions involving debt liability or obligation of non-residents provides the bond/guarantee is covered by a counter guarantee of the overseas Head Office/branch/correspondent or a bank of international repute. Authorised dealers may make rupee payments to the resident beneficiaries immediately when the

guarantee is invoked and simultaneously arrange to obtain the reimbursement from the overseas bank concerned which had issued the counter guarantee. Authorised dealers are well advised that they should ensure that counter guarantees are properly evaluated and their own guarantees against such guarantees are not issued in routine manner. Before issuing a guarantee against the counter guarantee from an overseas Head Office/branch/ correspondent or a bank of international repute, authorised dealers should satisfy themselves that the obligations under the counter guarantee when invoked, would be honoured by the overseas bank promptly. If the authorised dealer desires to issue guarantee with the condition that payment will be made provided reimbursement has been received from the overseas bank which has issued the counter guarantee, this fact should be made clearly known to the beneficiary in the guarantee documents itself. Cases whose payments are not received by the authorised dealers when the guarantees of overseas banks are invoked; should be reported to Reserve Bank indicating the steps taken by the bank to recover the amount due under the guarantee.

11. Till the new Exchange Control Manual was introduced the position was as follows:

Reserve Bank has likewise granted general permission to authorised dealers vide the above Notification to give guarantees in favour of persons resident in Indian in respect of any debt or other obligation or liability of a person resident outside India subject to such instructions as may be issued from time to time. Authorised dealers may accordingly give, on behalf of their overseas Head Offices/branches/ correspondents, performance bonds or guarantees in favour of residents of India, in support of tenders to be submitted for due performance of contracts or for refund, in the event of contracts not being fulfilled, of advance payments received, provided the bond or guarantee is covered by counter guarantee of the Head Office/ branch/correspondent. Authorised dealers may make rupee payments to residents in implementation of invoked bonds/guarantees issued in favour of residents of India without, prior reference to Reserve Bank, provided reimbursement has been received from the Head Office/branch/correspondent abroad in an approved manner.

12. When, in fact, there is no defence for suit filed merely to rely upon an injunction granted or obtained in their favour does not carry the case of the respondent Bank any further. The only basis upon which the respondent Bank sought for and obtained the injunction is that in event the counter guarantee cannot be honoured by reason of the injunction granted by the Italian court the respondent Bank should be extended the similar benefit. But a perusal of the Foreign Exchange Manual makes it clear that none of the claims would be an impediment to make payment under the Bank Guarantee in question. Therefore, in our view, the High Court plainly erred in having granted leave to defend unconditionally. We vacate that order and dismiss the application filed by respondent Bank for leave to defend by allowing this appeal. Considering the nature of the case, we order no costs.

* * * * *

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS

Manohar Lal Chopra v. *Rai Bahadur Rao Raja Seth Hiralal*

AIR 1962 SC 527

RAGHUBAR DAYAL, J. – 1.The appellant and the respondent entered into a partnership at Indore for working coal mines at Kajoragram (District Burdwan) and manufacture of cement etc., in the name and style of 'Diamond Industries.' The head office of the partnership was at Indore. The partnership was dissolved by a deed of dissolution dated August 22, 1945. Under the terms of this deed, the appellant made himself liable to render full, correct and true account of all the moneys advanced by the respondent and also to render accounts of the said partnership and its business, and was held entitled to $1/4^{th}$ of Rs. 4,00,000 solely contributed by the respondent towards the capital of the partnership. He was, however, not entitled to get this amount unless and until he had rendered the accounts and they had been checked and audited.

2. The second proviso at the end of the covenants in the deed of dissolution reads:

> Provided however and it is agreed by and between the parties that as the parties entered into the partnership agreement at Indore (Holkar State) all disputes and differences whether regarding money or as to the relationship or as to their rights and liabilities of the parties hereto in respect of the partnership hereby dissolved or in respect of questions arising by and under this document shall be decided amicably or in court at Indore and at nowhere else.

3. On September 29, 1945, a registered letter on behalf of the respondent was sent to the appellant. This required the appellant to explain to and satisfy the respondent at Indore as to the accounts of the said colliery within three months of the receipt of the notice. It was said in the notice that the accounts submitted by the appellant had not been properly kept and that many entries appeared to be wilfully falsified, evidently with mala fide intentions and that there appeared in the account books various false and fictitious entries causing wrongful loss to the respondent and wrongful gain to the appellant. The appellant sent a reply to this notice on December 5, 1945, and denied the various allegations, and requested the respondent to meet him at Asansol or Kajoragram on any day suitable to him, within ten days from the receipt of that letter.

4. On August 18, 1948, the appellant instituted Suit M.S. No. 39 of 1948 in the Court of the Subordinate Judge at Asansol against the respondent for the recovery of Rs. 1,00,000 on account of his share in the capital and assets of the partnership firm 'Diamond Industries' and Rs. 18,000 as interest for detention of the money or as damages or compensation for wrongful withholding of the payment. In the plaint he mentioned about the respondent's notice and his reply and to a second letter on behalf of the respondent and his own reply thereto. A copy of the deed of dissolution, according to the statement in paragraph 13 of the plaint, was filed along with it.

5. On October 27, 1948, the respondent filed a petition under S. 34 of the Arbitration Act in the Asansol Court praying for the stay of the suit in view of the arbitration agreement in the original deed of partnership. This application was rejected on August 20, 1949.

6. Meanwhile, on January 3, 1949, the respondent filed Civil Original Suit NO. 71 of 1949 in the Court of the District Judge, Indore, against the appellant and prayed for a decree of Rs. 1,90,519-0-6 against the appellant and further interest on the footing of settled accounts and in the alternative for a direction to the appellant to render true and full accounts of the partnership.

7. On November 28, 1949, the respondent filed his written statement in the Asansol Court. Paragraphs 19 and 21 of the written statement are:

> "19. With reference to paragraph 21 of the plaint, the defendant denies that the plaintiff has any cause of action against the defendant or that the alleged cause of action, the existence of which is denied, arose at Kajora Colliery. The defendant craves reference to the said deed of dissolution whereby the plaintiff and the defendant agreed to have disputes, if any, tried in the Court at Indore. In the circumstances, the defendant submits that this Court has no jurisdiction to try and entertain this suit."
>
> "21. The suit is vexatious, speculative, oppressive, and is instituted mala fide and should be dismissed with costs."

Issues were struck on February 4, 1950. The first two issues are:

> "1. Has this Court jurisdiction to entertain and try this suit?
>
> 2. Has the plaintiff rendered and satisfactorily explained the accounts of the partnership in terms of the deed of dissolution of partnership?

8. In December, 1951, the respondent applied in the Court at Asansol for the stay of that suit in the exercise of its inherent powers. The application was rejected on August 9, 1952. The learned Sub-Judge held:

> No act done or proceeding taken as of right in due course of law is 'an abuse of the process of the Court' simply because such proceeding is likely to embarrass the other party.

He, therefore, held that there could be no scope for acting under S. 151, C.P.C., as S. 10 of that Code had no application to the suit, it having been instituted earlier than the suit at Indore. The High Court of Calcutta confirmed this order on May 7, 1953 and said:

> We do not think that, in the circumstances of these cases and on the materials on record, those orders ought to be revised. We would not make any other observation lest it might prejudice any of the parties.

The High Court further gave the following direction:

> As the preliminary issues, Issue No. 1 in the two Asansol suits have been pending for over two years, it is only desirable that the said issues should be heard out at once. We would, accordingly, direct that the hearing of the said issues should be taken up

by the learned Subordinate Judge as expeditiously as possible and the learned Subordinate Judge will take immediate steps in that direction.

9. Now, we may refer to what took place in the Indore suit till then. On April 28, 1950, the appellant applied to the Indore Court for staying that suit under Ss. 10 and 151 C.P.C. The application was opposed by the respondent on three grounds. The first ground was that according to the term in the deed of dissolution, that Court alone could decide the disputes. The second was that under the provisions of the Civil Procedure Code in force in Madhya Bharat, the Court at Asansol was not an internal Court and that the suit filed in Asansol Court could not have the effect of staying the proceedings of that suit. The third was that the two suits were of different nature, their subject matter and relief claimed being different. The application for stay was rejected on July 5, 1951. The Court mainly relied on the provisions of the second proviso in the deed of dissolution. The High Court in Madhya Bharat confirmed that order on August 20, 1953.

10. The position then, after August 20, 1953, was that the proceedings in both the suits were to continue, and that the Asansol Court had been directed to hear the issue of jurisdiction at an early date.

11. It was in these circumstances that the respondent applied under S. 151, C.P.C., on September 14, 1953, to the Indore Court, for restraining the appellant from continuing the proceedings in the suit filed by him in the Court at Asansol. The respondent alleged that the appellant filed the suit at Asansol in order to put him to trouble, heavy expenses and wastage of time in going to Asansol and that he was taking steps for the continuance of the suit filed in the Court of the Subordinate Judge of Asansol. The appellant contested this application and stated that he was within his rights to institute the suit at Asansol, that the Court was competent to try it and that the point had been decided by over-ruling the objections raised by the respondent and that the respondent's objection for the stay of proceedings in the Court at Asansol had been rejected in instituting the suit was to cause trouble and heavy expenses to the respondent.

12. It may be mentioned that the respondent did not state in his application that his application for the stay of the suit at Asansol had been finally dismissed by the High Court of Calcutta and that Court had directed the trial Court to decide the issue of jurisdiction at an early date. The appellant, too, in his objections, did not specifically state that the order rejecting the respondent's stay application had been confirmed by the High Court at Calcutta and that that Court had directed for an early hearing of the issue of jurisdiction.

13. The learned Additional District Judge, Indore issued interim injunction under Order XXXIX C.P.C. to the appellant restraining him from proceeding with his Asansol suit pending decision of the Indore suit, as the appellant was proceeding with the suit in Asansol in spite of the rejection of his application for the stay of the suit at Indore, and, as the appellant wanted to violate the provision in the deed of dissolution about the Indore Court being the proper forum for deciding the disputes between the parties. Against this order, the appellant went in appeal to the High Court of Judicature at Madhya Bharat, contending that the Additional District Judge erred in holding that he was competent to issue such an interim injunction to the appellant under Order XXXIX of the Code of Civil Procedure and that it was

a fit case for the issue of such an injunction and that considering the provisions of Order XXXIX, the order was without jurisdiction.

14. The High Court dismissed the appeal by its order dated May 10, 1955. The learned Judges agreed with the contention that Order XXXIX, rule 1, did not apply to the facts of the case. They, however, held that the order of injunction could be issued in the exercise of the inherent powers of the Court under S. 151, C.P.C. It is against this order that the appellant has preferred this appeal, by special leave.

15. On behalf of the appellant, two main questions have been raised for consideration. The first is that the Court could not exercise its inherent powers when there were specific provisions in the Code of Civil Procedure for the issue of interim injunctions, they being S. 94 and Order XXXIX. The other question is whether the Court, in the exercise of its inherent jurisdiction, exercised its discretion properly, keeping in mind the facts of the case. The third point which came up for discussion at the hearing related to the legal effect of the second proviso in the deed of dissolution on the maintainability of the suit in the Court at Asansol.

16. On the first question it is argued for the appellant that the provisions of cl. (c) of S. 94, C.P.C., make it clear that interim injunctions can be issued only if a provision for their issue is made under the rules, as they provide that a Court may, if it is so prescribed, grant temporary injunctions in order to prevent the ends of justice from being defeated, that the word 'prescribed' according to S. 2, means 'prescribed by rules' and that rules 1 and 2 of Order XXXIX lay down certain circumstances in which a temporary injunction may be issued.

17. There is difference of opinion between the High Courts on this point. One view is that a Court cannot issue an order of temporary injunction if the circumstances do not fall within the provisions of Order XXXIX of the Code: ***Varadacharlu* v. *Narsimha Charlu*** [AIR 1926 Mad. 258], ***Govindarajulu* v. *Imperial Bank of India*** [AIR 1932 Mad. 180], ***Karuppayya* v. *Ponnuswami*** [AIR 1933 Mad. 500]; ***Murugesa Mudali* v. *Angamuthu Mudali*** [AIR 1938 Mad. 190] and ***Subramanian* v. *Seetarama*** [AIR 1949 Mad. 104]. The other view is that a Court can issue an interim injunction under circumstances which are not covered by Order XXXIX of the Code, if the Court is of opinion that the interests of justice require the issue of such interim injunction. ***Dhaneshwar Nath* v. *Ghanshyam Dhar*** [AIR 1940 All. 185]; ***Firm Bichchha Ram Baburam* v. *Firm Baldeo Sahai Surajmal*** [AIR 1940 All. 241] ***Bhagat Singh* v. *Jagbir Sawhney*** [AIR 1941 Cal. 670] and ***Chinese Tannery Owners' Association* v. *Makhan Lal*** [AIR 1952 Cal. 560]. We are of opinion that the latter view is correct and that the Courts 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 S. 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 S. 94 were

not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction 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 S. 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power.

18. There is nothing in order XXXIX, rules 1 and 2, which provide specifically that a temporary injunction is not to be issued in cases which are not mentioned in those rules. The rules only provide that in circumstances mentioned in them the Court may grant a temporary injunction.

19. Further, the provisions of S. 151 of the Code make it clear that the inherent powers are not controlled by the provisions of the Code.

20. A similar question about the powers of the Court to issue a commission in the exercise of its powers under S. 151 of the Code in circumstances not covered by S. 75 and Order XXVI, arose in ***Padam Sen* v. *State of U.P.*** [AIR 1961 SC 218], and this Court held that the Court can issue a commission in such circumstances. It observed thus:

> The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in S. 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature.

These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in S. 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of those powers is not because those powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice.

20. In the above case, this Court did not uphold the order of the Civil Court, not coming under the provisions of Order XXVI, appointing a commissioner for seizing the account books of the plaintiff on the application of the defendants. The order was held to be defective not because the Court had no power to appoint a commissioner in circumstances not covered by S. 75 and Order XXVI, but because the power was exercised not with respect to matters of procedure but with respect to a matter affecting the substantive rights of the plaintiff. This is clear from the further observations made . This Court said:

> The question for determination is whether the impugned order of the Additional Munsif appointed Shri Raghubir Pershad Commissioner for seizing the plaintiff's books of account can be said to be an order which is passed by the Court in the exercise of its inherent powers. The inherent powers saved by S. 151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. These powers are not powers over the substantive rights which any litigant possesses. Specific powers have

> to be conferred on the Courts for passing such orders which would affect such rights of a party. Such powers cannot come within the scope of inherent powers of the Court in matters of procedure, which powers have their source in the Court possessing all the essential powers to regulate its practice and procedure.

22. The case reported as ***Maqbul Ahmad* v. *Onkar Pratap Narain Singh*** [AIR 1935 PC 85], does not lay down that the inherent powers of the Court are controlled by the provisions of the Code. It simply hold that the statutory discretion possessed by a Court in some limited respects under an Act does not imply that the Court possesses a general discretion to dispense with the provisions of that Act. In that case, an application for the preparation of a final decree was presented by the decree-holder beyond the period of limitation prescribed for the presentation of such an application. It was however contended that the Court possessed some sort of judicial discretion which would enable it to relieve the decree-holder from the operation of the Limitation Act in a case of hardship. To rebut this contention, it was said (at p. 88):

> It is enough to say that there is no authority to support the proposition contended for. In their Lordships' opinion it is impossible to hold that, in a manner which is governed by Act, an Act which in some limited respects gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that S. 3 of the Act is peremptory and that the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings.

These observations have no bearing on the question of the Court's exercising its inherent powers under S. 151 of the Code. 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.

23. Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code.

24. We, therefore, repel the first contention raised for the appellant.

25. On the second question, we are of opinion that, in view of the facts of the case, the Courts below were in error in issuing a temporary injunction to the appellant restraining him from proceeding with the suit in the Asansol Court.

26. The inherent powers are to be exercised by the Court in very exceptional circumstances, for which the Code lays down no procedure.

27. The question of issuing an order to a party restraining him from proceeding with any other suit in a regularly constituted Court of law deserves great care and consideration and such an order is not to be made unless absolutely essential for the ends of justice.

28. In this connection, reference may usefully be made to what was said in ***Cohen* v. *Rothfield*** [1919-1 KB 410] and which case appears to have influenced the decision of the

Courts in this country in the matter of issuing such injunction orders. Scrutton, L.J., said at page 413:

> Where it is proposed to stay an action on the ground that another is pending and the action to be stayed is not in the Court asked to make the order, the same result is obtained by restraining the person who is bringing the second action from proceeding with it. But, as the effect is to interfere with proceedings in another jurisdiction, this power should be exercised with great caution to avoid even the appearance of undue interference with another Court.

And again, at page 415:

> While, therefore, there is jurisdiction to restrain a defendant from suing abroad, it is a jurisdiction very rarely exercised, and to be resorted to with great care and on ample evidence produced by the applicant that the action abroad is really vexatious and useless.

The principle enunciated for a plaintiff in an earlier instituted suit to successfully urge a restraint order against a subsequent suit instituted by the defendant, is stated thus in this case, at page 415:

> It appears to me that unless the applicant satisfies the Court that no advantage can be gained by the defendant by proceeding with the action in which he is plaintiff in another part of the King's dominions, the Court should not stop him from proceeding with the only proceedings which he, as plaintiff can control. The principle has been repeatedly acted upon.

The injunction order in dispute is not based on any such principle. In fact in the present case, it is the defendant of the previously instituted suit that has obtained the injunction order against the plaintiff of the previously instituted suit.

29. The considerations which would make a suit vexatious are well explained in ***Hyman* v. *Helm*** [(1883) 24 ChD 531]. In that case, the defendant, in an action before the Chancery Division of the High Court brought an action against the plaintiffs in San Francisco. The plaintiffs, in an action in England, prayed to the Court to restrain with the action in San Francisco. It was contended that it was vexatious for the defendants to bring the action in San Francisco as the witness to the action were residents of England, the contract between the parties was an English contract and that its fulfillment took place in England. In repelling the contention that the defendants' subsequent action in San Francisco was vexatious, Brett, M.R., said at page 537:

> If that makes an action vexatious it would be a ground for the interference of the Court, although there were no action in England at all, the ground for alleging the action in San Francisco to be vexatious being that it is brought in an inconvenient place. But that is not the sort of vexation on which an English Court can act.
>
> It seems to me that where a party claims this interference of the Court to stop another action between the same parties, it lies upon him to show to the Court that the multiplicity of actions is vexatious, and that the whole burden of proof lies upon him. He does not satisfy that burden of proof by merely showing that there is a multiplicity

> of actions, he must go further. If two actions are brought by the same plaintiff against the same defendant in England for the same cause of action, then, as was said in ***McHenry* v. *Lewis*** [(1882) 22 ChD 397] and in the case of the ***Peruvian Guano Co.* v. *Bockwoldt*** [(1883) 23 ChD 225], prima facie that is vexatious, and therefore the party who complains of such a multiplicity of actions has made out a prima facie case for the interference of the Court. Where there is an action by a plaintiff in England, and a cross-action by a defendant in England, whether the same prima facie case of vexation arises is a much more difficult point to decide, and I am not prepared to say that it does.

It should be noticed that this question for an action being vexatious was being considered with respect to the subsequent action brought by the defendant in the previously instituted suit and when the restraint order was sought by the plaintiff of the earlier suit. In the case before us, it is the plaintiff of the subsequent suit who seeks to restrain the plaintiff of the earlier suit from proceeding with his suit. This cannot be justified on general principles when the previous suit has been instituted in a competent Court.

30. The reasons which weighed with the Court below for maintaining the order of injunction may be given in its own words as follows:

> In the plaint filed in the Asansol Court the defendant has based his claim on the deed of dissolution dated August 22, 1945, but has avoided all references to the provisions regarding the agreement to place the disputes before the Indore Courts. It was an action taken by the present defendant in anticipation of the present suit and was taken in flagrant breach of the terms of the contract. In my opinion, the defendant's action constitutes misuse and abuse of the process of the Court.

31.The appellant attached the deed of dissolution to the plaint he filed at Asansol. Of course, he did not state specifically in the plaint about the proviso with respect to the forum for the decision of the dispute. Even if he had mentioned the term, that would have made no difference to the Asansol Court entertaining the suit, as it is not disputed in these proceedings that both the Indore and Asansol Courts could try the suit in spite of the agreement. The appellant's institution of the suit at Asansol cannot be said to be in anticipation of the suit at Indore, which followed it by a few months. There is nothing on the record to indicate that the appellant knew at the time of instituting the suit, that the respondent was contemplating the institution of a suit at Indore. The notices which the respondent gave to the appellant were in December 1945. The suit was filed at Asansol in August 1948, more than two years and a half after the exchange of correspondence referred to in the plaint filed at Asansol.

32 In fact, it is the conduct of the respondent in applying for the injunction in September 1953, knowing full well of the orders of the Calcutta High Court confirming the order refusing stay of the Asansol suit and directing that Court to proceed with the decision of the issue of jurisdiction at an early date, which can be said to amount to an abuse of the process of the Court. It was really in the respondent's interest if he was sure of his ground that the issue of jurisdiction be decided by the Asansol Court expeditiously, as ordered by the Calcutta High Court in May 1953. If the Asansol Court had clearly no jurisdiction to try the suit in view of the terms of the deed of dissolution, the decision of that issue would have finished the

Asansol suit forever. He, however, appears to have avoided a decision of that issue from that Court and, instead of submitting to the order of the Calcutta High Court, put in this application for injunction. It is not understandable why the appellant did not clearly state in his objection to the application what the High Court of Calcutta had ordered. That might have led the consideration of the question by the Indore Court in a different perspective.

33. It is not right to base an order of injunction, under S. 151 of the Code, restraining the plaintiff from proceeding with his suit at Asansol, on the consideration that the terms of the deed of dissolution between the parties make it a valid contract and the institution of the suit at Asansol is in breach of it. The question of jurisdiction of the Asansol Court over the subject matter of the suit before it will be decided by that Court. The Indore Court cannot decide that question. Further, it is not for the Indore Court to see that the appellant observes the terms of the contract and does not file the suit in any other Court. It is only in proper proceedings when the Court considers alleged breach of contract and gives redress for it.

34. For the purpose of the present appeal, we assume that the jurisdiction of the Asansol Court is not ousted by the provisions of the proviso in the deed of dissolution, even though that proviso expresses the choice of the parties for having their disputes decided in the Court at Indore. The appellant therefore could choose the forum in which to file his suit. He chose the Court of Asansol for his suit. The mere fact that that Court is situate at along distance from the place of residence of the respondent is not sufficient to establish that the suit has been filed in that Court in order to put the respondent to trouble and harassment and to unnecessary expense.

35. It cannot be denied that it is for the Court to control the proceedings of the suit before it and not for a party, and that therefore, an injunction to a party with respect to his taking part in the proceedings of the suit would be putting that party in a very inconvenient position.

36. It has been said that the Asansol Court would not act in a way which may put the appellant in a difficult position and will show a spirit of co-operation with the Indore Court. Orders of Court are not ordinarily based on such considerations when there be the least chance for the other Court to think in that way. The narration of facts will indicate how each Court has been acting on its own view of the legal position and the conduct of the parties.

37. There have been cases in the past, though few, in which the Court took no notice of such injunction orders to the party in a suit before them. They are: ***T.A. Menon* v. *Parvathi Ammal*** [AIR 1950 Mad 373]; ***Harbhagat Kaur* v. *Kirpal Singh*** [AIR 1951 Pepsu 78] & ***Shiv Charan Lal* v. *Phool Chand*** [AIR 1952 Punj. 247]. In the last case, the Agra Court issued an injunction against the plaintiff of a suit at Delhi restraining him from proceeding with that suit. The Delhi Court, holding that the order of the Agra Court did not bind it, decided to proceed with the suit. This action was supported by the High Court. Kapur, J., observed at page 248:

> On the facts as have been proved it does appear rather extra-ordinary that a previously instituted suit should be sought to be stayed by adopting this rather extraordinary procedure.

38. It is admitted that the Indore Court could not have issued an injunction or direction to the Asansol Court not to proceed with the suit. The effect of issuing an injunction to the

plaintiff of the suit at Asansol, indirectly achieves the object which an injunction to the Court would have done. A court ought not to achieve indirectly what it cannot do directly. The plaintiff, who has been restrained, is expected to bring the restraint order to the notice of the Court. If that Court, as expected by the Indore Court, respects the injunction order against the appellant and does not proceed with the suit, the injunction order issued to the appellant who is the plaintiff in that suit is as effective an order for arresting the progress of that suit as an injunction order to the Court would have been. If the Court insists on proceeding with the suit, the plaintiff will have either to disobey the restraint order or will run the risk of his suit being dismissed for want of prosecution. Either of these results is a consequence which an order of the Court should not ordinarily lead to.

39. The suit at Indore which had been instituted later, could be stayed in view of S. 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 suits being instituted, recourse to the inherent powers under S. 151 is not justified. The provisions of S. 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, as has been said in ***Ram Bahadur Thakur and Co.*** **v.** ***Devidayal (Sales) Ltd.*** [AIR 1954 Bom. 176], that the Legislature did not contemplate the provisions of S. 10 to apply when the previously instituted suit be held to be instituted in those circumstances. The provisions of S. 35A indicate that the Legislature was aware of a 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 S. 10 in those circumstances, but it did not. Further, S. 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 Asansol 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.

40. In view of the various considerations stated above, we are of opinion that the order under appeal cannot be sustained and cannot be said to be an order necessary in the interests of justice or to prevent the abuse of the process of the Court. We therefore allow the appeal with costs, and set aside the order restraining the appellant from proceeding with the suit at Asansol.

J.C. SHAH, J. – 41. I have perused the judgment delivered by Mr. Justice Dayal. I agree with the conclusion that the appeal must succeed, but I am unable to hold that civil courts generally have inherent jurisdiction in cases not covered by Rr. 1 and 2 of O. 39, Civil Procedure Code to issue temporary injunctions restraining parties to the proceedings before them from doing certain acts. The powers of courts, other than the Chartered High Courts, in the exercise of their ordinary original civil jurisdiction to issue temporary injunctions are

defined by the terms of S. 94(1)(c) and O. 39, Civil Procedure Code. A temporary injunction may issue if it is so prescribed by rules in the Code. The provisions relating to the issue of temporary injunctions are to be found in O. 39 Rr. 1 and 2; a temporary injunction may be issued only in those cases which come strictly within those rules, and normally the civil courts have no power to issue injunctions by transgressing the limits prescribed by the rules.

42. It is true that the High Courts constituted under Charters and exercising ordinary original jurisdiction do exercise inherent jurisdiction to issue an injunction to restrain parties in a suit before them from proceeding with a suit in another court, but that is because the Chartered High Courts claim to have inherited this jurisdiction from the Supreme Courts of which they were successors. The jurisdiction would be saved by S. 9 of the Charter Act (24 and 25 Vict. C. 104) of 1861 and in the Code of Civil Procedure, 1908 it is so expressly provided by S. 4. But the power of the civil courts other than the Chartered High Courts must be found within S. 94 and O. 39 Rr. 1 and 2 of the Civil Procedure Code.

43. The Code of Civil Procedure is undoubtedly not exhaustive: it does not lay down rules for guidance in respect of all situations nor does it seek to provide rules for decision of all conceivable cases which may arise. The civil courts are authorised to pass such orders as may be necessary for the ends of justice, or to prevent abuse of the process of court, but where an express provision is made to meet a particular situation the Code must be observed, and departure therefrom is not permissible. As observed in [(62 Ind App 80): (AIR 1935 PC 85)]:

> It is impossible to hold that in a matter which is governed by an Act, which in some limited respects gives the court a statutory discretion, there can be implied in court, outside the limits of the Act a general discretion to dispense with the provisions of the Act.

Inherent jurisdiction of the court to make orders *ex debito justitiae* is undoubtedly affirmed by S. 151 of the Code, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive.

44. Power to issue an injunction is restricted by S. 94 and O. 39, and is not open to the Civil Court which is not a Chartered High Court to exercise that power ignoring the restrictions imposed thereby in purported exercise of its inherent jurisdiction. The decision of this Court in ***Padam Sen*** [AIR 1961 SC 218], does not assist the case of the appellant. In ***Padam Sen*** case this Court was called upon in a criminal appeal to consider whether an order of a Munsif appointing a commissioner for seizing certain books of the plaintiff in a suit pending before the Munsif was an order authorised by law. It was the case for the prosecution that the appellants offered a bribe to the commissioner as consideration for being allowed to tamper with entries therein, and thereby the appellants committed an offence punishable under S. 165A of the Indian Penal Code. This Court held that the commissioner appointed by the Civil Court in exercise of powers under O. 26, C.P.C. did not hold any office as a public servant and the appointment by the Munsif being without jurisdiction, the commissioner could not be deemed to be a public servant. In dealing with the argument of counsel for the appellants that the Civil Court had inherent powers to appoint a commissioner in exercise of

authority under S. 151 Civil Procedure Code for purposes which do not fall within the provisions of S. 75 and O. 26 Civil Procedure Code, the Court observed:

> "Section 75 of the Code empowers the Court to issue a commission, subject to conditions and limitations which may be prescribed, for four purposes, viz. for examining any person, for making or adjusting account and for making a partition. Order XXVI lays down rules relating to the issue of commissions and allied matters. Mr. Chatterjee, learned counsel for the appellants, has submitted that the powers of a Court must be found within the four corners of the Code and that when the Code has expressly dealt with the subject matter of commissions in S. 75 the Court cannot invoke its inherent powers under S. 151 and thereby add to its powers. On the other hand, it is submitted for the State, that the Code is not exhaustive and the Court, in the exercise of its inherent powers, can adopt any procedure not prohibited by the Code expressly or by necessary implication if the Court considers it necessary for the ends of justice or to prevent abuse of the process of the Court.
>
> The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in S. 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary or different from the procedure expressly provided in the Code."

The Court in that case held that in exercise of the powers under S. 151 of the Code of Civil Procedure, 1908 the Court cannot issue a commission for seizing books of account of the plaintiff - a purpose for which a commission is not authorized to be issued by S. 75.

45. The principle of the case is destructive of the submission of the appellants. Section 75 empowers the Court to issue a commission for purposes specified therein: even though it is not so expressly stated that there is no power to appoint a commissioner for other purposes, a prohibition to that effect is, in the view of the Court in ***Padam Sen*** case, implicit in S. 75. By parity of reasoning, if the power to issue injunctions may be exercised, if it is so prescribed by rules in the Orders in Schedule I, it must be deemed to be not exercisable in any other manner or for purposes other than those set out in O. 39, Rr. 1 and 2.

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Dalpat Kaur v. *Prahlad Singh*

AIR 1993 SC 276

K. RAMASWAMY, J. – 1. This is the fourth round of litigation relating to the same subject matter. On June 14, 1979 the first appellant claimed to have entered into an agreement to purchase the residential house situated at Jaipur for a consideration of Rs. 51,000/-. He laid the suit for specific performance and the suit was decreed *ex - parte*. On August 10, 1983, the sale deed was executed through court. On April 28, 1984, the respondent's wife filed Suit No. 83 of 1984 and also sought for temporary injunction from dispossession. In May 1984, the Trial Court rejected the application for ad interim injunction which was confirmed, on appeal, by the High Court on July 14, 1987. Thereafter the suit was got dismissed for non-prosecution. The first appellant filed Execution Application No. 6/85 in which the respondent filed five unsuccessful objections. The first was dismissed on March 4, 1987. The second one on December 4, 1987, which was confirmed on revision by the High Court on January 20, 1988. The third one on October 4, 1987 and fourth one on January 17, 1989. Even thereafter 5th objection was filed on May 23, 1989 which was dismissed on October 24, 1989. This was also confirmed by the High Court in Civil Revision No. 109/90 dated August 7, 1990. The third round of litigation was started at the behest of his sons in O.S. No. 278/88 claiming to be the joint family property and for a declaration that the sale does not bind them and they sought for partition. They also sought for ad- interim injunction which was rejected on July 7, 1988. On appeal, the High Court in Misc. Appeal No. 177/88 confirmed it by the order dated July 26, 1988. The 4th round of litigation was started by the respondent in filing the present suit on December 7, 1988 pleading, that the first appellant being his counsel played fraud on him, in paragraphs 9 and 10, the details of which are not material for the purpose of this case. He also sought for an interim injunction from dispossession. In the meanwhile, a part of the property, namely, shops were obtained as symbolical possession by the first appellant. The Trial Court by order dated November 3, 1990 dismissed the application. On appeal, the High Court in Misc. Appeals Nos. 498/90 and 501/90 by the impugned order dated February 26, 1991 allowed the applications and granted ad interim injunction restraining the appellants from taking possession of the residential portion.

2. Order 39, Rule 1(c) provides that temporary injunction may be granted where, in any suit, it is proved by the affidavit or otherwise, that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing… or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the court thinks fit until the disposal of the suit or until further orders. Pursuant to the recommendation of the Law Commission clause (c) was brought on statute by S. 88(i)(c) of the Amending Act 104 of 1966 with effect from February 1, 1977. Earlier thereto there was no express power except the inherent power under S. 151, C.P.C. to grant ad interim injunction against dispossession. Rule 1 primarily concerns with the preservation of the property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or to refrain from doing any particular act. It is in the nature of

preventive relief to a litigant to prevent future possible injury. In other words, the court in exercise of the power of granting ad interim injunction is to preserve the subject matter of the suit in the status quo for the time being. 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 ensure 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.

3. Therefore, the burden is on the plaintiff by evidence adduced by affidavit or otherwise that there is "a *prima facie* case" in his favour which needs adjudication at the trial. The existence of the *prima facie* right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. *Prima facie* case is not to be confused with *prima facie* title which has to be established, on evidence at the trial. Only *prima facie* case is a substantial question raised, *bona fide*, which needs investigation and a decision on merits. Satisfaction that there is a *prima facie* case by itself is not sufficient to grant injunction. 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. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

4. 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 and whether the plaintiff could be adequately compensated if injunction is refused. This case demonstrates (we are not expressing any opinion on the plea of fraud or their relative merits in the case or the validity of the decree impugned), suffice to state that the conduct of the respondent militates against the *bona fides*. At present there is a sale deed executed by the Court in favour of the first appellant. If ultimately the respondent succeeds at the trial, they can be adequately

compensated by awarding damages for use and occupation from the date of dispossession till date of restitution. Repeatedly the Civil Court and the High Court refused injunction pending proceedings. For any acts of damage, if attempted to make, to the property, or done, appropriate direction could be taken in the suit. If any alienation is made it would be subject to doctrine of *lis pendens* under S. 52 of the Transfer of Property Act. The High Court without averting to any of these material circumstances held that balance of convenience lies in favour of granting injunction with the following observations, "keeping in mind the history, various facts which have been brought to my notice, and looking to the balance of convenience and irreparable loss, I think it will be in the interest of justice to allow these appeals and grant temporary injunction that the appellants may not be dispossessed from the suit property." The phrases "*prima facie* case," "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice. The facts are eloquent and speak for themselves. It is well nigh impossible to find from facts *prima facie* case and balance of convenience. The respondents can be adequately compensated on their success.

5. In our considered view, the High Court committed manifest error of law in jumping to the above conclusion to allow the appeal. This appeal is, accordingly, allowed. The order of the High Court is set aside and that of the trial Court is confirmed. It is made clear that any observations made either by the trial Court or the High Court or of this Court should be taken to be not relevant at the trial on merits. These are our only *prima facie* observations, subject to adduction of evidence and proof at the trial on merits in the suit. The parties are directed to bear their own costs.

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Salem Advocates Bar Assn., Tamil Nadu **v.** *Union of India*

AIR 2003 SC 189

B.N. KIRPAL, C.J.I. – 1. These writ petitions have been filed seeking to challenge amendments made to the Code of Civil Procedure by the Amendment Act 46 of 1999 and Amendment Act 22 of 2002.

2. In the petitions, the amendments which were sought to be made by the aforesaid Amendment Acts, have been challenged, but we do not find that the said provisions are in any way ultra vires the Constitution. Neither Mr. Vaidyanathan nor any other learned Counsel made any submissions to the effect that any of the amendments made were without legislative competence or violative of any of the provisions of the Constitution. We have also gone through the provisions by which amendments have been made and do not find any constitutional infirmity in the same.

3. Mr. Vaidyanathan, however, drew our attention to some of the amendments which have been made with a view to show that there may be some practical difficulties in implementing the same. He also contended that some clarifications may be necessary. We shall deal with the said provisions presently.

4. Amendment has been made to Section 27 dealing with summons to the defendant which, after the amendment, reads as follows:

> ***Summons to Defendants-*** Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed on such day not beyond thirty days from the date of the institution of the suit.

5. It was submitted by Mr. Vaidyanathan that the words "on such day not beyond thirty days from the date of the institution of the suit" seem to indicate that the summons must be served within thirty days of the date of the institution of the suit. In our opinion, the said provisions read as a whole will not be susceptible to that meaning. The words added by amendment, it appears, fix outer time frame, by providing that steps must be taken within thirty days from the date of the institution of the suit, to issue summons. In other words, if the suit is instituted, for example, on 1st January 2002, then the correct addresses of the defendants and the process fee must be filed in the Court within thirty days so that summons be issued by the Court not beyond thirty days from the date of the institution of the suit. The object is to avoid long delay in issue of summons for want of steps by the plaintiff. It is quite evident that if all that is required to be done by a party, has been performed within the period of thirty days, then no fault can be attributed to the party. If for any reason, the Court is not in a position or is unable to or does not issue summons within thirty days, there will, in our opinion, compliance with the provisions of Section 27 once within thirty days of the issue of the summons the party concerned has taken steps to file the process fee along with completing the other formalities which are required to enable the Court to issue the summons.

6. Our attention was then drawn to a new Section 89, which has been introduced in the Code of Civil Procedure. This provides for settlement of disputes, etc.

7. It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in Court need not necessarily be decided by the Court itself. Keeping in mind the long delays and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) Mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refers to different Acts in relation to Arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2)(d) provides that the parties shall follow the procedure as may be prescribed. Section 89(2)(d), therefore, contemplates appropriate rules being framed with regard to mediation.

8. In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of Court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the Court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not *ipso facto* take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.

9. Section 89 is a new provision and even though arbitration or conciliation has been in place as a mode for settling the disputes, this has not really reduced the burden on the Courts. It does appear to us that modalities have to be formulated for the manner in which Section 89 and, for that matter, any other provisions which have been introduced by way of amendments, may have to be in operation. All counsel are agreed that for this purpose, it will be appropriate if a Committee is constituted so as to ensure that the amendments made become effective and result in quicker dispensation of justice.

10. In our opinion, the suggestion so made merits a favorable consideration. With the constitution of such a Committee, any creases which require to be ironed out can be identified and apprehensions which may exist in the minds of the litigating public or the lawyers clarified. This Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89. The model rules, with or without modification, which are formulated may be adopted by the High Courts concerned for giving effect to Section 89(2)(d).

11. Mr. Vaidyanathan drew our attention to Section 100-A which deals with intra-Court appeals.

12. Section 100-A deals with two types of cases, which are decided by a single Judge. One is where the single Judge hears an appeal from an appellate decree or order. The question of there being any further appeal in such a case cannot and should not be contemplated. Where, however, an appeal is filed before the High Court against the decree of a trial Court, a question may arise whether any further appeal should be permitted or not. Even at present

depending upon the value of the case, the appeal from the original decree is either heard by a single Judge or by a Division Bench of the High Court. Where the regular first appeal so filed is heard by a Division Bench, the question of there being an intra-Court appeal does not arise. It is only in cases where the value is not substantial that the rules of the High Court may provide for the regular first appeal to be heard by a single Judge. In such a case to give a further right of appeal where the amount involved is nominal to a Division Bench will really be increasing the workload unnecessarily. We do not find that any prejudice would be caused to the litigants by not providing for intra-Court appeal, even where the value involved is large. In such a case, the High Court by Rules, can provide that the Division Bench will hear the regular first appeal. No fault can, thus, be found with the amended provision Section 100-A.

13. Our attention has been drawn to Order 7, Rule 11 to which clauses (e) and (f) have been added which enable the Court to reject the plaint where it is not filed in duplicate or where the plaintiff fails to comply with the provisions of Rule 9 of Order 7. It appears to us that the said clauses being procedural would not require the automatic rejection of the plaint at the first instance. If there is any defect as contemplated by Rule 11(e) or non-compliance as referred to in Rule 11(f), the Court should ordinarily give an opportunity for rectifying the defects, and in the event of the same not being done the Court will have the liberty or the right to reject the plaint.

14. In Order 18, Rule 4 has been substituted and sub-rule (1) provides that in every case examination-in-chief of the witnesses shall be on affidavits and copies thereof shall be supplied to the opposite parties by the party who calls them for evidence. It was contended by Mr. Vaidyanathan that it may not be possible for the party calling the witness to compel the witness to file an affidavit. It often happens that the witness may not be under the control of the party who wants to rely upon his evidence and that witness may have to be summoned through Court. Order 16, Rule 1 provides for list of witnesses being filed and summons being issued to them for being present in Court for recording their evidence. Rule 1-A, on the other hand, refers to production of witnesses without summons where any party to the suit may bring any witness to give any evidence or to produce documents. Reading the provisions of Order 16 and Order 18 together, it appears to us that Order 18, Rule 4 will not necessarily apply to a case contemplated by Order 16, Rule 1-A i.e. where any party to a suit, without applying for summoning under Rule 1 brings any witness to give evidence or produce any document. In such a case, examination-in-chief is not to be recorded in Court but shall be in the form of an affidavit.

15. In cases where the summon have to be issued under Order 16, Rule 1, the stringent provision of Order 18, Rule 4 may not apply. When summons are issued, the Court can give an option to the witness summoned either to file an affidavit by way of examination-in-chief or to be present in Court for his examination. In appropriate cases, the Court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, with regard to the summoned witnesses the principle incorporated in Order 18, Rule 4 can be waived. Whether a witness shall be directed to file affidavit or be required to be present in Court for recording of his evidence is a matter to be decided by the Court in its discretion having regard to the facts of each case.

16. Order 18, Rule 4(2) gives the Court the power to decide as to whether evidence of a witness shall be taken either by the Court or by the Commissioner. An apprehension was raised to the effect that the Court has no discretion and once it decides that the evidence will be recorded by the Commissioner then evidence of other witnesses cannot be recorded in Court. We do not think that this is the correct interpretation of sub-rule 4(2). Under the said sub-rule, the Court has the power to direct either all the evidence being recorded in Court or all the evidence being recorded by the Commissioner or the evidence being recorded partly by the Commissioner and partly by the Court. For example, if the plaintiff wants to examine 10 witnesses, then the Court may direct that in respect of five witnesses evidence will be recorded by the Commissioner while in the case of other five witnesses evidence will be recorded in Court. In this connection, we may refer to Order 18, Rule 4(3) which provides that the evidence may be recorded either in writing or mechanically in the presence of the Judge or the Commissioner. The use of the word 'mechanically' indicates that the evidence can be recorded even with the help of the electronic media, audio or audio-visual, and in fact whenever the evidence is recorded by the Commissioner it will be advisable that there should be simultaneously at least an audio recording of the statement of the witnesses so as to obviate any controversy at a later stage.

17. Mr. Vaidyanathan drew our attention to the fact that by amendment in 1976, Rule 17-A had been inserted in Order 18 which gave an opportunity to a party to adduce additional evidence under the circumstances mentioned therein. He submitted that by the Amendment Act of 2002, this sub-rule has been deleted which may cause hardship to the litigants.

18. We find that in the Code of Civil Procedure, 1908, a provision similar to Rule 17-A did not exist. This provision, as already noted, was inserted in 1976. The effect of the decision of this provision in 2002 is merely to restore *status quo ante*, that is to say, the position that existed prior to the insertion of Rule 17-A in 1976. The remedy if any, which was available to a litigant with, regard to adducing additional evidence prior to 1976 would be available now and no more. It is quite evident that Rule 17-A has been deleted with a view that unnecessarily applications are not filed primarily with a view to prolong the trial.

19. Lastly, Mr. Vaidyanathan drew our attention to Rule 9 which was inserted in Order 41 which reads as follows:

> 9. ***Registry of memorandum of appeal*** – (1) The Court from whose decree an appeal lies shall entertain the memorandum of appeal and shall endorse thereon the date of presentation and shall register the appeal in a book of appeal kept for that purpose.
>
> (2) Such book shall be called the register of appeal.

20. The apprehension was that this rule requires the appeal to be filed in the Court from whose decree the appeal is sought to be filed. In our opinion, this is not so. The appeal is to be filed under Order 41, Rule 1 in the Court in which it is maintainable. All that Order 41, Rule 9 requires is that a copy of memorandum of appeal which has been filed in the appellate Court should also be presented before the Court against whose decree the appeal has been filed and endorsement thereof shall be made by the decreeing Court in a book called the Register of Appeals. Perhaps, the intention of the Legislature was that the Court against whose decree an

appeal has been filed should be made aware of the factum of the filing of the appeal which may or may not be relevant at a future date. Merely because a memorandum of appeal is not filed under Order 41, Rule 9 will not, to our mind, make the appeal filed in the appellate Court as a defective one.

21. As already observed, if any difficulties are felt, these can be placed before the Committee constituted hereinabove. The Committee would consider the said difficulties and make necessary suggestions in its report.

22. It would be open to the Committee to seek directions. The Committee is requested to file its report within a period of four months. To consider the report, list these petitions after four months. Copies of this judgment be sent to the Registrars of all the High Courts so that necessary action can be taken by the respective High Courts and any writ petition pending in those High Courts can be formally disposed of.

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Salem Advocates Bar Association, Tamil Nadu **v.** *Union of India*

AIR 2005 SC 3353

Y.K. SABHARWAL, J. - 1. The challenge made to the constitutional validity of amendments made to the Code of Civil Procedure (for short, 'the Code') by Amendment Acts of 1999 and 2002 was rejected by this Court in ***Salem Advocates Bar Association, T.N.*** **v.** ***Union of India***, but it was noticed in the judgment that modalities have to be formulated for the manner in which section 89 of the Code and, for that matter, the other provisions, which have been introduced by way of amendments, may have to be operated. For this purpose, a Committee headed by a former Judge of this Court and Chairman, Law Commission of India (Justice M. Jagannadha Rao) was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. It was further observed that the Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the Alternate Disputes Resolution (ADR) referred to in section 89. It was also observed that the model rules, with or without modification, which are formulated may be adopted by the High Courts concerned for giving effect to section 89(2)(d) of the Code. Further, it was observed that if any difficulties are felt in the working of the amendments, the same can be placed before the Committee which would consider the same and make necessary suggestions in its report. The Committee has filed the report.

2. The report is in three parts. Report 1 contains the consideration of the various grievances relating to amendments to the Code and the recommendations of the Committee. Report 2 contains the consideration of various points raised in connection with draft rules for ADR and mediation as envisaged by section 89 of the Code read with Order X Rule 1A, 1B and 1C. It also contains model Rules. Report 3 contains a conceptual appraisal of case management. It also contains the model rules of case management.

3. First, we will consider Report 1 which deals with the amendments made to the Code.

REPORT NO. 1

Amendment inserting Sub-section (2) to Section 26 and Rule 15(4) to Order VI Rule 15

4. Prior to insertion of aforesaid provisions, there was no requirement of filing affidavit with the pleadings. These provisions now require the plaint to be accompanied by an affidavit as provided in Section 26(2) and the person verifying the pleadings to furnish an affidavit in support of the pleading [Order VI Rule 15(4)]. It was sought to be contended that the requirement of filing an affidavit is illegal and unnecessary in view of the existing requirement of verification of the pleadings. We are unable to agree. The affidavit required to be filed under amended Section 26(2) and Order VI Rule 15(4) of the Code has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof.

Amendment of Order XVIII Rule 4

5. The amendment provides that in every case, the examination-in-chief of a witness shall be on affidavit. The Court has already been vested with power to permit affidavits to be filed as evidence as provided in Order XIX Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re-examination in open court has not been disturbed by Order XVIII Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but we feel that no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order XVIII Rule 4 has been examined and its validity upheld in ***Salem Advocates Bar Association*** case. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further, in ***Salem Advocates Bar Association*** case, it has been held that the trial court in appropriate cases can permit the examination-in-chief to be recorded in the Court. Proviso to Sub-rule (2) of Rule 4 of Order XVIII clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in court or by the Commissioner appointed by it. The power under Order XVIII Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the court to appoint Commissioner to record cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, serious disputes as to the execution of the will etc. In such cases, as far as possible, the court may prefer to itself record the cross-examination of the material witnesses. Another contention raised is that when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanor of witness. That may be so but, in our view; the will of the legislature, which has by amending the Code provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, as noticed above, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. It may also be noted that Order XVIII Rule 4, specifically provides that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The Court would have the benefit of the observations if made by the Commissioner.

6. The report notices that in some States, advocates are being required to pass a test conducted by the High Court in the subjects of Civil Procedure Code and Evidence Act for the purpose of empanelling them on the panels of Commissioners. It is a good practice. We would, however, leave it to the High Courts to examine this aspect and decide to adopt or not such a procedure. Regarding the apprehension that the payment of fee to the Commissioner

will add to the burden of the litigant, we feel that generally the expenses incurred towards the fee payable to the Commissioner is likely to be less than expenditure incurred for attending the Courts on various dates for recording evidence besides the harassment and inconvenience to attend the Court again and again for the same purpose and, therefore, in reality in most of the cases, there could be no additional burden.

7. Amendment to Order XVIII Rule 5(a) and (b) was made in 1976 whereby it was provided that in all appealable cases evidence shall be recorded by the Court. Order XVIII Rule 4 was amended by Amendment Act of 1999 and again by Amendment Act of 2002. Order XVIII Rule 4(3) enables the commissioners to record evidence in all type of cases including appealable cases. The contention urged is that there is conflict between these provisions.

8. To examine the contention, it is also necessary to keep in view Order XVIII Rule 19 which was inserted by Amendment Act of 1999. It reads as under:

"Power to get statements recorded on commission.– Notwithstanding, anything contained in these rules, the Court may, instead of examining witnesses in open Court, direct their statements to be recorded on commission under Rule 4A of the Order XXVI."

9. The aforesaid provision contains a non-obstante clause. It overrides Order XVIII Rule 5 which provides the court to record evidence in all appealable cases. The Court is, therefore, empowered to appoint a Commissioner for recording of evidence in appealable cases as well.

10. Further, Order XXVI Rule 4-A inserted by Amendment Act of 1999 provides that notwithstanding anything contained in the Rules, any court may in the interest of justice or for the expeditious disposal of the case or for any other reason, issue Commission in any suit for the examination of any person resident within the local limits of the court's jurisdiction. Order XVIII Rule 19 and Order XXVI Rule 4-A, in our view, would override Order XVIII Rule 5(a) and (b). There is, thus, no conflict.

11. The next question that has been raised is about the power of the Commissioner to declare a witness hostile. Order XVIII Rule 4(4) requires that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments. Order XVIII Rule 4(8) stipulates that the provisions of Rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission thereunder. The discretion to declare a witness hostile has not been conferred on the Commissioner. Under section 154 of the Evidence Act, it is the Court which has to grant permission, in its discretion, to a person who calls a witness, to put any question to that witness which might be put in cross-examination by the adverse party. The powers delegated to the Commissioner under Order XXVI Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in Court under section 154 of the Evidence Act to declare a witness hostile.

12. If a situation as to declaring a witness hostile arises before a Commission recording evidence, the concerned party shall have to obtain permission from the Court under section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the commission so as to

itself record remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party.

13. Another aspect is about proper care to be taken by the Commission of the original documents. Undoubtedly, the Commission has to take proper care of the original documents handed over to him either by Court or filed before him during recording of evidence. In this regard, the High Courts may frame necessary rules, regulations or issue practice directions so as to ensure safe and proper custody of the documents when the same are before the Commissioner. It is the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one party in absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with the Court in case long adjournments are granted and for taking back the documents before the adjourned date.

Additional Evidence

14. In Salem Advocates Bar Association's case, it has been clarified that on deletion of Order XVIII Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment, i.e., 1st July, 2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just.

Order VIII Rule 1

15. Order VIII Rule 1, as amended by Act 46 of 1999 provides that the defendant shall within 30 days from the date of service of summons on him, present a written statement of his defence. The rigour of this provision was reduced by Amendment Act 22 of 2002 which enables the Court to extend time for filing written statement, on recording sufficient reasons therefor, but the extension can be maximum for 90 days.

16.The question is whether the Court has any power or jurisdiction to extend the period beyond 90 days. The maximum period of 90 days to file written statement has been provided but the consequences on failure to file written statement within the said period have not been provided for in Order VIII Rule 1. The point for consideration is whether the provision providing for maximum period of ninety days is mandatory and, therefore, the Court is altogether powerless to extend the time even in an exceptionally hard case.

17. It has been common practice for the parties to take long adjournments for filing written statements. The legislature with a view to curb this practice and to avoid unnecessary delay and adjournments, has provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order VIII Rule 1 shall have to be determined by having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the legislature. The consequences

which may follow and whether the same were intended by the legislature have also to be kept in view.

18. In ***Raza Buland Sugar Co. Ltd. Rampur* v. *The Municipal Board, Rampur***, a Constitution Bench of this Court held that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

18. In ***Sangram Singh* v. *Election Tribunal Kotah***, considering the provisions of the Code dealing with the trial of the suits, it was opined that:

> "Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.
>
> Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

20. In ***Topline Shoes Ltd.* v. *Corporation Bank***, the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond total period of 45 days in view of Section 13(2) of the Consumer Protection Act, 1986. It was held that the intention to provide time frame to file reply is really made to expedite the hearing of such matters and avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directory. It was observed that the provision is more by way of procedure to achieve the object of speedy disposal of the case.

21. The use of the word 'shall' in Order VIII Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention

of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are hand-maid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

22. In construing this provision, support can also be had from Order VIII Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1.

Section 39

23. Section 39(1) of the Code provides that the Court which passed a decree may, on the application of the decree-holder send it for execution to another court of competent jurisdiction. By Act 22 of 2002, Section 39(4) has been inserted providing that nothing in the section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. The question is whether this newly added provision prohibits the executing court from executing a decree against a person or property outside its jurisdiction and whether this provision overrides Order XXI Rule 3 and Order XXI Rule 48 or whether these provisions continue to be an exception to Section 39(4) as was the legal position before the amendment.

24. Order XXI Rule 3 provides that where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more courts, any one of such courts may attach and sell the entire estate or tenure. Likewise, under Order XXI Rule 48, attachment of salary of a Government servant, Railway servant or servant of local authority can be made by the court whether, the judgment-debtor or the disbursing officer is or is not within the local limits of the court's jurisdiction.

25. Section 39 does not authorise the Court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance of conditions stipulated in those provisions. Thus, the provisions, such as, Order XXI Rule 3 or Order XXI Rule 48 which provide differently, would not be effected by Section 39(4) of the Code.

Order VI Rule 17

27. Order VI Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002, but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

Service through Courier

28. Order V Rule 9, *inter alia*, permits service of summons by party or through courier. Order V Rule 9(3) and Order V Rule 9-A permit service of summons by courier or by the plaintiff. Order V Rule 9(5) requires the court to declare that the summons had been duly served on the defendant on the contingencies mentioned in the provision. It is in the nature of deemed service. The apprehension expressed is that service outside the normal procedure is likely to lead to false reports of service and passing of *ex-parte* decrees. It is further urged that courier's report about defendant's refusal to accept service is also likely to lead to serious malpractice and abuse.

29. While considering the submissions of learned counsel, it has to be borne in mind that problem in respect of service of summons has been one of the major causes of delay in the due progress of the case. It is common knowledge that the defendants have been avoiding to accept summons. There have been serious problems in process serving agencies in various courts. There can, thus, be no valid objection in giving opportunity to the plaintiff to serve the summons on the defendant or get it served through courier. There is, however, danger of false reports of service. It is required to be adequately guarded. The courts shall have to be very careful while dealing with a case where orders for deemed service are required to be made on the basis of endorsement of such service or refusal. The High Courts can make appropriate rules and regulations or issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. In this regard, the High Courts can consider making a provision for filing of affidavit setting out details of events at the time of refusal of service. For instance, it can be provided that the affidavit of person effecting service shall state as to who all were present at that time and also that the affidavit shall be in the language known to the deponent. It can also be provided that if affidavit or any endorsement as to service is found to be false, the deponent can be summarily tried and punished for perjury and the courier company can be black-listed. The guidelines as to the relevant details to be given can be issued by the High Courts. The High Courts, it is hoped, would issue as expeditiously

as possible, requisite guidelines to the trial courts by framing appropriate rules, order, regulations or practice directions.

Adjournments

30. Order XVII of the Code relates to grant of adjournments. Two amendments have been made therein. One that adjournment shall not be granted to a party more than three times during hearing of the suit. The other relates to cost of adjournment. The awarding of cost has been made mandatory. Costs that can be awarded are of two types. First, cost occasioned by the adjournment and second such higher cost as the court deems fit.

31. While examining the scope of proviso to Order XVII Rule 1 that more than three adjournments shall not be granted, it is to be kept in view that proviso to Order XVII Rule 2 incorporating Clauses (a) to (e) by Act 104 of 1976 has been retained. Clause (b) stipulates that no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party. The proviso to Order XVII Rule 1 and Order XVII Rule 2 have to be read together. So read, Order XVII does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. For instance, a party may be suddenly hospitalized on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though circumstances may be beyond the control of a party, further adjournment cannot be granted because of restriction of three adjournments as provided in proviso to Order XVII Rule 1.

321. In some extreme cases, it may become necessary to grant adjournment despite the fact that three adjournments have already been granted (Take the example of Bhopal Gas Tragedy, Gujarat earthquake and riots, devastation on account of Tsunami). Ultimately, it would depend upon the facts and circumstances of each case, on the basis whereof the Court would decide to grant or refuse adjournment. The provision for costs and higher costs has been made because of practice having been developed to award only a nominal cost even when adjournment on payment of costs is granted. Ordinarily, where the costs or higher costs are awarded, the same should be realistic and as far as possible actual cost that had to be incurred by the other party shall be awarded where the adjournment is found to be avoidable but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the case or on any such reason. Further, to save proviso to Order XVII Rule 1 from the vice of Article 14 of the Constitution of India, it is necessary to read it down so as not to take away the discretion of the Court in the extreme hard cases noted above. The limitation of three adjournments would not apply where adjournment is to be granted on account of circumstances which are beyond the control of a party. Even in cases which may not strictly come within the category of circumstances beyond the control of a party, the Court by resorting to the provision of higher cost which can also include punitive cost in the discretion of the Court, adjournment beyond three can be granted having regard to the injustice that may result on refusal thereof, with reference to peculiar facts of a case. We may, however, add that grant of any adjournment let alone first, second or third adjournment

is not a right of a party. The grant of adjournment by a court has to be on a party showing special and extraordinary circumstances. It cannot be in routine. While considering prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict grant of adjournments.

Order XVIII Rule 2

33. Order XVIII Rule 2(4), which was inserted by Act 104 of 1976, has been omitted by Act 46 of 1999. Under the said Rule, the Court could direct or permit any party, to examine any party or any witness at any stage. The effect of deletion is the restoration of the *status quo ante*. This means that law that was prevalent prior to 1976 amendment, would govern. The principles as noticed hereinbefore in regard to deletion of Order XVIII Rule 17(a) would apply to the deletion of this provision as well. Even prior to insertion of Order XVIII Rule 2(4), such permission could be granted by the Court in its discretion. The provision was inserted in 1976 by way of caution. The omission of Order XVIII Rule 2(4) by 1999 amendment does not take away Court's inherent power to call for any witness at any stage either suo moto or on the prayer of a party invoking the inherent powers of the Court.

34. In Order XVIII Rule 2 Sub-rules (3A) to 3(D) have been inserted by Act 22 of 2002. The object of filing written arguments or fixing time limit of oral arguments is with a view to save time of court. The adherence to the requirement of these rules is likely to help in administering fair and speedy justice.

Order VII Rule 14

35. Order VII Rule 14 deals with production of documents which are the basis of the suit or the documents in plaintiff's possession or power. These documents are to be entered in the list of documents and produced in the Court with plaint. Order VII Rule 14(3) requires leave of Court to be obtained for production of the documents later. Order VII Rule 14(4) reads as under:

"othing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

36. In the aforesaid Rule, it is evident that the words 'plaintiff's witnesses' have been mentioned, as a result of mistake seems to have been committed by the legislature. The words ought to be 'defendant's witnesses'. There is a similar provision in Order VIII Rule 1A(4) which applies to a defendant. It reads as under:

"Nothing in this rule shall apply to documents -
(a) produced for the cross-examination of the plaintiff's witnesses, or
(b) handed over to a witness merely to refresh his memory."

37. Order VII relates to the production of documents by the plaintiff whereas Order VIII relates to production of documents by the defendant. Under Order VIII Rule 1A(4) a document not produced by defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of 'defendant's witnesses', the words 'plaintiff's witnesses' have been mentioned in Order VII Rule (4). To avoid any confusion, we direct that till the legislature corrects the mistake, the word 'plaintiff's

witnesses' would be read as 'defendant's witnesses' in Order VII Rule 4. We, however, hope that the mistake would be expeditiously corrected by the legislature.

Costs

38. Section 35 of the Code deals with the award of cost and Section 35A with award of compensatory costs in respect of false or vexatious claims or defences. Section 95 deals with grant of compensation for obtaining arrest, attachment or injunction on insufficient grounds. These three sections deal with three different aspects of award of cost and compensation. Under Section 95 cost can be awarded upto Rs. 50,000/-and under Section 35A, the costs awardable are upto Rs. 3,000/-. Section 35B provides for award of cost for causing delay where a party fails to take the step which he was required by or under the Code to take or obtains an adjournment for taking such step or for producing evidence or on any other ground. In circumstances mentioned in Section 35-B an order may be made requiring the defaulting party to pay to other party such costs as would, in the opinion of the court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of the suit or the defence. Section 35 postulates that the cost shall follow the event and if not, reasons thereof shall be stated. The award of the cost of the suit is in the discretion of the Court. In Sections 35 and 35B, there is no upper limit of amount of cost awardable.

39. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow.

Section 80

40. Section 80 (1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the Court may not insist on the rigid rule of prior notice. The two months period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefore, it is not only

necessary for the Governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, Government departments or statutory authorities are defendants in large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of section 80.

41. These provisions cast an implied duty on all concerned governments and States and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all concerned Governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him.

Section 115

42. Section 115 of the Code vests power of revision in the High Court over courts subordinate to it. Proviso to section 115(1) of the Code before the amendment by Act 46 of 1999 read as under:

> "Provided that the High Court shall not, under this section vary or reverse any order made, or may order deciding an issue, in the course of a suit or other proceeding except where -
>
> (a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or
>
> (b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made."

43. Now, the aforesaid proviso has been substituted by the following proviso:

> "Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings."

44. The aforesaid Clause (b) stands omitted. The question is about the constitutional powers of the High Courts under Article 227 on account of omission made in section 115 of the Code. The question stands settled by a decision of this Court in ***Surya Dev Rai* v. *Ram Chander Rai*** holding that the power of the High Court under article 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. Curtailment of revisional jurisdiction of the High Court under section 115 of the Code does not take away and could not have taken away the constitutional jurisdiction of the High Court. The power exists, untrammeled by the amendment in section 115 and is available to be exercised subject to rules of self-discipline and practice which are as well settled.

Section 148

45. The amendment made in Section 148 affects the power of the Court to enlarge time that may have been fixed or granted by the Court for the doing of any act prescribed or allowed by the Code. The amendment provides that the period shall not exceed 30 days in total. Before amendment, there was no such restriction of time. Whether the Court has no inherent power to extend the time beyond 30 days is the question. We have no doubt that the upper limit fixed in Section 148 cannot take away the inherent power of the Court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of Court. The rigid operation of the section would lead to absurdity. Section 151 has, therefore, to be allowed to fully operate. Extension beyond maximum of 30 days, thus, can be permitted if the act could not be performed within 30 clays for the reasons beyond the control of the party. We are not dealing with a case where time for doing an act has been prescribed under the provisions of the Limitation Act which cannot be extended either under Section 148 or Section 151 We are dealing with a case where the time is fixed or granted by the Court for performance of an act prescribed or allowed by the Court.

46. In ***Mahanth Ram Das* v. *Ganga Das***, this Court considered a case where an order was passed by the Court that if the Court fee was not paid by a particular day, the suit shall stand dismissed. It was a self-operating order leading to dismissal of the suit. The party's application filed under Sections 148 and 151 of the Code for extension of time was dismissed. Allowing the appeal, it was observed:

> "How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with events that might arise in between, it is not necessary to decide in this appeal. These orders turn out, often enough to be inexpedient. Such procedural orders, though peremptory (conditional decree 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. Such orders are not like the law of the Medes and the Persians."

47. There can be many cases where non-grant of extension beyond 30 days would amount to failure of justice. The object of the Code is not to promote failure of justice.

Section 148, therefore, deserves to be read down to mean that where sufficient cause exists or events are beyond the control of a party, the Court would have inherent power to extend time beyond 30 days.

Order IX Rule 5

48. The period of seven days mentioned in Order IX Rule 5 is clearly directory.

Order XI Rule 15

49. The stipulation in Rule 15 of Order XI confining the inspection of documents 'at or before the settlement of issues' instead of 'at any time' is also nothing but directory. It does not mean that the inspection cannot be allowed after the settlement of issues.

Judicial Impact Assessment

50. The Committee has taken note of para 7.8.2 of Volume I of the Report of the National Commission to Review the Working of the Constitution which reads as follows :

"7.8.2 Government of India should not throw the entire burden of establishing the subordinate courts and maintaining the subordinate judiciary on the State Governments. There is a concurrent obligation on the Union Government to meet the expenditure for subordinate courts. Therefore, the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demands of the State Judiciary in each of the States."

51. The Committee has further noticed that:

"33.3 As pointed out by the Constitution Review Commission, the laws which are being administered by the Courts which are subordinate to the High Court are laws which have been made by,

(a) Parliament on subjects which fall under the Entries in List I and List III of Schedule 7 to the Constitution, or

(b) State legislatures on subjects which fall under the Entries in List II and List III of Schedule 7 to the Constitution.

But, the bulk of the cases (civil, criminal) in the subordinate Courts concern the Law of Contract, Transfer of Property Act, Sale of Goods Act, Negotiable Instruments Act, Indian Penal Code, Code of Civil Procedure, Code of Criminal Procedure etc., which are all Central Laws made under List III. In addition, the Subordinate Courts adjudicate cases (in civil, criminal) arising under Central Laws made under List I.

33.4 The Central Government has, therefore, to bear a substantial portion of the expenditure on subordinate Courts which are now being established/maintained by the States. The Central Government has only recently given monies for the fast track courts but these courts are a small fraction of the required number.

33.5 Under Article 247, Central Government could establish Courts for the purpose of administering Central Laws in List 1. Except a few Tribunals, no such Courts have been established commensurate with the number of cases arising out of subjects in List I."

52. The Committee has suggested that the Central Government has to provide substantial funds for establishing courts which are subordinate to the High Court and the Planning Commission and the Finance Commission must make adequate provisions therefore, noticing that it has been so recommended by the Constitution Review Committee.

53. The Committee has also suggested that:

> "Further, there must be 'judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or in the State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many Courts are necessary, how many Judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such a judicial impact assessment has never been made by any legislature or by Parliament in our country."

54. Having regard to the constitutional obligation to provide fair, quick and speedy justice, we direct the Central Government to examine the aforesaid suggestions and submit a report on this Court within four months.

REPORT NO. 2

55. We will now take up Report No. 2 dealing with Model Alternative Dispute Resolution and Mediation Rules.

56. Part X of the Code (Sections 121 to 131) contains provisions in respect of the Rules. Sections 122 and 125 enable the High Courts to make Rules. Section 128 deals with matters for which rules may provide. It, *inter alia*, states that the rules which are not inconsistent with the provisions in the body of the Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

57. The question for consideration is about framing of the rules for the purposes of section 89 and Order X Rules 1A, 1B and 1C. These provisions read as under:

89. ***Settlement of disputes outside the Court--***

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and given them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for-

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of Sub-section (1) of Section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

1A. Direction of the court to opt for any one mode of alternative dispute resolution.- After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in Sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1B. Appearance before the conciliatory forum or authority-Where a suit is referred under Rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

1C. Appearance before the Court consequent to the failure of efforts of conciliation- Where a suit is referred under Rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it."

58. Some doubt as to a possible conflict has been expressed in view of use of the word 'may' in section 89 when it stipulates that 'the Court may reformulate the terms of a possible settlement and refer the same for1 and use of the word 'shall' in Order X, Rule 1A when it states that 'the Court shall direct the parties to the suit to opt either mode of settlements outside the Court as specified in Sub-section (1) of section 89.

59. As can be seen from section 89, its first part uses the word 'shall' when it stipulates that the 'court shall formulate terms of settlement'. The use of the word 'may' in later part of section 89 only relates to the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting section 89 is that where it appears to the Court that there exists element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the court shall refer them to one or other of the said modes. section 89 uses both the word 'shall' and 'may' whereas Order X, Rule 1A uses the word 'shall' but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in section 89 only governs the

aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of section 89.

60. One of the modes to which the dispute can be referred is 'Arbitration'. section 89 (2) provides that where a dispute has been referred for Arbitration or Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 ('1996 Act') shall apply as if the proceedings for Arbitration or Conciliation were referred for settlement under the provisions of 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to Arbitration where there is arbitration agreement. As held in ***P. Anand Gajapathi Raju* v. *P.V.G. Raju (Dead),*** 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in section 89 of the Code where the Court asks the parties to choose one or other ADRs including Arbitration and the parties choose Arbitration as their option. Of course, the parties have to agree for Arbitration. Section 82 of 1996 Act enables the High Court to make Rules consistent with this Act as to all proceedings before the Court under 1996 Act. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to Arbitration among four ADRs is not contemplated by the 1996 Act and, therefore, Section 82 or 84 has no applicability where parties agree to go for arbitration under section 89 of the Code. As already noticed, for the purposes of section 89 and Order X, Rule 1A, 1B and 1C, the relevant Sections in Part X of the Code enable the High Court to frame rules. If reference is made to Arbitration under section 89 of the Code, 1996 Act would apply only from the stage after reference and not before the stage of reference when options under section 89 are given by the Court and chosen by the parties. On the same analogy, 1996 Act in relation to Conciliation would apply only after the stage of reference to Conciliation. The 1996 Act does not deal with a situation where after suit is filed, the court requires a party to choose one or other ADRs including Conciliation. Thus, for Conciliation also rules can be made under Part X of the Code for purposes of procedure for opting for 'Conciliation' and upto the stage of reference to Conciliation. Thus, there is no impediment in the ADR rules being framed in relation to Civil Court as contemplated in section 89 upto the stage of reference to ADR. The 1996 Act comes into play only after the stage of reference upto the award. Applying the same analogy, the Legal Services Authority Act, 1987 (for short '1987 Act') or the Rules framed thereunder by the State Governments cannot act as impediment in the High Court making rules under Part X of the Code covering the manner in which option to Lok Adalat can be made being one of the modes provided in section 89. The 1987 Act also does not deal with the aspect of exercising option to one of four ADR methods mentioned in section 89. Section 89 makes applicable 1996 Act and 1987 Act from the stage after exercise of options and making of reference.

61. A doubt has been expressed in relation to Clause (d) of section 89 (2) of the Code on the question as to finalisation of the terms of the compromise. The question is whether the terms of compromise are to be finalised by or before the mediator or by or before the court. It is evident that all the four alternatives, namely, Arbitration, Conciliation, Judicial Settlement including settlement through Lok Adalat and Mediation are meant to be the action of persons or institutions outside the Court and not before the Court. Order X, Rule 1C speaks of the

'Conciliation forum' referring back the dispute to the Court. In fact, the court is not involved in the actual mediation/conciliation. Clause (d) of section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing the parties, 'effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, in this view, there is no question of the Court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The Judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be settlement and on that ground he cannot be treated to be disqualified to try the suit afterwards if no settlement is arrived at between the parties.

62. The question also is about the payment made and expenses to be incurred where the court compulsorily refers a matter for conciliation/mediation. Considering large number of responses received by the Committee to the draft rules it has suggested that in the event of such compulsory reference to conciliation/mediation procedures if expenditure on conciliation/mediation is borne by the government, it may encourage parties to come forward and make attempts at conciliation/mediation. On the other hand, if the parties feel that they have to incur extra expenditure for resorting to such ADR modes, it is likely to act as a deterrent for adopting these methods. The suggestion is laudable. The Central Government is directed to examine it and if agreed, it shall request the Planning Commission and Finance Commission to make specific financial allocation for the judiciary for including the expenses involved for mediation/conciliation under section 89 of the Code. In case, Central Government has any reservations, the same shall be placed before the court within four months. In such event, the Government shall consider provisionally releasing adequate funds for these purposes also having regard to what we have earlier noticed about many statutes that are being administered and litigations pending in the Courts in various States are Central Legislation concerning the subjects in List I and List III of Schedule VII to the Constitution of India.

63. With a view to enable the Court to refer the parties to conciliation/mediation, where parties are unable to reach a consensus on an agreed name, there should be a panel of well trained conciliators/mediators to which it may be possible for the Court to make a reference. It would be necessary for the High Courts and District Courts to take appropriate steps in the direction of preparing the requisite panels.

64. A doubt was expressed about the applicability of ADR rules for dispute arising under the Family Courts Act since that Act also contemplates rules to be made. It is, however, to be borne in mind that the Family Courts Act applies the Code for all proceedings before it. In this view, ADR rules made under the Code can be applied to supplement the rules made under the Family Courts Act and provide for ADR insofar as conciliation/mediation is concerned.

65. It seems clear from the report that while drafting the model rules, after examining the mediation rules in various countries, a fine distinction is tried to be maintained between conciliation and mediation, accepting the views expressed by British author Mr. Brown in his work on India that in 'conciliation' there is little more latitude and conciliator can suggest some terms of settlements too.

66. When the parties come to a settlement upon a reference made by the Court for mediation, as suggested by the Committee that there has to be some public record of the manner in which the suit is disposed of and, therefore, the Court has to first record the settlement and pass a decree in terms thereof and if necessary proceed to execute it in accordance with law. It cannot be accepted that such a procedure would be unnecessary. If the settlement is not filed in the Court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without decree. In such eventuality, nothing prevents them in informing the Court that the suit, may be dismissed as a dispute has been settled between the parties outside the Court.

67. Regarding refund of the court fee where the matter is settled by the reference to one of the modes provided in section 89 of the Act, it is for the State Governments to amend the laws on the lines of amendment made in Central Court Fee Act by 1999 Amendment to the Code. The State Governments can consider making similar amendments in the State Court Fee legislations.

68. The draft rules have been finalised by the Committee. Prior to finalisation, the same were circulated to the High Courts, Subordinate Courts, the Bar Council of India, State Bar Councils and the Bar Associations, seeking their responses. Now, it is for the respective High Courts to take appropriate steps for making rules in exercise of rule making power subject to modifications, if any, which may be considered relevant.

69. The draft Civil Procedure-Alternative Dispute Resolution and Mediation Rules as framed by the Committee read as under:

CIVIL PROCEDURE - ADR AND MEDIATION RULES

(These Rules are the final Rules framed by the Committee, in modification of the Draft Rules circulated earlier, after considering the responses to the Consultation paper)

CIVIL PROCEDURE- ALTERNATIVE DISPUTE RESOLUTION AND MEDIATION RULES, 2003

In exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and Clause (d) of Sub-section (2) of section 89 of the said Code, the High Court of ..., is hereby issuing the following Rules:

Part I

Alternative Dispute Resolution Rules

Rule 1: Title

These Rules in Part I shall be called the 'Civil Procedure - Alternative Dispute Resolution Rules 2003'.

Rule 2: Procedure for directing parties to opt for alternative modes of settlement

(a) The Court shall, after recording admissions and denials at the first hearing of the suit under Rule 1 of Order X, and where it appears to the Court that there exist elements

of a settlement which may be acceptable to the parties, formulate the terms of settlement and give them to the parties for their observations under Sub-section (1) of section 89, and the parties shall submit to the Court their responses within thirty days of the first hearing.

(b) At the next hearing, which shall be not later than thirty days of the receipt of responses, the Court may reformulate the terms of a possible settlement and shall direct the parties to opt for one of the modes of settlements disputes outside the Court as specified in Clauses (a) to (d) of Sub-section (1) of section 89 read with Rule 1A of Order X, in the manner stated hereunder,

Provided that the Court, in the exercise of such power, shall not refer any dispute to arbitration or to judicial settlement by a person or institution without the written consent of all the parties to the suit.

Rule 3: Persons authorized to take decision for the Union of India, State Governments and others:

(1) For the purpose of Rule 2, the Union of India or the Government of a State or Union Territory, all local authorities, all Public Sector Undertakings, all statutory corporations and all public authorities shall nominate a person or persons or group of persons who are authorized to take a final decision as to the mode of Alternative Dispute Resolution in which it proposes to opt in the event of direction by the Court under section 89 and such nomination shall be communicated to the High Court within the period of three months from the date of commencement of these Rules and the High Court shall notify all the subordinate courts in this behalf as soon as such nomination is received from such Government or authorities.

(2) Where such person or persons or group of persons have not been nominated as aforesaid, such party as referred to in Clause (1) shall, if it is a plaintiff, file along with the plaint or if it is a defendant file, along with or before the filing of the written statement, a memo into the Court, nominating a person or persons or group of persons who is or are authorized to take a final decision as to the mode of Alternative Dispute Resolution, which the party prefers to adopt in the event of the Court directing the party to opt for one or other mode of Alternative Dispute Resolution.

Rule 4: Court to give guidance to parties while giving direction to opt

(a) Before directing the parties to exercise option under Clause (b) of Rule 2, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their option as to the particular mode of settlement, namely:

(i) that it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one or other of these modes of settlement referred to in section 89 rather than seek a trial on the disputes arising in the suit;

(ii) that, where there is no relationship between the parties which requires to be preserved, it may be in the interest of the parties to seek reference of the matter of arbitration as envisaged in Clause (a) of Sub-section (1) of section 89.

(iii) that, where there is a relationship between the parties which requires to be preserved, it may be in the interest of parties to seek reference of the matter to conciliation or mediation, as envisaged in Clauses (b) or (d) of Sub-section (1) of section 89,

Explanation: Disputes arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

(iv) that, where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to Lok Adalat or to judicial settlement as envisaged in Clause (c) of Sub-section (1) of section 89.

(v) the difference between the different modes of settlement, namely, arbitration, conciliation, mediation and judicial settlement as explained below:

Settlement by 'Arbitration' means the process by which an arbitrator appointed by parties or by the Court, as the case may be, adjudicates the disputes between the parties to the suit and passes an award by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996), in so far as they refer to arbitration.

Settlement by 'Conciliation' means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) in so far as they relate to conciliation, and in particular, in exercise of his powers under section 67 section 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

Settlement by 'Mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions which affect them.

Settlement in Lok Adalat means settlement by Lok Adalat as contemplated by the Legal Services Authority Act, 1987.

'Judicial settlement' means a final settlement by way of compromise entered into before a suitable institution or person to which the Court has referred the dispute and which institution or person are deemed to be the Lok Adalats under the provisions of the Legal Service Authority Act, 1987 (39 of 1987) and where after such reference, the provisions of the said Act apply as if the dispute was referred to a Lok Adalat under the provisions of that Act.

Rule 5** : **Procedure for reference by the Court to the different modes of settlement:

(a) Where all parties to the suit decide to exercise their option and to agree for settlement by arbitration, they shall apply to the Court, within thirty days of the direction of the Court under Clause (b) of Rule 2 and the Court shall, within thirty days of the said application, refer the matter to arbitration and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to arbitration under that Act, shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act;

(b) Where all the parties to the suit decide to exercise their option and to agree for settlement by the Lok Adalat or where one of the parties applies for reference to Lok Adalat, the procedure envisaged under the Legal Services Act, 1987 and in particular by Section 20 of that Act, shall apply.

(c) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within thirty days of the direction under Clause (b) of Rule 2 and then the Court shall, within thirty days of the application, refer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and thereafter the provisions of the Legal Services Authority Act, 1987 (39 of 1987) which are applicable after the stage of making of the reference to Lok Adalat under that Act, shall apply as if the proceedings were referred for settlement under the provisions of that Act;

(d) Where none of the parties are willing to agree to opt or agree to refer the dispute to arbitration, or Lok Adalat, or to judicial settlement, within thirty days of the direction of the Court under Clause (b) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.

(e)(i) Where all the parties opt and agree for conciliation, they shall apply to the Court, within thirty days of the direction under Clause (b) of Rule 2 and the Court shall, within thirty days of the application refer the matter to conciliation and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to conciliation under that Act, shall apply, as if the proceedings were referred for settlement by way of conciliation under the provisions of that Act;

(ii) Where all the parties opt and agree for mediation, they shall apply to the Court, within thirty days of the direction under Clause (b) of Rule 2 and the Court shall, within thirty days of the application, refer the matter to mediation and then the Mediation Rules, 2003 in Part II shall apply.

(f) Where under Clause (d), all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the Court within thirty days of the direction under Clause (b) of Rule 2, seeking settlement through conciliation or mediation, as the case may be, and in that event, the Court shall, within a further period of thirty days issue notice to the other parties to respond to the application, and

(i) in case all the parties agree for conciliation, the Court shall refer the matter to conciliation and thereafter, the provisions of the Arbitration and Conciliation Act, 1996

which are applicable after the stage of making of the reference to conciliation under that Act, shall apply.

(ii) in case all the parties agree for mediation, the Court shall refer the matter to mediation in accordance with the Civil Procedure - Mediation Rules, 2003 in Part II shall apply.

(iii) in case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be. In case the dispute is referred to Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to Conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure-Mediation Rules, 2003, shall apply.

(g)(i) Where none of the parties apply for reference either to arbitration, or Lok Adalat, or Judicial Settlement, or for Conciliation or Mediation, within thirty days of the direction under Clause (b) of Rule 2, the Court shall, within a further period of thirty days, issue notices to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.

(ii) After hearing the parties or their representatives on the day so fixed the Court shall, if there exist elements of a settlement which may be acceptable to the parties and there is a relationship between the parties which has to be preserved, refer the matter to Conciliation or Mediation. In case the dispute is referred to Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to Conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure -Mediation Rules, 2003, shall apply.

(h)(i) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings of the Court, opt for any one of the modes of alternative dispute resolution nor shall enter into any settlement on behalf of a minor or person under disability with reference to the suit in which he acts as mere friend or guardian.

(ii) Where an application is made to the Court for leave to enter into a settlement initiated into in the Alternative Dispute Resolution proceedings on behalf of a minor or other person under disability and such minor or other person under disability is represented by Counsel or pleader, the counsel or pleader shall file a certificate along with the said application to the effect that the settlement is, in his opinion, for the benefit of the minor or other person under disability. The decree of the Court based on the settlement to which the minor or other person under disability is a party, shall refer to the sanction of the Court thereto and shall set out the terms of the settlement.

Rule 6 : Referral to the Court and appearance before the Court upon failure of attempts to settle disputes by conciliation or judicial settlement or mediation:

(1) Where a suit has been referred for settlement for conciliation, mediation or judicial settlement and has not been settled or where it is felt that it would not be proper in the interests of justice to proceed further with the matter, the suit shall be referred back again to the Court with a direction to the parties to appear before the Court on a specific date.

(2) Upon the reference of the matter back to the Court under Sub-rule (1) or under Sub-section (5) of Section 20 of the Legal Services Authority Act, 1987, the Court shall proceed with the suit in accordance with law.

Rule 7 : Training in alternative methods of resolution of disputes, and preparation of manual:

(a) The High Court shall take steps to have training courses conducted in places where the High Court and the District Courts or Courts of equal status are located, by requesting bodies recognized by the High Court or the Universities imparting legal education or retired Faculty Members or other persons who, according to the High Court are well versed in the techniques of alternative methods of resolution of dispute, to conduct training courses for lawyers and judicial officers.

(b)(i) The High Court shall nominate a committee of judges, faculty members including retired persons belonging to the above categories, senior members of the Bar, other members of the Bar specially qualified in the techniques of alternative dispute resolution, for the purpose referred to in Clause (a) and for the purpose of preparing a detailed manual of procedure for Alternative Dispute Resolution to be used by the Courts in the State as well as by the Arbitrators, or authority or person in the case of judicial settlement or Conciliators or Mediators.

(ii) The said manual shall describe the various methods of Alternative Dispute Resolution, the manner in which any one of the said methods is to be opted for, the suitability of any particular method for any particular type of dispute and shall specifically deal with the role of the above persons in disputes which are commercial or domestic in nature or which relate to matrimonial, maintenance and child custody matters.

(c) The High Court and the District Courts shall periodically conduct seminars and workshops on the subject of Alternative Dispute Resolution procedures throughout the State or States over which the High Court has jurisdiction with a view to bring awareness of such procedures and to impart training to lawyers and judicial officers.

(d) Persons who have experience in the matter of Alternative Dispute Resolution procedures, and in particular in regard to conciliation and mediation, shall be given preference in the matter of empanelment for purposes of conciliation or mediation.

Rule 8 : Applicability to other proceedings :

The provisions of these Rules may be applied to proceedings before the Courts, including Family Courts constituted under the Family Courts Act (66 of 1984), while

dealing with matrimonial, maintenance and child custody disputes, wherever necessary, in addition to the rules framed under the Family Courts Act, (66 of 1984).

PART II

CIVIL PROCEDURE MEDIATION RULES,2003

Rule 1 : Title

These Rules in Part II shall be called the Civil Procedure Mediation Rules, 2003.

Rule 2 : Appointment of mediator

(a) Parties to a suit may all agree on the name of the sole mediator for mediating between them.

(b) Where, there are two sets of parties and are unable to agree on a sole mediator, each set of parties shall nominate a mediator.

(c) Where parties agree on a sole mediator, under Clause (a) or where parties nominate more than one mediator under Clause (b), the mediator need not necessarily be from the panel of mediators referred to in Rule 3 nor bear the qualifications referred to in Rule 4 but should not be a person who suffers from the disqualifications referred to in Rule 5.

(d) Where there are more than two sets of parties having diverse interests, each set shall nominate a person on its behalf and the said nominees shall select the sole mediator and failing unanimity in that behalf, the Court shall appoint a sole mediator.

Rule 3 : Panel of mediators

(a) The High Court shall, for the purpose of appointing mediators between parties in suits filed on its original side, prepare a panel of mediators and publish the same on its Notice Board, within thirty days of the coming into force of these Rules, with copy to the Bar Association attached to the original side of the High Court.

(b)(i) The Courts of the Principal District and Sessions Judge in each District or the Courts of the Principal Judge of the City Civil Court or Courts of equal status shall, for the purposes of appointing mediators to mediate between parties in suits filed on their original side, prepare a panel of mediators, within a period of sixty days of the commencement of these Rules, after obtaining the approval of the High Court to the names included in the panel, and shall publish the same on their respective Notice Board.

(ii) Copies of the said panels referred to in Clause (i) shall be forwarded to all the Courts of equivalent jurisdiction or Courts subordinate to the Courts referred to in Sub-clause (i) and to the Bar associations attached to each of the Courts :

(c) The consent of the persons whose names are included in the panel shall be obtained before empanelling them.

(d) The panel of names shall contain a detailed Annexure giving details of the qualifications of the mediators and their professional or technical experience in different fields.

Rule 4* : *Qualifications' of persons to be empanelled under Rule 3

The following persons shall be treated as qualified and eligible for being enlisted in the panel of mediators under Rule 3, namely:

(a) (i) Retired Judges of the Supreme Court of India;

(ii) Retired Judges of the High Court;

(iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status.

(b) Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court; or the District Courts or Courts of equivalent status.

(c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;

(d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

Rule 5* : *Disqualifications of persons

The following persons shall be deemed to be disqualified for being empanelled as mediators:

(i) any person who has been adjudged as insolvent or is declared of unsound mind.

(ii) or any person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending, or

(iii) any person who has been convicted by a criminal court for any offence involving moral turpitude;

(iv) any person against whom disciplinary proceedings or charges relating to moral turpitude have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment.

(v) any person who is interested or connected with the subject-matter of dispute or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing.

(vi) any legal practitioner who has or is appearing for any of the parties in the suit or in any other suit or proceedings.

(vii) such other categories of persons as may be notified by the High Court.

Rule 6* : *Venue for conducting mediation

The mediator shall conduct the mediation at one or other of the following places:

(i) Venue of the Lok Adalat or permanent Lok Adalat.

(ii) Any place identified by the District Judge within the Court precincts for the purpose of conducting mediation.

(iii) Any place identified by the Bar Association or State Bar Council for the purpose of mediation, within the premises of the Bar Association or State Bar Council, as the case may be.

(iv) Any other place as may be agreed upon by the parties subject to the approval of the Court.

Rule 7: Preference

The Court shall, while nominating any person from the panel of mediators referred to in Rule 3, consider his suitability for resolving the particular class of dispute involved in the suit and shall give preference to those who have proven record of successful mediation or who have special qualification or experience in mediation.

Rule 8: Duty of mediator to disclose certain facts

(a) When a person is approached in connection with his possible appointment as a mediator, the person shall disclose in writing to the parties, any circumstances likely to give rise to a justifiable doubt as to his independence or impartiality.

(b) Every mediator shall, from the time of his appointment and throughout the continuance of the mediation proceedings, without delay, disclose to the parties in writing, about the existence of any of the circumstances referred to in Clause (a).

Rule 9 : Cancellation of appointment

Upon information furnished by the mediator under Rule 8 or upon any other information received from the parties or other persons, if the Court, in which the suit is filed, is satisfied, after conducting such inquiry as it deems fit, and after giving a hearing to the mediator, that the said information has raised a justifiable doubt as to the mediator's independence or impartiality, it shall cancel the appointment by a reasoned order and replace him by another mediator.

Rule 10 : Removal or deletion from panel

A person whose name is placed in the panel referred to in Rule 3 may be removed or his name be deleted from the said panel, by the Court which empanelled him, if:

(i) he resigns or withdraws his name from the panel for any reason;

(ii) he is declared insolvent or is declared of unsound mind;

(iii) he is a person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending;

(iv) he is a person who has been convicted by a criminal court for any offence involving moral turpitude;

(v) he is a person against whom disciplinary proceedings on charges relating to moral turpitude have been initiated by appropriate disciplinary authority which are pending or have resulted in a punishment;

(vi) he exhibits or displays conduct, during the continuance of the mediation proceedings, which is unbecoming of a mediator;

(vii) the Court which empanelled, upon receipt of information, if it is satisfied, after conducting such inquiry as it deem fit, is of the view, that it is not possible or desirable to continue the name of that person in the panel,

Provided that, before removing or deleting his name, under Clause (vi) and (vii), the Court shall hear the mediator whose name is proposed to be removed or deleted from the panel and shall pass a reasoned order.

Rule 11 **:** ***Procedure of mediation***

(a) The parties may agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings.

(b) Where the parties do not agree on any particular procedure to be followed by the mediator, the mediator shall follow the procedure hereinafter mentioned, namely:

(i) he shall fix, in consultation with the parties, a time schedule, the dates and the time of each mediation session, where all parties have to be present;

(ii) He shall hold the mediation conference in accordance with the provisions of Rule 6;

(iii) He may conduct joint or separate meetings with the parties;

(iv) Each party shall, ten days before a session, provide to the Mediator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator to understand the issue; such memoranda shall also be mutually exchanged between the parties;

(v) Each party shall furnish to the mediator, copies of pleadings or documents or such other information as may be required by him in connection with the issues to be resolved.

Provided that where the mediator is of the opinion that he should look into any original document, the Court may permit him to look into the original document before such officer of the Court and on such date or time as the Court may fix.

(vi) Each party shall furnish to the mediator such other information as may be required by him in connection with the issues to be resolved.

(c) Where there is more than one mediator, the mediator nominated by each party shall first confer with the party that nominated him and shall thereafter interact with the other mediators, with a view to resolving the disputes.

Rule 12 **:** ***Mediator not bound by Evidence Act, 1872 or Code of Civil Procedure, 1908***

The mediator shall not be bound by the Code of Civil Procedure 1908 or the Evidence Act, 1872, but shall be guided by principles of fairness and justice, have regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute.

Rule 13 **:** ***Non-attendance of parties at sessions or meetings on due dates***

(a) The parties shall be present personally or may be represented by their counsel or power of attorney holders at the meetings or sessions notified by the mediator.

(b) If a party fails to attend a session or a meeting notified by the mediator, other parties or the mediator can apply to the Court in which the suit is filed, to issue appropriate directions to that party to attend before the mediator and if the Court finds

that a party is absenting himself before the mediator without sufficient reason, the Court may take action against the said party by imposition of costs.

(c) The parties not resident in India, may be represented by their counsel or power of attorney holders at the sessions or meetings.

Rule 14 : Administrative assistance

In order to facilitate the conduct of mediation proceedings, the parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

Rule 15 : Offer of settlement by parties

(a) Any party to the suit may, 'without prejudice', offer a settlement to the other party at any stage of the proceedings, with notice to the mediator.

(b) Any party to the suit may make a, 'with prejudice' offer, to the other party at any stage of the proceedings, with notice to the mediator.

Rule 16 : Role of mediator

The mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasizing that it is the responsibility of the parties to take decision which effect them; he shall not impose any terms of settlement on the parties.

Rule 17 : Parties alone responsible for taking decision

The parties must understand that the mediator only facilitates in arriving at a decision to resolve disputes and that he will not and cannot impose any settlement nor does the mediator give any warranty that the mediation will result in a settlement. The mediator shall not impose any decision on the parties.

Rule 18 : Time limit for completion of mediation

On the expiry of sixty days from the date fixed for the first appearance of the parties before the mediator, the mediation shall stand terminated, unless the Court, which referred the matter, either *suo moto*, or upon request by the mediator or any of the parties, and upon hearing all the parties, is of the view that extension of time is necessary or may be useful; but such extension shall not be beyond a further period of thirty days.

Rule 19 : Parties to act in good faith

While no one can be compelled to commit to settle his case in advance of mediation, all parties shall commit to participate in the proceedings in good faith with the intention to settle the dispute, if possible.

Rule 20: Confidentiality, disclosure and inadmissibility of information:

(1) When a mediator receives confidential information concerning the dispute from any party, he shall disclose the substance of that information to the other party, if permitted in writing by the first party.

(2) When a party gives information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose that information to the other party, nor shall the mediator voluntarily divulge any information regarding the documents or what is conveyed to him orally as to what transpired during the mediation.

(3) Receipt or perusal, or preparation of records, reports or other documents by the mediator, or receipt of information orally by the mediator while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding the documents nor in regard to the oral information nor as to what transpired during the mediation.

(4) Parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to:

(a) views expressed by a party in the course of the mediation proceedings;

(b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;

(c) proposals made or views expressed by the mediator;

(d) admission made by a party in the course of mediation proceedings;

(e) the fact that a party had or had not indicated willingness to accept a proposal;

(5) There shall be no stenographic or audio or video recording of the mediation proceedings.

Rule 21 : Privacy

Mediation sessions and meetings are private; only the concerned parties or their counsel or power of attorney holders can attend. Other persons may attend only with the permission of the parties or with the consent of the mediator.

Rule 22 : Immunity

No mediator shall be held liable for anything bona fide done or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit to appear in a Court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

Rule 23 : Communication between mediator and the Court

(a) In order to preserve the confidence of parties in the Court and the neutrality of the mediator, there should be no communication between the mediator and the Court, except as stated in Clauses (b) and (c) of this Rule.

(b) If any communication between the mediator and the Court is necessary, it shall be in writing and copies of the same shall be given to the parties or their counsel or power of attorney.

(c) Communication between the mediator and the Court shall be limited to communication by the mediator:

(i) with the Court about the failure of party to attend;

(ii) with the Court with the consent of the parties;

(iii) regarding his assessment that the case is not suited for settlement through mediation;

(iv) that the parties have settled the dispute or disputes.

Rule 24 : Settlement Agreement

(1) Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced to writing and signed by the parties or their power of attorney holder. If any counsel have represented the parties, they shall attest the signature of their respective clients.

(2) The agreement of the parties so signed and attested shall be submitted to the mediator who shall, with a covering letter signed by him, forward the same to the Court in which the suit is pending.

(3) Where no agreement is arrived at between the parties, before the time limit stated in Rule 18 or where, the mediator is of the view that no settlement is possible, he shall report the same to the said Court in writing.

Rule 25 : Court to fix a date for recording settlement and passing decree

(1) Within seven days of the receipt of any settlement, the Court shall issue notice to the parties fixing a day for recording the settlement, such date not being beyond a further period of fourteen days from the date of receipt of settlement, and the Court shall record the settlement, if it is not collusive.

(2) The Court shall then pass a decree in accordance with the settlement so recorded, if the settlement disposes of all the issues in the suit.

(3) If the settlement disposes of only certain issues arising in the suit, the Court shall record the settlement on the date fixed for recording the settlement and (i) if the issues are severable from other issues and if a decree could be passed to the extent of the settlement covered by those issues, the Court may pass a decree straightaway in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues which are not settled.

(ii) if the issues are not servable, the Court shall wait for a decision of the Court on the other issues which are not settled.

Rule 26 : Fee of mediator and costs

(1) At the time of referring the disputes to mediation, the Court shall, after consulting the mediator and the parties, fix the fee of the mediator.

(2) As far as possible a consolidated sum may be fixed rather than for each session or meeting.

(3) Where there are two mediators as in Clause (b) of Rule 2, the Court shall fix the fee payable to the mediators which shall be shared equally by the two sets of parties.

(4) The expense of the mediation including the fee of the mediator, costs of administrative assistance, and other ancillary expenses concerned, shall be borne equally by the various contesting parties or as may be otherwise directed by the Court.

(5) Each party shall bear the costs for production of witnesses on his side including experts, or for production of documents.

(6) The mediator may, before the commencement of mediation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation, as referred to in Clauses (1), (3) and (4). The remaining 60% shall be deposited with the mediator, after the conclusion of mediation. For the amount of cost paid to the mediator, he shall issue the necessary receipts and a statement of account shall be filed, by the mediator in the Court.

(7) The expense of mediation including fee, if not paid by the parties, the Court shall, on the application of the mediator or parties, direct the concerned parties to pay, and if they do not pay, the Court shall recover the said amounts as if there was a decree for the said amount.

(8) Where a party is entitled to legal aid under Section 12 of the Legal Services Authority Act, 1987, the amount of fee payable to the mediator and costs shall be paid by the concerned Legal Services Authority under that Act.

Rule 27* : *Ethics to be followed by mediator

The mediator shall:

(1) follow and observe these Rules strictly and with due diligence;

(2) not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator;

(3) uphold the integrity and fairness of the mediation process;

(4) ensure that the parties involved in the mediation and fairly informed and have an adequate understanding of the procedural aspects of the process;

(5) satisfy himself/herself that he/she is qualified to undertake and complete the assignment in a professional manner;

(6) disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias;

(7) avoid, while communicating with the parties, any impropriety or appearance of impropriety;

(8) be faithful to the relationship of trust and confidentiality imposed in the office of mediator;

(9) conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;

(10) recognize that mediation is based on principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary, undisclosed agreement;

(11) maintain the reasonable expectations of the parties as to confidentiality;

(12) refrain from promises or guarantees of results.

Rule 28 : Transitory provisions

Until a panel of arbitrators is prepared by the High Court and the District Court, the Courts referred to in Rule 3, may nominate a mediator of their choice if the mediator belongs to the various classes of persons referred to in Rule 4 and is duly qualified and is not disqualified, taking into account the suitability of the mediator for resolving the particular dispute."

REPORT NO. 3

70. Report No. 3 deals with the Case Flow Management and Model Rules. The case management policy can yield remarkable results in achieving more disposals of the cases. Its mandate is for the Judge or an officer of the court to set a time-table and monitor a case from its initiation to its disposal. The Committee on survey of the progress made in other countries has come to a conclusion that the case management system has yielded exceedingly good results.

71. Model Case Flow Management Rules have been separately dealt with for trial courts and first appellate subordinate courts and for High Courts. These draft Rules extensively deal with the various stages of the litigation. The High Courts can examine these Rules, discuss the matter and consider the question of adopting or making Case Law Management and Model Rules with or without modification, so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice.

72. The Model Case Flow Management Rules read as under:

"MODEL CASE FLOW MANAGEMENT RULES"

(A) Model Case Management Rules for Trial Courts and First Appellate Subordinate Courts

I. Division of Civil Suits and Appeals into Tracks

II. Original Suits

1. Fixation of time limits while issuing notice
2. Service of Summons/notice and completion of pleadings
3. Calling of Cases (Hajri or Call Work or Roll Call)
4. Procedure on the grant of interim orders
5. Referral to Alternate Dispute Resolution
6. Procedure on the failure of Alternate Dispute Resolution
7. Referral to Commissioner for recordal of evidence
8. Costs
9. Proceedings for Perjury
10. Adjournments
11. Miscellaneous Applications.

III. First Appeals to Subordinate Courts

1. Service of Notice of Appeal

2. Essential Documents to be filed with the Memorandum of Appeal
3. Fixation of time limits in interlocutory matters.
4. Steps for completion of all formalities (Call Work Hajri)
5. Procedure on grant of interim-orders
6. Filing of Written submissions
7. Costs

IV. Application/Petition under Special Acts

V. Criminal Trial and Criminal Appeals to Subordinate Courts

(a) Criminal Trials
(b) Criminal Appeals

VI. Notice under section 80 of Code of Civil Procedure

VII. Note

(B) Model Case Flow Management Rules in High Court

I. Division of Cases into Tracks
II. Writ of Habeas Corpus
III. Mode of Advance Service
IV. First Appeals to High Court
V. Appeals to Division Bench
VI. Second Appeals.
VII. Civil Revisions
VIII. Criminal Appeals
IX. Note.

HIGH COURT RULES, 2003

In exercise of the power conferred by Part X of the Code of Civil Procedure 1908, (5 of 1908) and ... High Court Act, ... and all other powers enabling, the ... High Court hereby makes the following Rules, in regard to case flow management in the subordinate courts.

(A) Model Rules for Trial Courts and First Appellate Subordinate Courts

I. Division of Civil Suits and Appeals into Tracks

1. Based on the nature of dispute, the quantum of evidence to be recorded and the time likely to be taken for the completion of suit, the suits shall be channeled into different tracks. Track I may include suits for maintenance, divorce and child custody and visitation rights, grant of letters of administration and succession certificate and simple suits for rent or for eviction (upon notice under Section 106 of Transfer of Property Act). Track 2 may consist of money suits and suits based solely on negotiable instruments. Track 3 may include suits concerning partition and like property disputes, trademarks, copyrights and other intellectual property matters. Track 4 may relate to other matters.

All efforts shall be taken to complete the suits in track 1 within a period of 9 months, track 2 within 12 months and suits in track 3 and 4 within 24 months.

This categorization is illustrative and it will be for the High Court to make appropriate categorization. It will be for the judge concerned to make an appropriate assessment as to which track any case can be assigned.

2. Once in a month, the registry/administrative staff of each Court will prepare a report as to the stage and progress of cases which are proposed to be listed in next month and place the report before the Court. When the matters are listed on each day, the judge concerned may take such decision as he may deem fit in the presence of counsel/parties in regard to each case for removing any obstacles in service of summons, completion of pleadings etc. with a view to make the case ready for disposal.

3. The judge referred to in Clause (2) above, may shift a case from one track to another, depending upon the complexity and other circumstances of the case.

4. Where computerization is available, the monthly data will be fed into the computer in such a manner that the judge referred to in Clause (2) above, will be able to ascertain the position and the stage of every case in every track from the computer screen. Over a period, all cases pending in his Court will be covered. Where computerization is not available, the monitoring must be done manually.

5. The judge referred to in Clause (2) above, shall monitor and control the flow or progress of every case, either from the computer or from the register or data placed before him in the above manner or in some other manner he may innovate.

II. <u>Original Suit</u>:

1. Fixation of time limit while issuing notice

(a) Wherever notice is issued in a suit, the notice should indicate that the Code prescribes a maximum of 30 days for filing written statement (which for special reasons may be extended upto 90 days) and, therefore, the defendants may prepare the written statement expeditiously and that the matter will be listed for that purpose on the expiry of eight weeks from the date of issue of notice (so that it can be a definite date). After the written statement is filed, the replication (if any, proposed and permitted), should be filed within six weeks of receipt of the written statement. If there are more than one defendant, each one of the defendant should comply with this requirement within the time-limit.

(b) The notice referred to in Clause (a) shall be accompanied by a complete copy of the plaint and all its annexure/enclosures and copies of the interlocutory applications, if any.

(c) If interlocutory applications are filed along with the plaint, and if an *ex-parte* interim order is not passed and the Court is desirous of hearing the respondent, it may, while sending the notice along with the plaint, fix an earlier date for the hearing of the application (than the date for filing written statement) depending upon the urgency for interim relief.

2. Service of Summons/notice and completion of pleadings

(a) Summons may be served as indicated in Clause (3) of Rule 9 of Order V.

(b) In the case of service of summons by the plaintiff or a courier where a return is filed that the defendant has refused notice, the return will be accompanied by an undertaking that the plaintiff or the courier, as the case may be, is aware that if the return is found to be false, he can be punished for perjury or summarily dealt with for contempt of Court for abuse of the provisions of the Code. Where the plaintiff comes forward with a return of 'refusal', the provisions of Order 9A Rule (4) will be followed by re-issue of summons through Court.

(c) If it has not been possible to effect service of summons under Rule 9 of Order V, the provisions of Rule 17 of Order V shall apply and the plaintiff shall within 7 days from the date of its inability to serve the summons, to request the Court to permit substituted service. The dates for filing the written statement and replication, if any, shall accordingly stand extended.

3. Calling of Cases (Hajri or Call Work or Roll Call)

The present practice of the Court-master or Bench-clerk calling all the cases listed on a particular day at the beginning of the day in order to confirm whether counsel are ready, whether parties are present or whether various steps in the suit or proceeding has been taken, is consuming a lot of time of the Court, sometimes almost two hours of the best part of the day when the judge is fresh. After such work, the Court is left with very limited time to deal with cases listed before it. Formal listing should be first before a nominated senior officer of the registry, one or two days before the listing in Court. He may give dates in routine matters for compliance with earlier orders of Court. Cases will be listed before Court only where an order of the Court is necessary or where an order prescribing the consequences of default or where a peremptory order or an order as to costs is required to be passed on the judicial side. Cases which have to be adjourned as a matter of routine for taking steps in the suit or proceeding should not be unnecessarily listed before Court. Where parties/counsel are not attending before the Court-officer or are defiant or negligent, their cases may be placed before the Court. Listing of cases on any day before a Court should be based on a reasonable estimate of time and number of cases that can be disposed of by the Court in a particular day. The Courts shall, therefore, dispense with the practice of calling all the cases listed adjourned to any particular day. Cases will be first listed before a nominated senior officer of the Court, nominated for the purpose.

4. Procedure on the grant of interim orders

(a) If an interim order is granted at the first hearing by the Court, the defendants would have the option of moving appropriate applications for vacating the interim order even before the returnable date indicated in the notice and if such an application is filed, it shall be listed as soon as possible even before the returnable date.

(b) If the Court passes an *ad-interim ex-parte* order in an interlocutory application, and the reply by the defendants is filed, and if, thereafter, the plaintiff fails to file the rejoinder (if any) without good reason for the delay, the Court has to consider whether the stay or interim order passed by the Court should be vacated and shall list the case with that purpose. This is meant to prevent parties taking adjournment with a view to have

undue benefit of the *ad interim* orders. The plaintiff may, if he so chooses, also waive his right to file a rejoinder. A communication of option by the plaintiff not to file a rejoinder, made to the registry will be deemed to be the completion of pleadings in the interlocutory application.

5. Referral to Alternate Dispute Resolution

In the hearing before the Court, after completion of pleadings, time limit for discovery and inspection, and admission and denials, of documents shall be fixed, preferably restricted to 4 weeks each.

After the completion of admission and denial of documents by the parties, the suit shall be listed before the Court , for examination of parties ,under Order X of the Civil Procedure Code. A joint statement of admitted facts should be filed before the said date. The Court shall thereafter, follow the procedure prescribed under the Alternative Dispute Resolution and Mediation Rules, 2002.

6. Procedure on the failure of Alternate Dispute Resolution

On the filing of report by the Mediator under the Mediation Rules that efforts at Mediation have failed, or a report by the Conciliator under the provisions of the Arbitration and Conciliation Act, 1996, or a report of no settlement in the Lok Adalat under the provisions of the Legal Services Authority Act, 1987 the suit shall be listed before the registry within a period of 14 days. At the said hearing before the registry, all the parties shall submit the draft issues proposed by them. The suit shall be listed before the Court within 14 days thereafter for framing of issues.

When the suit is listed after failure of the attempts at Conciliation, Arbitration or Lok Adalat, the Judge may merely inquire whether it is still possible for the parties to resolve the dispute. This should invariably be done by the Judge at the first hearing when the matter comes back on failure of Conciliation, Mediation or Lok Adalat.

If the parties are not keen about settlement, the Court shall frame the issues and direct the plaintiff to start examining his witnesses. The procedure of each witness filing his examination-in-chief and being examined in cross or re-examination will continue, one after the other. After completion of evidence on the plaintiff's side, the defendant shall lead evidence likewise, witness after witness, the chief examination of each witness being by affidavit and the witness being then cross-examined or re-examined. The parties shall keep the affidavit in chief-examination ready whenever the witness's examination is taken up. As far as possible, evidence must be taken up day by day as stated in Clause (a) of proviso to Rule 2 of Order XVII. The parties shall also indicate the likely duration for the evidence to be completed, and for the arguments to be thereafter heard. The Judge shall ascertain the availability of time of the Court and will list the matter for trial on a date when the trial can go on from day to day and conclude the evidence. The possibility of further negotiation and settlement should be kept open and if such a settlement takes place, it should be open to the parties to move the registry for getting the matter listed at an earlier date for disposal.

7. Referral to Commissioner for recordal of evidence

(a) The High Court shall conduct an examination on the subjects of the Code of Civil Procedure and Evidence Act. Only those advocates who have passed an examination conducted by the High Court on the subjects of 'Code of Civil Procedure' and 'Evidence Act' - shall be appointed as Commissioners for recording evidence. They shall be ranked according to the marks secured by them.

(b) It is not necessary that in every case the Court should appoint a Commissioner for recording evidence. Only if the recording of evidence is likely to take a long time, or there are any other special grounds, should the Court consider appointing a Commissioner for recording the evidence. The Court should direct that the matter be listed for arguments fifteen days after the Commissioner files his report with the evidence.

The Court may initially fix a specific period for the completion of the recording of the evidence by the Commissioner and direct the matter to be listed on the date of expiry of the period, so that Court may know whether the parties are co-operating with the Commissioner and whether the recording of evidence is getting unnecessarily prolonged.

(c) Commissioners should file an undertaking in Court upon their appointment that they will keep the records handed over to them and those that may be filed before them, safe and shall not allow any party to inspect them in the absence of the opposite party/counsel. If there is delay of more than one month in the dates fixed for recording evidence, it is advisable for them to return the file to the Court and take it back on the eve of the adjourned date.

8. Costs

So far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory in as much as the liberal attitude of the Courts in directing the parties to bear their own costs had led parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event. Where a party succeeds ultimately on one issue or point but loses on number of other issues or points which were unnecessarily raised, costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to rules in force. If any of the parties has unreasonably protracted the proceedings, the Judge should consider exercising discretion to impose exemplary costs after taking into account the expense incurred for the purpose of attendance on the adjourned dates.

9. Proceedings for Perjury

If the Trial Judge, while delivering the judgment, is of the view that any of the parties or witnesses have willfully and deliberately uttered blatant falsehoods, he shall consider (at least in some grave cases) whether it is a fit case where prosecution should be initiated for perjury and order prosecution accordingly.

10. Adjournments

The amendments to the Code have restricted the number of adjournments to three in the course of hearing of the suit, on reasonable cause being shown. When a suit is listed before a Court and any party seeks adjournment, the Court shall have to verify whether the party is seeking adjournment due to circumstances beyond the control of the party, as required by Clause (b) of proviso to Rule 2 of Order XVII. The Court shall impose costs as specified in Rule 2 of Order XVII.

11. Miscellaneous Applications

The proceedings in a suit shall not be stayed merely because of the filing of Miscellaneous Application in the course of suit unless the Court in its discretion expressly thinks it necessary to stay the proceedings in the suit.

III. First Appeals to Subordinate Courts

1. Service of Notice of Appeal

First Appeals being appeals on question of fact and law, Courts are generally inclined to admit the appeal and it is only in exceptional cases that the appeal is rejected at the admission stage under Rule 11 of Order XLI. In view of the amended CPC, a copy of the memorandum of appeal is required to be filed in the Subordinate Court. It has been clarified by the Supreme Court that the requirement of filing a copy of appeal memorandum in the sub-ordinate Court does not mean that appeal memorandum cannot be filed in the Appellate Court immediately for obtaining interim orders.

Advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party who appeared in the Subordinate Court so as to enable the respondents to appear if they so choose, even at the first hearing stage.

2. Essential Documents to be filed with the Memorandum of Appeal

The Appellant shall, as far as possible, file, along with the appeal, copies of essential documents marked in the suit, for the purpose of enabling the appellate Court to understand the points raised or for purpose of passing interim orders.

3. Fixation of time limits in interlocutory matters

Whenever notice is issued by the Appellate Court in interlocutory matters, the notice should indicate the date by which the reply should be filed. The rejoinder, if any, should be filed within four weeks of receipt of the reply. If there are more parties than one who are Respondents, each one of the Respondent should comply with this requirement within the time limit and the rejoinder may be filed within four weeks from the receipt of the last reply.

4. Steps for completion of all formalities/ (Call Work) (Hajri)

The appeal shall be listed before the Registry for completion of all formalities necessary before the appeal is taken up for final hearing. The procedure indicated above of listing the case before a senior officer of the Appellate Court Registry for giving dates in routine matters must be followed to reduce the 'call work' (Hajri) and only where judicial orders are necessary, such cases should be listed before Court.

5. Procedure on grant of interim-orders

If an interim order is granted at the first hearing by the Court, the Respondents would have the option of moving appropriate applications for vacating the interim order even before the returnable date indicated in the notice and if such an application is filed, it shall be listed as soon as possible even before the returnable date.

If the Court passes an *ad-interim ex-parte* order, and if the reply is filed by the Respondents and if, without good reason, the appellant fails to file the rejoinder, Court shall consider whether it is a fit case for vacating the stay or interim order and list the case for that purpose. This is intended to see that those who have obtained *ad- interim* orders do not procrastinate in filing replies. The appellant may also waive his right to file the rejoinder. Such choice shall be conveyed to the registry on or before the date fixed for filing of rejoinder. Such communication of option by the applicant to the registry will be deemed to be completion of pleadings.

6. Filing of Written submissions

Both the appellants and the respondents shall be required to submit their written submissions two weeks before the commencement of the arguments in the appeal. The cause-list should indicate if written submissions have been filed or not. Wherever they have not been filed, the Court must insist on their being filed within a particular period to be fixed by the Court and each party must serve a copy thereof on the opposite side before the date of commencement of arguments. There is no question of parties filing replies to each other's written submissions.

The Court may consider having a Caution List/Alternative List to take care of eventualities when a case does not go on before a court, and those cases may be listed before a court where, for any reason, the scheduled cases are not taken up for hearing.

7. Costs

Awarding of costs must be treated generally as mandatory in as much as it is the liberal attitude if the Courts in not awarding costs that has led to frivolous points being raised in appeals or frivolous appeals being filed in the courts. Costs should invariably follow the event and reasons must be assigned by the Appellate Court for not awarding costs. If any of the parties have unreasonably protracted the proceedings, the Judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments.

IV. Application/Petition under Special Acts

This chapter deals with applications/petitions filed under Special Acts like the Industrial Disputes Act, Hindu Marriage Act, Indian Succession Act etc.

The Practice directions in regard to Original Suits should *mutatis mutandis* apply in respect of such applications/petitions.

V. Criminal Trials and Criminal Appeals to Subordinate Courts

(a) Criminal Trials

1. Criminal Trials should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment, rape and cases involving sexual offences or dowry deaths should be kept in Track I. Other cases where the accused is not granted bail and is in jail, should be kept in Track II. Cases which affect a large number of persons such as cases of mass cheating, economic offences, illicit liquor tragedy and food adulteration cases, etc. should be kept in Track III. Offences which are tried by special courts such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in Track IV. Track V - all other offences.

The endeavor should be to complete Track I cases within a period of nine months, Track II and Track ill cases within twelve months and Track IV within fifteen months.

2. The High Court may classify criminal appeals pending before it into different tracks on the same lines mentioned above.

(b) Criminal Appeals

3. Wherever an appeal is filed by a person in jail, and also when appeals are filed by State, as far as possible, the memorandum of appeal may be accompanied by important documents, if any, having a bearing on the question of bail.

4. In respect of appeals filed against acquittals, steps for appointment of *amicus curie* or State Legal Aid counsel in respect of the accused who do not have a lawyer of their own should be undertaken by the Registry/State Legal Services Authority immediately after completion of four weeks of service of notice, it shall be presumed that in such an event the accused is not in a position to appoint counsel.

5. Advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party in the subordinate Court, so as to enable the other party to appear if they so choose even at the first hearing stage.

VI. Notice issued under section 80 of Code of Civil Procedure

Every public authority shall appoint an officer responsible to take appropriate action on a notice issued under section 80 of the Code of Civil Procedure. Every such officer shall take appropriate action on receipt of such notice. If the Court finds that the concerned officer, on receipt of the notice, failed to take necessary action or was negligent in taking the necessary steps, the Court shall hold such officer responsible and recommend appropriate disciplinary action by the concerned authority.

VII. Note

Whenever there is any inconsistency between these rules and the provisions of either the Code of Civil Procedure, 1908 or the Code of Criminal Procedure 1973 or the High Courts Act or any other Statutes, the provisions of such Codes and Statutes shall prevail.

(B) Model Case Flow Management Rules in High Court
High Court Rules, 2003

In exercise of the power conferred by article 225 of the Constitution of India, and Chapter X of the Code of Civil Procedure, 1908 (5 of 1908) and Section ... of the ... High Court Act and all other powers enabling it, the ... High Court hereby makes the following Rules :

I. Division of Cases into different tracks

1. *Writ Petitions* : The High Court shall, at the stage of admission or issuing notice before admission categorise the Writ Petitions other than Writ of Habeas Corpus, into three categories depending on the urgency with which the matter should be dealt with : the Fast Track, the Normal Track and the Slow Track. The petitions in the Fast Track shall invariably be disposed of within a period not exceeding six months while the petitions in the Normal Track should not take longer than a year. The petitions in the Slow Track, subject to the pendency of other cases in the Court, should ordinarily be disposed of within a period of two years.

Where an interim order of stay or injunction is granted in respect of liability to tax or demolition or eviction from public premises etc. shall be put on the Fast Track. Similarly, all matters involving tenders would also be put on the Fast Track. These matters cannot brook delays in disposal.

2. Senior officers of the High Court, nominated for the purpose, shall at intervals of every month, monitor the stage of each case likely to come up for hearing before each Bench (Division Bench or Single Judge) during that month which have been allocated to the different tracks. The details shall be placed before the Chief Justice or Committee nominated for that purpose as well as the concerned Judge dealing with cases.

3. The Judge or Judges referred to in Clause (2) above may shift the case from one track to another, depending upon the complexity, urgency and other circumstances of the case.

4. Where computerization is available, data will be fed into the computer in such a manner that the court or Judge or Judges, referred to in Clause (2) above will be able to ascertain the position and stage of every case in every track from the computer screen.

5. Whenever the roster changes, the judge concerned who is dealing with final matters shall keep himself informed about the stage of the cases in various tracks listed before him during every week, with a view to see that the cases are taken up early.

6. *Other matters* : The High Court shall also divide Civil Appeals and other matters in the High Court into different tracks on the lines indicated in Sub-clauses (2) to (5) above and the said clauses shall apply, mutatis mutandis, to the civil appeals filed in the High Court. The High Court shall make a subject-wise division of the appeals/revision application for allocation into different tracks.

(Division of criminal petitions and appeals into different tracks is dealt with separately under the heading 'criminal petitions and appeals'.)

II. Writ of Habeas Corpus

Notices in respect of Writ of Habeas Corpus where the person is in custody under orders of a State Government or Central Government shall invariably be issued by the Court at the first listing and shall be made returnable within 48 hours. State Government or Central Government may file a brief return enclosing the relevant documents to justify the detention. The matter shall be listed after notice on the fourth working day after issuance of notice, and the Court shall consider whether a more detailed return to the Writ is necessary, and, if so required, shall give further time of a week and three days' time for filing a rejoinder. A Writ of Habeas Corpus shall invariably be disposed of within a period of fifteen days. It shall have preference over and above fast-track cases.

III. Mode of Advance Service

The Court rules will provide for mode of service of notice on the standing counsel for Respondents wherever available, against whom, interim orders are sought. Such advance service shall generally relate to Governments or public sector undertakings who have Standing Counsel.

FIRST APPEALS TO HIGH COURT

1. Service of Notice of Appeal

First Appeals being appeals on questions of fact and law, Courts are generally inclined to admit the appeal and it is only in exceptional cases that the appeal is rejected under Order XLI Rule 11 at the admission stage. In view of the amended CPC, a copy of the appeal is required to be filed in the Trial Court. It has been clarified by the Supreme Court that the requirement of filing of appeal in the Trial Court does not mean that the party cannot file the appeal in the appellate Court (High Court) immediately for obtaining interim orders.

In addition to the process for normal service as per the Code of Civil Procedure, advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party in the Trial Court itself so as to enable them to inform the parties to appear if they so choose even at the first hearing stage.

2. Filing of Documents

The Appellant shall, on the appeal being admitted, file all the essential papers within such period as may be fixed by the High Court for the purpose the High Court understanding the scope of the dispute and for the purpose of passing interlocutory orders.

3. Printing or typing of Paper Book

Printing and preparation of paper-books by the High Court should be done away with. After service of notice is effected, counsel for both sides should agree on the list of documents and evidence to be printed or typed and the same shall be made ready by the parties within the time to be fixed by the Court. Thereafter the paper book shall be got

ready. It must be assured that the paper books are ready at lease six months in advance before the appeal is taken up for arguments. (Cause Lists must specify if paper books have been filed or not).

4. Filing of Written Submissions and time for oral arguments

Both the appellants and the respondents shall be required to submit their written submissions with all the relevant pages as per the Court paper-book marked therein within a month of preparation of such paper-books, referred to in para 3 above.

Cause List may indicate if written submissions have been filed. If not, the Court must direct that they be filed immediately.

After the written submissions are filed, (with due service of copy to the other side) the matter should be listed before the Registrar/Master for the parties to indicate the time that will be taken for arguments in the appeal. Alternatively, such matters may be listed before a judge in chambers for deciding the time duration and thereafter to fix a date of hearing on a clear date when the requisite extent of time will be available.

In the event that the matter is likely to take a day or more, the High Court may consider having a Caution List/Alternative List to meet eventualities where a case gets adjourned due to unavoidable reasons or does not go on before a court, and those cases may be listed before a court where, for one reason or another, the scheduled cases are not taken up for hearing.

5. Court may explore possibility of settlement

At the first hearing of a First Appeal when both parties appear, the Court shall find out if there is a possibility of a settlement. If the parties are agreeable even at that stage for Mediation or Conciliation, the High Court could make a reference to Mediation or Conciliation for the said purpose.

If necessary, the process contemplated by section 89 of CPC may be resorted to by the Appellate Court so, however, that the hearing of the appeal is not unnecessarily delayed. Whichever is the ADR process adopted, the Court should fix a date for a report on the ADR two months from the date of reference.

V. Appeals to Division Bench from judgment of Single Judge of High Court

[*Letter Patent Appeals (LPA) or similar appeals under High Courts Acts*]

An appeal to a Division Bench from judgment of a Single Judge may lie in the following cases:

(1) Appeals from interlocutory orders of the Single Judge in original jurisdiction matters including writs; (2) appeals from final judgments of a Single Judge in original jurisdiction; (3) other appeals permitted by any law to a Division Bench.

Appeals against interlocutory orders falling under category (1) above should be invariably filed after advance notice to the opposite counsel (who has appeared before the Single Judge) so that both the sides will be represented at the very first hearing of the appeals. If both parties appear at the first hearing, there is no need to serve the opposite side by normal process and at least in some cases, the appeals against interlocutory orders

can be disposed of even at the first hearing. If, for any reason, this is not practicable, such Appeals against interim orders should be disposed of within a period of a month.

In cases referred to above, necessary documents should be kept ready by the counsel to enable the Court to dispose of the Appeal against interlocutory matter at the first hearing itself.

In all Appeals against interim orders in the High Court, in writs and civil matters, the Court should endeavour to set down and observe a strict time limit in regard to oral arguments. In case of Original Side appeals/LPAs arising out of final orders in a Writ Petition or arising out of civil suits filed in the High Court, a flexible time schedule may be followed.

The practice direction in regard to First Appeal should *mutatis mutandis* apply in respect of LPAs/Original Side appeals against final judgments of the Single Judge.

Writ Appeals/Letters Patent Appeals arising from orders of the Single Judge in a Writ Petition should be filed with simultaneous service on the counsel for the opposite party who had appeared before the Single Judge or on service of the opposite party.

Writ Appeals against interim orders of the Single Judge should invariably be disposed of early and, at any rate, within a period of thirty days from the first hearing. Before Writ Appeals against final orders in Writ Petitions are heard, brief written submissions must be filed by both parties within such time as may be fixed by the Court.

VI. Second Appeals

Even at the stage of admission, the questions of law with a brief synopsis and written submissions on each of the propositions should be filed so as to enable the Court to consider whether there is a substantial question of law. Wherever the Court is inclined to entertain the appeal, apart from normal procedure for service as per rules, advance notice shall be given to the counsel who had appeared in the first appeal letter Court. The notice should require the respondents to file their written submissions within a period of eight weeks from service of notice. Efforts should be made to complete the hearing of the Second Appeals within a period of six months.

VII. Civil Revision

A revision petition may be filed under section 115 of the Code or under any special statute. In some High Courts, petitions under Article 227 of the Constitution of India are registered as civil revision petitions. The practise direction in regard to LPAs and First Appeals to the High Courts, should *mutatis mutandis* apply in respect of revision petitions.

VIII. Criminal Appeals

Criminal Appeals should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment cases, rape, sexual offences, dowry death cases should be kept in Track I. Other cases where the accused is not granted bail and is in jail, should be kept in Track II. Cases which affect a large number of persons such as cases of mass cheating, economic offences, illicit liquor tragedy, food adulteration cases, offences of sensitive nature should be kept in Track III. Offences which are tried by

special courts such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in Track IV, Track V - all other offences.

The endeavour should be to complete Track I cases within a period of six months, Track II cases within nine months, Track III within a year, Track IV and Track V within fifteen months.

Wherever an appeal is filed by a person in jail, and also when appeals are filed by State, the complete paper-books including the evidence, should be filed by the State within such period as may be fixed by Court.

In appeals against acquittals, steps for appointment of *Amicus Curie* or State Legal Aid counsel in respect of the accused who do not have a lawyer of their own should be undertaken by the Registry/State Legal Services Committee immediately after completion of four weeks of service of notice. It shall be presumed that in such an event the accused is not in a position to appoint counsel, and within two weeks thereafter counsel shall be appointed and shall be furnished all the papers.

IX. Note

Wherever there is any inconsistency between these rules and the provisions of either the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973 or the High Court Act, or any other statute, the provisions of such Codes and statute, the provisions of such Codes and statutes shall prevail.

73. Before concluding, we wish to place on record our sincere gratitude and appreciation for the members of the Committee, in particular Hon'ble Mr. Justice M. Jagannadha Rao, Chairman of the Committee and Law Commission of India who as usual has taken great pains in examining the whole issue in detail and going into depth of it and has filed the three Reports above referred which we hope will go a long way in dispensation of effective and meaningful administration of justice to the litigating public. We hope that the High Courts in the country would be in a position to examine the aforesaid rules expeditiously and would be able to finalise the Rules within a period of four months.

74. Further, we place on record our deep appreciation for very useful assistance rendered by Senior Advocates Mr. K. Parasaran and Mr. Arun Mohan who on request from this court readily agreed to render assistance as Amicus Curie. We also record our appreciation for useful assistance rendered by Mr. Gulam Vahnavati, learned Solicitor General on behalf of Union of India and the Attorney General of India and Mr. T.LV. Iyer, Senior Advocate on behalf of Bar Council of India.

75. A copy of this judgment shall be sent to all the High Courts through Registrar Generals, Central Government through Cabinet Secretary and State Governments/Union Territories through Chief Secretaries so that expeditious follow up action can be taken by all concerned. The Registrar Generals, Central Government and State/Union Territories shall file the progress report in regard to the action taken within a period of four months.

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Iridium India Telecom Ltd. v. *Motorola Inc.*

2005 (2) SCC 145

B.N. SRIKRISHNA, J. - 1. This appeal impugns the judgment of the Division Bench of the High Court of Judicature at Bombay in a Letters Patent Appeal holding that the amended provision of Order VIII Rule 1 of the Code of Civil Procedure 1908 (hereinafter referred to as the 'CPC') would not apply to the suits on the Original Side of the High Court and that such suits would continue to be governed by the High Court Original Side Rules.

Facts: 2. The appellant company filed Suit No. 3092 of 2002 on 16.9.2002 on the Original Side of the High Court of Judicature at Bombay claiming about Rs. 1000 crores on the ground that it had suffered loss and/or damages on account of an alleged fraud on the part of the respondent, a foreign corporation incorporated in the United States of America. The appellant also obtained an *ex parte* order against the respondent in the nature of an attachment before judgment of receivables in India. On 17.9.2002, the first respondent claims to have dispatched the plaint and all connected papers by courier along with a covering letter of the same date. According to the appellant, the Sheriff of Bombay was requested to transmit the writ of summons along with the plaint and the other proceedings by Regd. A.D. post or by air mail to the respondent, and the Sheriff had done it. On 1.10.2002 the respondent filed a detailed affidavit along with an application to vacate the *ex parte* ad-interim order made on 16.9.2002, as a result of which the *ex parte* order was modified by the High Court on 3.10.2002. On 16.10.2002 a second Notice of Motion was filed by the appellant. The respondent filed an affidavit opposing the prayers made in the second Notice of Motion. After hearing the parties, the High Court by an order made on 24.10.2002 refused the *ad interim* reliefs sought in the second Notice of Motion. Though the appellant preferred an appeal from both the Orders dated 3.10.2002, modifying the earlier *ex parte* order, and the refusal of *ad interim* reliefs on 24.10.2002, that appeal was finally withdrawn. On 2.3.2003, the appellant applied for issue of duplicate summons. On 13.3.2003 the respondent filed a comprehensive affidavit in reply to the Notice of Motion. On 9.4.2003, duplicate summons were served upon the respondent. On 2.5.2003 the respondent applied for extension of time purportedly under Order VIII, Rule 1 of CPC, by a letter addressed to the Prothonotary and Senior Master, High Court of Bombay. The matter came before the learned Single Judge, who after hearing both the sides was of the view that "granting of 90 days time from 9.4.2003, the date on which the duplicate writ of summons had been admittedly served upon the respondent, would provide ample opportunity to the respondent to file written statement on or before 8.7.2003". Although, a prayer was made that the court may exercise its powers under Section 148 of the CPC and grant further extension of 30 days beyond 8.7.2003, that request was declined on the ground that the “request was premature and would be considered only on 8.7.2003, provided the defendant-respondent was able to show sufficient cause for such an indulgence.” Further time to file written statement was granted on payment of costs quantified at Rs.10,000 to be paid to the plaintiff-appellant. According to the respondent, the written statement was ready by 6.7.2003, but had not yet been affirmed. The respondent moved the court for further extension of time. This request was also opposed by the appellant. By an order made on 7.7.2003, the High Court extended time up to 28.7.2003.

3. The appellant filed Appeal No. 608 of 2003 before the Division Bench of the High Court challenging the order extending time to file the written statement. On 28.7.2003, the written statement was actually filed by the respondent. The Appeal was dismissed by the Division Bench on 17.10.2003, taking the view that the suits on the Original Side would be governed by the Original Side Rules and not by the amended provisions of Order VIII Rule 1 of the CPC.

Contentions: 4. The learned counsel for the appellant contends thus: the view taken by the High Court that the proceedings on the Original Side of the High Court would be governed by the Original Side Rules and not by the amended provisions of Order VIII Rule 1 of the CPC, is contrary to the legislative intendment; the High Court (Original Side) Rules were framed under the delegated rule making power under Section 129 of the CPC and they could not override the provisions of the amended Order VIII Rule 1, which is a part and parcel of the substantive Statute itself; this is particularly so, when the intention of Parliament in making the amendment is clear, namely, to shorten the time period of endlessly long and protracted course of litigation and to discourage dishonest defendants from interminably seeking adjournments. Hence, Parliament has now made a tight schedule within which written statements have to be filed, failing which the legal consequences contemplated under the CPC, including the one as to making of an *ex- parte* decree should follow ; rules framed by the High Court under the delegated rule making power conferred by Section 129 of the CPC could not be treated as "a stand alone body of rules outside the CPC", as erroneously done by the High Court in the impugned judgment ; that Section 129 of the CPC must be so interpreted as not to defeat the substantive vested rights created in favour of a litigant under the Amendment Act of 2002. Since the written statement had not been filed within the time prescribed therein, by reason of the amended provisions of Order VIII Rule 1, the plaintiff-appellant had a vested right to have his suit decided *ex- parte*.

5. The learned counsel for the respondent supported the impugned judgment and reiterated the arguments which have appealed to the High Court.

The Statutory Scheme: 6. The Code of Civil Procedure, 1908 is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature. It would, therefore, govern all actions of civil nature, unless otherwise provided for in the CPC. Some of the provisions of the CPC, however, do make some exceptions, and it is necessary to notice them. Section 4(1) provides as follows:

> ***4. Savings***.- (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

7. Apart from this section, Part IX of the CPC contains the fascicules of Sections 116 to Section 120 delineating the manner of application of the CPC to the High Courts. Section 116 declares that Part IX applies only to High Courts not being the Court of a Judicial Commissioner. Section 117 provides that save as provided in Parts IX or X or in the rules, the provisions of the Code would apply to such High Courts. Section 120 provides that Sections

16, 17, and 20, which deal with the pecuniary and territorial jurisdictions, shall not apply to the High Court in the exercise of its original civil jurisdiction.

8. Then comes Part X, which deals with the rule making power. By Section 121, the rules prescribed in the First Schedule, being rules prescribed by the Legislature itself, have been declared to have the same effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of Part X. Section 122 confers power on a High Court, other than the Court of a Judicial Commissioner, to annul, alter or add to all or any of the rules in the First Schedule. This power is conferred with regard to rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, but is subject to the condition of previous publication. Section 123 contemplates the constitution of Rule Committees in each of the High Courts as prescribed therein. Such a Committee makes its report to the High Court under Section 124 formulating and forwarding proposals with regard to annulment, alteration or addition in the First Schedule or for making new rules. Section 126 requires that the rules made by the High Court shall be subject to the previous approval of the State Government concerned. Section 127 requires previous publication of the rules so made in the Official Gazette. Section 128 enumerates a number of matters with regard to which rules may be framed by the High Courts. Then comes to Section 129, which is crucial for the present discussion.

9. Section 129 reads as under:

> **129.** ***Power of High Courts to make rules as to their original civil procedure.-*** Notwithstanding anything in this Code, any High Court not being the Court of a Judicial Commissioner, may make such rules not inconsistent with the Letters Patent or order or other law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

10. Mr. Ram Jethmalani, learned counsel for the appellant, strenuously urged that the power of the High Court to frame rules governing the procedure on its Original Side is a delegated legislative power, and can in no event override or be independent of the parent legislation, namely, the CPC. According to him, Parliament has, by prescription of rules in the First Schedule to the CPC, declared that the said rules would have the same status as if enacted in the body of the Code itself. No doubt, power has been given to the High Courts to amend these rules, subject to the condition of the report of the Rule Committee, previous approval of the State Government and publication of the rules. He contends that Section 129 of the CPC does not invest any independent power in the High Courts to make rules, but must be read harmoniously with the High Courts power under Section 122 of the CPC, if not as subordinate and subject thereto.

11. Section 129 begins with a *non obstante* clause and seems to suggest something to the contrary. At least as far as Chartered High Courts are concerned, Section 129 seems to invest them with the power to make rules with regard to the regulation of their own procedure, which may be inconsistent with the CPC itself, as long as such rules are consistent with the Letters Patent establishing the High Courts. The section also ends with the words: *"nothing*

herein contained shall affect the validity of any such rules in force at the commencement of this Code" (emphasis ours).

12. The CPC has been amended from time to time in order to meet with the changing situations. The historical developments as to the application of the CPC to the proceedings in the Chartered High Courts are illuminating. In order to appreciate the merit of the contention so strongly urged by the learned counsel for the appellant, it would be necessary to take a chronological perspective of the law.

Chronological Perspective:

13. Prior to the establishing of the Chartered High Courts by the British Government in 1862, the Civil Courts in the Presidency of Bombay were governed by the Code of Civil Procedure, 1859 (Act No. VIII of 1859, which received the assent of the Governor General on 22.3.1859). This Act, as its preamble suggests, was "an Act for simplifying the procedure of the Courts of Civil Judicature not established by Royal Charter" and was not intended to apply to High Courts established by Royal Charter.

14. The First Letters Patent or Charter establishing High Courts were accompanied by a Despatch from the Secretary of State on 14.5.1862, and were in force till revoked by a further Letters Patent on 28.12.1865. The learned counsel drew our attention to paragraph 36 of the Despatch, which explains the purpose of Clause 37 in the First Letters Patent. The said paragraph 36 of the Despatch reads as under:

> 36. Clause 37 is a very important one, and there is little doubt, will prove a very salutary provision. It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Court, not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its common law, equity and Admiralty Jurisdiction) which have been in operation in the Supreme Court since the date of its establishment.

15. It is, therefore, seen that clause 37 of the Letters Patent was intended to extend to the High Courts the Code of Civil Procedure enacted by the Legislature of India for the Courts other than the Courts established by the Royal Charter. The intention was to substitute one simple Code of Procedure for the various systems which had been in operation in the Supreme Court since the date of its establishment.

16. Clause 37 of the Letters Patent of 1865, which deals with “civil procedure and regulation of proceedings”, reads as follows:

> “37. And we do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdictions, respectively: Provided that the said High Court shall be guided in making such rules and orders as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council,

and being Act No. VIII of 1859, and the provisions of any law which has been made amending or altering the same, by competent legislative authority for India."

(Letters Patent of the three High Courts, namely, Calcutta, Bombay and Madras are identically worded).

17. The Code of Civil Procedure, 1877 (Act No. X of 1877), which received the assent of the Governor General on 30.3.1877, and was thereafter brought into force with effect from 1.10.1877, was "an Act to consolidate and amend the laws relating to the procedure of the Court of Civil Judicature". Part IX of this Act contained special rules relating to the Chartered High Courts. Chapter XLVIII of the Act applied only to the Chartered High Courts. Section 632 of the Civil Procedure Code of 1877, in express words, provided: "except as provided in this Chapter the provisions of this Code apply to such High Courts." Section 638 was the exception to the general rule and provided as under:

> "The following portions of this Code shall not apply to the High Court in the exercise of its ordinary or extra- ordinary Original Civil Jurisdiction, namely Sections 16 and 17, Sections 54, clauses (a) and (b), 57, 119, 160, 182 to 185 (both inclusive), 187, 189, 190, 191, 192 (so far as relates to the manner of taking evidence), 198 to 206 (both inclusive), 261, and so much of Section 409 as relates to the making of a memorandum; and Section 579 shall not apply to the High Court in the exercise of its appellate jurisdiction.
>
> Nothing in this Code shall extend or apply to any High Court in the exercise of its jurisdiction as an Insolvent Court."

18. The Legislature recognized the special role assigned to the Chartered High Courts and exempted them from the application of several provisions of the Code in the exercise of their ordinary or extra-ordinary civil jurisdiction for the simple reason that those jurisdictions were governed by the procedure prescribed by the rules made in exercise of the powers of the Chartered High Courts under clause 37 of the Letters Patent. Interestingly, Section 652 of this Act itself empowered the High Courts to make rules "consistent with this Code to regulate any matter connected with the procedure of the Courts of Civil Judicature subject to its superintendence", suggesting that consistency with the Code was a *sine qua non* only when making rules for the subordinate courts.

19. The Code of Civil Procedure, 1882 (Act No. XIV of 1882) received the assent of the Governor General on 17.3.1882. It also contained Part IX dealing with special rules relating to the Chartered High Courts. Section 638 of this Code also exempted the Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction from the application of the Code. Section 652 invested with the High Courts with power to make rules "consistent with this Code to regulate any matter connected *with its own procedure* or the procedure of the Courts of Civil Judicature subject to its superintendence." (emphasis ours).

20. By an amendment made by Act No. XIII of 1895, Sections 632 and 652 of the Code of Civil Procedure, 1882, were amended. Section 632, as amended by this Act, reads as under:

> "Except as provided in this chapter and in Section 652 the provisions of this Code apply to such High Courts."

The amendment made in Section 652 provides an *apercu* to the controversy. Section 652 was amended by adding the following:

"Notwithstanding anything in this Code contained, any High Court established under the said Act for establishing High Courts of Judicature in India may make such Rules consistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit."

"All such rules shall be published in the local official Gazette, and shall thereupon have the force of law."

21. The reason for making this amendment is clarified in the Statement of Objects and Reasons accompanying the relevant Bill No. 13 of 1895 in the following words:

"Section 652 of the Code of Civil Procedure, as it now stands, purports to require that any rules to regulate its own procedure made by a High Court, even although it be established by Royal Charter, shall be consistent with that Code. The Letters Patent of the High Courts at Fort William, Madras and Bombay, appear, however, to recognize the practical expediency of leaving such High Courts some latitude in the direction of adapting the provisions of the ordinary law to meet their requirements. It has been found by experience that these provisions are not in all respects convenient in the case of original proceedings in those Courts, and the object of this Bill is, by an amendment of Section 652 and, an ancillary amendment of Section 632, to bring the Code into perfect harmony with the provisions of those Letters Patent and to enable the High Courts referred to to regulate the exercise of their original civil jurisdiction accordingly."

22. Then we come to the 1908 Act, which made a drastic departure from the hitherto pattern of the Code. The Code was now divided into a fascicle of substantive sections and a Schedule containing Rules, which by force of Section 121 were declared to have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of Part X of the CPC.

23. Despite the sweeping change made by the 1908 Act, interestingly, the amendment introduced in the Code of Civil Procedure, 1882 by Act No. XIII of 1895, which we have quoted above, was retained in a slightly modified form in Section 129.

The Arguments: 24. Learned counsel for the appellant emphasized the fact that the High Court's power of making rules and orders for regulation of civil proceedings before it, conferred by clause 37 of the Letters Patent, is subject to the proviso that the High Court shall be guided in making such rules and orders as far as possible by the provisions of the Civil Procedure Code of 1859, and any provision of law amending or altering the same by a competent legislative authority in India. It is urged that the powers of the Chartered High Courts to make rules to govern civil proceedings of its Original Side is itself derived from clause 37 of the Letters Patent; Clause 37 of the Letters Patent requires the rules to be in conformity with the provisions of the CPC. Ergo, the rules are overridden by CPC to the extent of conflict, goes the argument.

25. The learned counsel for the respondent, however, justifiably contends that the purpose of retaining Section 129 in the present form is exactly the purpose for which it was inserted, in the first place, in the CPC of 1882 by amending Act No. XIII of 1895, namely, "to

recognize the practical expediency of leaving such High Courts some latitude in the direction of adapting the provisions of the ordinary law to meet their requirements", and further, "it had been found by experience that these provisions were not in all respects convenient in the case of original proceedings in those Courts". The amendment, therefore, became necessary "to bring the Code into perfect harmony with the provisions of the Letters Patent and to enable the High Courts referred to to regulate the exercise of their original civil jurisdiction accordingly."

26. It appears to us that this was the real reason why a distinction was drawn between the proceedings in Original Jurisdiction before the Chartered High Courts and those in other Courts. For historical reasons this distinction was maintained right from the time the Letters Patent was issued, and has not been disturbed by the Code of Civil Procedure, 1908, despite the amendments made in the CPC from 1976 to 2002.

27. The learned counsel for the Appellant referred to the speech of the Law Member while introducing the Code of Civil Procedure Bill, 1907, which ultimately resulted in the Code of 1908. Our attention was drawn to the proceedings of the Council of the Governor General of India (published in the Gazette of India dated 7.9.1907, pp. 134 to 143). The only relevant portion is the portion at page 141 where the Law Member, who introduced the Bill, referring to clauses 145 and 148 to 150 contained in Parts X and XI of the Bill, explained the need as under:

> "I have already explained the nature of the rule- making power which is dealt with in Part X of the Bill and in regard to Part XI (Miscellaneous), I would only call attention to clauses 145 and 148 to 150, which widen the discretion of Courts. They confer powers to enlarge time and to amend written proceedings, and they recognize the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In these ways greater elasticity will, it is hoped, be of benefit."

28. Far from advancing the case of the appellant, the speech of the Law Member, while introducing the Bill, suggests that it was thought necessary that the inherent powers of the Court to make appropriate orders, as may be necessary for the ends of justice or to prevent abuse of the process of the Court, was retained for the purpose of greater elasticity.

29. It is next contended for the appellant that merely because Section 129 of the CPC begins with the *non obstante* clause, "notwithstanding anything in this Code", the section cannot be construed as a departure from the entire body of the CPC so as to render the rules made by the High Courts to regulate its own procedure in the exercise of its original civil jurisdiction into a 'stand alone body of rules'. Our attention was drawn by the learned counsel to pages 318-320 of Justice G.P. Singh's ***Principles of Statutory Interpretation*** (Ninth Edition), and it was contended that "the *non obstante* clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment." Reliance was placed on the observations of this Court in ***Ashwini Kumar Ghosh* v. *Arabinda Bose*** [1953 SCR 1 377] where it was said: "the enacting part of the statute must, where it is clear, be taken to control the *non obstante* clause where both cannot be read harmoniously."

30. There cannot be any doubt about the principle of harmonious construction. However, what confronts us is not a mere question of two independent provisions of the CPC being in conflict. The provisions of the CPC, which we have extracted, and the historical development of the different sections to which we have referred, do not suggest a situation of mere conflict. They seem to suggest that, throughout; the Legislature had made a distinction between the proceedings in other Civil Courts and the proceedings on the Original Side of the Chartered High Courts. This distinction was made for good historical reasons and it had continued unabated, as we have noticed, through the consolidating Acts, and continued unaffected even through the last amendment of the CPC in the year 2002. In the face of this body of evidence, it is difficult to accede to the contention of the appellant that the force of the non obstante clause is merely declaratory and not intended to operate as a declared exception to the general body of the CPC.

31. After noticing the observations made in ***Ashwini Kumar Ghose*** and ***Dominion of India* v. *Shrinbai A. Irani*,** this Court in ***Chandavarkar Sita Ratna Rao* v. *Ashalata S. Guram*,** observed thus, in the context of construction of a *non obstante* clause:

> "67. A clause beginning with the expression "notwithstanding anything contained in the Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in ***South India Corporation (P) Ltd.* v. *Secretary, Board of Revenue, Trivandrum.***
>
> 68. It is well settled that the expression 'notwithstanding' is in contradistinction to the phrase 'subject to', the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject. This will be clarified in the instant case by comparison of sub-section(1) of Section 15 with sub-section (1) of Section 15-A. We are, therefore ,unable to accept, with respect, the view expressed by the Full Bench of the Bombay High Court as relied on by the learned Single Judge in the judgment under appeal."

32. Again in ***Parayankandiyal Eravath Kanapravan Kalliani Amma (Smt.)* v. *K. Devi*** this Court observed:

> 77. Non obstante clause is sometimes appended to a section in the beginning, with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision or Act mentioned in that clause. It is equivalent to saying that in spite of the provisions or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provision indicated in the non obstante clause will not be an impediment for the operation of the enactment.

33. Reference was made to ***A.G. Varadarajulu* v. *State of Tamil Nadu.***. This judgment merely followed the observations made in ***Aswini Kumar*** and ***Madhav Rao Scindia* v. *Union of India***. There is no doubt that where the *non obstante* clause is widely worded, "a search has, therefore, to be made with a view to determining which provision answers the description and which does not". The historical development of the law suggests that the *non obstante* clause in Section 129 is intended to bypass the entire body of the Code so far as the rules made by the Chartered High Court for regulating the procedure on its Original Side are concerned.

34. The observations of this Court in ***R.S. Raghunath*** in paragraphs 11 and 12 were pressed into service. These paragraphs merely reiterate and follow the observations made in ***Aswini Kumar Ghosh, The Dominion of India Union of India* v. *G.M. Kokil*,** [(1984) Supp. SCC 196] as well as the observations made in ***Chandavarkar Sita Ratna Rao*.** Finally, it is observed in Paragraph 12, in the words of Chinnapa Reddy, J.:

> "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment with the glasses of the statute- maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

35. Application of this principle clearly supports the view taken by the High Court.

36. Taking into account the extrinsic evidence, i.e. the historical circumstances in which the precursor of Section 129 was introduced into the 1882 Code by a specific amendment made in 1895, we are of the view that the non obstante clause used in Section 129 is not merely declaratory, but indicative of Parliament's intention to prevent the application of the CPC in respect of civil proceedings on the Original Side of the High Courts.

37. The High Court noticed that the interpretation put on Section 129 had been uniformly followed in the several judgments of High Courts, including the judgments of two Full Benches of Delhi and Calcutta High Courts. In ***Mishri Lal* v. *Dhirendra Nath***, this Court referred to its earlier decision in ***Muktul* v. *Manbhari***, on the scope of the doctrine of stare decisis with reference to ***Halsbury's Laws of England*** and ***Corpus Juris Secundum*** and held that "a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed

by courts of higher authority other than the court establishing the rule, even though the court before whom the matter arises afterwards might be of a different view."

38. In our judgment, the principle of stare decisis squarely applies to the case on hand. In the first place, we are not satisfied that all the aforesaid judgments of the High Courts have been wrongly decided. Secondly, even assuming that it is possible to take a different view, as long as the principle has been consistently followed by the majority of the High Courts in this country, as observed in Mishri Lal, even if the High Courts consistently have taken an erroneous view, (though we do not see that the view is erroneous), it would be worthwhile to let the matter rest, since a large number of parties have modulated and continue to modulate their legal relationships based on the settled law. On this principle also the view taken by the Division Bench of the High Court of Judicature at Bombay commends itself to us.

39. Learned counsel for the appellant next contends that even clause 37 of the Letters Patent establishing the High Court of Bombay, which empowers the High Court to make rules and orders on its Original Side, is subject to the proviso "that the said High Court shall be guided in making such rules and orders as far as possible, by the provisions of the Code of Civil Procedure-.." He contends that the words "as far as possible" are words of limitation and must be interpreted to mean that the rules made should be consistent with the provisions of the CPC as amended from time to time.

40. The Full Bench of the High Court of Calcutta in ***Manickchand* v. *Pratabmull,*** had occasion to consider this very contention with regard to clause 37 of the Letters Patent and observed:

> "The restriction upon the power of the Court as contained in the proviso to cl. 37 of the Letters Patent is that the rules framed under that clause should, "as far as possible" be in conformity with the provisions of the Code of Civil Procedure. This restriction as the phrase "as far as possible" indicates is merely directory. The provisions of the Code of Civil Procedure are intended for the purpose of guidance of this Court in framing rules under cl. 37 of the Letters Patent. Consequently, if any rule framed by the High Court under cl. 37 be inconsistent with or confers any additional power besides what is granted by the Code of Civil Procedure, the rule framed under cl. 37 will prevail over the corresponding provisions of the Code of Civil Procedure."

This we think is the correct view to be taken in interpreting the words "as far as possible" in clause 37 of the Letters Patent. This interpretation would be consistent with the amplitude of the words used in Section 129 of the CPC by which the High Court is empowered to make rules "not inconsistent with the Letters Patent to regulate its own procedure in the exercise of its original jurisdiction as it shall think fit."

41. Mr. Ram Jethmalani then put forth what he submits is the legal effect of Section 16 of the Amending Act, 2002. In his submission, the legal effect of this provision is to sweep away anything that is inconsistent therewith. He placed strong reliance on the judgments of this Court in ***Ganpat Giri* v. *Second Additional District Judge, Ballia*** and ***Kulwant Kaur* v. *Gurdial Singh Mann*** to canvass his argument.

42. In ***Ganpat Giri,*** the question considered was with regard to the overriding provision contained in Section 97(1) of the Code of Civil Procedure (Amendment) Act of 1976 (Act 104 of 1976). The said provision reads thus:

> "Any amendment made, or any provision inserted in the principal Act by a State legislature or a High Court before the commencement of this Act shall, except insofar as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed."

It is obvious that what was done by Section 97(1) of the Amending Act was to sweep away amendments made or provisions inserted in the principal Act by the State Legislature, or the High Court in exercise of its delegated powers of legislation, and to declare that all such amendments inconsistent with the provisions of the Code would stand repealed. We are afraid that Section 129 is neither an amendment made by the State legislature, nor by the High Court, and as such, it does not get overridden by Section 97(1) of the Amending Act of 1976. Though, both the Sections 122 and 129 were noticed in this judgment, it does not hold that the impact of Section 129 was, in any way, watered down by Section 122. The following observations in para 5 of the judgment were relied upon:

> "The object of Section 97 of the Amending Act appears to be that on and after February 1, 1977 throughout India wherever the Code was in force there should be same procedural law in operation in all the civil courts subject of course to any future local amendment that may be made either by the State legislature or by the High Court, as the case may be, in accordance with law. Until such amendment is made the Code as amended by the Amending Act alone should govern the procedure in civil courts which are governed by the Code. We are emphasizing this in view of the decision of the Allahabad High Court which is now under appeal before us."

In our view, Section 97 of the Amending Act does not, in any way, affect the special hierarchial status given to the proceedings before the Chartered High Courts on its Original Side. It was merely intended to standardize and make uniform the law as to civil procedure in other Civil Courts.

43. ***Kulwant Kaur*** was concerned with a situation where Punjab Courts Act, 1918 had a special right of appeal and the question was whether the amended provisions in Section 100 of the CPC, as amended by Act 104 of 1976, would exclude appeals under Section 41of the Punjab Courts Act, 1918. The view taken was that there was inconsistency between the provisions of the Punjab Courts Act and the provisions of Section 97(1) of the CPC. By reason of Article 254, the Section 97(1) of the CPC, being the Central Act, was held to prevail. It was pointed out in the judgment that though Section 4 of the Civil Procedure Code, 1908 saved special or local laws in the absence of any specific provision to the contrary, Section 97(1) was such a provision to the contrary, and, therefore, the saving under Section 4 would no longer be available to the local Act. Consequently, it was held "language of Section 97(1) of the Amendment Act clearly spells out that any local law which can be termed to be inconsistent perishes, but if it is not so, the local law would continue to occupy its field." We do not think that this decision carries forward the argument.

44. Finally, it was argued by Mr. Jethmalani that the Letters Patent, and the rules made there under by the High Court for regulating its procedure on the Original Side, were subordinate legislation and, therefore, must give way to the superior legislation, namely, the substantive provisions of the Code of Civil Procedure. There are two difficulties in accepting this argument. In the first place, Section 2(18) of the CPC defines "rules" to mean "rules and forms contained in the First Schedule or made under section 122 or section 125". The conspicuous absence of reference to the rules regulating the procedure to be followed on the Original Side of a Chartered High Court makes it clear that those rules are not "rules" as defined in the Code of Civil Procedure, 1908. Secondly, it is not possible to accept the contention that the Letters Patent and rules made there under, which are recognized and specifically protected by section 129, are relegated to a subordinate status, as contended by the learned counsel. We might usefully refer to the observations of the Constitutional Bench of this Court in ***P.S. Santhappan (Dead) by LRs.*** **v.** ***Andhra Bank Ltd.*** With reference to Letters Patent, this is what the Constitution Bench said:

> "148. It was next submitted that Clause 44 of the Letters Patent showed that Letters Patent were subject to amendment and alteration. It was submitted that this showed that a Letters Patent was a subordinate or subservient piece of law. Undoubtedly, Clause 44 permits amendment or alteration of Letters Patent but then which legislation is not subject to amendment or alteration. CPC is also subject to amendments and alterations. In fact it has been amended on a number of occasions. The only unalterable provisions are the basic structure of our Constitution. Merely because there is a provision for amendment does not mean that, in the absence of an amendment or a contrary provision, the Letters Patent is to be ignored. To submit that a Letters Patent is a subordinate piece of legislation is to not understand the true nature of a Letters patent. As has been held in Vinita Khanolkar's case, and Sharda Devi's case, a Letters Patent is the charter of the High Court. As held in Shah Babulal Khimji's case, (AIR 1981 SC 1786) a Letters Patent is the specific law under which a High Court derives its powers. It is not any subordinate piece of legislation. As set out in aforementioned two cases a Letters Patent cannot be excluded by implication. Further it is settled law that between a special law and a general law the special law will always prevail. A Letters Patent is a special law for the concerned High Court. Civil Procedure Code is a general law applicable to all courts. It is well settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see no conflict between Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the Civil Procedure Code then the provisions of Letters Patent would always prevail unless there was a specific exclusion. This is also clear from Section 4 Civil Procedure Code which provides that nothing in the Code shall limit or affect any special law. As set out in Section 4 C.P.C., only a specific provision to the contrary can exclude the special law. The specific provision would be a provision like Section 100A."

45. Far from doing away with the Letters Patent, the amending Act of 2002 has left unscathed the provisions of section 129 and what follows therefrom. The contention must, therefore, fail. There is no merit in the appeal and it is hereby dismissed.