



## **LL.B. III Term**

# **Code of Civil Procedure & Limitation Act**

**Cases Selected and Edited by**

***Dr. Belu Gupta Arora***

***Dr. Anjay Sharma***

***Dr. Ajay Kr. Sharma***

***Dr. Akash Deep Nagal***

***Dr. Kavita***

***Dr. Pramod Tiwari***

***Dr. Saurabh Rana***

***Dr. Shourie Anand Singh***

***Dr. Suman Yadav***

***Dr. Megh Raj***

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### **Paper - LB - 302 – Code of Civil Procedure and Limitation Act**

#### **PART : A – C.P.C.**

##### **Prescribed Legislations:**

Code of Civil Procedure, 1908 (As amended).

##### **Prescribed Books (Latest Editions):**

C.K. Takwani's Civil Procedure

AIR Manual of CPC

B. M. Prasad & S. K. Sarvaria, *Mulla's Code of Civil Procedure*

**Topic 1 : Definitions** - Decree [section 2(2)], Judgement [section 2(9)] Legal Representative [section 2(11)], Mesne Profits [section 2(12)], Order [section 2(14)]

**Topic 2 : Jurisdiction of Courts, Principle of Res subjudice and Res judicata** (Sections 9 to 11) and Order II, Rules 1 and 2 - Suit to include the whole claim. Introduction to Commercial Courts Act, 2015.

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| 3. <i>Iftikhar Ahmed v. Syed Meharban Ali</i> , AIR 1974 SC 749                                    | 16 |
| 4. <i>State of U.P. v. Nawab Hussain</i> , AIR 1977 SC 1680  | 20 |
| 5. <i>C.A. Balakrishnan v. Commissioner Corporation of Madras</i> , AIR 2003 Mad. 170              | 26 |

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**Topic 6 : Appeals** (i) Appeals from Orders and Decrees, Second Appeal and Power of Appellate Court (Sections 96, 100, 107(1)d) and Production of additional evidence at appellate stage; Order XLI, Rule 27

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Misjoinder and non joinder of parties

**Topic 10 : Amendment of Pleadings** (Order VI , Rule 17)

11. *Jai Jai Ram Manohar Lal v. National Building Material Supply Co.*,  
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12. *M/s Ganesh Trading Co. v. Moji Ram*, AIR 1978 SC 484 62
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14. *B.K. Narayana Pillai v. Parameswaran Pillai*, (2000) 1 SCC 712 69

**Topic 11 : Rejection of Complaint** (Order VII, Rule 11)

15. *Saleem Bhai v. State of Maharashtra*, AIR 2003 SC 759 72

**Topic 12 : Appearance of Parties and Consequences of Non-appearance**  
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16. *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425 74
17. *Rajni Kumar v. Suresh Kumar Malhotra*, 2003 (3) SCALE 434 85
18. *Bhanu Kumar Jain v. Archana Kumar*, AIR 2005 SC 626 88

**Topic 13 : Summary Procedure** (Order XXXVII, Rules 1 to 4)

19. *Santosh Kumar v. Bhai Mool Singh*, AIR 1958 S.C. 321 95
20. *M/s Mechalec Engineers and Manufacturers v. Basic Equipment Corporation*, AIR 1977 SC 577 99
21. *ONGC Ltd. v. State Bank of India*, AIR 2000 SC 2548 102
22. *IDBI Trusteeship Services Ltd. v. Hubtown Ltd.*, [2016] 11 S.C.R. 660 107

**Topic 14: Temporary Injunctions and Interlocutory Orders** (Order XXXIX, Rules 1 to 5)

23. *Monohar Lal v. Seth Hira Lal* AIR 1962 SC 527 121
24. *Dalpat Kaur v. Prahlad Singh*, AIR 1993 SC 276 133

**Topic 15: Miscellaneous :** Alternative Dispute Resolution, Precepts, Interpleader Suits, Indigent Suits, Caveat

## **Part - B : Limitation**

**Prescribed Legislation:** The Limitation Act, 1963

**Prescribed Books (Latest Editions):**

1. M.R. Mallick, **B.B. Mitra** *The Limitation Act,, 1963*
2. K. Shanmukham, **Sanjiva Row's** *The Limitation Act*

### **Topic 1 : Limitation of Suits, Appeals and Applications (Sections 3-5)**

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**IMPORTANT NOTE :**

1. The topics and cases given above are not exhaustive. The teachers teaching the course shall be at liberty to add new topics/cases.
2. The students are required to study the legislations as amended up to date and also to consider and correlate amendments and cases under a Topic with other topics and cases.
3. **Any three questions shall be attempted from Part-A and any two questions shall be attempted from Part-B.**

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***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 15<sup>th</sup> 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 22<sup>nd</sup> 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 15<sup>th</sup> December 1965 coupled with supplementary agreement dated 26<sup>th</sup> 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 23<sup>rd</sup> 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 28<sup>th</sup> 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. Negating 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 enquiry 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 1<sup>st</sup> 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 negated 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 1<sup>st</sup> April 1957 which would imply whether the person so contending was a tenant of the land on 1<sup>st</sup> 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. 1<sup>st</sup> 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.

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***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 (5<sup>th</sup> 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.

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***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, he 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. 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?

43. 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’être* 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].

44. 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.

45. 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.

\* \* \* \* \*



***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 him was mala fide. It was dismissed on October 30, 1959. The respondent then filed 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 Inspector-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 Inspector-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 Chhotatal 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 *Devil 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 Inspector-General of Police as he had been appointed by the Inspector-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 Udappa 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 licensee, Seetharam Udappa 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 Udappa is the licensee to run the canteen. Under Section 357 of the City Municipal Corporation Act, the said Seetharama Udappa was granted licence up to the year 1996. The canteen was inspected by the Assistant Health Officer-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 Udappa 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 Udappa 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 Udappa. 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 Udappa as incorrect. The said Seetharama Udappa 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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***Chunnilal 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 appellant 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 2<sup>nd</sup> appeals are admitted without serious scrutiny of law. It is the bounden duty of High Courts to admit 2<sup>nd</sup> 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 2<sup>nd</sup> 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 misappreciation 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 matter 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. 1 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 either 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. 1 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 XI 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 case, 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. 1 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. 1 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. 1 in negotiating certain business deals. For instance, vide letter dated 28th April 1972, Ex. RW4/24, the Delhi Cloth & General Mills intimated appellant No. 1 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 1st 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 1st 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 inter se 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 he 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 negated 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 un rebutted 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

## **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.

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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 Kanlal*** [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 24<sup>th</sup> August, 1973, just before the expiry of the period of limitation for the claim for payment. The written statement was filed on 5<sup>th</sup> 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 31<sup>st</sup> 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 15<sup>th</sup> 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 8<sup>th</sup> 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 15<sup>th</sup> 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 18<sup>th</sup> 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 compendious 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.

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***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.

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***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 Corp. 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.

\* \* \* \* \*

## **REJECTION OF PLAINT**

### ***Saleem Bhai v. State of Maharashtra***

AIR 2003 SC 759

**S.S.M. OUADRI, 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, out 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 on 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 contesting 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.

\* \* \* \* \*

**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 16<sup>th</sup> to 21<sup>st</sup> March, 1953. It was discovered later that the 16<sup>th</sup> was a public holiday, so on 5-1-1953 the dates were changed to "from the 17<sup>th</sup> March onwards" and the parties were duly notified. On the 17<sup>th</sup> 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 17<sup>th</sup>, five more witnesses on the 18<sup>th</sup> and on the 19<sup>th</sup> the case was adjourned till the 20<sup>th</sup>. On the 20<sup>th</sup> 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 21<sup>st</sup>, 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 17<sup>th</sup> and the 19<sup>th</sup> 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 18<sup>th</sup> and 19<sup>th</sup> of March, 1953, if not, on the 17<sup>th</sup> 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 20<sup>th</sup> 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 broad 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 Rule 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 is 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 16<sup>th</sup> March at Udaipur for the petitioner's evidence alone from 16<sup>th</sup> to 21<sup>st</sup> 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 he appeared at the first hearing) Order 17 Rule 2 applies and the court is given the widest possible discretion either

"to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit".

The 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 17<sup>th</sup> and the 18<sup>th</sup> 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 20<sup>th</sup>, the 21<sup>st</sup> and the 23<sup>rd</sup> 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].

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

2003 (3) SCALE 434

**S.S.M. OUADRI, 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 jurisdictional 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.

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***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 IIInd 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.

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## **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 in. 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.

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***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 25<sup>th</sup> 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 12<sup>th</sup> 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.

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***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 *Elia 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 India 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 India 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.

\* \* \* \* \*

***IDBI Trusteeship Services Ltd. v. Hubtown Ltd.***

[2016] 11 S.C.R. 660

**R.F. NARIMAN, J.-** 1. Leave granted.

2. The present appeal arises out of a Summons for Judgment No. 39 of 2013 in a Summary Suit filed on the original side of the Bombay High Court, by the Petitioner, a debenture trustee, to enforce rights that arise out of a Corporate Guarantee executed by the Respondent-defendant. The necessary averments made in the plaint would disclose the cause of action of the suit as well as the facts necessary to decide this appeal. They are as follows:

“3. In 2009 and 2010, Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V. (hereinafter referred to as “FMO”) invested in certain equity shares and compulsorily convertible debentures (hereinafter referred to as the “CCDs”) of Vinca Developer Private Limited (hereinafter referred to as “Vinca”). As a result of the said investment, FMO currently holds (i) 10% of the equity of Vinca through Class A shares and is entitled to 10% of the voting rights and economic interest in Vinca by virtue thereof; and (ii) 3 CCDs in Vinca. Further, as on date, the Defendant owns 49% of the equity of Vinca through Class A shares and is entitled to 49% of the voting rights and economic interest in Vinca by virtue thereof. The remaining 41% Class A equity shares in Vinca are owned by the individual promoters of the Defendant, being Hemant Shah and Vyomesh Shah, which entitles them to 41% of the voting rights and economic interest in Vinca. Hemant Shah and Vyomesh Shah together also own 100% of Class B equity shares of Vinca, which carry with them collective voting rights and dividend entitlement not exceeding 0.01%. Upon conversion, the 3 CCDs in Vinca will entitle FMO to 99% of the equity of Vinca (by allotment of additional Class A shares), thereby entitling it to 99% of the voting and economic rights of Vinca. The said monies invested by FMO into Vinca were then used by Vinca to subscribe to certain optionally partially convertible debentures (hereinafter referred to as “OPCDs”), as specified below.

4. The Plaintiff is India’s largest Trusteeship Company and provides a wide spectrum of Trusteeship Services. The Plaintiff has been appointed as the Debenture Trustee under (i) the Debenture Subscription and Debenture Trust Deed dated 1st December, 2009 executed by Amazia Developers Private Limited (hereinafter referred to as “Amazia”), Vinca, Brainpoint Infotech Private Limited (hereinafter referred to as “Brainpoint”), the Defendant and the Plaintiff; and (ii) the Debenture Subscription and Debenture Trust Deed dated 1st December, 2009 executed by Rubix Trading Private Limited (hereinafter referred to as “Rubix”), Vinca, the Defendant and the Plaintiff as amended by OPCD Amendment Agreement dated 8th September, 2010; (hereinafter collectively referred to as the “Debenture Trust Deeds”) in relation to Vinca’s investment in OPCDs issued by Amazia and Rubix. A copy of the Debenture Trust Deeds is annexed hereto and marked as Exhibits “A- 1”, “A-2” and “A-3”.

5. Pursuant to and in accordance with the terms of the Debenture Trust Deeds, Vinca has subscribed to:

- i. certain secured, non marketable, transferable, OPCDs of Rubix, of a face value of Rs.10,00,000 each aggregating to INR 1,285,000,000 in tranche 1;
- ii. additional secured, non marketable, transferable, OPCDs of Rubix, of a face value of Rs. 10,00,000 each, aggregating to INR 1,395,000,000 in tranche 2;
- iii. certain secured, non marketable, transferable, OPCDs of Amazia, of a face value of Rs.10,00,000 each, aggregating to INR 1,500,000,000.

6. The OPCDs carry a variable running coupon and a back ended coupon to ensure an internal rate of return of 14.75% per annum.

7. The Plaintiff states that the proceeds obtained by Amazia and Rubix from the issue of the OPCD’s to Vinca were to be applied towards inter alia projects which are compliant with Indian foreign direct investment law as applicable to townships, housing, built-up infrastructure and construction development projects, as provided more particularly under clause I, Part C, Schedule 7 of the Debenture Trust Deeds.

8. The Plaintiff states that in order to secure the said OPCDs, and to ensure the due and punctual payment by Amazia and Rubix of all dues to Vinca under the Debenture Guarantee Deeds, the Defendant has, inter alia vide the Corporate Guarantee Deed, dated 9th December, 2009, issued an unconditional, absolute and irrevocable corporate guarantee in favour of the Plaintiff, inter alia for the benefit of Vinca (hereinafter referred to as the “Guarantee”). A copy of the Guarantee is annexed hereto and marked as Exhibit “B”.



9. The Plaintiff submits that inter alia the following defaults were committed by Amazia and Rubix, inter alia under the said Debenture Trust Deeds:

Defaults by Amazia and Rubix in payment of interest on the OPCDs, as contemplated under Condition 7 of Schedule 3 of the Debenture Trust Deeds, which default has been subsisting since 15th June, 2011, on the interest accrued on the OPCDs since 16th March, 2011;

Defaults by Amazia and Rubix in payment of default interest accrued on the OPCDs since 16th June, 2011;

The occurrence of an event of default (cross default) specified in Clause 21(a) of Schedule 14 of the Debenture Trust Deeds, arising inter alia out of a default by Vinca under the CCDs;

Failure on the part of Rubix, Amazia and the Defendant in providing the financial statements required to be provided as per Entry I (Financial Statements) of Part A of Schedule 7 (Covenants of the Obligors and Security Providers) of the Debenture Trust Deeds;

Failure on the part of the Defendant in maintaining the Net Debt to EBITDA Ratio, the Debt Service Cover Ratio and the Interest Coverage Ratio as per the provisions of Part B of Schedule 7 (Covenants of the Obligors and Security Providers) of the Debenture Trust Deeds, for the Ratio period from 1st April, 2011 to 30th September, 2011;

Failure on the part of Rubix, Amazia and the Defendant in complying with a number of the Positive Covenants which were required to be fulfilled by them as per the provisions of Part C of Schedule 7 (Covenants of the Obligors and Security Providers) of the Debenture Trust Deeds, including the failure to apply the proceeds from the issue of OPCD's in the manner contemplated in the abovementioned Schedule i.e. towards projects that are compliant with the Indian foreign direct investment law;

Failure on the part of Rubix, Amazia and the Defendant in complying with a number of the Negative Covenants as per the provisions of Part D of Schedule 7 (Covenants of the Obligors and Security Providers) of the Debenture Trust Deeds.

10. In view of the aforesaid defaults, the Plaintiff was constrained to issue notices dated 2nd May, 2012 to Amazia and Rubix respectively, under Clause 33.1 of the Debenture Trust Deeds, for subsisting payment of interest on OPCDs as contemplated under Condition 7 of Schedule 3 of the Debenture Trust Deeds, setting out inter alia (i) the payment defaults subsisting as on the said date; (ii) the default by Amazia and Rubix in crediting the designated account with lease rental proceeds; and (iii) the failure to provide information, and breach of certain identified covenants. However, no response was forthcoming from Amazia and/or Rubix. A copy of the notices dated 2nd May, 2012 is annexed hereto and marked Exhibits "C-1" and "C-2".

11. Consequently, and further to the Plaintiff's letters dated 2nd May, 2012, and in view of the fact that the said defaults were not rectified by Amazia and Rubix as required under the said letters dated 2nd May, 2012, the Plaintiff, in exercise of its right of early redemption under Condition 12.1(a) and Condition 12.2 of Schedule 3 of the Debenture Trust Deeds, has issued redemption notices to both Amazia and Rubix on 27th June, 2012 (hereinafter referred to as the "Redemption Notices") for the reasons and on the grounds contained therein, inter alia calling upon Amazia and Rubix to fully redeem all the OPCDs at par value on 3rd July, 2012 (hereinafter referred to as the "Early Redemption Date") and to credit the Principal Redemption Amount alongwith interest accrued and unpaid thereon, aggregating to Rs.4,843,299,862.97/- into A/c. no.: 00600350098359 held in the name of the Plaintiff at HDFC Bank, on the Early Redemption Date. A copy of the Redemption Notices is annexed hereto and marked Exhibits "D-1" and "D-2".

12. However, despite repeated reminders to rectify their various defaults under the Debenture Trust Deeds, and various attempts to resolve the issues amicably, Amazia and Rubix have failed and neglected to pay the amounts due and payable in terms of the Debenture Trust Deeds. Consequently, the Plaintiff was constrained to issue a Demand Certificate for the enforcement of the Guarantee, in terms of the said Guarantee, to the Defendant on 3rd August, 2012. A copy of the Demand Certificate dated 3rd August, 2012 is annexed hereto and marked Exhibit "E".

13. No reply has been received to the aforementioned Demand Certificate from the Defendant till date. The Defendant therefore failed and neglected to make payment of the amounts due to the Plaintiff under the Guarantee.

33. The Plaintiff therefore prays:

this Hon'ble Court be pleased to order and decree the Defendant to pay to the Plaintiff a sum of Rs.532,11,29,364.05/- (Rupees Five Hundred and Thirty Two Crores Eleven Lakhs Twenty Nine Thousand Three Hundred and Sixty Four and Five Paise Only) as on May 6, 2013, being (i) Rs.

477,51,90,932.97/- (Rupees Four Hundred Seventy Seven Crores Fifty One Lakhs Ninety Thousand Nine Hundred and Thirty Two and Ninety Seven Paise only) as the revised principal amount, being Rs.484,32,99,862.97/- (Rupees Four Hundred and Eighty Four Crores Thirty Two Lakhs Ninety Nine Thousand Eight Hundred and Sixty Two and Ninety Seven Paise only) (hereinafter referred to as “Principal Amount”), less an amount of Rs.6,81,08,930/- (Rupees Six Crores Eighty One Lakhs Eight Thousand Nine Hundred and Thirty Only) received on March 4, 2013 under the Amazia TRA Agreement (hereinafter referred to as “Revised Principal Amount”); (ii) Rs.42,26,78,815.12/- (Rupees Forty Two Crores Twenty Six Lakhs Seventy Eight Thousand Eight Hundred and Fifteen and Twelve Paise only) as the default interest on the Principal Amount, at the rate of 14.75% per annum from August 11, 2012 till March 4, 2013 as per Clause 3 of the Guarantee; and (iii) Rs.12,32,59,615.96/- (Rupees Twelve Crores Thirty Two Lakhs Fifty Nine Thousand Six Hundred and Fifteen and Ninety Six Paise only) as the default interest on the Revised Principal Amount, at the rate of 14.75% per annum from March 5, 2013 till May 6, 2013, as per Clause 3 of the Guarantee and thereafter, such further interest @ 14.75% per annum on the Revised Principal Amount being Rs. 477,51,90,932.97/- (Rupees Four Hundred Seventy Seven Crores Fifty One Lakhs Ninety Thousand Nine Hundred and Thirty Two and Ninety Seven Paise only), till the date of actual payment or realization.”

3. The affidavit-in-reply to the aforesaid Summons for Judgment raised the following defence, as recorded by the Ld. Single Judge in the impugned judgment dated 8th May, 2015.

“16. Since according to the Defendant, the above submission is their main submission in the present matter, the same is elaborated as follows:

16.1 That the FDI Policy and the statutory FEMA Regulations (which incorporate the FDI Policy as a Schedule thereto), permit FDI in townships, construction of houses, only by way of equity investments (which is defined to also include debentures which are compulsorily required to be converted into equity: CCDs). The FDI Policy and the FEMA Regulations prohibit any other form of investment (non equity) in the said sector with an assured return/rate of return.

16.2 That FMO, a foreign entity wanted to invest a substantial sum by way of FDI in a slum rehabilitation project being undertaken in Mumbai by Rubix and an Industrial Park being undertaken/ owned by Amazia. FMO was however only willing to invest in the said projects on the basis of an assured/fixed return, which was and is not permissible under the FEMA Regulations/FDI Policy. To enable FMO to bypass/circumvent the said FEMA/FDI prohibitions and get a fixed return of 14.5% per annum on its investment of Rs. 418 crores, the investment structure (i.e investment by way of CCDs in Vinca and Vinca purporting to invest the said amounts in OPCDs of Amazia and Rubix) was devised/adopted as follows:

i) Vinca was interposed as the Holding Company of Amazia and Rubix and Vinca was the nominal recipient of the FDI of Rs. 418 crores from FMO by way of equity investment and CCDs (in apparent compliance with the FDI/FEMA Regulations).

ii) The documents executed for the FDI investment (Subscription Agreement and Debenture Trust Deed annexed as Schedule 13 thereto), however establish that the FDI received from FMO, was not intended for/could not be used by Vinca for any project of its own but was specifically required to be immediately invested by/through Vinca in OPCDs of Rubix & Amazia, bearing a fixed rate of return of 13.5%.

iii) Under the FEMA/FDI regulations/policy FMO could not have invested the said amounts in Amazia and Rubix through OPCDs bearing a fixed rate of return. By interposing Vinca (an Indian Company) the amounts received from FMO were invested in OPCDs of Amazia and Rubix bearing the fixed 14.5% rate of return.

iv) At the same time it was provided (a) that on conversion of the CCDs FMO would own 99% of the equity of Vinca and further that (b) the Articles of Vinca were amended to provide that any decision regarding the OPCDs/investment could only be taken by FMO nominees on the Board of Vinca.

(c) the DTDs for the Amazia and Rubix OPCDs provided that the Debenture Trustee/the Petitioner would only act on the instructions of the Nominee Directors of FMO.

v) Accordingly though Vinca was an “Indian Company” and the nominal recipient of the FDI, the transaction was so structured that:

(a) the FDI amount would be immediately routed by Vinca to Amazia & Rubix against issue by them of OPCDs bearing a return of 14.5%.

(b) FMO/its Nominee Directors could exclusively deal with the OPCDs and the Debenture Trustee/IDBI.

(c) after receipt by Vinca of the fixed rate of return (14.5 per cent per annum) from Amazia and Rubix under the OPCDs, FMO would on conversion of the CCDs, become the owner of Vinca and thereby receive/become entitled to the amounts received by Vinca by way of the fixed rate of return from Amazia and Rubix.

vi) The Deed of Guarantee was contemporaneously executed by the Respondents on 9th December, 2009 in favour of the Debenture Trustee (the Petitioner herein) for securing the “due and punctual payment” of the principal and the interest by Amazia and Rubix to Vinca, actually to FMO and was part of the structure devised to ensure the receipt by FMO at the fixed rate of return of 14.5%.

16.3 That, if the entire transaction is looked at as a whole, it is clear that the interposing of Vinca as the nominal recipient of the FDI (against issuance of equity shares and CCDs) was a colourable and artificially structured transaction, the object and purpose of which was to enable FMO to secure a fixed rate of return on its FDI investments in townships/construction of housing, notwithstanding the FEMA Regulations/FDI Policy which permit only an equity investment without any fixed/agreed rate of return in the said sector. The said structure was and is not lawful and was and is opposed to public policy as it was designed to defeat and would defeat the provisions of law, the FEMA Regulations read with the FDI Policy.

16.4 That, the present Petition has been filed to effectuate the said illegal object of securing the said fixed rate of return for FMO. Although IDBI, the Petitioner, claims to be nominally acting on behalf of Vinca, it is in fact admittedly acting only at the instance of FMO/FMO's Nominee Directors on the Board of Vinca. FMO through its Nominee Directors on the Board of Vinca has instructed IDBI to demand the said sums (principal and agreed rate of return) from Amazia and Rubix and has further instructed/required IDBI to invoke the said Guarantee and file the present Petition. (sic – actually, Plaintiff). This is apparent from the correspondence annexed as Exhibits-C to V to the Petition.

xxx 16.6 That, by the present Petition, the Petitioner, acting at the instance of FMO, is seeking to utilise the process of this Court to secure for FMO a 14.5 per cent fixed rate of return on its FDI investment, contrary to the statutory stipulation/prohibition contained in the FEMA Regulations (which incorporate/embody the FDI Policy), which require FDI in townships/housing/construction development projects to be made only by equity participation (including compulsorily convertible debentures) and prohibits/precludes any assured return/rate of return. It is submitted that this would be contrary to law, public policy and public interest.” Based on this defence, the Ld. Single Judge in the impugned judgment arrived at the following conclusions:

“31. According to the Plaintiff, the doctrine of *Pari Delicto* is not applicable, that IDBI is not a party to the conspiracy and IDBI is not acting on behalf of FMO. Even if IDBI is acting on behalf of FMO, the doctrine of *Pari Delicto* would not be applicable as the Defendant had induced FMO to make the FDI/Investment by representing that the transaction was FDI/FEMA compliant.

31.1 The above submission of the Plaintiff cannot be accepted. The conduct of FMO in routing its FDI nominally through Vinca to Amazia and Rubix against issuance by them of OPCDs and the amendments/provisions made in Vinca's Articles of Association, establishes that FMO was fully aware that it could not under the FDI policy and FEMA Regulations directly invest in the OPCDs, or require that its FDI amount/investment be returned back to it with a fixed rate of return after a stipulated period i.e. without bearing an equity investment risk. The complex structure devised for FMO's FDI investment establishes that all parties (including FMO) were aware that the transaction which was premised on return back of the FDI amount along with a fixed rate of return thereon, was not permissible under/in violation of the FDI policy and the FEMA Regulations. It is clear that in claiming the amount and initiating the present proceedings, the Plaintiff is acting at the instance of FMO/FMO nominees on the Board of Directors of Vinca. This is the stipulation in Vinca's articles and under the DTD. In any event, inasmuch as the transaction (based on return of the FDI/principal amount invested along with a fixed rate of return thereon) is not permissible/prohibited under the FDI policy and the FEMA Regulations, neither IDBI nor FMO can seek the assistance of the Court to effectuate/implement/enforce such a prohibited/illegal transaction.

32. The Plaintiff has lastly contended that the alleged illegal purpose of securing a fixed return has not been carried out and that if the proceedings are allowed, the money will go to Vinca and not to FMO. It has been contended that FMO cannot receive the sums without complying with the FDI Regulations for sale of shares and repatriation.

32.1 This submission too of the Plaintiff cannot be accepted. The present claim has been made and the present proceeding has been initiated/filed by the Plaintiff at the instance of FMO/FMO nominees on Vinca's Board of Directors, in order to secure repayment/return of the FDI amount invested along

with a fixed rate of return thereon i.e. for seeking the active assistance of this Court to implement/effectuate/enforce a transaction prohibited by the FDI policy and the FEMA Regulations. The contractual documents (SSA & DTD) establish that it was always agreed and understood that Vinca was only the nominal recipient of the FDI amount received from FMO and was also only nominally the recipient of the FDI amount and interest thereon at 14.5 per cent per annum to be received back from Amazia and Rubix. On receipt back by Vinca of the FDI amount and 14.5 per cent interest thereon, FMO can and will by conversion of the three CCDs become the 99% shareholder of Vinca. Under the FDI policy/FEMA Regulations, FMO can thereafter sell the shares of Vinca at the fair value, which will necessarily include the value/benefit of the FDI amount and interest at 14.5 per cent thereon.

33. However, I must also state that I do not find substance qua the following defences raised by the Defendant:

33.1 That the Suit deserves to be dismissed on the ground that the guarantee as well as trusteeship of IDBI has been discharged/terminated;

33.2 That under the provisions of the FDI Policy, an Indian Company which has received foreign direct investment can utilise its funds downstream only for making investment by way of equity instruments (i.e. in the form of equity capital or compulsorily and mandatorily convertible preference shares or debentures);

33.3 That Investment by an Indian Company in OPCDs issued by subsidiary (also an Indian Company) would amount to an external commercial borrowing.

xxx 37.2 In the case in hand, I am prima facie of the view that the structure/device of routing FMO's FDI amount of Rs. 418 crores to Amazia and Rubix through the newly interposed Vinca (as the nominal recipient of the FDI) was a colourable device structured only to enable FMO to secure repayment (through Vinca) of its FDI amount and interest thereon at 14.75%, contrary to the statutory FEMA Regulations and the FDI policy embodied therein, which only permit FDI investment in townships/real estate development sector to be made in the form of equity (including Compulsorily Convertible Debentures) and preclude any assured return. I am also prima facie of the view that the Defendant's guarantee (which is the basis of the Company Petition No. 644 of 2013) though ostensibly in favour of Vinca, an Indian Company, was part of the aforesaid illegal structure/scheme and was given to ensure that FMO received back its FDI amount with interest as aforesaid through Vinca. The Guarantee was therefore part of the aforesaid illegal structures/scheme and therefore prima facie illegal and unenforceable.

37.3 Further the question of the Defendant not being allowed to plead its own wrong also does not arise in the facts of the present case. Through the present Petition, the Plaintiff (who is admittedly acting at the instance of FMO/FMO's nominees) is in effect seeking the assistance of this Court to enable/enforce recovery by FMO of its FDI amount and interest thereon (through Vinca), contrary to the provisions of the FEMA Regulations and FDI policy embodied therein. As has been held by the Hon'ble Supreme Court in the case of Immami Appa Rao vs. G. Ramalingamurthi (supra), the Plaintiff who wants orders in his favour, is actually seeking the active assistance of the Court to achieve what the law prohibits/declares illegal and that is clearly and patently inconsistent with public interest.

Moreover, as has been held by the Supreme Court in the above case, in such a case there can be no question of estoppel and the paramount consideration of public interest requires that the plea be allowed to be raised and tried." xxx 40.2 In my view, the Plaintiff is also not correct when they state/submit that the judgment supports the Plaintiff in contending that the Defendant had not "brought on record a shred of material to show how the facts of the present dispute would mandate lifting of the corporate veil..." Even if it is assumed that the corporate veil is not to be lifted or Vinca, Amazia and Rubix are to be treated as one Company, as has been mentioned hereinabove, Vinca interposed as the holding Company of Amazia and Rubix only for the purpose of structuring FMO's FDI investment into Amazia and Rubix, through Vinca as the nominal recipient. The SSA and the annexed Debenture Trust Deed, specifically provided that the FDI amount to be received by Vinca from FMO against issuance of CCDs and equity shares by Vinca, was not to be retained by Vinca or used by Vinca in its own projects. The SSA and Trust Deed in fact expressly stipulated that the FDI amount received by Vinca from FMO, was to be immediately passed on by Vinca to Amazia and Rubix, against issuance by them of OPCDs. Accordingly the SSA and the Trust Deed itself established that Vinca had been interposed only to provide a facade of compliance with the FEMA Regulations/FDI policy and was only a nominal recipient of the FDI and that Vinca was immediately

required to route the entire amount received from FMO to Amazia and Rubix, against issuance by them of OPCDs.” xxx

42. In the circumstances I am of the view that the Defendant has raised triable issues which require adjudication on further evidence at the time of final disposal of the suit. Hence the following order:

- (i) Unconditional leave is granted to the Defendant to defend the above suit;
- (ii) The suit is transferred to the list of commercial causes and the Defendant is directed to file its written statement on or before 15th June, 2015;
- (iii) The hearing of the suit is expedited and the Court will endeavour to dispose of the suit within a period of one year from the date of this order. It is clarified that the Suit shall be decided without being influenced by any of the observations made in the present order.
- (iv) Place the suit for framing of issues on 29th June, 2015.”

5. Since the summary suit is filed on a Corporate Guarantee, and since this document has been heavily relied upon by Dr. Abhishek Manu Singhvi, Ld. Senior Counsel on behalf of the appellant, it is necessary to set out some of the clauses of this Guarantee. It may first be noticed that the deed of Corporate Guarantee cum Mortgage, dated 9th December, 2009, was made by Ackruti City Ltd. as guarantor. Ackruti City Ltd. has since become Hubtown Ltd., the Respondent-defendant. IDBI Trusteeship Services Ltd. is described as the debenture trustee for the benefit of Vinca Developer Pvt. Ltd., for the Amazia Optional Partially Convertible Debentures (hereinafter referred to as “OPCDs”) and the Rubix OPCDs, and appointed pursuant to the Amazia OPCD subscription and debenture trust deed and the Rubix OPCD subscription and debenture trust deed. The very opening clause of the Deed of Corporate Guarantee states as follows:

“A. GUARANTEE In consideration of the premises, the Surety hereby unconditionally, absolutely and irrevocably guarantees to and agrees with the Debenture Trustee for the benefit of the Debenture Holder and the Security Trustee, for the benefit of the Lender, respectively, that:

1. It shall ensure that Amazia shall duly and punctually pay or repay the Amazia Secured Obligations and Rubix shall duly and punctually pay or repay the Rubix Secured Obligations and Rubix Facility Secured Obligations, including but not limited to the Principal Amount under the Amazia OPCD Subscription and Debenture Trust Deed and the Rubix OPCD Subscription and Debenture Trust Deed, respectively and the Facility, together with all interest, liquidated damages, commitment charges, premia on prepayment or on redemption, costs, expenses, and other monies due to (i) the Debenture Holder and the Debenture Trustee and any remuneration and charges that and

(ii) the Lender and the Security Trustee and any remuneration and charges that might be payable to the Security Trustee, in accordance with the Facility Agreement and perform and comply with all the other terms, conditions and covenants contained in the OPCD Subscription and Debenture Trust Deeds and the Facility Agreement.

2. The Surety guarantees to the Debenture Trustee acting for the benefit of the Debenture Holder and the Security Trustee acting for the benefit of the Lender, jointly and severally, the due and punctual payment by Amazia of the Amazia Secured Obligations and by Rubix of the Rubix Secured Obligation and Rubix Facility Secured Obligations, which are due but unpaid, and irrevocably and unconditionally agrees and undertakes (as primary obligor and not only as (sic.) to pay to the Debenture Trustee and/or the Security Trustee forthwith on demand (which demand shall be made in terms of the Transaction Documents) as stated in Clause 31 herein (and in any event within five (5) Business Days of the demand) and indemnify and keep indemnified the Debenture Trustee acting for the benefit of the Debenture Holder and the Security Trustee acting for the benefit of the Lender against all losses, damages, claims, charges, fees and expenses whatsoever which the Debenture Trustee/Security Trustee may incur by reason of or in connection with any default on the part of the Guarantor or on the part of the Issuers in making such payment and including in connection with legal proceedings taken against the Issuers and/or the Guarantor for recovery of the moneys referred to in this Guarantee. In this regard the Debenture Trustee’s and/or the Security Trustee’s independent opinion of default of the Issuers and the amounts comprising shortfall amounts, as indicated in the Demand Certificate (as defined hereinafter in Clause 31) shall be final and binding on the Guarantor and the Guarantor shall not dispute the same. This Guarantee shall be continuing and shall remain in full force and effect until all the Secured Obligations have been discharged in full to the satisfaction of the Debenture Approved Instructions) and the Security Trustee certify the same in writing.

3. If the Guarantor delays in making payments in full pursuant to the demand being made on it, then it shall pay interest at the rate of 14.75% per annum (“Default Interest Rate”) on the outstanding amount, till the same is discharged in full to the satisfaction of the Debenture Trustee (acting on

Approved Instructions) or the Security Trustee and the Guarantor agrees that the Default Interest Rate agreed, is a genuine pre-estimate of the loss likely to be suffered by the Debenture Holder, Debenture Trustees, Security Trustee and/or the Lender on account of any default by the Guarantor in discharging its obligations as agreed herein.

14. Notwithstanding the Debenture Holder's/the Debenture Trustee's and the Security Trustee's/ Lender's rights under any security which the Debenture Holder/ the Trustee (acting on Approved Instructions) and the Security Trustee, jointly and severally, shall have the fullest liberty to call upon the Guarantor to pay all or part of the monies for the time being due to the Debenture Holder/ the debenture Trustee and/or the Security Trustee/ the Lender (as the case may be) in respect of the Secured Obligations without requiring the Debenture Trustee/ the debenture Holder and/or the Security Trustee/ the Lender to realize from the Issuers the amount outstanding to the Debenture Holder/ the Debenture Trustee and/or the Security Trustee/ the Lender pursuant to the Debentures/ Facility and/or requiring the Debenture Trustee/ the Debenture Holder and/or the Security Trustee/ the Lender to enforce any remedies or securities available to the Debenture Trustee/ the Debenture Holder and/or the Security Trustee/ the Lender.

31. The Guarantor agrees that the amount hereby guaranteed shall be payable to the Debenture Trustee and/or the Security Trustee immediately upon the Debenture Trustee and/or the Security Trustee/ Lender serving the Guarantor with a notice requiring payment of the amount due (the "Demand Certificate"), in the form and manner set out in Schedule I hereto, at the address and details specified in Clause 34 below. Save and except as provided above, prior to making any demand hereunder, the Debenture Trustee/ the Debenture Holder and/or the Security Trustee/ the Lender shall not be required to take any step, make any demand upon, exercise any remedies or obtain any judgment against any of the Obligors, give notice to the Obligors or any other person under the Transaction Documents or otherwise and howsoever arising, or make or file any claim or proof in the dissolution or winding-up of any of the Obligors or enforce or seek to enforce any Security now or hereafter held by any of the Debenture Trustee/Debenture Holder and/or the Security Trustee/ Lender in respect of the when sent (with the correct answerback), (ii) if sent by fax, when sent (on receipt of a confirmation to the correct fax number), (iii) if sent by person, when delivered, (iv) if sent by courier, one (1) Business Day after deposit with an overnight courier, and (v) if sent by registered letter, when the registered letter would, in the ordinary course of post, be delivered whether actually delivered or not. An original of each notice and communication sent by telex or telecopy shall be dispatched by person or overnight courier and, if such person or courier service is not available, by registered first class mail with postage prepaid, provided that the effective date of any such notice shall be determined in accordance with paragraphs (i) or (ii) of this Clause 31, as the case may be, without regard to the dispatch of such original.

SCHEDULE I FORM OF DEMAND CERTIFICATE To: Ackruti City Limited [as "Guarantor"] From: [. ] [as "Debenture Trustee"/ Security Trustee"] Dated: [. ] Dear Sirs, Ref: Deed of Corporate Guarantee cum Mortgage dated [. ] (the "Deed") executed by the Guarantor in favour of the Debenture Trustee and the Security Trustee.

[Amazia Developers Private Limited/Rubix Trading Private Limited] has not fulfilled its obligations under [the Amazia OPCD Subscription and Debenture Trust Deed dated [. ] and/or the Rubix OPCD Subscription and Debenture Trust Deed dated [. ] and/or the Facility Agreement] and an amount of Rs.[. ] (Rupees [. ] only) is due and payable by [Amazia Developers Private Limited/Rubix Trading Private Limited]. Accordingly, we hereby give you notice pursuant to Clause 2 and Clause 31 of the Deed that we require you to pay such amount.

All amounts due should be paid to the account [details of account] entitled [. ] under the [. ] immediately and in no event later than 5 Business Days from the date hereof.

Capitalised terms used herein shall have the meaning given to them in the Guarantee.

Yours faithfully [Debenture Trustee]/ [Security Trustee]"

6. It is on this Corporate Guarantee that the Summary Suit is based. Dr. Singhvi has argued before us that there has been no violation of the FEMA Regulations, 1999, as observed by the Ld. Single Judge. In particular, he referred to and relied upon Regulations 4 and 5 of the FEMA Regulations, which are set out as follows:

"Restriction on an Indian entity to issue security to a person resident outside India or to record a transfer of security from or to such a person in its books :-

[4. Save as otherwise provided in the Act or Rules or Regulations made | thereunder, an Indian entity shall not issue any security to a person | resident outside India or shall not record in its books any

transfer of | security from or to such person:- | | | | Provided that the Reserve Bank may, on an application made to it and for | sufficient reasons, permit an entity to issue any security to a person | resident outside India or to record in its books transfer of security | from or to such person, subject to such conditions as may be considered | necessary. | Permission for purchase of shares by certain persons resident outside | India :- | 5. (1) (i) A person resident outside India (other than a citizen of | Bangladesh or Pakistan) or an entity incorporated outside India (other | than an entity in Bangladesh or Pakistan), may purchase shares or | convertible debentures or warrants of an Indian company under Foreign | Direct Investment Scheme, subject to the terms and conditions specified | in Schedule 1. | Explanation.--- Shares or convertible debentures containing an | optionality clause but without any option/right to exit at an assured | price shall be reckoned as eligible instruments to be issued to a | person resident outside India by an Indian company subject to the terms | and conditions as specified in Schedule 1.” |

7. Dr. Singhvi argued that there is no breach whatsoever of the Regulations inasmuch as the suit, based upon a Corporate Guarantee to enforce its terms, is filed by an Indian company, namely, the debenture trustee IDBI Trusteeship Pvt. Ltd., against another Indian company namely Hubtown Ltd, the beneficiary being a subsidiary of Hubtown namely Vinca, which is also an Indian company. There is therefore no question of any funds going out of the country in violation of any FEMA Regulation, the ultimate repose of the funds being for the benefit of Vinca which is an Indian company. He argued before us that admittedly ₹418 crores were paid by FMO, a Dutch company, and have been swallowed by the development project that has been set up by Amazia and Rubix. He also argued that there is no question of any infraction of the FEMA Regulations for the reason that these funds went to purchase equity shares of Vinca in the form of fully convertible debentures, such debentures having to be converted into shares after a certain period, and that, therefore, there was no question of any illegality in the said transaction. He further submitted that it is only in 2011 that defaults were made in payment, as a result of which the Corporate Guarantee was invoked. The said Corporate Guarantee is unconditional and not a word has been stated against its invocation, namely, that it has not been alleged to have been invoked wrongly. According to him, there is no defence whatsoever to the suit, and the defence being entirely frivolous and vexatious, leave to defend ought to have been refused altogether. But, he stated as an alternative argument, that in any case the Appellant-plaintiff should be fully secured for the amount claimed in the plaint. He also submitted before us that the test laid down in *Mechelec Engineers & Manufacturers v. Basic Equipment Corporation*, (1976) 4 SCC 687 is no longer good law in view of the fact that O.XXXVII of the Code of Civil Procedure, 1908 (“CPC”) was amended in 1976, and it is the amended provision that has to be looked at. He cited certain judgments before us to show that this court has taken the view that the amended provision makes a sea change in the law, as a result of which it is open to the court, even if it thinks that a triable issue is made out, to secure the plaintiff in monetary terms as a condition for leave to defend the suit.

8. Shri Aspi Chinoy, Ld. senior counsel appearing on behalf of the Respondent, has reiterated the submissions of his predecessor in the Bombay High Court. According to him there is a clear breach of the FEMA Regulations and this being so, the Ld. Single Judge was correct in referring to the judgment in *Immami Appa Rao vs. G. Ramalingamurthi*, (1962) 3 SCR 739, and stating that where two persons may be party to an illegality, the court would be justified, in the larger public interest, in not lending the court’s aid to a person who comes to court to enforce such illegality. That this may incidentally benefit the defendant is of no moment, and therefore the Ld. Single Judge was correct in prima facie coming to the conclusion that the suit was to lend assistance to the plaintiff in enforcing something illegal, the Corporate Guarantee being part of the larger illegal transaction. According to Ld. senior counsel, there is in fact no change made by the amendment of 1976, save and except in one area – that where the defendant admits that a certain amount is due from him, then even though leave to defend may be granted, the admitted amount ought to be deposited or secured. Short of this change, the law continues to be the same, and therefore, according to him, triable issues having been raised in the present case, it is clear that clause (e) of the propositions laid down in paragraph 8 of Mechelec’s case alone would entitle the Plaintiff to an order for deposit into court or security, and sub-clause (e) not being attracted, the Ld. Single Judge was absolutely right in the conclusion that he reached. He also asked us not to interfere with the Ld. Single Judge’s judgment under Article 136 as there was nothing perverse in the Single Judge’s conclusions.

9. This case therefore raises a larger and very important question:

namely, whether the judgment in Mechelec’s case continues to be the law even after the amendment

of O.XXXVII in 1976. To appreciate the respective submissions of counsel, it is necessary to set out O.XXXVII Rule 3 as it stood pre-amendment and as it now stands.

O.XXXVII, Rule 3 (pre-amendment) “3. Defendant showing defence on merits to have leave to appear. (1) The Court shall, upon an 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.

(2) 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.” O.XXXVII, Rule 3 (post amendment) “3. Procedure for the appearance of defendant.—(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under Rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form 4-A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such 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:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,—

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.”

10. The 3 judge bench in Mechelec's case heard an appeal from a judgment of the Delhi High Court. In paragraph 2 of the judgment, the unamended O.XXXVII Rule 3 is set out, after which, in paragraph 4, the Court stated that the only question which arose before them in that appeal by special leave was whether the High Court could, in exercise of its powers under Section 115 of the CPC, interfere with the discretion of the district court in granting unconditional leave to defend to the defendant-appellant, upon grounds which even a perusal of the impugned judgment of the High Court showed to be reasonable. The answer to the question thus posed was in the question itself, and this Court had no doubt that the High Court judgment, in interfering with the trial court's judgment under its revisional jurisdiction, was wrong. Paragraphs 6 and 7, which constitute the ratio of the judgment, went into the well-established principles repeatedly laid down by this court which govern the jurisdiction of the High Courts under Section 115 of the CPC. This Court held that such principles had been ignored in the judgment under appeal. However, in paragraph 8, the judges set out the 5



propositions governing O.XXXVII laid down in *Kiranmoyee Dassi Smt v. Dr J. Chatterjee*, AIR 1949 Cal 479, as follows:

“In *Kiranmoyee Dassi Smt v. Dr J. Chatterjee* [AIR 1949 Cal 479 : 49 CWN 246, 253 : ILR (1945) 2 Cal 145.] Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37 CPC 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 has a defence, yet, shews 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 leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.” [para 8]

11. As the case before the court did not fall within clause (e), this Court held that imposition of a condition to deposit an amount in court would not be possible, and allowed the appeal as aforesaid. It is interesting to note that a binding four judge bench decision on order 37 in *Milkhiram (India) (P) Ltd. v. Chamanlal Bros.*, AIR 1965 SC 1698, was bunched together with several other judgments that were relied upon in paragraph 6, as judgments relating to the exercise of jurisdiction of High Courts under section 115 of the CPC.

12. We find that *Milkhiram*'s case is in fact an important judgment on the scope of O.XXXVII of the CPC, and is not a judgment on principles to be applied under Section 115. This judgment, being a judgment of four learned judges of this court, set out, in paragraph 1, O.XXXVII, Rule 3 sub-rules (2) and (3) as amended by the Bombay High Court at the relevant time, as follows:

“(2) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment returnable not less than ten clear days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(3) The defendant may at any time within ten days from the service of such summons for judgment by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend the suit. Leave to defend may be granted to him unconditionally or upon such terms as to the Judge appear just.”

13. The trial court found that the defence disclosed by the affidavit required by sub-rule (3) was sufficient to grant leave to defend the suit, but as against a claim of ₹4,05,434.38/-, the Court ordered the appellant to deposit security worth ₹70,000/-. A first appeal having been dismissed, the Supreme Court had to decide whether it was incumbent upon the trial court to grant unconditional leave to defend, having found that a triable issue exists. Since this judgment is of seminal importance in deciding the issue raised before us, it is necessary for us to quote parts of this judgment, as follows:

“Learned counsel relied upon a decision of this court in *Santosh Kumar v. Bhai Mool Singh* [ (1958) SCR 1211] and particularly upon a passage at p. 1216. That was a case in which the Court of Commercial Subordinate Judge, Delhi, had held that the defence raised a triable issue but that defence was vague and was not bona fide because the defendant had produced no evidence to prove his assertion. For these reasons the court granted leave to defend the suit on the condition of the defendant giving security for the entire claim in the suit and costs thereon. This court held that the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts

alleged by the defendant are established, there would be a good, or even a plausible defence on those facts. If the court is satisfied about that, leave must be given unconditionally. This Court further held that the trial court was wrong in imposing a condition about giving security on the ground that documentary evidence had not been adduced by the defendant. This Court pointed out that the stage of proof can only arise after leave to defend has been granted and that the omission to adduce documentary evidence would not justify the inference the defence sought to be raised was vague and not bona fide. While dealing with the matter Bose, J., who spoke for the Court observed (p. 1216): "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." The latter part of the observations of the learned Judge have to be understood in the background of the facts of the case this Court was called upon to consider. The trial Judge being already satisfied that the defence raised a triable issue was not justified in imposing a condition to the effect that the defendant must deposit security because he had not adduced any documentary evidence in support of the defence. The stage for evidence had not been reached. Whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage. If upon consideration of material placed before it the court comes to the conclusion that the defence is a sham one or is fantastic or highly improbable it would be justified in putting the defendant upon terms before granting leave to defend. Even when a defence is plausible but is improbable the court would be justified in coming to the conclusion that the issue is not a triable issue and put the defendant on terms while granting leave to defend. To hold otherwise would make it impossible to give effect to the provisions of Order 37 which have been enacted, as rightly pointed out by Bose, J., to ensure speedy decision in cases of certain types. It will be seen that Order 37 Rule 2 is applicable to what may be compendiously described as commercial causes. Trading and commercial operations are liable to be seriously impeded if, in particular, money disputes between the parties are not adjudicated upon expeditiously. It is these considerations which have to be borne in mind for the purpose of deciding whether leave to defend should be given or withheld and if given should be subjected to a condition.

It may be mentioned that this Court relied upon the decision *in Jacobs v. Booth's Distillery Co.* [(1901) 85 LT 262] in which the House of Lords held that whenever a defence raises a triable issue leave must be given and also referred to two subsequent decisions where it was held that when such is the case leave must be given unconditionally. In this connection we may refer to the following observations of Devlin, L.J. in *Fieldrank Ltd. v. Stein* [(1961) 3 AELR 681 at pp 682-3] : "The broad principle, which is founded on *Jacob v. Booth's Distillery Co.* is summarised on p. 266 of the Annual Practice (1962 Edn.) in the following terms:

"The principle on which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition." If that principle were mandatory, then the concession by counsel for the plaintiffs that there is here a triable issue would mean at once that the appeal ought to be allowed; but counsel for the plaintiffs has drawn our attention to some comments that have been made on *Jacobs v. Booth's Distillery Co.* [(1901) 85 LT 262] They will be found at pp. 251 and 267 of the Annual Practice, 1962. It is suggested (see p. 251) that possibly the case, if it is closely examined, does not go as far as it has hitherto been thought to go; and on the top of p. 267 the learned editors of the Annual Practice have this note: "The condition of payment into court, or giving security, is nowadays more often imposed than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defence set up is a sham defence and the master 'is prepared very nearly to give judgment for the plaintiff.'" It is worth noting also that in *Lloyd's Banking Co. v. Ogle* 1 Ex. D. at p. 264 in a dictum which was said to have been overruled or qualified by *Jacob v. Booth's Distillery Co.* [(1901) 85 LT 262] Bramwell, B., had said that "...those conditions (of bringing money into court or giving security) should only be applied when there is something suspicious in the defendant's mode of presenting his case." I should be very glad to see some relaxation of the strict rule in *Jacob v. Booth's Distillery Co.* I think that any Judge who has sat in chambers in RSC, Order 14 summonses has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith, and

would like to protect the plaintiff, especially if there is not grave hardship on the defendant in being made to pay money into court. I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past, and I think that that is a good tendency;" These observations as well as some observations of Chagla, C.J., in **Rawalpindi Theatres Private Ltd. v. Film Group Bombay** [ (1958) BLR 1373 at p 1374] may well be borne in mind by the court sitting in appeal upon the order of the trial Judge granting conditional leave to defend. It is indeed not easy to say in many cases whether the defence is a genuine one or not and therefore it should be left to the discretion of the trial Judge who has experience of such matters both at the bar and the bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false, or sham, he should refuse leave to defend altogether. Unfortunately, however, the majority of cases cannot be dealt with in a clear cut way like this and the judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words whether it raises a triable issue or not.

It is to meet such cases that the amendment to Order 37 Rule 2 made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend. Thus this is a matter in the discretion of the trial Judge and in dealing with it, he ought to exercise his discretion judiciously. Care must be taken to see that the object of the rule to assist the expeditious disposal of commercial causes to which the Order applies, is not defeated. Care must also be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In a matter of this kind, it would be undesirable and inexpedient to lay down any rule of general application." [paras 7 – 12]

14. We may hasten to add that Mechelec's case has since been followed in a series of judgments of this court – **Municipal Corpn. of Delhi v. Suresh Chandra Jaipuria**, (1976) 4 SCC 719 at para 11; **Sunil Enterprises v. SBI Commercial & International Bank Ltd.**, (1998) 5 SCC 354 at para 4; **State Bank of Saurashtra v. Ashit Shipping Services (P) Ltd.**, (2002) 4 SCC 736 at para 10; **Uma Shankar Kamal Narain v. M.D. Overseas Ltd.**, (2007) 4 SCC 133 at paras 8 and 9; **SIFY Ltd. v. First Flight Couriers Ltd.**, (2008) 4 SCC 246 at para 10; **Wada Arun Asbestos (P) Ltd. v. Gujarat Water Supply & Sewerage Board**, (2009) 2 SCC 432 at para 19; **R. Saravana Prabhu v. Videocon Leasing & Industrial Finance Ltd.**, (2013) 14 SCC 606 at para 4; and **State Bank of Hyderabad v. Rabo Bank**, (2015) 10 SCC 521 at para 16.

15. However, there are two judgments of this Court which directly deal with the amendment made to O.XXXVII and the effect thereof on the ratio contained in Mechelec's case. In **Defiance Knitting Industries (P) Ltd. v. Jay Arts**, (2006) 8 SCC 25, this Court, after setting out the amended O.XXXVII and after referring to Mechelec's case, laid down the following principles – "While giving leave to defend the suit the court shall observe the following principles:

(a) If the court is of the opinion that the case raises a triable issue then leave to defend should ordinarily be granted unconditionally.

See **Milkhiram (India) (P) Ltd. v. Chamanlal Bros.** [AIR 1965 SC 1698 : 68 Bom LR 36] The question whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties.

(b) If the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious it may refuse leave to defend altogether. **Kiranmoyee Dassi v. Dr. J. Chatterjee** [AIR 1949 Cal 479 : 49 CWN 246] (noted and approved in **Mechelec** case [(1976) 4 SCC 687 : AIR 1977 SC 577] ).

(c) In cases where the court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the court may impose conditions in granting leave to defend." [para 13]

16. In **Southern Sales & Services v. Sauermilch Design & Handels GMBH**, (2008) 14 SCC 457, this Court was squarely asked to render its decision on whether the judgment in Mechelec's case was to a large extent rendered ineffective in view of the amended O.XXXVII. This Court found:

"Having considered the submissions made on behalf of the respective parties and the decisions cited, there appears to be force in Mr Sharma's submissions regarding the object intended to be achieved by the introduction of sub-rules (4), (5) and (6) in Rule 3, Order 37 of the Code. Whereas in the unamended provisions of Rule 3, there was no compulsion for making any deposit as a condition

precedent to grant of leave to defend a suit by virtue of the second proviso to sub-rule (5), the said provision was altered to the extent that the deposit of any admitted amount is now a condition precedent for grant of leave to defend a suit filed under Order 37 of the Code. A distinction has been made in respect of any part of the claim, which is admitted. The second proviso to sub-rule (5) of Rule 3 makes it very clear that leave to defend a suit shall not be granted unless the amount as admitted to be due by the defendant is deposited in court.” [para 15]

17. It is thus clear that O.XXXVII has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that Milkhiram’s case is a direct authority on the amended O.XXXVII provision, as the amended provision in O.XXXVII Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality, another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order XXXVII to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to Joseph’s multi-coloured coat – a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.

18. Accordingly, the principles stated in paragraph 8 of Mechelec’s case will now stand superseded, given the amendment of O.XXXVII R.3, and the binding decision of four judges in Milkhiram’s case, as follows:

If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;

if the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant’s good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

if the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

if the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.

19. Coming to the facts of the present case:

It is clear that a sum of ₹418 crores has been paid by FMO, the Dutch company, to Vinca for purchase of shares as well as compulsorily convertible debentures. This transaction by itself is not alleged to be violative of the FEMA regulations.

The suit is filed only on invocation of the Corporate Guarantee which on its terms is unconditional. It may be added that it is not the defendant’s case that the said Corporate Guarantee is wrongly invoked.

Payment under the said Guarantee is to the debenture trustee, an Indian company, for and on behalf of Vinca, another Indian company, so that prima facie again there is no infraction of the FEMA Regulations. Since FMO becomes a 99% holder of Vinca after the requisite time period has elapsed, FMO may at that stage utilise the funds received pursuant to the overall structure agreements in India. If this is so, again prima facie there is no breach of FEMA Regulations.

At the stage that FMO wishes to repatriate such funds, RBI permission would be necessary. If RBI permission is not granted, then again there would be no infraction of FEMA Regulations.

The judgment in Immami Appa Rao's case would be attracted only if the illegal purpose is fully carried out, and not otherwise.

20. Based on the aforesaid, it cannot be said that the defendant has raised a substantial defence to the claim made in the suit. Arguably at the highest, as held by the learned Single Judge, even if a triable issue may be said to arise on the application of the FEMA Regulations, nevertheless, we are left with a real doubt about the Defendant's good faith and the genuineness of such a triable issue. ₹418 crores has been stated to be utilized and submerged in a building construction project, with payments under the structured arrangement mentioned above admittedly being made by the concerned parties until 2011, after which payments stopped being made by them. The defence thus raised appears to us to be in the realm of being 'plausible but improbable'. This being the case, the plaintiff needs to be protected. In our opinion, the defendant will be granted leave to defend the suit only if it deposits in the Bombay High Court the principal sum of ₹418 crores invested by FMO, or gives security for the said amount of ₹418 crores, to the satisfaction of the Prothonotary and Senior Master, Bombay High Court within a period of three months from today. The appeal is accordingly allowed, and the judgment of the Bombay High Court is set aside.

21. We further direct that the suit be tried expeditiously, preferably within a period of one year from the date of this judgment, uninfluenced by any observations made by us herein.

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## **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<sup>th</sup> 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]; *Murugesu 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.

\* \* \* \* \*

***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 5<sup>th</sup> 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 4<sup>th</sup> 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 ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.

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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## **PART – B : LIMITATION**

### ***R.B. Policies at Lloyd's v. Butler***

(1949) 2 All ER 226 (KBD)

**STREATIFEILD, J** - This is an action brought by R.B. Policies at Lloyd's against Mr. Alfred Butler by a writ issued on July 16, 1947, claiming the return of a motor-car which, they allege, has been wrongfully detained by the defendant. When the motorcar was first in the plaintiff's possession it had registration number JD 6412 and it was stolen from them by some person or persons unknown on June 27, 1940. In January 1947, the car, then bearing the registration number ALN 765, was found in the possession of the defendant, having passed to him through a line of intermediate purchasers during the previous seven years. It is pleaded in the defense that the plaintiffs' cause of action is barred under the Limitation Act, 1939, by S. 2 (1) of which no action shall be brought "after the expiration of six years from the date on which the cause of action accrued".

The plaintiffs were the owners of this car and the defendant was an innocent purchaser who acquired it for good consideration and in good faith many years after it was stolen. Where there is any doubt or ambiguity in an Act of Parliament, natural justice shall be done, where there is any doubt about the wording of an Act of Parliament, the words are to be understood in a way which harmonises with the policy of the Act.

In deciding this issue, it became necessary to determine the date on which the cause of action accrued. If it accrued to the plaintiffs as soon as the motor car was stolen so that they then had a cause of action against the thief for conversion or detention, it is contended that under S. 3 (1) of the Limitation Act, 1939, any subsequent detention cannot be the subject of any action. That sub-section contemplates that if a cause of action did accrue at the date of the theft and, before the plaintiffs recovered possession, there were further conversion by a line of persons of whom the defendant was the last, no cause of action will lie against any of them after six years from the date of the original cause of action. Sub-section (2) goes on to introduce what is new law:

Where any such cause of action had accrued to any person, and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid had expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

When does the cause of action accrue? In the present case when the thief stole this car in 1940, clearly he converted it to his own use, and apart from his prosecution for the felony, if he had been known, undoubtedly an action could have been brought against him for conversion of the car then. I have to determine whether it is necessary that there should be an actual, known, and available defendant to such an action before it can be said that the cause of action has accrued so as to fulfill the phrase used in S. 2 (1) of the Act of 1939.

A cause of action cannot accrue unless there be a person in existence capable of suing and another person in existence who can be sued.

Is it to be said, because a person is not traceable or is not known that he is not in existence, and cannot be sued? If the thief in the present case had been traceable, he could have been sued, so I doubt whether on that definition it can be said that there was no person in existence who could have been sued. It was, no doubt, a misfortune to the plaintiffs that they could not find a defendant whose name they could insert in a writ, but the fact remains that every other ingredient of the cause of action was present. S. 26 of the Act of 1939, provides:

Where, in the case of any action which a period of limitation is prescribed by this

Act...;(b) the right of action is concealed by fraud of any such person as aforesaid...;

the period of limitation shall not begin to run until the plaintiff has discovered the

fraud...; or could with reasonable diligence have discovered it....

A proviso protects third parties who take for valuable consideration without notice. The section does not say the cause of action shall accrue for the first time on the discovery of the fraud; but only that time “shall not begin to run” until that event. Section 26 is the only provision in the Act of 1939 where a special exception of this nature is made. *Prima facie*, therefore, if there is a cause of action (as there clearly was here the moment this motor car was stolen), time begins to run as from that moment, notwithstanding the fact that the plaintiff is ignorant of the identity of the thief.

Can it be said, therefore, that, the cause of action being otherwise complete the ignorance of the plaintiff regarding the person who committed the conversion is sufficient to prevent the accrual of that cause of action? I think not, and I agree with the argument of counsel for the defendant. It would lead to appalling results if someone, having lost a watch and discovered it fifty or sixty years later in the possession of a wholly innocent person who had bought it many years previously, was able to bring action for its recovery merely because he did not know who the thief was fifty or sixty years before. I cannot think that that is the policy of the Limitation Act, 1939. I agree that one of the principles of the Act is that those who go to sleep on their claims should not be assisted by the Courts in recovering their property. But another equally important principle is that there shall be an end of these matters, and that there shall be protection against stale demands. In *A' Court v. Cross* [(1825) 3 Bing. 329] Best, C.J., referred to the policy of the Limitation Act, 1923, in this way:

It has been supposed that the legislature only meant to protect persons who had paid

their debts, but from length of time had lost or destroyed the proof of payment. From

the title of the Act to the last section, every word of it shows that it was not passed on

this narrow ground. It is, as I have heard it often called by great judges, an act of peace. Long dormant claims have often more cruelty than of justice in them.

I am not suggesting that the plaintiffs here was guilty of heartlessness or cruel conduct, but a claim made seven or eight years after the loss of the car against a perfectly innocent holder who has given good consideration for it without any knowledge that it was stolen does not seem just. I thin that one object of this Act is to prevent injustices of that kind and to protect innocent people against demands which are made many years afterwards. In my view, the proper construction of the words "the action accrued" involves the finding that the cause of action here accrued in 1940 when the car was stolen from the plaintiffs. This preliminary point must, therefore, be decided in favour of the defendant.

\* \* \* \* \*

***Union of India v. West Coast Paper Mills Ltd.***

AIR 2004 SC 1596

**CJI, S.B. SINHA , S.H. KAPADIA & S.B. SINHA, JJ** : Doubting the correctness of a two-Judge Bench decision of this Court in *P.K. Kutty Anuja Raja v. State of Kerala* [JT 1996 (2) SC 167 : (1996) 2 SCC 496], a Division Bench of this Court has referred the matter to a three-Judge Bench.

The factual matrix required to be taken note of is as under:

The respondents herein were transporting their goods through the branch line to the appellants from Alnavar to Dandeli wherefor the common rate fixed in respect of all commodities on the basis of weight was being levied as freight. However, a revision was made in the rate of freight w.e.f. 1.2.1964.

Aggrieved thereby and dissatisfied therewith, the respondents herein filed a complaint petition before the Railway Rates Tribunal (hereinafter referred to as 'The Tribunal') challenging the same as unjust, unreasonable and discriminatory as the standard telescopic class rates on three times of inflated distance was adopted for levy of freight on goods traffic. The Tribunal by a judgment dated 18.4.1966 declared the said levy as unreasonable where against the appellants herein filed an application for grant of special leave before this Court.

While granting special leave, this Court also passed a limited interim order which is in the following terms:

"The Railway may charge the usual rates without inflation of the distance, and the Respondent will give a Bank guarantee to the satisfaction of the Register of this Court for Rupees Two Lakhs to be renewed each year until the disposal of the appeal. One month's time allowed for furnishing the Bank Guarantee. The stay petition is dismissed subject to the above."

Eventually, however, the said Special Leave Petition was dismissed by this Court on 14.10.1970.

A writ petition was filed by the respondent herein on 05.01.1972 which was marked as W.P. NO. 210/1972, and the same was disposed by the High Court on 29.10.1973 observing:

"All these matters, in my opinion, cannot be properly adjudicated upon in a Writ Petition filed under Art. 226 of the Constitution. If so advised the petitioner could avail of the ordinary remedy of filing a suit for appropriate relief. If such a suit is filed, it will be open to the respondents to raise all available contentions in defence just as it is open to the petitioner to raise all available contentions in support of its claim. Having considered all relevant aspects, I am of the opinion, that this is a case where I should decline to exercise my discretion under Art. 226 of the Constitution.

Subject to the aforesaid observations, this writ petition is dismissed."

Two suits thereafter were filed by the respondents on 12.12.1973 and 18.04.1974 which were renumbered later on as OS NO. 38/1982 and OS No.39/1982.



A contention that the said suits were barred by limitation was raised by the appellants herein stating that the cause of action for filing the same arose immediately after the judgment was passed by 'The Tribunal' on 18.4.1966 and, thus, in terms of Article 58 of the Limitation Act, 1963, they were required to be filed within a period of three years from the said date, as despite the fact that the Special Leave Petition was preferred there against, no stay had been granted by this Court and, thus, the period, during which the matter was pending before this Court, would not be excluded in computing the period of limitation. Having regard to the plea raised by the Plaintiff-Respondent in the aforementioned suits as regards the applicability of Sections 14 and 15 of the Limitation Act, 1963, the Trial Court held that the suits had been filed within the stipulated period. The High Court in appeal also affirmed the said view.

Mr. P.P. Malhotra, learned senior counsel appearing on behalf of the appellant, at the outset drew our attention to the fact that the Union of India has already complied with the direction of 'The Tribunal' by refunding the excess freight charged from the respondent for the period 18.4.1966 to 25.9.1966. The learned counsel, however, would contend that the suit for refund of excess amount of the freight for the disputed periods (a) 24.6.1963 to 1.2.1964, and (b) 1.2.1964 to 18.4.1966 were barred by limitation in terms of

Article 58 of the Limitation Act, 1963, as the cause of action for filing the suit had arisen on the date on which such declaration was made by 'The Tribunal'.

Mr. Malhotra would further contend that in absence of an order staying the operation of the judgment, it became enforceable and, thus, the plaintiff-respondent was required to file the suit within the period of limitation specified therefore. Furthermore, the learned counsel would urge that in terms of Section 46A of the Indian Railways Act, the judgment of the Tribunal being final, the starting period of limitation for filing the suit would be three years from the said date. Strong reliance in this behalf has been placed on *Juscurn Boid v. Pirthichand Lal* [L.R. Indian Appeals 1918-1919 page 52], P.K. Kutty (supra), *Maqbul Ahmad and others v. Onkar Pratap Narain Singh* [AIR 1935 PC 85] and *Secretary, Ministry of Works & Housing Govt. of India and Others v. Mohinder Singh Jagdev* [(1996) 6 SCC 229].

Mr. Harish N Salve, learned senior counsel appearing on behalf of the respondents, on the other hand, would submit that having regard to the fact situation obtaining in this case Article 113 of the Limitation Act shall apply and not Article 58 thereof. The learned counsel would urge that as admittedly this Court granted Special Leave to Appeal in favour of the appellants and passed a limited interim order, the judgment of the Tribunal was in jeopardy and, thus, cannot be said to have attained finality. Furthermore, the learned counsel would submit that when the doctrine of merger applies, the period of limitation would begin to run from the date of passing the appellate decree and not from the date of passing of the original decree. In support of the said contention, reliance has been placed on a decision of this Court in *Kunhayammed v. State of Kerala* [(2000) 6 SCC 359].

The plaintiff in this case has filed a suit for refund of the excess amount collected by the defendant-Railways for the period 24.6.1963 to 1.2.1964 and 1.2.1964 to 18.4.1966 with interest accrued thereupon. It is not in dispute that in terms of the provisions of the Indian Railways Act, as thence existing 'The Tribunal' was only entitled to make a declaration to the

effect that the freight charged was unreasonable or excessive. It did not have any jurisdiction to execute its own order.

It may be true that by reason of Section 46A of Indian Railways Act the judgment of the Tribunal was final but by reason thereof the jurisdiction of this Court to exercise its power under Article 136 of the Constitution of India was not and could not have been excluded.

Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.

Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of Appeal.

The starting point of limitation for filing a suit for the purpose of recovery of the excess amount of freight illegally realised would, thus, begin from the date of the order passed by this Court. It is also not in dispute that the respondent herein filed a writ petition which was not entertained on the ground stated hereinbefore. The respondents were, thus, also entitled to get the period during which the writ petition pending, excluded for computing the period of limitation. In that view of the matter, the civil suit was filed within the prescribed period of limitation.

The Trial Judge as also the High Court have recorded a concurrent opinion that the respondents were entitled to the benefits of Sections 14 and 15 of the Limitation Act, 1963. We have no reason to take a different view. It is beyond any cavil that in the event, the respondent was held to have been prosecuting its remedy bona fide before an appropriate forum, it would be entitled to get the period in question excluded from computation of the period of limitation.

Articles 58 and 113 of the Limitation Act read thus:

"Description of Suit Period of Limitation Time from which period begins to run

58. To obtain any other declaration Three years When the right to sue first accrues

113. Any suit for which no period of limitation is provided elsewhere in this Schedule Three years

When the right to sue accrues"

It was not a case where the respondents prayed for a declaration of their rights. The declaration sought for by them as regard unreasonableness in the levy of freight was granted by the Tribunal.

A distinction furthermore, which is required to be noticed is that whereas in terms of Article 58 the period of three years is to be counted from the date when 'the right to sue first accrues'; in terms of Article 113 thereof, the period of limitation would be counted from the date 'when the right to sue accrues'. The distinction between Article 58 and Article 113 is, thus, apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time and, thus, whereas in terms of Article 58 the period of limitation would be reckoned from the

date on which the case of action arose first whereas, in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefore arose.

The fact that the suit was not filed by plaintiff-respondent claiming existence of any legal right in itself is not disputed. The suit for recovery of money was based on the declaration made by 'The Tribunal' to the effect that the amount of freight charged by the appellant was unreasonable. It will bear repetition to state that a plaintiff filed a suit for refund and a cause of action therefore arose only when its right was finally determined by this Court and not prior thereto. This Court not only granted special leave but also considered the decision of the Tribunal on merit.

In **Kunhayammed** (supra), this Court held:

"12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

It was further observed:

"41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.

42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68)"

(See also *Raja Mechanical Company Pvt. Ltd. v. Commissioner of Central Excise*, 2002 (4) AD (Delhi) 621).

The question as regard applicability of merger with reference to the provisions for departmental appeal and revision had first been considered by this Court in *Sita Ram Goel v. Municipal Board, Kanpur* [1959 SCR 1148] stating :

"The initial difficulty in the way of the appellant, however, is that departmental enquiries even though they culminate in decisions on appeals or revision cannot be equated with proceedings before the regular courts of law."

However, the said view was later on not accepted to be correct.

Despite the rigours of Section 3 of the Limitation Act, 1963, the provisions thereof are required to be construed in a broad based and liberal manner. We need not refer to the decisions of this Court in the matter of condoning delay in filing appeal or application in exercise of its power under Section 5 of the Limitation Act.

In *The State of Uttar Pradesh v. Mohammad Nooh* [1958 SCR 595] Vivian Bose, J. held that justice should be done in a common sense point of view stating: "I see no reason why any narrow or ultra technical restrictions should be placed on them. Justice should, in my opinion be administered in our courts in a common sense liberal way and be broadbased on human values rather than on narrow and restricted considerations hedged round with hair-splitting technicalities "

However, in that case also a distinction was sought to be made between a judgment of a 'Court' and 'Tribunal'. In *S.S. Rathore v. State of Madhya pradesh* [(1989) 4 SCC 582], noticing the earlier Constitution Benches decision of this Court in Mohammad Nooh (supra), *Madan Gopal Rungta v. Secy. To the Government of Orissa* [1962 Supp 3 SCR 906], *Collector of Customs, Calcutta v. East India Commercial Co. Ltd.* [(1963) 2 SCR 563] as well as 3-Judge Bench of this Court in *Somnath Sahu v. State of Orissa* [(1969) 3 SCC 384], this Court observed:

"14. The distinction adopted in Mohammad Nooh case (1958 SCR 595 : AIR 1958 SC 86) between a court and a tribunal being the appellate or the revisional authority is one without any legal justification. Powers of adjudication ordinarily vested in courts are being exercised under the law by tribunals and other constituted authorities. In fact, in respect of many disputes the jurisdiction of the court is now barred and there is a vesting of jurisdiction in tribunals and authorities. That being the position, we see no justification for the distinction between courts and tribunals in regard to the principle of merger. On the precedents indicated, it must be held that the order of dismissal made by the Collector did merge into the order of the Divisional Commissioner when the appellant's appeal was dismissed on August 31, 1966."

**Rathore's case** (supra) was followed in *Mohd. Quaramuddin (Dead) By LRS. v. State of A.P.* [(1994) 5 SCC 118] and noticed in *Kunhayammed* (supra).

We may now, keeping in view the law laid down by this Court, as noticed hereinbefore, consider the decisions relied upon by Mr. Malhotra.

In **Juscurn Boid** (supra) the question which arose for consideration was as to in a suit for recovery of the purchase money paid for sale of a patni taluk under Bengal Regulation VIII of

1819, which had been set aside; what would be the date when cause of action therefor can be said to have arisen? In that case several suits were filed. The sale was reversed in its entirety in the first suit. Stay was not granted in the other suits. In the peculiar fact situation obtaining therein it was held that under the Indian law and procedure when a original decree is not questioned by presentation of an appeal nor is its operation interrupted; where the decree on appeal is one of dismissal, the running of the period of limitation did not stop.

In **Maqbul Ahmad** (supra) the question which arose for consideration was as to whether subsequent to the passing of a preliminary decree in the mortgage suit, an application to obtain execution under the preliminary decree can be dismissed. In that case a preliminary mortgage decree was obtained on 7th May, 1917 which was amended in some respects on 22nd May, 1917. Some of the mortgagors who were interested in different villages comprised in the mortgage, appealed to the High Court against the preliminary decree. Two such appeals were filed. One appeal succeeded while the other failed. The decrees of the High Court disposing of those appeals were made on 7th June, 1920 whereafter the decree-holder proceeded to seek execution under the preliminary decree. In the aforementioned situation, it was held:

"It is impossible to say, apart from any other objection, that the application to obtain execution under the preliminary decree was an application for the same relief as the application to the Court for a final mortgage decree for sale in the suit. That being so, it is not permissible, on the basis of S. 14 in computing the period of limitation prescribed, to exclude that particular period."

The question which falls for consideration in this case did not arise therein.

Before we advert to **P.K. Kutty** (supra) we may notice another decision of this Court in Sales Tax Officer, **Banaras v. Kanhaiya Lal Makund Lal Saraf** [AIR 1959 SC 135]. In that case an order of assessment was in question which came up before this Court. The question which arose for consideration therein was as to whether Section 72 of the Indian Contract Act had any application. This Court held that cause of action for filing the suit for recovery would arise from the date when such payment of tax made under a mistake of law became known to the party.

In **P.K. Kutty** (supra) an order of assessment under the Agricultural Income Tax was set aside by the High Court by a judgment dated 1st January, 1968. A civil suit was filed in the year 1974. The suit was held to be barred by limitation. A Contention was raised therein that the appellant had discovered the mistake on 5th October, 1971 when the Court dismissed the appeal filed by the State against the order passed by the High Court dated 1st January, 1968. This Court negatived the said plea stating:

"3...We are unable to agree with the learned counsel. It is not in dispute that at his behest the assessment was quashed by the High Court in the aforesaid OP on 1-1-1968. Thereby the limitation started running from that date. Once the limitation starts running, it runs its full course until the running of the limitation is interdicted by an order of the Court."

Distinguishing **Kanhaiya Lal** (supra), it was observed:

"5... We do not have that fact situation in this case. The appellant is a party to the proceedings and at his instance the assessment of agricultural income tax was quashed as referred to

hereinbefore and having had the assessment quashed the cause of action had arisen to him to lay the suit for refund unless it is refunded by the State. The knowledge of the mistake of law cannot be countenanced for extended time till the appeal was disposed of unless, as stated earlier, the operation of the judgment of the High Court in the previous proceedings were stayed by this Court."

In **Mohinder Singh Jagdev** (supra) also this Court held:

"7. The crucial question is whether the suit is barred by limitation ? Section 3 of the Limitation Act, 1963 (for short, "the Act") postulates that the limitation can be pleaded. If any proceedings have been laid after the expiry of the period of limitation, the court is bound to take note thereof and grant appropriate relief and has to dismiss the suit, if it is barred by limitation. In this case, the relief in the plaint, as stated earlier, is one of declaration. The declaration is clearly governed by Article 58 of the Schedule to the Act which envisages that to obtain "any other" declaration the limitation of three years begins to run from the period when the right to sue "first accrues". The right to sue had first accrued to the respondent on 10-9-1957 when the respondent's services came to be terminated. Once limitation starts running, until its running of limitation has been stopped by an order of the competent civil court or any other competent authority, it cannot stop. On expiry of three years from the date of dismissal of the respondent from service, the respondent had lost his right to sue for the above declaration."

Unfortunately in **P.K. Kutty** (supra) and **Mohinder Singh Jagdev** (supra) no argument was advanced as regard applicability of doctrine of merger. The ratio laid down by the Constitution Benches of this Court had also not been brought to the court's notice.

In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit.

It has not been and could not be contended that even under the ordinary civil law the judgment of the appellate court alone can be put to execution. Having regard to the doctrine of merger as also the principle that an appeal is in continuation of suit, we are of the opinion that the decision of the Constitution Bench in **S.S. Rathore** (supra) was to be followed in the instant case.

The facts obtaining in **Mohinder Singh Jagdev** (supra) being totally different, the same cannot said to have any application in the facts obtaining in the present case.

We, therefore, are of the opinion that **P.K. Kutty** (supra) does not lay down the law correctly and is overruled accordingly.

The matter may now be placed before an appropriate Bench for disposal of the appeals on merits.

\* \* \* \* \*

***Punjab National Bank v. Surendra Prasad Sinha***

AIR 1992 SC 1815

**K. RAMASWAMY, J.** - 2. Though the respondent was served on July 29, 1991, he neither appeared in person, nor through counsel. The facts set out in the complaint eloquently manifest on its face a clear abuse of the process of the court to harass the appellants. The respondent, an Advocate and Standing Counsel for the first appellant filed a private complaint in the court of Additional Chief Judicial Magistrate, Katni in C.C. No. 933 of 1991 for offences under Section 409 and Sections 109/114 IPC.

3. The first appellant's branch at Katni gave a loan of Rs 15,000 to one Sriman Narain Dubey on May 5, 1984 and the respondent and his wife Annapoorna stood as guarantors, executed Annexure 'P' "security bond" and handed over Fixed Deposit Receipt for a sum of Rs 24,000, which would mature on November 1, 1988. At maturity its value would be at Rs. 41,292. The principal debtor committed default in payment of the debt. On maturity, the Branch Manager, appellant 5, Shri V. K. Dubey, adjusted a sum of Rs 27,037.60 due and payable by the principal debtor as on December, 1988 and the balance sum of Rs 14,254.40 was credited to the Savings Bank Account of the respondent. The respondent alleged that the debt became barred by limitation as on May 5, 1987. The liability of the respondent being coextensive with that of the principal debtor, his liability also stood extinguished as on May 5, 1987. Without taking any action to recover the amount from the principal debtor within the period of limitation, on January 14, 1989, Shri D. K. Dubey, the Branch Manager, intimated that only Rs 14,254.40 was credited to his Savings Bank Account No. 3763. The entire amount at maturity, namely Rs. 41,292 ought to have been credited to his account and despite repeated demands made by the respondent it was not credited. Thereby the appellants criminally embezzled the said amount. The first appellant with a dishonest interest to save himself from the financial obligation neglected to recover the amount from the principal debtor and allowed the claim to be barred by limitation and embezzled the amount entrusted by the respondent. Appellants 2 to 6 abetted the commission of the crime in converting the amount of Rs. 27,037.40 to their own use in violation of the specific direction of the respondent. Thus they committed the offences punishable under Section 409 and Sections 109 and 114 IPC.

4. The security bond, admittedly, executed by the respondent reads in material parts thus: "We confirm having handed over to you by way of security against your branch office Katni F.D. Account No. 77/83 dated November 1, 1983 for Rs 24,000 in the event of renewal of the said Fixed Deposit Receipt as security for the above loan." "We confirm... the F.D.R. will continue to remain with the bank as security here." "The amount due and other charges, if any, be adjusted and appropriated by you from the proceeds of the said F.D.R. at any time before, or on its maturity at your discretion, unless the loan is otherwise fully adjusted from the dues on demand in writing made by you...." "We give the bank right to credit the balance to our savings bank account or any other amount and adjust the amount due from the borrowers out of the same." "We authorise you and confirm that the F.D.R. pledged as security for the said loan shall also be security including the surplus proceeds thereof for any other liability and obligation of person and further in favour of the bank and the bank shall be entitled to retain/realise/utilise/appropriate the same without reference to us."

5. Admittedly, as the principal debtor did not repay the debt. The bank as creditor adjusted at maturity of the F.D.R., the outstanding debt due to the bank in terms of the contract and the balance sum was credited to the Savings Bank account of the respondent. The rules of limitation are not meant to destroy the rights of the parties. Section 3 of the Limitation Act 36 of 1963, for short "the Act" only bars the remedy, but does not destroy the right, which the remedy relates to. The right to the debt continues to exist notwithstanding the remedy is barred by the limitation. Only exception in which the remedy also becomes barred by limitation is that the right itself is destroyed. For example under Section 27 of the Act a suit for possession of any property becoming barred by limitation, the right to property itself is destroyed. Except in such cases which are specially provided under the right to which remedy relates in other case the right subsists. Though the right to enforce the debt by judicial process is barred under Section 3 read with the relevant article in the schedule, the right to debt remains. The time barred debt does not cease to exist by reason of Section 3. That right can be exercised in any other manner than by means of a suit. The debt is not extinguished, but the remedy to enforce the liability is destroyed. What Section 3 refers is only to the remedy but not to the right of the creditors. Such debt continues to subsist so long as it is not paid. It is not obligatory to file a suit to recover the debt. It is settled law that the creditor would be entitled to adjust, from the payment of a sum by a debtor, towards the time barred debt. It is also equally settled law that the creditor when he is in possession of an adequate security, the debt due could be adjusted from the security in his possession and custody. Undoubtedly the respondent and his wife stood guarantors to the principal debtor, jointly executed the security bond and entrusted the F.D.R. as security to adjust the outstanding debt from it at maturity. Therefore, though the remedy to recover the debt from the principal debtor is barred by limitation, the liability still subsists. In terms of the contract the bank is entitled to appropriate the debt due and credit the balance amount to the savings bank account of the respondent. Thereby the appellant did not act in violation of any law, nor converted the amount entrusted to them dishonestly for any purpose. Action in terms of the contract expressly or implied is a negation of criminal breach of trust defined in Section 405 and punishable under Section 409 IPC. It is neither dishonest, nor misappropriation. The bank had in its possession the fixed deposit receipt as guarantee for due payment of the debt and the bank appropriated the amount towards the debt due and payable by the principal debtor. Further, the F.D.R. was not entrusted during the course of the business of the first appellant as a Banker of the respondent but in the capacity as guarantor. The complaint does not make out any case much less prima facie case, a condition precedent to set criminal law in motion. The Magistrate without advertent whether the allegation in the complaint prima facie makes out an offence charged for, obviously, in a mechanical manner, issued process against all the appellants. The High Court committed grave error in declining to quash the complaint on the finding that the Bank acted prima facie high-handedly.

6. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing director of the Bank by name and a host of officers. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. Considered from any angle we find that the respondent had abused the process and laid complaint against all the appellants without any prima facie case to harass them for vendetta.

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***Collector, Land Acquisition, Anantnag v. Katiji***  
AIR 1987 SC 1353

**THAKKAR, J.** - To condone or not to condone, is not the only question. Whether or not to apply @ the same standard in applying the “sufficient cause” test to all the litigants regardless of their personality in the said context is another.

2. An appeal preferred by the State of Jammu and Kashmir arising out of a decision enhancing compensation in respect of acquisition of lands for a public purpose to the extent of nearly 14 lakhs rupees by making an upward revision of the order of 800% (for Rs. 1,000 per kanal to Rs. 8,000 per kanal) which also raised important questions as regards principles of valuation was dismissed as time barred being 4 days beyond time by rejecting an application for condonation of delay. Hence, this appeal by special leave.

3. The legislature has conferred the power to condone delay by enacting 8.5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties-by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which sub-serves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated.
3. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
4. “Every day's delay must be explained” does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
5. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
6. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective; there was sufficient cause for condoning the delay in the institution of the appeal.. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an evenhanded manner. There is no warrant for

according step-motherly treatment, when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing and passing-on-the-buck methods, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community does not deserve a litigant non grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore, set aside. Held and the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides.

4. Appeal is allowed accordingly.

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***State of Nagaland v. Lipok AO***  
(2005) 3 SCC 752

**ARIJIT PASAYAT, J.** - 2. The State of Nagaland questions correctness of the judgment rendered by a learned Single Judge of the Gauhati High Court, Kohima Bench refusing to condone the delay by rejecting the application filed under Section 5 of the Limitation Act, 1963 (in short “the Limitation Act”) and consequentially rejecting the application for grant of leave to appeal. Before we deal with the legality of the order refusing to condone the delay in making the application for grant of leave, a brief reference to the factual background would suffice:

Application for grant of leave was made in terms of Section 378(3) of the Code of Criminal Procedure, 1973 (in short “the Code”). A judgment of acquittal was passed by learned Additional Deputy Commissioner (Judicial), Dimapur, Nagaland. The judgment was pronounced on 18-12-2002. As there was delay in making the application for grant of leave in terms of Section 378(3) of the Code, application for condonation of delay was filed. As is revealed from the application for condonation, copy of the order was received by the department concerned on 15-1-2003; without wasting any time on the same date the relevant documents and papers were put up for necessary action before the Deputy Inspector General of Police (Headquarters), Nagaland. On the next day, the said Deputy Inspector General considered the matter and forwarded the file for consideration to the Deputy Inspector General of Police (M&P), Nagaland. Unfortunately the whole file along with note-sheet was found missing from the office and could not be traced in spite of best efforts made by the department. Finally it was traced on 15-3-2003 and the file was put up for necessary action by the Additional Director General of Police (Headquarters), Nagaland. The said officer opined that an appeal was to be filed on 26-3-2003, and finally the appeal was filed after appointing a Special Public Prosecutor. When it was noticed that no appeal had been filed, the Secretary to the Department of Law and Justice, Government of Nagaland got in touch with the Additional Advocate General, Gauhati High Court regarding the filing of the appeal and in fact the appeal was filed on 14-5-2003. It is of relevance to note that in the application for condonation of delay it was clearly noted that when directions were given to reconstruct the file, the missing file suddenly appeared in the office of the Director General of Police, Nagaland.

3. In support of the application for condonation of delay, it was submitted that the aspects highlighted clearly indicated that the authorities were acting bona fide and various decisions of this Court were pressed into service to seek condonation of delay. The High Court, however, refused to condone the delay of 57 days on the ground that it is the duty of the litigant to file an appeal before the expiry of the limitation period. Merely because the Additional Advocate General did not file an appeal in spite of the instructions issued to him, that did not constitute sufficient cause and further the fact that the records were purportedly missing was not a valid ground. It was noted that merely asking the Additional Advocate General to file an appeal was not sufficient and the department should have pursued the matter and should have made enquiries as to whether the appeal had in fact, been filed or not. Accordingly the application for condonation of delay in filing the appeal was rejected and consequentially the application for grant of leave was rejected.

4. Learned counsel appearing for the appellant State submitted that the approach of the High Court is not correct and in fact it is contrary to the position of law indicated by this Court in various cases. In the application for condonation of delay the various factors which were responsible for the delayed filing were highlighted. There was no denial or dispute regarding the correctness of the assertions and, therefore, the refusal to condone the delay in filing application is not proper. It has to be noted that police officials were involved in the crime. The background facts involved also assume importance. As the police officers attached to a Minister had allegedly killed two persons, therefore, the mischief played by some persons interested to help the accused colleagues could not have been lost sight of. There is no appearance on behalf of the respondent in spite of the service of notice.

5. As noted above, a brief reference to the factual aspect is necessary. The background facts of the prosecution version are as follows:

On 29-5-1999 the five accused-respondents comprised the escort party of a State Cabinet Minister. The case of the accused-respondents was that at 5.30 p.m. on 29-5-1999, the occupants of a Maruti Zen crossed the cavalcade of the Minister and shouted at them. The personal security officer attached to the Minister saw one of the occupants of the car holding a small firearm. After dropping the Minister, the escort vehicle while proceeding to another place saw the Maruti Zen and its occupants, who on seeing the police party tried to escape. Meanwhile one of the occupants of the car opened the rear glass and opened fire from his firearm. On hearing gunfire, the police party also opened fire but the Maruti Zen escaped and disappeared. Subsequently, the car was discovered with one of its three occupants who was found to be already dead and the other two had sustained bullet injuries. Of the two survivors one died subsequently in hospital and another had to have his arm amputated.

6. The said shoot-out incident was investigated by the police and a case under Sections 302/307/326/34 of the Indian Penal Code, 1860 was registered against the accused-respondents.

7. The trial court noted that the ballistic report established that the bullets were fired from the guns of the accused-respondents. A finding was also recorded that the respondents exceeded their power of opening fire, and this constituted misfeasance, but absence of the post-mortem report was held to have vitally affected the prosecution case. It was also held that the accused persons had fired with AK-47 and M-22 rifles in self-defence. Therefore, benefit of doubt was given to them. A pragmatic approach has to be adopted and when substantial justice and technical approach are pitted against each other the former has to be preferred.

8. The proof by sufficient cause is a condition precedent for exercise of the extraordinary restriction (*sic* discretion) vested in the court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. In *N. Balakrishnan v. M. Krishnamurthy* [AIR 1998 SC 3222] it was held by this Court that Section 5 is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the court has to go in the position of the person concerned and to find out if the delay can be said to have resulted from the cause which he had adduced and whether the cause can be recorded in the peculiar circumstances of the case as sufficient. Although no special indulgence can be shown to the Government which, in similar

circumstances, is not shown to an individual suitor, one cannot but take a practical view of the working of the Government without being unduly indulgent to the slow motion of its wheels.

9. What constitutes sufficient cause cannot be laid down by hard-and-fast rules. In *New India Insurance Co. Ltd. v. Shanti Misra* [(1975) 2 SCC 840] this Court held that discretion given by Section 5 should not be defined or crystallised so as to convert a discretionary matter into a rigid rule of law. The expression “sufficient cause” should receive a liberal construction. In *Brij Indar Singh v. Kanshi Ram* [AIR 1917 PC 156] it was observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. In *Shakuntala Devi Jain v. Kuntal Kumari* [AIR 1969 SC 575] a Bench of three Judges had held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

10. In *Concord of India Insurance Co. Ltd. v. Nirmala Devi* [(1979) 4 SCC 365] which is a case of negligence of the counsel which misled a litigant into delayed pursuit of his remedy, the default in delay was condoned. In *Lala Mata Din v. A. Narayanan* [(1969) 2 SCC 770] this Court had held that there is no general proposition that mistake of counsel by itself is always sufficient cause for condonation of delay. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In that case it was held that the mistake committed by the counsel was bona fide and it was not tainted by any malafide motive.

11. In *State of Kerala v. E.K. Kuriyipe* [1981 Supp SCC 72] it was held that whether or not there is sufficient cause for condonation of delay is a question of fact dependent upon the facts and circumstances of the particular case. In *Milavi Devi v. Dina Nath* [(1982) 3 SCC 366] it was held that the appellant had sufficient cause for not filing the appeal within the period of limitation. This Court under Article 136 can reassess the ground and in appropriate case set aside the order made by the High Court or the Tribunal and remit the matter for hearing on merits. It was accordingly allowed, delay was condoned and the case was remitted for decision on merits.

12. In *O.P. Kathpalia v. Lakhmir Singh* [(1984) 4 SCC 66] a Bench of three Judges had held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay. Delay was accordingly condoned. In *Collector, Land Acquisition v. Katiji* [(1987) 2 SCC 107] a Bench of two Judges considered the question of limitation in an appeal filed by the State and held that Section 5 was enacted in order to enable the court to do substantial justice to the parties by disposing of matters on merits. The expression “sufficient cause” is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice - that being the life purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. This Court reiterated that the expression “every day’s delay must be explained” does not mean that a pedantic approach should be made. The doctrine must be applied in a rational, common-sense, pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is

occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a stepmotherly treatment when the State is the applicant. The delay was accordingly condoned.

13. Experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. The State which represents collective cause of the community, does not deserve a litigant-non-grata status. The courts, therefore, have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression of sufficient cause. Merit is preferred to scuttle a decision on merits in turning down the case on technicalities of delay in presenting the appeal. Delay as accordingly condoned, the order was set aside and the matter was remitted to the High Court for disposal on merits after affording opportunity of hearing to the parties. In ***Prabha v. Ram Parkash Kalra*** [1987 Supp SCC 339] this Court had held that the court should not adopt an injustice-oriented approach in rejecting the application for condonation of delay. The appeal was allowed, the delay was condoned and the matter was remitted for expeditious disposal in accordance with law.

14. In ***G. Ramegowda v. Spl. Land Acquisition Officer*** [(1988) 2 SCC 142] it was held that no general principle saving the party from all mistakes of its counsel could be laid. The expression “sufficient cause” must receive a liberal construction so as to advance substantial justice and generally delays in preferring the appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of delay. In litigations to which Government is a party, there is yet another aspect which, perhaps, cannot be ignored. If appeals brought by Government are lost for such defaults, no person is individually affected, but what, in the ultimate analysis, suffers is public interest. The decisions of Government are collective and institutional decisions and do not share the characteristics of decisions of private individuals. The law of limitation is, no doubt, the same for a private citizen as for governmental authorities. Government, like any other litigant must take responsibility for the acts, omissions of its officers. But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purposes with it. It was, therefore, held that in assessing what constitutes sufficient cause for purposes of Section 5, it might, perhaps, be somewhat unrealistic to exclude from the considerations that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Government decisions are proverbially slow encumbered, as they are, by a

considerable degree of procedural red tape in the process of their making. A certain amount of latitude is, therefore, not impermissible. It is rightly said that those who bear responsibility of Government must have “a little play at the joints”. Due recognition of these limitations on governmental functioning — of course, within reasonable limits - is necessary if the judicial approach is not to be rendered unrealistic. It would, perhaps, be unfair and unrealistic to put Government and private parties on the same footing in all respects in such matters. Implicit in the very nature of governmental functioning is procedural delay incidental to the decision-making process. The delay of over one year was accordingly condoned.

15. It is axiomatic that decisions are taken by officers/agencies proverbially at a slow pace and encumbered process of pushing the files from table to table and keeping it on the table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression “sufficient cause” should, therefore, be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day’s delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-à-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file appeal, needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while the State is an impersonal machinery working through its officers or servants.

16. The above position was highlighted in *State of Haryana v. Chandra Mani* [(1996) 3 SCC 132] and *Special Tehsildar, Land Acquisition v. K.V. Ayisumma* [(1996) 10 SCC 634]. It was noted that adoption of strict standard of proof sometimes fails to protract (*sic*) public justice, and it would result in public mischief by skilful management of delay in the process of filing an appeal.

17. When the factual background is considered in the light of legal principles as noted above, the inevitable conclusion is that the delay of 57 days deserved condonation. Therefore, the order of the High Court refusing to condone the delay is set aside.

18. In normal course, we would have required the High Court to consider the application praying for grant of leave on merits. But keeping in view the long passage of time and the points involved, we deem it proper to direct grant of leave to appeal. The appeal shall be registered and disposed of on merits. It shall not be construed that we have expressed any merits on the appeal to be adjudicated by the High Court.

19. Appeal is allowed.

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***State of Madhya Pradesh v. Bherulal***  
(2020) 10 SCC 654

**SANJAY KISHAN KAUL, J.-**

1. The Special Leave Petition has been filed with a delay of 663 days! The explanation given in the application for condonation of delay is set out in paragraphs 3 and 4.

2. We are constrained to pen down a detailed order as it appears that all our counseling to Government and Date: 2020.10.16 Government authorities have fallen on deaf ears i.e., the Supreme Court of India cannot be a place for the Governments to walk in when they choose ignoring the period of limitation prescribed. We have raised the issue that if the Government machinery is so inefficient and incapable of filing appeals/petitions in time, the solution may lie in requesting the Legislature to expand the time period for filing limitation for Government authorities because of their gross incompetence. That is not so. Till the Statute subsists, the appeals/petitions have to be filed as per the Statutes prescribed.

3. No doubt, some leeway is given for the Government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had not advanced and a greater leeway was given to the ***Government (Collector, Land Acquisition, Anantnag & Anr vs. Mst. Katiji & Ors.*** (1987) 2 SCC 107). This position is more than elucidated by the judgment of this Court in Office of the ***Chief Post Master General & Ors. v. Living Media India Ltd. & Anr.*** (2012) 3 SCC 563 where the Court observed as under:

“12) It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

13) In our view, it is the right time to inform all the government bodies, their agencies and

instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay.” Eight years hence the judgment is still unheeded!

4. A reading of the aforesaid application shows that the reason for such an inordinate delay is stated to be only “due to unavailability of the documents and the process of arranging the documents”. In paragraph 4 a reference has been made to “bureaucratic process works, it is inadvertent that delay occurs”.

5. A preposterous proposition is sought to be propounded that if there is some merit in the case, the period of delay is to be given a go-by. If a case is good on merits, it will succeed in any case. It is really a bar of limitation which can even shut out good cases. This does not, of course, take away the jurisdiction of the Court in an appropriate case to condone the delay.

6. We are also of the view that the aforesaid approach is being adopted in what we have categorized earlier as “certificate cases”. The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal. It is to complete this formality and save the skin of officers who may be at default that such a process is followed. We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement. The purpose of coming to this Court is not to obtain such certificates and if the Government suffers losses, it is time when the concerned officer responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing. It is presumed that this Court will condone the delay and even in making submissions, straight away counsels appear to address on merits without referring even to the aspect of limitation as happened in this case till we pointed out to the counsel that he must first address us on the question of limitation.

7. We are thus, constrained to send a signal and we propose to do in all matters today, where there are such inordinate delays that the Government or State authorities coming before us must pay for wastage of judicial time which has its own value. Such costs can be recovered from the officers responsible.

8. Looking to the period of delay and the casual manner in which the application has been

worded, we consider appropriate to impose costs on the petitioner- State of Rs.25,000/- (Rupees twenty five thousand) to be deposited with the Mediation and Conciliation Project Committee. The amount be deposited in four weeks. The amount be recovered from the officers responsible for the delay in filing the special leave petition and a certificate of recovery of the said amount be also filed in this Court within the said period of time.

9. The special leave petition is dismissed as time barred in terms aforesaid.

10. We make it clear that if the aforesaid order is not complied within time, we will be constrained to initiate contempt proceedings against the Chief Secretary.

11. A copy of the order be placed before the Chief Secretary, State of Madhya Pradesh.

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***Commissioner of Sales Tax, U. P. v. Madan Lal Das***

AIR 1977 SC 523

**H.R. KHANNA, J.** - This is an appeal by special leave against the judgment of Allahabad High Court whereby the High Court answered the following question referred to it under Section 11(3) of the U.P. Sales Tax Act (hereinafter referred to as the Act) in favour of the dealer-respondent and against the revenue:

“Whether the time taken by the dealer in obtaining another copy of the impugned appellate order could be excluded for the purpose of limitation of filing revision under Section 10(1) of the U.P. Sales Tax Act when one copy of the appellate order was served upon the dealer under the provisions of the Act.”

The matter relates to the assessment year 1960-61. An appeal filed by the respondent against the order of Sales Tax Officer was disposed of by the Additional Commissioner (Judicial) Sales Tax, Bareilly. The copy of the appellate order was served on the dealer respondent on August 22, 1965. The respondent, it appears, lost the copy of the appellate order, which had been served upon him. On June 15, 1966 the respondent made an application for obtaining another copy of the above order. The copy was ready on August 17, 1967 and was delivered to the respondent on the following day i.e. August 18, 1967. Revision under Section 10 of the Act was thereafter filed by the respondent before the Judge (Revision) Sales Tax on September 9, 1967. Sub-section (3-B) of Section 10 of the Act prescribes the period of limitation for filing such a revision. According to that sub-section such a revision application shall be made within one year from the date of service of the order complained of but the revising authority may on proof of sufficient cause entertain an application within a further period of six months.

Question was then agitated before the Judge (Revision) as to whether the revision application was within time. The respondent claimed that under Section 12(2) of the Limitation Act, he was entitled to exclude in computing the period of limitation for filing the revision, the time spent for obtaining a copy of the appellate order. This contention was accepted by the Judge (Revision). He also observe that the fact that the said copy was not required to be filed along with the revision petition would not stand in the way of respondent relying upon Section 12(2) of the Limitation Act. The Judge (Revision) thereafter dealt with the merits of the case and partly allowed the revision petition. At the instance of the Commissioner of Sales Tax, the question reproduced above was referred to the High Court. The High Court, as stated above, answered the question in favour of the respondent and in doing so placed reliance upon the provisions of Section 12(2) of the Limitation Act, 1963 (Act 36 of 1963) which reads as under:

“(2) In computing the period of limitation for an appeal or an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.”

Bare perusal of sub-section (2) of Section 12 of the Act of 1908 would show that it did not deal with the period of limitation prescribed for an application for revision. As against that, the language of sub-section (2) of Section 12 of the Act of 1963 makes it manifest that its provisions would also apply in computing the period of limitation for application for revision. There can, therefore, be no manner of doubt that in a case like the present which is governed by the Act of

1963, the provisions of sub-section (2) of Section 12 can be invoked for computing the period of limitation for the application for revision if the other necessary conditions are fulfilled.

2. It is, however, contended by Mr. Manchanda that the U. P. Sales Tax Act constitutes a complete code in itself and as that Act prescribes the period of limitation for filing of revision petition, the High Court was in error in relying upon the provisions of sub-section (2) of Section 12 of the Limitation Act, 1963. The contention, in our opinion, is wholly bereft of force.

4. There can be no manner of doubt that the U.P. Sales Tax Act answers to the description of a special or local law. According to sub-section (2) of Section 29 of the Limitation Act, reproduced above, for the purpose of determining any period of limitation prescribed for any application by any special or local law, the provisions contained in Section 12(2), *inter alia*, shall apply in so far as and to the extent to which they are not expressly excluded by such special or local law. There is nothing in the U.P. Sales Tax Act expressly excluding the application of Section 12(2) of the Limitation Act for determining the period of limitation prescribed for revision application. The conclusion would, therefore, follow that the provisions of Section 12(2) of the Limitation Act of 1963 can be relied upon in computing the period of limitation prescribed for filing a revision petition under Section 10 of the U.P. Sales Tax Act.

5. It has been argued by Mr. Manchanda that it was not essential for the dealer-respondent to file a copy of the order of the Assistant Commissioner along with the revision petition. As such, according to the learned Counsel, the dealer-respondent could not exclude the time spent in obtaining the copy. This contention is equally devoid of force. There is nothing in the language of Section 12(2) of the Limitation Act to justify the inference that the time spent for obtaining copy of the order sought to be revised can be excluded only if such a copy is required to be filed along with the revision application. All that Section 12(2) states in this connection is that in computing the period of limitation a revision, the time requisite for obtaining a copy of the order sought to be revised shall be excluded. It would be impermissible to read in Section 12(2) a proviso that the time requisite for obtaining copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded only if such copy has to be filed along with the memorandum of appeal or application for leave to appeal or for revision or for review of judgment, when the legislature has not inserted such a proviso in Section 12(2). It is also plain that without procuring copy of the order of the Assistant Commissioner the respondent and his legal adviser would not have been in a position to decide as to whether revision petition should be filed against that order and if so, what grounds should be taken in the revision petition.

6. The matter indeed is not *res integra*. In the case of *J. N. Surty v. T. S. Chetiyar* [AIR 1928 PC 103], the Judicial Committee after noticing the conflict in the decisions of the High Courts held that Section 12(2) of the Indian Limitation Act, 1908 applies even when by a rule of the High Court a memorandum of appeal need not be accompanied by a copy of the decree. Lord Phillimore speaking on behalf of the Judicial Committee observed:

“Their Lordships have now to return to the grammatical construction of the Act, and they find plain words directing that the time requisite for obtaining the two documents is to be excluded from computation Section 12 makes no reference to the Code of Civil Procedure or to any other Act. It does not say why the time is to be excluded, but simply enacts it as a positive direction.”

If, indeed, it could be shown that in some particular class of cases there could be no object in obtaining the two documents, an argument might be offered that no time could be requisite for

obtaining something not requisite. But this is not so. The decree may be complicated, and it may be open to draw it up in two different ways, and the practitioner may well want to see its form before attacking it by his memorandum of appeal. As to the judgment, no doubt when the case does not come from upcountry, the practitioner will have heard it delivered, but he may not carry all the points of a long judgment in his memory, and as Sir John Edge says, the Legislature may not wish him to hurry to make a decision till he has well considered it.

7. Following the above decision, it was held by a Full Bench consisting of five Judges of the Lahore High Court in the case of *Punjab Co-operative Bank Ltd., Lahore v. Official Liquidators, Punjab Cotton Press Co. Ltd.* [AIR 1941 Lah. 257] that even though under the Rules and Orders of the High Court no copy of the judgment is required to be filed along with the memorandum of appeal preferred under Section 202 of the Indian Companies Act from an order of a single Judge, the provisions of Section 12 of the Indian Limitation Act would be attracted. The provisions of Section 12 were also held to govern an appeal under Letters Patent.

8. A full Bench of the Patna High Court in the case of *Mt. Lalitkumari v. Mahaprasad N. Singh* [AIR 1947 Pat. 329] also held that the provisions of Section 12 of the Limitation Act were applicable to letter patent appeals under Clause 10 of the letters patent.

9. The above decision of the Judicial Committee was followed by this Court in the case of *Additional Collector of Customs, Calcutta v. M/s. Best & Co.* (AIR 1966 SC 1713).

11. It is plain that since 1928 when the Judicial Committee decided the case of *Surty*, the view which has been consistently taken by the courts in India is that the provisions of Section 12 (2) of the Limitation Act would apply even though the copy mentioned in that sub-section is not required to be filed along with the memorandum of appeal. The same position should hold good in case of revision petitions ever since Limitation Act of 1963 came into force.

12. Lastly, it has been argued that the copy of the order of the Assistant Commissioner was served upon the respondent, and as such it was not necessary for the respondent to apply for copy of the said order. In this respect we find that the copy which was served upon the respondent was lost by him. The loss of that copy necessitated the filing of an application for obtaining another copy of the order of the Assistant Commissioner.

13. In the case of *State of Uttar Pradesh v. Maharaj Narain* [AIR 1968 SC 960] the appellant obtained three copies of the order appealed against by applying on three different dates for the copy. The appellant filed along with the memorandum of appeal that copy which had taken the maximum time for its preparation and sought to exclude such maximum time in computing the period of limitation for filing the appeal. This Court, while holding the appeal to be within time, observed that the expression time requisite in Section 12(2) of the Limitation Act cannot be understood as the time absolutely necessary for obtaining the copy of the order and that what is deductible under Section 12(2) is not the minimum time within which a copy of the order appealed against could have been obtained. If that be the position of law in a case

where there was no allegation of the loss of any copy, a fortiori it would follow that where as in the present case the copy served upon a party is lost and there is no alternative for that party except to apply for a fresh copy in order to be in a position to file revision petition, the time spent in obtaining that copy would necessarily have to be excluded under Section 12(2) of the Limitation Act, 1963.

14. The High Court, in our opinion, correctly answered the question referred to it in favour of the dealer-respondent and against the revenue.

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***State of Uttar Pradesh v. Maharaj Narain***

AIR 1968 SC 960

**HEDGE, J.** - 1. In this appeal by certificate, the only question that arises for decision is as to the true scope of the expression "time requisite for obtaining a copy of the decree, sentence or order appealed from" found in sub-s. 2 of s. [12](#) of the Indian Limitation Act 1908 which will be hereinafter referred to as the Act. The said question arose for decision under the following circumstances : The respondents were tried for various offences before the learned assistant sessions judge, Farrukhabad. The said learned judge acquitted them. Against the order of acquittal the State went up in appeal to the High Court of Allahabad. The said appeal was dismissed as being barred by limitation. The correctness of that decision is in issue in this appeal.

2. Item 157 of the first schedule to the Act prescribes that the period of limitation for an appeal under the Code of Criminal Procedure 1898, from an order of acquittal is three months from the date of the order appealed from. But sub-s. 2 of s. [12](#) provides that in computing the period of limitation prescribed for an appeal the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the order appealed from shall be excluded.

3. The memorandum of appeal was filed into court on March 29, 1963. The order appealed from had been delivered on November 10, 1962. According to the information contained in the copy of the order produced along with the said memorandum the appeal was within time. It showed that that copy was applied for on November 15, 1962 and the same was ready on January 3, 1963.

4. It was contended on behalf of the respondents that the appeal was out of time to view of the fact that the appellant had applied for and obtained two other copies of the order appealed from and if time is calculated on the basis of those copies the appeal was beyond time. In addition to the copy referred to earlier, the appellant had applied for another copy of the order appealed from on December 3, 1962 and that copy was ready for delivery on December 20, 1962. The appellant also applied for yet another copy of the same order on December 21, 1962 and that copy was made ready on the same day. There is no dispute that if the period of limitation is computed on the basis of those copies the appeal was barred by limitation. But the point for consideration is whether the obtaining of those copies has any relevance in the matter of computing the period of limitation for the appeal.

5. The High Court of Allahabad accepted the contention of the respondents that in determining the time requisite for obtaining a copy of the order appealed from, it had to take into consideration the copies made available to the appellant on the 20th and 21st December, 1962. It opined that the expression 'requisite' found in s. [12\(2\)](#) means "property required", and hence the limitation has to be computed on the basis of the copy made available to the appellant in December, 1962.

6. It was not disputed on behalf of the respondents that it was not necessary for the appellant to apply for a copy of the order appealed from immediately after the order was pronounced. The appellant could have, if it chose to take the risk, waited till the ninety days period allowed



to it by the statute was almost exhausted. Even then the time required for obtaining a copy of the order would have been deducted in calculating the period of limitation for filing the appeal. Hence the expression 'time requisite' cannot be understood as the time absolutely necessary for obtaining the copy of the order. What is deducible under s. [12\(2\)](#) is not the minimum time within which a copy of the order appealed against could have been obtained. It must be remembered that sub-s. 2 of s. [12](#) enlarges the period of limitation prescribed under entry 157 of Schedule I. That section permits the appellant to deduct from the time taken for filing the appeal, the time required for obtaining the copy of the order appealed from and not any lesser period which might have been occupied if the application for copy had been filed at some other date. That section lays no obligation on the appellant to be prompt in his application for a copy of the order. A plain reading of s. [12\(2\)](#) shows that in computing the period of limitation, prescribed for an appeal, the day on which the judgment or order complained of was pronounced and the time taken by the court to make available the copy applied for, have to be excluded. There is no justification for restricting the scope of that provision.

7. If the appellate courts are required to find out in every appeal filed before them the minimum time required for obtaining a copy of the order appealed from, it would be unworkable. In that event every time an appeal is filed, the court not only will have to see whether the appeal is in time on the basis of the information available from the copy of the order filed along with the memorandum of appeal but it must go further and hold an enquiry whether any other copy had been made available to the appellant and if so what was the time taken by the court to make available that copy. This would lead to a great deal of confusion and enquiries into the alleged laches or dilatoriness in respect not of copies produced with the memorandum of appeal but about other copies which he might have got and used for other purposes with which the court has nothing to do.

8. The High Court in arriving at the decision that the appeal is barred by time relied on the decision of the Lahore High Court in *Mathela v. Sher Mohammad* [A.I.R. 1935 Lah. 682]. It also sought support from the decisions of the Judicial Committee in *Pramatha Nath Roy v. Lee* [49 I.A. 307] and *J. N. Surty v. T. S. Chettyar* [55 I.A. 161]. The Lahore decision undoubtedly supports the view taken by the High Court. It lays down that the words "time requisite" mean simply time required by the appellant to obtain a copy of the decree assuming that he acted with the reasonable promptitude and diligence. It further lays down that the time requisite for obtaining a copy is the shortest time during which the copy would have been obtained by the appellant, and it had nothing to do with the amount of time spent by him in obtaining the copy which he chooses to file with the memorandum of appeal. With respect to the learned judges who decided that case we are unable to spell out from the language of s. [12\(2\)](#) the requirement that the appellant should act with reasonable promptitude and diligence and the further condition that the time requisite for obtaining a copy should be the shortest time during which a copy could have been obtained by the appellant. We are of the opinion that the said decision does not lay down the law correctly.

9. Now we shall proceed to consider the decisions of the Judicial Committee relied on by the High Court. In *Pramatha Nath Roy v. Lee* [49 I.A. 307] the appellant was found to be guilty of laches. The Judicial Committee held that he was not entitled to deduct the time lost due to his laches. It is in that context the Board observed that the time which need not have

elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order could not be regarded as 'requisite' within sub-s. 2 of s. 12. That decision does not bear on the question under consideration.

10. In *J. N. Surty v. T. S. Chettyar* [55 I.A. 161], the question that fell for decision by the Judicial Committee was whether in reckoning the time for presenting an appeal, the time required for obtaining a copy of the decree or judgment must be excluded even though by the rules of the court it was not necessary to produce with the memorandum of appeal the copy of the decree or judgment. Their Lordships answered that question in the affirmative. While deciding that question, their Lordships considered some of the observations made by the High Court relating to the dilatoriness of some Indian practitioners. In that context they observed:

There is force no doubt in the observation made in the High Court that the elimination of the requirement to obtain copies of the documents was part of an effort to combat the dilatoriness of some Indian practitioner; and their Lordships would be unwilling to discourage any such effort. All, however, that can be done, as the law stands, is for the High Courts to be strict in applying the provision of exclusion.

The word 'requisite' is a strong word; it may be regarded as meaning something more than the word 'required'. It means 'properly required' and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his fault.

11. In other words, what their Lordships said was that any delay due to the default of the pleader of the appellant cannot be deducted. There can be no question of any default if the steps taken by the appellant are in accordance with law. Hence, the above quoted observations of the Judicial Committee can have no application to the point under consideration.

12. Preponderance of judicial opinion is in favour of the conclusion reached by us earlier. The leading case on the subject is the decision of the full bench of the Madras High Court in *Panjam v. Trimala Reddy* [I.L.R. 57 Mad. 560], wherein the court laid down that in s. 12 the words 'time requisite for obtaining a copy of the decree' mean the time beyond the party's control occupied in obtaining the copy which is filed with the memorandum of appeal and not an ideal lesser period which might have been occupied if the application for the copy had been filed on some other date. This decision was followed by the Travancore-Cochin High Court in *Kunju Kesavan v. M. M. Philip* [AIR 1953 T.C. 552], by the Allahabad High Court in *B. Govind Raj Sewak Singh v. Behuti Narain Singh* [AIR 1950 All 486] and by the Madhya Pradesh High Court in *K. U. Singh v. M. R. Kachhi* [AIR 1960 MP 140].

13. From the above discussion it follows that the decision under appeal does not lay down the law correctly. But yet we are of the opinion that this is not a fit case to interfere with the order of the High Court dismissing the appeal. The respondents were acquitted by the assistant sessions judge. Farrukhabad on November 10, 1962. We were informed by learned counsel for the State that this appeal was brought to this court mainly with a view to settle an important question of law, and under instructions from the State government he told us that he does not press the appeal on merits. Accordingly this appeal is dismissed.

\* \* \* \* \*

***Mahabir Kishore v. State of Madhya Pradesh***

AIR 1990 SC 313

**K. N. SAIKIA, J.** - This plaintiffs' appeal by special leave is from the appellate judgment of the Madhya Pradesh High Court dismissing the appeal upholding the judgment of the trial court dismissing the plaintiffs' suit on the ground of limitation.

2. A registered firm Rai Saheb Nandkishore Rai Saheb Jugalkishore (appellants) was allotted contracts for manufacture and sale of liquor for the calendar year 1959 and for the subsequent period from January 1, 1960 to March 31, 1961 for Rs. 2, 56, 200 and Rs. 4,71,900, respectively, by the Government of Madhya Pradesh who also charged 7 1/2 per cent. over the auction money as mahua and fuel cess. As writ petitions challenging the government's right to charge this 7 1/2 per cent were pending in the Madhya Pradesh High Court, the government announced that it would continue to charge it and the question of stopping it was under consideration of the government whose decision would be binding on the contractors. The firm (appellants) thus paid for the above contracts a total extra sum of Rs. 54,606.

4. On April 24, 1959 the Madhya Pradesh High Court's judgment in ***Surajdin v. State of M. P.*** [1960 MPLJ 39] declaring the collection of 7 1/2 per cent. illegal was reported in 1960 MPLJ 39. Even after this decision, government continued to charge 7 1/2 per cent. extra money. Again on August 31, 1961 the High Court of Madhya Pradesh in ***N. K. Doongaji v. Collector, Surguja*** [1962 MPLJ 130] decided that the charging of 7 1/2 per cent. by the government above the auction money was illegal. This judgment was reported in 1962 MPLJ 130. It is the appellants' case that they came to know about this decision only in or about September 1962. On October 17, 1964 they served a notice on Government of Madhya Pradesh under Section 80 of the Code of Civil Procedure requesting the refund of Rs. 54,606, failing which, a suit for recovery would be filed; and later they instituted Civil Suit No. 1-B of 1964 in the Court of Additional District Judge, Jabalpur on December 24, 1964. The government resisted the suit on, inter alia, ground of limitation. The trial court taking the view that Articles 62 and 96 of the First Schedule to the Limitation Act, 1908 were applicable and the period of limitation began to run from the dates the payments were made to the government, held the suit to be barred by limitation and dismissed it. In appeal, the High Court took the view that Article 113 read with Section 17, and not Article 24, of the Schedule to the Limitation Act, 1963, was applicable; and held that the limitation began to run from October 17, 1961 on which date the government decided not to charge extra 7 1/2 per cent. on the auction money, and as such, the suit was barred on December 17, 1964 taking into consideration the period of two months prescribed by Section 80 of the Code of Civil Procedure. Consequently, the appeal was dismissed. The appellants' petition for leave to appeal to this Court was also rejected observing, "it was unfortunate that the petitioners filed their suit on December 24, 1964 and as such the suit was barred by time by seven days."

5. Mr M. V. Goswami, learned counsel for the appellants, submits, inter alia, that the High Court erred in holding that the limitation started running from October 17, 1961 being the date of the letter, Ex. D-23, which was not communicated to the appellants or any other contractor and therefore the appellants had no opportunity to know about it on that very date with

reasonable diligence under Section 17 and the High Court ought to allow at least a week for knowledge of it by the appellants in which case the suit would be within time. Counsel further submits that the High Court while rightly discussing that Section 17 of the Limitation Act, 1963 was applicable, erred in not applying that section to the facts of the instant case, wherefore, the impugned judgment is liable to be set aside.

6. Mr. Ujjwal A. Rama, the learned counsel for the respondent, submits, inter alia, that October 17, 1961 having been the date on which the government finally decided not to recover extra 7 1/2 per cent. above the auction money, the High Court rightly held that the limitation started from that date and the suit was clearly barred under Article 24 or 113 of the Schedule to the Limitation Act, 1963; and that though the records did not show that the government decision was communicated to the appellants, there was no reason why they, with reasonable diligence, could not have known about it on the same date.

7. The only question to be decided, therefore, is whether the decision of the High Court is correct. To decide that question it was necessary to know what the suit was for. There is no dispute that 7 1/2 per cent. above the auction money was charged by the Government of Madhya Pradesh as mahua and fuel cess, and the High Court subsequently held that it had no power to do so. In view of those writ petitions challenging that power, government asked the contractors to continue to pay the same pending government's decision on the question; and the appellants accordingly paid. Ultimately on October 17, 1961 government decided not to recover the extra amount any more but did not yet decide the fate of the amounts already realised. There is no denial that the liquor contracts were performed by the appellants. There is no escape from the conclusion that the extra 7 1/2 per cent was charged by the government believing that it had power, but the High Court in two cases held that the power was not there. The money realised was under a mistake and without authority of law. The appellants also while paying suffered from the same mistake. There is therefore no doubt that the suit was for refund of money paid under mistake of law.

11. The principle of unjust enrichment requires: first, that the defendants has been 'enriched' by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiffs"; and thirdly, that the retention of the enrichment be unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved.

17. There is no doubt that the instant suit is for refund of money paid by mistake and refusal to refund may result in unjust enrichment depending on the facts and circumstances of the case. It may be said that this Court has referred to unjust enrichment in cases under Section 72 of the Contract Act. See *M/s. Shiv Shanker Dal Mills v. State of Haryana* [AIR 1980 SC 1037], *UPSEB v. City Board, Mussorie* [AIR 1985 SC 883] and *State of M.P. v. Vyankatlal* [AIR 1985 SC 901].

18. The next question is whether, and if so, which provision of the Limitation Act will apply to such a suit. On this question we find two lines of decisions of this Court, one in respect of civil suits and the other in respect of petitions under Article 226 of the Constitution of India. Though there is no constitutionally provided period of limitation for petitions under Article

226, the limitation prescribed for such suits has been accepted as the guideline, though little more latitude is available in the former.

19. A tax paid under mistake of law is refundable under Section 72 of the Indian Contract Act, 1872. In *STO v. Kanhaiya Lal* [1959 SCR 1350] where the respondent, a registered firm, paid sales tax in respect of its forward transactions in pursuance of the assessment orders passed by the Sales Tax Officer for the years 1949-51; in 1952 the Allahabad High Court held in *M/s Budh Prakash Jai Prakash v. STO* [1952 All LJ 332] that the levy of sales tax on forward transactions was ultra vires. The respondent asked for a refund of the amounts paid, filing a writ petition under Article 226 of the Constitution. It was contended for the sales tax authorities that the respondent was not entitled to a refund because (1) the amounts in dispute were paid by the respondent under a mistake of law and were, therefore, irrecoverable, (2) the payments were in discharge of the liability under the Sales Tax Act and were voluntary payments without protest, and (3) inasmuch as the monies which had been received by the government had not been retained but had been spent away by it, the respondent was disentitled to recover the said amounts. This Court held that the term "mistake" in Section 72 of the Indian Contract Act comprised within its scope a mistake of law as well as a mistake of fact and that, under that section a party is entitled to recover money paid by mistake or under coercion, and if it is established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law, the party receiving the money is bound to repay or return it though it might have been paid voluntarily, subject, however, to questions of estoppel, waiver, limitation or the like. On the question of limitation, it was held that Section 17(1)(c) of the Limitation Act, 1963 would be applicable and that where a suit will be to recover "monies paid under a mistake of law, a writ petition within the period of limitation prescribed, i.e., within 3 years of the knowledge of the mistake, would also lie". It was also accepted that the period of limitation does not begin to run until the plaintiff has discovered the mistake or could, with reasonable diligence, have discovered it.

21. In *D. Cawasji & Co. v. State of Mysore* [AIR 1975 SC 813], the appellants paid certain amount to the government as excise duty and education cess for the years 1951-52 to 1965-66 in one case and from 1951-52 to 1961-62 in the other. The High Court struck down the provisions of the relevant Acts as unconstitutional. In writ petitions before the High Court claiming refund, the appellants contended that the payments in question were made by them under mistake of law; that the mistake was discovered when the High Court struck down the provisions as unconstitutional and the petitions were, therefore, in time but the High Court dismissed them on the ground of inordinate delay. Dismissing the appeals, this Court held that where a suit would lie to recover monies paid under a mistake of law, a writ petition for refund of tax within the period of limitation would lie. For filing a writ petition to recover the money paid under a mistake of law the starting point of limitation is from the date on which the judgment declaring as void the particular law under which the tax was paid was rendered. It was held in *D. Cawasji* [AIR 1975 SC 813] that although Section 72 of the Contract Act has been held to cover cases of payment of money under a mistake of law, as the State stands in a peculiar position in respect of taxes paid to it, there are perhaps practical reasons for the law according different treatment both in the matter of the heads under which they could be recovered and the period of limitation for recovery. P. N. Bhagwati J. as he then was, in *Madras*

**Port Trust v. Hymanshu International** [(1979) 4 SCC 176], deprecated any resort to plea of limitation by public authority to defeat just claim of citizens observing that though permissible under law, such technical plea should only be taken when claim is not well founded.

22. Section 17(1)(c) of the Limitation Act, 1963, provides that in the case of a suit for relief on the ground of mistake, the period of limitation does not begin to run until the plaintiff had discovered the mistake or could with reasonable diligence, have discovered it. In a case where payment has been made under a mistake of law as contrasted with a mistake of fact, generally the mistake becomes known to the party only when a court makes a declaration as to the invalidity of the law. Though a party could, with reasonable diligence, discover a mistake of fact even before a court makes a pronouncement, it is seldom that a person can, even with reasonable diligence, discover a mistake of law before a judgment adjudging the validity of the law.

23. E. S. Venkataramiah, J., as his Lordship then was, in **Shri Vallabh Glass Works Ltd. v. Union of India** [AIR 1984 SC 971], where the appellants claimed refund of excess duty paid under Central Excise and Salt Act, 1944, laid down that the excess amount paid by the appellants would have become refundable by virtue of Section 72 of the Indian Contract Act if the appellants had filed a suit within the period of limitation; and that Section 17(1)(c) and Article 113 of the Limitation Act, 1963 would be applicable.

24. In **CST v. M/s Auriaya Chamber of Commerce, Allahabad** [(1986) 3 SCC 50], the Supreme Court in its decision dated May 3, 1954 in **STO v. Budh Prakash Jai Prakash** [(1954) 5 STC 193] having held tax on forward contracts to be illegal and ultra vires the U. P. Sales Tax Act, and that the decision was applicable to the assessee's case, the assessee filed several revisions for quashing the assessment order for the year 1949-50 and for subsequent years which were all dismissed on ground of limitation. In appeal to this Court Sabyasachi Mukharji, J. while dismissing the appeal held that money paid under a mistake of law comes within mistake in Section 72 of the Contract Act; there is no question of any estoppel when the mistake of law is common to both the assessee and taxing authority. His Lordship observed that Section 5 of the Limitation Act, 1908 and Article 96 of its First Schedule which prescribed a period of 3 years were applicable to suits for refund of illegally collected tax.

25. In **Salonah Tea Co. Ltd. v. Superintendent of Taxes, Nowgong** [(1988) 1 SCC 401], the Assam Taxation (on Goods carried by Road or Inland Waterways) Act, 1954 was declared ultra vires the Constitution by the Supreme Court in **Atiabari Tea Co. Ltd. v. State of Assam** [AIR 1961 SC 232] subsequent Act was also declared ultra vires by High Court on August 1, 1963 against which the State of Assam and other respondents preferred appeal to Supreme Court. Meanwhile the Supreme Court in a writ petition **Khyerbari Tea Co. Ltd. v. State of Assam** [AIR 1964 SC 925], declared on December 13, 1963 the Act to be intra vires. Consequently the above appeal were allowed. Notices were, therefore, issued requiring the appellant under Section 7(2) of the Act to submit returns. Returns were duly filed and assessment orders passed thereon. On July 10, 1973, the Gauhati High Court in its judgment in **Loong Soong Tea Estate** case [Civil Rule No. 1005 of 1969, decided on July 10, 1973 (Gau HC)] declared the assessment to be without jurisdiction. In November, 1973 the appellant filed writ petition in the High Court contending that in view of the decision in **Loong Soong Tea Estate** case [Civil Rule No. 1005 of 1969, decided on July 10, 1973 (Gau HC)] he came to

know about the mistake in paying tax as per assessment order and also that he became entitled to refund of the amount paid. The High Court set aside the order and the notice of demand for tax under the Act but declined to order refund of the taxes paid by the appellant on the ground of delay and laches as in view of the High Court it was possible for the appellant to know about the illegality if the tax sought to be imposed as early as in 1963, when the Act in question was declared ultra vires. Allowing the assessee's appeal, Mukharji, J. speaking for this Court held:

In this case indisputably it appears that tax was collected without the authority of law. Indeed the appellant had to pay the tax in view of the notices, which were without jurisdiction. It appears that the assessment was made under Section 9(3) of the Act. Therefore, it was without jurisdiction. In the premises it is manifest that the respondents had no authority to retain the money collected without the authority of law and as such the money was liable to refund.

26. The question there was whether in the application under Article 226 of the Constitution, the court should have refused refund on ground of laches and delay, the case of the appellant having been that it was after the judgment in the case of **Loong Soong Tea Estate** [Civil Rule No. 1005 of 1969, decided on July 10, 1973 (Gau HC)] the cause of action arose. That judgment was passed in July 1973. The High Court was, therefore, held to have been in error in refusing to order refund on the ground that it was possible for the appellant to know about the legality of the tax sought to be imposed as early as 1973 when the Act in question was declared ultra vires. The court observed:

Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally, as a corollary of the said statement of law it follows that taxes collected without the authority of law as in this case from a citizen should be refunded because no State has the right to receive or to retain taxes or monies realised from citizens without the authority of law.

27. On the question of limitation referring to **Suganmal v. State of M.P.** [AIR 1965 SC 1740] and **Tilokchand Motichand v. H. B. Munshi** [AIR 1970 SC 898], his Lordship observed that the period of limitation prescribed for recovery of money paid by mistake started from the date when the mistake was known. In that case knowledge was attributable from the date of the judgment in **Loong Soong Tea Estate** case [Civil Rule No. 1005 of 1969, decided on July 10, 1973 (Gau HC)] on July 10, 1973. There had been statement that the appellant came to know of that matter in October 1973 and there was no denial of the averment made. On that ground, the High Court was held to be in error. It was accordingly held that the writ petition filed by the appellants were within the period of limitation prescribed under Article 113 of the Schedule read with Section 23 of the Limitation Act, 1963.

28. It is thus a settled law that in a suit for refund of money paid by mistake of law, Section 72 of the Contract Act is applicable and the period of limitation is three years as prescribed by Article 113 of the Schedule to the Indian Limitation Act, 1963 and the provisions of Section 17(1)(c) of that Act will be applicable so that the period will begin to run from the date of knowledge of the particular law, whereunder the money was paid, being declared void; and this could be the date of the judgment of competent court declaring that law void.

29. In the instant case, though the Madhya Pradesh High Court in **Surajdin v. State of M.P.** [1960 MPLJ 39] declared the collection of 7 1/2 per cent. illegal and that decision was reported

in 1960 MPLJ 39, the government was still charging it saying that the matter was under consideration of the government. The final decision of the government as stated in the letter dated October 17, 1961 was purely an internal communication of the government copy whereof was never communicated to the appellants or other liquor contractors. There could, therefore, be no question of the limitation starting from that date. Even with reasonable diligence, as envisaged in Section 17(1)(c) of the Limitation Act, the appellants would have taken at least a week to know about it. Mr. Rana has fairly stated that there was nothing on record to show that the appellants knew about this letter on October 17, 1961 itself or within a reasonable time thereafter. We are inclined to allow at least a week to the appellants under the above provision. Again Mr. Rana has not been in a position to show that the statement of the appellants that they knew about the mistake only after the judgment in *Doongaji* case [1962 MPLJ 130] reported in 1962 MPLJ 130, in or about September 1962, whereafter they issued the notice under Section 80 CPC was untrue. This statement has not been shown to be false. In either of the above cases, namely, of knowledge one week after the letter dated October 17, 1961 or in or about September 1962, the suit would be within the period of limitation under Article 113 of the Schedule to the Limitation Act, 1963.

30. In the result, we set aside the judgment of the High Court, allow the appeal and remand the suit. The records will be sent down forthwith to the trial court to decide the suit on merit in accordance with law, expeditiously. The appellants shall be entitled to the costs of this appeal.

\* \* \* \* \*



***Sampuran Singh v. Niranjan Kaur (Smt.)***

AIR 1999 SC 1047

**A.P. MISRA, J.** - The only question raised by the learned counsel for the mortgagor-appellants, and that is what is also decided by the courts below, is whether his suit for redemption is barred by time. This is a case of oral mortgage executed in the year 1893 for a sum of Rs. 53 and further, a question is raised, whether fresh period of limitation would revive from 11-1-1960, on which date the original mortgagee sold his mortgagee right by a registered deed to the respondents, who acknowledge the existence of the mortgage in question.

2. To appreciate the controversy, it is necessary to refer to the following short facts of this case. The suit land comprising of 37 kanals 15 marlas in Khewat No. 260, Khatauni No. 448, Rect. No. 45, Killas Nos. 14(8-0), 19(8-0), 21(5-15), 22(8-0) situated in Village Sambhli, Tehsil and District Karnal (Haryana) was originally mortgaged by Rekha and others for a sum of Rs. 53 in favour of Bakhatwara, Raju and Matu, s/o. Sahu on 21-3-1893. Mutation was sanctioned. Subsequently, on 11-1-1960, the mortgagee, Matu, s/o Raju and Smt Dasondha, wd/o Parsa, d/o Sahu sold their mortgagee rights vide registered sale deed in the even date to the respondents.

3. On the other hand, the appellants had purchased the suit land in the year 1959 from the original mortgagor; Rekha and others vide three separate registered sale deeds. According to the appellants till 1960- 61 it were the mortgagors who remained in possession of the suit land and were getting the same cultivated through their tenants. The appellants state that since in the year 1960 the original mortgagees had acknowledged the original mortgagors, therefore, a fresh period of limitation for redemption of the mortgage in question had begun to run from 11-1-1960 and prayed for possession by way of redemption on payment of Rs. 53.

4. On these facts, the appellants filed the present suit in the year 1980 for possession by way of redemption of the suit land as against the respondents. The respondents contested the suit and raised preliminary objections that the present suit is hopelessly time-barred and also raised other objections which are not necessary to refer, as both the parties pressed only the issue of limitation not only before us but even when the matter was before the courts below. The respondents' case is that they are in possession of the suit property as owners as their predecessors-in-interest mortgagees with possession transferred their entire right by means of a registered sale deed dated 11-1-1960 to the respondents, as aforesaid. At that time there was no agreement in subsistence as the original mortgagees became owners. As stated earlier, the original oral mortgage was for a sum of Rs. 53/-.

5. The trial court decreed the suit for redemption on payment of Rs. 53 and held that the suit is within time and hence they have right to redeem the mortgage. The trial court held that the suit is within time by holding that the acknowledgment by the respondents on behalf of the original mortgagees was vide sale deed dated 11-1-1960 and a fresh period of limitation starts from the date of this deed. It further placed reliance on the case of ***Inder Singh v. Kishno*** [(1966) 68 Punj LR 408] to hold that the period of limitation would only run after expiry of 12 years from the date of mortgage, in cases of unregistered mortgage. Since the present case is also a case of unregistered mortgage it held that such mortgage and possession would only become valid after a period of 12 years from the date of such mortgage. The present oral

mortgage in question was of the year 1893 thus the limitation would only start after 12 years of this date which would be in the year 1905 and adding 60 years from this, the limitation for filing suit would only expire in the year 1965 and since there is acknowledgment by the mortgagees on 11-1-1960, as aforesaid, a fresh limitation starts from this date hence the suit is within limitation. However, the first appellate court set aside this judgment. It held that the aforesaid decision in **Inder Singh** is of no help to the plaintiffs (mortgagors) as it is not disputed by the parties and rather conceded that earlier, specially during the year in question, oral agreement was permissible in the State of Punjab and was treated to be a valid agreement. This coupled with the fact that the principal money secured under the said agreement was less than Rs. 100, so the mortgage could have been effected either by a registered instrument or by delivery of possession of the land in question. In this view of the matter, admittedly, the land in the suit was mortgaged with possession for Rs. 53 in March 1893. Hence, a valid mortgage came into existence on the very day of its execution. In view of this, it held that the period of limitation of redemption of the land in suit started on that very date of the execution and thus the period of 60 years is to be counted from March 1893, hence the suit is barred by time. When the matter was taken in second appeal the High Court relied on its Full Bench decision entitled **Shri Chand v. Nathi** ((1983) 85 Punj LR 288) dated 21-1-1983, in which it overruled its earlier decision in **Inder Singh** and hence dismissed the appeal of the present appellants.

6. Learned Senior Counsel for the appellants, Mr. A. B. Rohtagi fairly stated that the aforesaid Full Bench decision is no doubt against the appellants but made submissions for holding contrary to what has been held therein. In the said case of **Shri Chand** one of the core questions raised was, whether an oral mortgage was valid in the eyes of law, which is executed on 14-6-1948 in the State of Punjab, prior to the extension of the provisions of Section 59 of the Transfer of Property Act, 1882 which requires registration of a mortgage. It is also not in dispute that the Transfer of Property Act by virtue of Section 1 is only extended in the State of Haryana on 5-8-1967, with which the Full Bench was concerned and to the State of Punjab after 1-11-1956, with which we are concerned. It held that there was no bar to give effect to an oral mortgage in a case where a mortgagor gave possession of the land to a mortgagee. The Full Bench held:

Now once that is so on the admitted stand that an oral mortgage was made on June 14, 1948 it seems to inflexibly follow that no legal infirmity attached thereto and the transaction was in essence, legally valid and enforceable. All that, therefore, remains for adjudication is as to what would be the period of limitation for the redemption of such a valid oral mortgage.

7. The Full Bench decision rightly overruled the decision of **Inder Singh** as that decision wrongly based its conclusion on an earlier decision in the case of **Purusottam Das v. S. M. Desouza** [AIR 1950 Ori 213]. The facts in that case were that the mortgage was for an amount for more than Rs. 100 and was unregistered which was executed after the Transfer of Property Act was made applicable to the State of Orissa hence the mortgage was invalid. It is for this reason it held that the period of limitation would only start after the expiry of 12 years of such invalid mortgage as such possession would perfect into a valid mortgage after the expiry of this period. Hence the Full Bench rightly held that the principle of **Purusottam Das** was wrongly applied in **Inder Singh**. The Full Bench finally concluded:

In the present case, admittedly the oral mortgage had been made on June 14, 1948. At that time the relevant provisions of the Transfer of Property Act had not been made applicable to the area. The said transaction at that time was therefore, valid and legally enforceable one and the fact whether the mortgage was registered or not was wholly irrelevant with regard to the issue of its validity. Consequently, the terminus for the limitation for redemption has to run from the aforesaid date of June 14, 1948.

8. We find no error committed in coming to the said decision by the Full Bench. No sustainable submission has been advanced to hold a contrary view.

9. In his endeavour, learned counsel for the appellants referred to Section 18 of the Limitation Act, 1963 to hold that the acknowledgment by the original mortgagees to the respondents, through the said registered document dated 11-1-1960, the period of limitation is revived which would only start from the date of acknowledgment hence the suit filed in the year 1980 would be within limitation. The said submission is without any force. Section 18 sub-section (1) itself starts with the words:

18. (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made .....

Thus, the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit, in other words, if the limitation has already expired, it would not revive under this section. It is only during subsistence of a period of limitation, if any, such document is executed, that the limitation would be revived afresh from the said date of acknowledgment. In the present case, admittedly, the oral mortgage deed is in March 1893. If the period of limitation for filing suit for redemption is 60 years then limitation for filing a suit would expire in the year 1953. Thus, by the execution of this document dated 11-1-1960 it cannot be held by virtue of Section 18 that the period of limitation is revived afresh from this date.

10. Learned counsel for the appellants has also made reference in the case reported in *C. Beepathuma v. Velasari Shankaranarayana Kadambolihaya* [AIR 1965 SC 241]. In view of this decision it was submitted that since the mortgagee-respondents continued to enjoy the property with possession under the mortgage they cannot shirk from accepting their obligation under it. This Court held:

That doctrine is that a person who accepts a benefit under a deed or Will or other instrument must adopt the whole contents of the instrument, must conform to all its provisions and renounce all rights that are inconsistent with it, in other words a person cannot approbate and reprobate the same transaction.

This has no relevance to the present case. The present case is not a case where the mortgagee has received any benefit under any instrument and is renouncing to perform any obligation under it. In the present case, there is neither any deed nor document of mortgage. Even under oral mortgages the only obligation for a mortgagee was to hand over possession of the property mortgaged at the moment the mortgagor pays the mortgage money. It is nobody's case that the mortgagor has paid back the money. This part of the judgment only refers to the doctrine of election. There is no obligation under the oral mortgage, which could be said to be not performed by the mortgagee. We are only concerned here, whether the suit filed by the appellants is within time or not. It is significant that this very decision also makes reference

about the limitation in filing such suits. Here a suit was filed for redemption of mortgage deed, Ex. P-2 by the 1st and 2nd respondents. The first respondent purchased Schedule 'A' property and undertook to redeem the mortgage property described in Schedules 'A' and 'B' and hand over possession of Schedule 'B' property to the legal representatives in the family of one Madana. Before this on 14-4-1842 Madana, who was then Ejaman of the family, usufructually mortgaged the 'A', 'B' and 'C' Schedule properties under Ex. P-1. This deed did not contain any provision for repayment of the amount or for the usufructuary mortgage to be worked off. So no period was stated for redemption. Then it was later converted into a mortgage specifying time through Ex. P-2, as aforesaid, in 1862. The Court held:

In 1842 when Ex. P-1 was executed, there was no law prescribing a period of limitation for the redemption of a usufructuary mortgage. Such limit came in 1859 for the first time and a period of 60 years from the date of the mortgage was prescribed. It is this statute which seems to have been the cause for the execution of Exs. P-2 and P-2 (a); the mortgagees were perhaps afraid that the mortgage could be redeemed at any time within 60 years from the date of the mortgage of 1842. The last date for redemption thus was 1902. By getting the term certain for 40 years, the date for redemption was shifted by them to 1902 and redemption could not take place till that year. The mortgagors also benefited, because they obtained a release of some properties and received Rs. 100 in cash. The period of 60 years was repeated in the Act of 1871; but it contained a rider that if during the period of 60 years, there was an acknowledgment then the period would run from the date of that acknowledgment. Article 148 of the Limitation Act as it stands today was introduced by the Act of 1877. It makes the 60 years' period run from the time when redemption is due.

The aforesaid passage clearly shows that the mortgage could be redeemed at any time within 60 years from the date of mortgage.

11. Hence we find that this case, instead of supporting, is against the submissions of learned counsel for the appellants. Lastly, learned counsel for the appellants faintly made reference to the Redemption of Mortgages (Punjab) Act, 1913 to submit that in an oral mortgage, till this Act came into force, there was no period of limitation and the right for redemption accrued only after this Act came into force, hence limitation cannot start before the date when this Act came into force and thus as in the present case neither the mortgagors offered to pay the mortgage amount nor the mortgagees communicated that the mortgage amount has been paid, hence right to redeem mortgage could not be said to have accrued, so the question of running any period of limitation never arose till this 1913 Act came into force. The submission is misconceived, without any merit and has no force. We have already recorded that the period of limitation starts the very first date of a valid mortgage. The court has only to see, whether a mortgage is valid or not. If it is valid, right to redeem to the mortgagors accrues from that very date, unless any restraint in the mortgage deed is provided specifying restriction under it as in the case of *C. Beepathuma* [AIR 1965 SC 241] specific restriction was contained under Ex. P-2. So far as this 1913 Act is concerned, the Statement of Objects and Reasons clearly reveals that this Act was only brought in, as under Section 7(5) of the Punjab Alienation of Land Act, as subsequently amended in 1907, the Deputy Commissioner has, in the case of mortgages made under Section 6 of that Act, certain powers to restore mortgagors to possession of their property was provided, therefore, 1913 Act was passed to confer similar powers in respect of other

mortgages not covered under Section 6. This also provided for a summary procedure in the matter of redemption mortgages. This has no correlation with the period of limitation in case of redemption of mortgages. In any case, even from the date of this Act, viz., 1913, the period of limitation expires in 1973 hence the suit is still barred by time.

12. Learned counsel also referred to the language of Article 61(a) of Part V of the Schedule to the Limitation Act, which is quoted hereunder:

“61. By a mortgagor –

Description of suit	Period of Limitation	Time from which period begins to run
(a) to redeem or recover possession of of immovable property mortgaged	Thirty years	When the right to redeem to recover possession accrues.”

13. It is not in dispute that at the relevant time, period of limitation under this was 60 years and not 30 years.

14. Submission was, as aforesaid, that right to redeem only accrues when either the mortgagors tender the amount of mortgage or the mortgagees communicate satisfaction of the mortgage amount through the usufruct from the land. This submission is misconceived, as aforesaid, if this interpretation is accepted, then till this happens the period of limitation never start running and it could go on for an infinite period. We have no hesitation to reject this submission. The language recorded above makes it clear that right of redemption accrues from the very first day unless restricted under the mortgage deed. When there is no restriction the mortgagors have a right to redeem the mortgage from that very date when the mortgage was executed. Right accruing means, right either existing or coming into play thereafter. Where no period in the mortgage is specified, there exists a right to a mortgagor to redeem the mortgage by paying the amount that very day in case he receives the desired money for which he has mortgaged his land or any day thereafter. This right could only be restricted through law or in terms of a valid mortgage deed. There is no such restriction shown or pointed out. Hence, in our considered opinion, the period of limitation would start from the very date the valid mortgage is said to have been executed and hence the period of limitation of 60 years would start from the very date of oral mortgage that would be from March 1893. In view of this, we do not find any error in the decision of the first appellate court or the High Court holding that the suit of the present appellants is time-barred.

15. Hence, for the reasons recorded above, we do not find any merit or force in the submissions made by the learned counsel for the appellants. Accordingly, the present appeal is dismissed.

***Rajender Singh v. Santa Singh***

AIR 1973 SC 2537

**BEG. J.** - The plaintiffs-appellants, before us by grant of special leave, had filed a suit on April 20, 1959 for possession against the defendants-respondents, of 331 Kanals and 11 Marlas of land, the Khasra numbers of which are given in the plaint. The plaintiffs were the sons of Smt Premi, a daughter of Sham Singh (deceased), the original owner of the plots, and of Smt Malan, who, as the widow of Sham Singh, had gifted the plots in dispute in 1935, half and half, to the plaintiffs and Smt Khemi, the younger sister of their deceased mother, Smt Premi. It appears that Smt Khemi, who was issueless, had also made a gift in favour of the plaintiffs before her death in 1944. The plaintiffs are said to have obtained possession of the whole land in dispute thus gifted to them. But, as there was considerable uncertainty at that time about the rights of the daughters and the powers of a widow to donate during her life-time under the customary law in Punjab, which was applicable to the parties, the defendants-respondents, the 8th degree collaterals of Sham Singh, had filed a suit on July 3, 1940, for possession of the land in dispute. This suit had been stayed from 1941 to May 29, 1946, under the Indian Soldiers (Litigation) Act, 1925, to the benefits of which the plaintiffs were entitled. It appears that there was also a dispute over mutation of names between the plaintiffs and defendants-respondents in Revenue Courts which ended finally by an order in favour of the appellants donees passed by the Financial Commissioner of Punjab on December 13, 1946. Defendants-respondents' suit of 1940, for declaration of rights and possession, renumbered in 1949, ended with the judgment and decree of a Division Bench of the Punjab High Court passed in favour of the appellants on November 21, 1958.

2. The plaintiffs asserted, in their Suit No. 179 of 1959, filed on April 16, 1959, now before us in appeal, that the defendants-respondents had taken illegal and forcible possession of the land in dispute after the decision of the High Court on November 21, 1958, and that, as the defendants-respondents refused to deliver possession of the land to the plaintiffs, they were compelled to file their suit for possession. The defendants-respondents, however, claimed that they had taken possession over the whole of the land in dispute after the death of Smt Khemi, issueless, in 1944, and that, since then, they had been in open, continuous, exclusive possession as owners, adversely to the rest of the world. Hence, according to the defendants-respondents, the plaintiffs' suit was barred by limitation.

3. There cannot be the least doubt, after looking at the plaint, that the plaintiffs-appellants, having alleged possession and dispossession, for which they claimed relief by delivery back of possession of the land in dispute to them, the case fell squarely within the ambit of Article 142 of the Limitation Act of 1908. The defendants-respondents had, however, pleaded the bar of limitation as well as acquisition of title by their adverse possession for over 12 years.

4. The trial court had framed the first three issues which had a direct bearing on the question whether Article 142 or 144 of the Limitation Act of 1908 would be applicable. These issues were:

“1. Whether the plaintiffs obtained the possession of the land in dispute through the Tehsildar near about the date December 13, 1946 as alleged by them in para 3 of the plaint? O.P.

2. Whether the defendants took possession of the land in dispute after November 21, 1958, as alleged in para 5 of the plaint? O.P.

3. Whether the defendants have become owners of the land in dispute through adverse possession? O.D.”

5. The trial court rightly placed the burden of proof of the first two issues on the plaintiffs and of the third issue upon the defendants. It took up and decided the three issues together holding that the plaintiffs’ suit is barred by Article 142 of the Limitation Act. The first appellate court also rejected the plaintiffs’ case of acquisition of possession on December 13, 1946 and then of dispossession after November 21, 1958. It accepted the defendants’ version. It observed that the “oral evidence coupled with the entries in the revenue records conclusively established that the possession over the suit land right from 1946 up to the present time was not that of the plaintiffs, but, that of the defendants”, who had been asserting their own proprietary rights as collaterals of Sham Singh, the husband of Smt Malan. Although, no issue was framed on the applicability of Section 52 of the Transfer of Property Act, 1882, to such a case, yet, the question appears to have been argued for the first time before the first appellate court which, relying upon a decision of the Nagpur High Court in *Sukhubai v. Eknath Bellappa* [AIR 1948 Nag 97] held that, despite the established possession of the defendants-respondents for over twelve years, the doctrine of lis pendens prevented the rights to the defendants-respondents from maturing by adverse possession. It held that the possession of the defendants-respondents became adverse when their appeal in their suit for possession was dismissed by the Punjab High court on November 21, 1958. Thus, the first appellate court had really used Section 52 of the Transfer of Property Act as though it was a provision for excluding the period of time spent in litigation in computing the prescribed period of limitation. The question whether the doctrine of lis pendens, contained in Section 52 of the Transfer of Property Act, would govern such a case was referred by a Division Bench to a Full Bench of the Punjab High Court.

6. A.N. Grover, J., giving the majority opinion of the Full Bench of three Judges of the Punjab High Court held that, on the concurrent findings of fact recorded by the Courts below, the adverse possession of the defendants, who were appellants before the High Court, commenced during the pendency of the earlier suit, and, once having begun to run, could not stop running merely because of the pendency of the dependents’ suit for possession which was finally dismissed by the High Court on November 21, 1958. On the other hand, I.D. Dua, J., expressing his minority opinion of the Full Bench of the High Court, held that the doctrine of lis pendens, contained in Section 52 of the Transfer of Property Act, would enable the plaintiffs-appellants to overcome the consequences of defendants’ adverse possession until November 21, 1958, so that the doctrine of lis pendens could operate as a provision enabling exclusion of time during the pendency of the defendants’ suit of 1940.

7. One of the questions attempted to be raised here, involving investigation of fresh facts, was that a portion of the land, entered in the revenue records as “Banjar”, cannot be adversely possessed at all because it is vacant so that it must be deemed to be in the possession of the plaintiffs on the principle that possession follows title. The plaintiffs had not taken such a case even in their replication in answer to the written statement of the defendants. Apart from the fact that the question does not appear to have been missed in the Courts below, we think that

the plaintiffs' admission of dispossession by the defendants, implying that the defendants-respondents were in actual adverse possession of all the land in dispute debars plaintiffs' learned Counsel from raising such a question now. Furthermore, the patent fallacy underlying such a contention is that Banjar land is incapable of adverse possession. It may be that Banjar land cannot be cultivated, but, we do not think that it could possibly be urged that it is per se incapable of being actually physically possessed by use for other purposes, such as building or storing of wood or crops, apart from cultivation. We will say no more about this unsustainable contention.

8. It was then urged that Article 142 was not applicable to this case and that no question as to its applicability should have been decided. We fail to see how such a contention could be advanced in view of the assertions in the plaint which clearly compelled the application of Article 142. As was held by a Full Bench of the Allahabad High Court., in *Bindhyachal Chand v. Ram Gharib Chand* [AIR 1934 All 993] the question whether the suit is within time, when the plaintiffs make assertions attracting the application of Article 142, becomes a question of proof of title itself. Without proof of subsisting title the plaintiffs' suit must obviously fail. It was said there by Sulaiman, C.J. (at p. 999):

“In cases falling strictly under Article 142, in which the only question is one of discontinuance of possession of the plaintiff and not of adverse possession of the defendant, the question of limitation in one sense becomes the question of title, because by virtue of Section 28, Limitation Act, if the claim is barred by time, the title must be deemed to be extinguished.”

9. It is true that the extinction of title took place in the case before us during the pendency of the suit. But, it has to be borne in mind that an extinction of title will not be hit by the doctrine of *lis pendens* simply because it is an extinction during the pendency of a suit. If so wide was the sweep of Section 52 of Transfer of Property Act this provision would have been differently worded. We are of opinion that a case in which the extinction of title takes place by an application of the specific and mandatory provisions of the Limitation Act falls outside the scope of Section 52 of the Transfer of Property Act. It would not be governed by provisions of an Act relating to “transfer”, defined by Section 3 of the Transfer of Property Act, but by the Limitation Act, exclusively.

10. It is immaterial in the case before us, from the point of view of extinction of title by an application of Section 28 of the Limitation Act of 1908, whether Article 142 or Article 144 of the Limitation Act is applicable. The findings of the Courts below, accepted as correct and binding by A.N. Grover, J., in the majority judgment of the Punjab High Court, would make Article 144 also of the Act clearly applicable to the case. All the elements of an open, adverse, hostile, continuous, and exclusive possession of the defendants for over 12 years were present here.

11. It would be idle to contend in the case before us, in view of the pleadings of the parties and the issues framed and decided, that the applicability of Article 142 of the Limitation Act was either not put in issue by pleadings of the parties or an issue on its applicability was not framed. The first two issues framed have a direct bearing on the applicability of Article 142. It



is not necessary that the issue framed must mention the provision of law to be applied. Indeed, it is the duty of the Court, in view of Section 3 of the Limitation Act, to apply the bar of limitation where, on patent facts, it is applicable even though not specifically pleaded. Therefore, we find no force in the submissions based on the supposed inapplicability of Article 142 of the Limitation Act of 1908 or assumed defects in procedure adopted in applying it.

12. The only question of some importance which could be said to arise in this case is: Does the doctrine of *lis pendens*, contained in Section 52 of the Transfer of Property Act, arrest the running of the period of limitation during the pendency of the suit of the defendants-respondents filed on July 3, 1940, and, finally decided in second appeal by the High Court on November 21, 1958?

13. We may here set out Section 52 of the Transfer of Property Act which runs as follows:

“52. During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the 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.

*Explanation.*—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.”

14. The background of the provision set out above was indicated by one of us (Beg, J.) in **Jayaram Mudaliar v. Ayyaswami** [(1972) 2 SCC 200] There, the following definition of the *lis pendens* from *Corpus Juris Secundum* (Vol. LIV, p. 570) was cited:

“*Lis pendens* literally means a pending suit, and the doctrine of *lis pendens* has been defined as the jurisdiction, power, or control which a court acquires over property involved in a suit pending the continuance of the action, and until final judgment therein.”

It was observed there:

“Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject-matter of litigation so that parties litigating before it may not remove any part of the subject-matter outside the power of the Court to deal with it and thus make the proceedings in fructuous.”

15. The doctrine of *lis pendens* was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject-matter of litigation from

the ambit of the Court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of *lis pendens* is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property, which are the subject-matter of a litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated.

16. It is very difficult to view the act of taking illegal possession of immovable property or continuance of wrongful possession, even if the wrongdoer be a party to the pending suit, as a "dealing with" the property otherwise than by its transfer so as to be covered by Section 52 of the Transfer of Property Act. The prohibition which prevents the immovable property being "transferred or otherwise dealt with" by a party is apparently directed against some action which would have an immediate effect, similar to or comparable with that of transfer, but for the principle of *lis pendens*. Taking of illegal possession or its continuance neither resemble nor are comparable to a transfer. They are one sided wrongful acts and not bilateral transactions of a kind which ordinarily constitute "deals" or dealings with property (e.g. contracts to sell). They cannot confer immediate rights on the possessor. Continued illegal possession ripens into a legally enforceable right only after the prescribed period of time has elapsed. It matures into a right due to inaction and not due to the action of the injured party which can approach a Court of appropriate jurisdiction for redress by a suit to regain possession. The relief against the wrong done must be sought within the time prescribed. This is the only mode of redress provided by law for such cases. Section 52 of the Transfer of Property Act was not meant to serve, indirectly, as a provision or a substitute for a provision of the Limitation Act to exclude time. Such a provision could and would have been there in the Limitation Act, where it would appropriately belong, if the policy behind the law was to have such a provision.

17. The policy underlying statutes of limitation, spoken of as statutes of "repose", or of "peace" has been thus stated in *Halsbury's Laws of England* Vol. 24, p. 181 (para 330):

"330. *Policy of Limitation Acts*.—The Courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely: (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence."

18. The object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence, or laches.

19. If Section 52 of the Transfer of Property Act was really intended to strike at the running of the period of limitation, based on the considerations mentioned above, it would have made it clear that the law excludes the period spent in any litigation from computation. Exclusion of time in computing periods of limitation is a different subject altogether to which the whole of Part III of the Limitation Act is devoted. There, we find Section 14, which deals with "exclusion of time of proceeding bona fide in Court without jurisdiction". There are certain conditions for

the applicability of Section 14 of the Limitation Act. One of these is that the plaintiff should have prosecuted, with due diligence, civil proceedings “founded upon the same cause of action”. In the case before us, the cause of action arose, according to the plaintiffs, after the decision of the previous suit. The cause of action in the previous suit was entirely different. Indeed, it was the defendants-respondents who had sought relief, there and set up a cause of action. Section 14 of the Limitation Act of 1908 which is the only provision of the statute specifically dealing with exclusion of time spent in another litigation, could not obviously apply to the case now before us. The only mode of relief open to the plaintiffs was to have instituted a suit of their own within the prescribed period of limitation. They did institute the suit now before us but did so long after the period of limitation had expired. In such a case Section 52 of the Transfer of Property Act could not, in our opinion, apply at all. The matter could only be covered, if at all, by some provision of the statute of limitation which, as already observed, makes no provision for such a case. The effect of Section 3 Limitation Act is that it expressly precludes exclusion of time on a ground outside this Act even if it parades under the guise of a doctrine which has no application whatsoever here.

20. The majority judgment of the Punjab High Court cites several cases to support the view that limitation would start running against the plaintiffs-appellants when the defendants-respondents took possession. We need mention only two of these cases: ***Subbaiya Pandaram v. Mahammad Mustapha Marcayar*** [AIR 1923 PC 175] and ***Narayan Jivangouda Patil v. Puttabai*** [AIR 1945 PC 5]. We are in complete agreement with the majority view.

21. It is not possible, in the absence of any provision which would entitle the plaintiffs to exclude time and thus bring their suit within 12 years period of limitation, to accept a contention which would enable the plaintiffs to escape the mandatory provisions of Section 3 of the Act read with Section 28 and Articles 142 and 144 of the Limitation Act of 1908. Courts of Justice cannot legislate or reconstruct law contained in a statute or introduce exceptions when statutory law debars them from doing so. Even hard circumstances of a case do not justify the adoption of such a course. Moreover, we fail to see how the plaintiffs could complain of hardship when their own negligence or failure to act in time enabled defendants to acquire rights by reason of the operation of a law of limitation with the wisdom or justice of which we are not concerned here.

22. A claim was sought to be advanced on behalf of the Custodian of Evacuee Property, who is also a defendant-respondent, based on the provisions of Section 8, sub-section (4) of the Administration of Evacuee Property Act 1950. This question was not gone into by the Punjab High Court. As we are affirming the Full Bench decision of the Punjab High Court, dismissing the plaintiffs’ suit on the ground that it is barred by limitation, it is not necessary for us to give any decision on any dispute between co-defendants-respondents regarding the right to possess any property which may have vested in the Custodian, Evacuee Property. A decision on such a dispute is not necessary for deciding the case before us. There is, therefore, no question of *res judicata* between co-defendants on the points raised. And, we cannot allow the plaintiffs-appellants to raise any such question on behalf of the Custodian, Evacuee Property, as their learned Counsel seemed to be attempting to do, in a desperate attempt to clutch at a straw.

23. The result is that we affirm the judgment and decree of the Punjab High Court and dismiss this appeal. An application on behalf of the plaintiffs-appellants (CMP No. 2487 of 1967), seeking permission to introduce additional questions in respect of Banjar land, is also dismissed for the reasons already given. In the circumstances of this case, we order that the parties will bear their own costs throughout.

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***Ravinder Kaur Grewal & Ors. v. Manjeet Kaur & Ors.***

[2019] 11 S.C.R. 74

**[ARUN MISHRA, S. ABDUL NAZEER AND M. R. SHAH, JJ.]**

**ARUN MISHRA, J. –**

1. The question of law involved in the present matters is quite significant. Whether a person claiming the title by virtue of adverse possession can maintain a suit under Article 65 of Limitation Act, 1963 (for short, “the Act”) for declaration of title and for a permanent injunction seeking the protection of his possession thereby restraining the defendant from interfering in the possession or for restoration of possession in case of illegal dispossession by a defendant whose title has been extinguished by virtue of the plaintiff remaining in the adverse possession or in case of dispossession by some other person? In other words, whether Article 65 of the Act only enables a person to set up a plea of adverse possession as a shield as a defendant and such a plea cannot be used as a sword by a plaintiff to protect the possession of immovable property or to recover it in case of dispossession. Whether he is remediless in such a case? In case a person has perfected his title based on adverse possession and property is sold by the owner after the extinguishment of his title, what is the remedy of a person to avoid sale and interference in possession or for its restoration in case of dispossession?

2. Historically, adverse possession is a pretty old concept of law. It is useful but often criticised concept on the ground that it protects and confers rights upon wrongdoers. The concept of adverse possession appeared in the Code of Hammurabi approximately 2000 years before Christ era. Law 30 contained a provision “If a chieftain or a man leaves his house, garden, and field .... and someone else takes possession of his house, garden and field and uses it for three years; if the first owner returns and claims his house, garden, and field, it shall not be given to him, but he who has taken possession of it and used it shall continue to use it.” However, there was an exception to the aforesaid rule: for a soldier captured or killed in battle and the case of the juvenile son of the owner. In Roman times, attached to the land, a kind of spirit that was nurtured by the possessor. Possessor or user of the land was considered to have a greater “ownership” of the land than the titled owner. We inherited the Common Law concept, being a part of the erstwhile British colony. William in 1066 consolidated ownership of land under the Crown. The Statute of Westminster came in 1275 when land records were very often scarce and literacy was rare, the best evidence of ownership was possession. In 1639, the Statute of Limitation fixed the period for recovery of possession at 20 years. A line of thought was also evolved that the person who possesses the land and produces something of ultimate benefit to the society, must hold the best title to the land. Revenue laws relating to land have been enacted in the spirit to confer the title on the actual tiller of the land. The Statute of Wills in 1540 allowed lands to be passed down to heirs. The Statute of Tenures enacted in 1660 ended the feudal system and created the concept of the title. The adverse possession remained as a part of the law and continue to exist. The concept of adverse possession has a root in the aspect that it awards ownership of land to the person who makes the best or highest use of the land. The land, which is being used is more valuable than idle land, is the concept of utilitarianism. The concept thus, allows the society as a whole to benefit from the land being held adversely but allows a sufficient period for the “true owner” to recover the land. The adverse possession statutes permit rapid development of “wild” lands with the weak or indeterminate title. It helps in the Doctrine of Administration also as it can be an effective and efficient way to remove or cure clouds of title which with memories grow dim and evidence becomes unclear. The possessor who maintains and improves the land has a more valid claim to the land than the owner who never visits or cares for the land and uses it, is of no utility. If a former owner neglects and allows the gradual dissociation between himself and what he is claiming and he knows that someone else is caring by doing acts, the attachment which one develops by caring cannot be easily parted with. The bundle of ingredients constitutes adverse possession.

3. We have heard learned counsel appearing for the parties at length and also the Amicus Curiae, Shri P.S. Patwalia and Shri Huzefa Ahmadi, senior counsel. Various decisions of this Court and Privy Council and English Courts have been cited in which the suit filed by the plaintiff based on adverse possession has been held to be maintainable for declaration of title and protection of the possession or the restoration of possession. Nature of right acquired by adverse possession and even otherwise as to the right to protect possession against unlawful dispossession of the plaintiff or for its recovery in

case of illegal dispossession.

4. Before dilating upon the issue, it is necessary to refer the decision in ***Gurudwara Sahab v. Gram Panchayat Village Sirthala*** (2014) 1 SCC 669 in which this court has referred to the decision of the Punjab and Haryana High Court in ***Gurudwara Sahib Sannauli v. State of Punjab*** since reported in (2009) 154 PLR 756, to opine that no declaration of title can be sought by a plaintiff on the basis of adverse possession inasmuch as adverse possession can be used as a shield by a defendant and not as a sword by a plaintiff. This Court while deciding the question gave the only reason by simply observing that there is “no quarrel” with the proposition to the extent that suit cannot be based by the plaintiff on adverse possession. Thus, this point was not contested in ***Gurudwara Sahib v. State Gram Panchayat Village, Sirthala*** (supra) when this Court expressed said opinion.

5. It is pertinent to mention here that before the aforesaid decision of this court, there was no such decision of this court holding that suit cannot be filed by a plaintiff based on adverse possession. The views to the contrary of larger and coordinate benches were not submitted for consideration of the Two Judge Bench of this Court which decided the aforesaid matter.

6. A Three-Judge Bench decision in ***Sarangadeva Periya Matam & Anr. v. Ramaswami Gondar (Dead) by Lrs.*** AIR 1966 SC 1603 of this Court in which the decision of Privy Council in ***Musumut Chundrabullee Debia v. Luchea Debia Chowdrain*** 1865 SCC Online PC 7 had been relied on, was not placed for consideration before the division bench deciding ***Gurudwara Sahib v. Gram Panchayat, Sirthala***.

7. Learned Amicus pointed out that in ***Sarangadeva Periya Matam & Anr. v. Ramaswami Goundar (Dead) by Lrs.*** (supra) the plaintiff was in the possession of the suit land until January 1950 when the ‘mutt’ obtained possession of the land. On February 18, 1954, plaintiff instituted the suit against the ‘mutt’ for “recovery of possession” of the suit land on based on an acquisition of title to land by way of “adverse possession”. A Three-Judge Bench of this Court has held that the plaintiff acquired the title by his adverse possession and was entitled to recover the possession. Following is the relevant discussion:

“1. Sri Sarangadevar Periya Matam of Kumbakonam was the inam holder of lands in Kannibada Zamin, Dindigul Taluk, Madurai District. In 1883, the then mathadhipathi granted a perpetual lease of the melwaram and kudiwaram interest in a portion of the inam lands to one Chinna Gopiya Goundar, the grandfather of the plaintiff-respondent on an annual rent of Rs. 70. The demised lands are the subject-matter of the present suit. Since 1883 until January 1950 Chinna Gopiya Goundar and his descendants were in uninterrupted possession and enjoyment of the suit lands. In 1915, the mathadhipathi died without nominating a successor. Since 1915, the descendants of Chinna Gopiya Goundar did not pay any rent to the math. Between 1915 and 1939 there was no mathadhipathi. One Basavan Chetti was in management of the math for a period of 20 years from 1915. The present mathadhipathi was elected by the disciples of the Math in 1939. In 1928, the Collector of Madurai passed an order resuming the inam lands and directing the full assessment of the lands and payment of the assessment to the math for its upkeep. After resumption, the lands were transferred from the "B" Register of inam lands to the "A" Register of ryotwari lands and a joint patta was issued in the name of the plaintiff and other persons in possession of the lands. The plaintiff continued to possess the suit lands until January 1950 when the math obtained possession of the lands. On February 18, 1954, the plaintiff instituted the suit against the math represented by its present mathadhipathi and an agent of the math claiming recovery of possession of the suit lands. The plaintiff claimed that he acquired title to the lands by adverse possession and by the issue of a ryotwari patta in his favour on the resumption of the inam. The Subordinate Judge of Dindigul accepted the plaintiff's contention and decreed the suit. On appeal, the District Judge of Madurai set aside the decree and dismissed the suit. On second appeal, the High Court of Madras restored the judgment and decree of the Subordinate Judge. The defendants now appeal to this Court by special leave. During the pendency of

the appeal, the plaintiff- respondent died and his legal representatives have been substituted in his place.

2. The plaintiff claimed title to the suit lands on the following grounds : (1) Since 1915 he and his predecessors-in-interest were in adverse possession of the lands, and on the expiry of 12 years in 1927, he acquired prescriptive title to the lands under s. 28 read with Art. 144 of the Indian Limitation Act, 1908; (2) by the resumption proceedings and the grant of the ryotwari patta a new tenure was created in his favour and he acquired full ownership in the lands; and (3) in any event, he was in adverse possession of the lands since 1928, and on the expiry of 12 years in 1940 he acquired prescriptive title to the lands under s. 28 read with Art. 134-B of the Indian Limitation Act, 1908. We are of the opinion that the first contention of the plaintiff should be accepted, and it is, therefore, not necessary to consider the other two grounds of his claim.

6. We are inclined to accept the respondents' contention. Under Art. 144 of the Indian Limitation Act, 1908, limitation for a suit by a math or by any person representing it for possession of immovable properties belonging to it runs from the time when the possession of the defendant becomes adverse to the plaintiff. The math is the owner of the endowed property. Like an idol, the math is a juristic person having the power of acquiring, owning and possessing properties and having the capacity of suing and being sued. Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency. See *Babajirao v. Laxmandas* (1904) ILR 28 Bom 215 (223). It may acquire property by prescription and may likewise lose property by adverse possession. If the math while in possession of its property is dispossessed or if the possession of a stranger becomes adverse, it suffers an injury and has the right to sue for the recovery of the property. If there is a legally appointed mathadhipathi, he may institute the suit on its behalf; if not, the de facto mathadhipathi may do so, see *Mahadeo Prasad Singh v. Karia Bharti* 62 Ind App 47 at p.51 and where, necessary, a disciple or other beneficiary of the math may take steps for vindicating its legal rights by the appointment of a receiver having authority to sue on its behalf, or by the institution of a suit in its name by a next friend appointed by the Court. With due diligence, the math or those interested in it may avoid the running of time. The running of limitation against the math under Art. 144 is not suspended by the absence of a legally appointed mathadhipathi; clearly, limitation would run against it where it is managed by a de facto mathadhipathi. See *Vithalbowa v. Narayan Daji*, (1893) I.L.R 18 Bom 507 at p.511, and we think it would run equally if there is neither a de jure nor a de facto mathadhipathi.

10. We hold that by the operation of Art. 144 read with s. 28 of the Indian Limitation Act, 1908 the title of the math to the suit lands became extinguished in 1927, and the plaintiff acquired title to the lands by prescription. He continued in possession of the lands until January 1950. It has been found that in January 1950 he voluntarily delivered possession of the lands to the math, but such delivery of possession did not transfer any title to the math. The suit was instituted in 1954 and is well within time.

(emphasis supplied)”

8. In *Balkrishnan vs. Satyaprakash & Ors.*, 2001 (2) SCC 498, decided by a Coordinate Bench, the plaintiff filed a suit for declaration of title on the ground of adverse possession and a permanent injunction. This Court considered the question, whether the plaintiff had perfected his title by adverse possession. This Court has laid down that the law concerning adverse possession is well settled, a person claiming adverse possession has to prove three classic requirements i.e. nec – nec vi, nec clam and nec precario. The trial court, as well as the First Appellate Court, decreed the suit while the High Court dismissed it. This Court restored the decree passed by the trial court decreeing the plaintiff suit based on adverse possession and observed:

“6. The short question that arises for consideration in this appeal is:

whether the High Court erred in holding that the appellant had not perfected his title by adverse possession on the ground that there was an order of a Tahsildar against him to deliver possession of the suit land to the auction purchasers.

7. The law with regard to perfecting title by adverse possession is well settled. A person claiming title by adverse possession has to prove three "neck" - nec vi, nec clam and nec precario. In other words, he must show that his possession is adequate in continuity in publicity and in extent. In *S.M. Karim vs. Bibi Sakina* [1964] 6 SCR 780 speaking for this Court Hidayatullah, J. (as he then was) observed thus:

"Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found."

14. In *Sk. Mukbool Ali vs. Sk. Wajed Hossein*, (1876) 25 WR 249 the High Court held:

"Whatever the decree might have been, the defendant's possession could not be considered as having ceased in consequences of that decree, unless he were actually dispossessed. The fact that there is a decree against him does not prevent the statute of limitation from running."

15. In our view, the Madras High Court correctly laid down the law in the aforementioned cases.

17. From the above discussion, it follows that the judgment and decree of the High Court under challenge cannot be sustained. They are accordingly set aside and the judgment and decree of the First Appellate Court confirming the judgment and decree of the trial court is restored. The appeal is accordingly allowed but in the circumstances of the case without costs." (emphasis supplied)

9. In *Des Raj and Ors. v. Bhagat Ram (Dead) by Lrs. and Ors.*, (2007) 9 SCC 641, a suit filed by the plaintiff for declaration of title and also for a permanent injunction based on adverse possession. The Courts below decreed the suit of the plaintiff on the ground of adverse possession. The same was affirmed by this Court. This Court considered the change brought about in the Act by Articles 64 and 65 vis-à-vis to Articles 142 and 144. Issue No.1 was framed whether the plaintiff becomes the owner of the suit property by way of adverse possession? This Court has observed that a plea of adverse possession was indisputably be governed by Articles 64 and 65 of the Act. This Court has discussed the matter thus :

"20. A plea of adverse possession or a plea of ouster would indisputably be governed by Articles 64 and 65 of the Limitation Act.

22. The mere assertion of title by itself may not be sufficient unless the plaintiff proves animus possidendi. But the intention on the part of the plaintiff to possess the properties in suit exclusively and not for and on behalf of other co-owners also is evident from the fact that the defendants-appellants themselves had earlier filed two suits. Such suits were filed for partition. In those suits the defendants-appellants claimed themselves to be co-owners of the plaintiff. A bare perusal of the judgments of the courts below clearly demonstrates that the plaintiff had even therein asserted hostile title claiming ownership in himself. The claim of hostile title by the plaintiff over the suit land, therefore, was, thus, known to the appellants. They allowed the first suit to be dismissed in the year 1977. Another suit was filed in the year 1978 which again was dismissed in the year 1984. It may be true, as has been contended on behalf of the appellants before the courts below, that a co-owner can bring about successive suits for partition as the cause of action, therefor, would be a continuous one. But, it is equally well-settled that pendency of a suit does not stop running of 'limitation'. The very fact that the defendants despite the purported entry made in the revenue settlement record of rights in the year 1953 allowed the plaintiff to possess the same exclusively and had not succeeded in their attempt to possess the properties in Village Samleu and/or otherwise enjoy the usufruct thereof, clearly goes to show that even prior to institution of the said suit the plaintiff-respondent had been in hostile possession thereof.

24. In any event the plaintiff made his hostile declaration claiming title for the property at least in his written statement in the suit filed in the year 1968. Thus, at least from 1968 onwards, the plaintiff continued to exclusively possess the suit land with a knowledge of the defendants-appellants.

26. Article 65 of the Limitation Act, 1963, therefore, would in a case of this nature have its role to play, if not from 1953, but at least from 1968. If that be so, the finding of the High Court that the respondent perfected his title by adverse possession and ouster cannot be said to be vitiated in law.

28. We are also not oblivious of a recent decision of this Court in *Govindammal v. R. Perumal Chettiar and Ors.*, (2006) 11 SCC 600 wherein it was held: (SCC p. 606, para 8) "In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case."

31. We, having regard to the peculiar facts obtaining in the case, are of the opinion that the plaintiff-respondent had established that he acquired title by ousting the defendant-appellants by



declaring hostile title in himself which was to the knowledge of his co-sharers.” (emphasis supplied)

10. In *Kshitish Chandra Bose v. Commissioner of Ranchi*, (1981) 2 SCC 103 a three-Judge Bench of this Court considered the question of adverse possession by a plaintiff. The plaintiff has filed a suit for declaration of title and recovery of possession based on Hukumnama and adverse possession for more than 30 years. The trial court decreed the suit on both the grounds, ‘title’ as well as of ‘adverse possession’. The plaintiff’s appeal was allowed by this Court. It has been observed by this Court that adverse possession had been established by a consistent course of conduct of the plaintiff in the case, possession was hostile to the full knowledge of the municipality. Thus, the High Court could not have interfered with the finding as to adverse possession and could not have ordered remand of the case to the Judicial Commissioner. The order of remand and the proceedings thereafter were quashed. This court restored decree in favour of plaintiff for declaration of title and recovery of possession and also for a permanent injunction, has dealt with the matter thus:

“2. The plaintiff filed a suit for declaration of his title and recovery of possession and also a permanent injunction restraining the defendant municipality from disturbing the possession of the plaintiff. It appears that prior to the suit, proceedings under Section 145 were started between the parties in which the Magistrate found that the plaintiff was not in possession but upheld the possession of the defendant on the land until evicted in due course of law.

3. In the suit the plaintiff based his claim in respect of plot No. 1735, Ward No. 1 of Ranchi Municipality on the ground that he had acquired title to the land by virtue of a hukumnama granted to him by the landlord as far back as April 17, 1912 which is Ex.18. Apart from the question of title, the plaintiff further pleaded that even if the land belonged to the defendant municipality, he had acquired title by prescription by being in possession of the land to the knowledge of the municipality for more than 30 years, that is to say, from 1912 to 1957.

10. Lastly, the High Court thought that as the land in question consisted of a portion of the tank or a land appurtenant thereto, adverse possession could not be proved. This view also seems to be wrong. If a person asserts a hostile title even to a tank which as claimed by the municipality, belonged to it and despite the hostile assertion of title no steps were taken by the owner, (namely, the municipality in this case), to evict the trespasser, his title by prescription would be complete after thirty years.” (emphasis supplied)

11. In *Nair Service Society Ltd. v. K.C. Alexander*, AIR 1968 SC 1165, the plaintiff filed a suit claiming to be in possession for over 70 years.

The plaintiff claimed possession of the excess land from the society, its Manager and Defendants Nos.3 to 6. The society denied the rights of the plaintiff to bring a suit for ejectment or its liability for compensation. Alternatively, the society claimed the value of improvements. The main controversy decided by the High Court was whether the plaintiff can maintain a suit for possession without proof of title. This court observed that in case the rightful owner does not come forward within the period of limitation his right is lost, and the possessory owner acquires an absolute title. The plaintiff was in de facto possession and was entitled to remain in possession and only the State could evict him. The State was not impleaded as a party in the case. The action of the society was a violent invasion of his possession and in the law, as it stands in India, the plaintiff can maintain a possessory suit under the provisions of the Specific Relief Act, 1963. The plaintiff has asserted that he had perfected his title by “adverse possession” but he did not join the State in a suit to get a declaration. He may be said to have not rested the suit on the acquired title. The suit was thus limited to recovery of possession from one who had trespassed against him. The Court observed that for the plaintiff to maintain suit based on adverse possession, it was necessary to implead the State Government i.e. the owner of the land as a party to the suit. A plaintiff can maintain a suit based on adverse possession as he acquires absolute title. The Court observed:

“(17) In our judgment this involves an incorrect approach to our problem. To express our meaning we may begin by reading 1907 AC 73 to discover if the principle that possession is good against all but the true owner has in any way been departed from. 1907 AC 73 reaffirmed the principle by stating quite clearly:

“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world

but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.” Therefore, the plaintiff who was peaceably in possession was entitled to remain in possession and only the State could evict him. The action of the Society was a violent invasion of his possession and in the law, as it stands in India the plaintiff could maintain a possessor suit under the provisions of the Specific Relief Act in which title would be immaterial or a suit for possession within 12 years in which the question of title could be raised. As this was a suit of latter kind title could be examined. But whose title? Admittedly neither side could establish title. The plaintiff at least pleaded the statute of Limitation and asserted that he had perfected his title by adverse possession. But as he did not join the State in his suit to get a declaration, he may be said to have not rested his case on an acquired title. His suit was thus limited to recovering possession from one who had trespassed against him. The enquiry thus narrows to this: did the Society have any title in itself, was it acting under authority express or implied of the true owner or was it just pleading a title in a third party? To the first two questions we find no difficulty in furnishing an answer. It is clearly in the negative. So the only question is whether the defendant could plead that the title was in the State? Since in every such case between trespassers the title must be outstanding in a third party a defendant will be placed in a position of dominance. He has only to evict the prior trespasser and sit pretty pleading that the title is in someone else. As Erle J put it *in Burling v. Read* (1848) 11 QB 904 ‘parties might imagine that they acquired some right by merely intruding upon land in the night, running up a hut and occupying it before morning’. This will be subversive of the fundamental doctrine which was accepted always and was reaffirmed in 1907 AC 73. The law does not, therefore, countenance the doctrine of ‘findings keepings’.

(22) The cases of the Judicial Committee are not binding on us but we approve of the dictum in 1907 AC 73. No subsequent case has been brought to our notice departing from that view. No doubt a great controversy exists over the two cases of (1849) 13 QB 945 and (1865) 1 QB 1 but it must be taken to be finally resolved by 1907 AC 73. A similar view has been consistently taken in India and the amendment of the Indian Limitation Act has given approval to the proposition accepted in 1907 AC 73 and may be taken to be declaratory of the law in India. We hold that the suit was maintainable.” (emphasis supplied)

12. In *Lallu Yashwant Singh (dead) by his legal representative v. Rao Jagdish Singh & Ors.*, AIR 1968 SC 620, this Court has observed that taking forcible possession is illegal. In India, persons are not permitted to take forcible possession. The law respect possession. The landlord has no right to re-enter by showing force or intimidation. He must have to proceed under the law and taking of forcible possession is illegal. The Court affirmed the decision of Privy Council in *Midnapur Zamindary Company Ltd. V. Naresh Narayan Roy* AIR 1924 PC 144 and other decisions and held: “10. In *Midnapur Zamindary Company Limited v. Naresh Narayan Roy*, 51 Ind App 293 = at p. 299 (AIR 1924 PC 144 at p.147), the Privy Council observed:

“In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court.”

11. In *K.K. Verma v. Naraindas C. Malkani* (AIR 1954 Bom 358 at p.

360) Chagla C.J., stated that the law in India was essentially different from the law in England. He observed:

“Under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy his possession is juridical and that possession is protected by statute. Under Section 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to Court under Section 9 and claim possession against the true owner.”

12. In *Yar Mohammad v. Lakshmi Das* (AIR 1959 All 1 at p.4), the Full Bench of the Allahabad High Court observed:

“No question of title either of the plaintiff or of the defendant can be raised or gone into in that case (under Section 9 of the Specific Relief Act). The plaintiff will be entitled to succeed without proving any title on which he can fall back upon and the defendant cannot succeed even though he may be in a position to establish the best of all titles. The restoration of possession in such a suit is, however,

always subject to a regular title suit and the person who has the real title or even the better title cannot, therefore, be prejudiced in any way by a decree in such a suit. It will always be open to him to establish his title in a regular suit and to recover back possession." The High Court further observed:

"Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a Court. No person can be allowed to become a Judge in his own cause. As observed by Edge C.J., in *Wali Ahmad Khan v. Ayodhya Kundu* (1891) ILR 13 All. 537 at p.556:

"The object of the section was to drive the persons who wanted to eject a person into the proper Court and to prevent them from going with a high hand and ejecting such persons."

14. In *Hillava Subbava v. Narayanappa*, (1911) 13 Bom. LR 1200 it was observed:

"No doubt, the true owner of property is entitled to retain possession, even though he has obtained it from a trespasser by force or other unlawful means: *Lillu v. Annaji*, (1881) ILR 5 Bom. 387 and *Bandu v. Naba*, (1890) ILR 15 Bom 238." We are unable to appreciate how this decision assists the respondent. It was not a suit under Section 9 of the Specific Relief Act. In (1881) ILR 5 Bom 387, it was recognised that "if there is a breach of the peace in attempting to take possession, that affords a ground for criminal prosecution, and, if the attempt is successful, for a summary suit also for a restoration to possession under Section 9 of the Specific Relief Act I of 1877- *Dadabhai Narsidas v. The Sub-Collector of Broach*, (1870) 7 Bom. HC AC 82." In (1890) ILR 15 Bom 238 it was observed by Sargent C J., as follows:

"The Indian Legislature has, however, provided for the summary removal of anyone who dispossesses another, whether peaceably or otherwise than by due course of law; but subject to such provision there is no reason for holding that the rightful owner so dispossessing the other is a trespasser, and may not rely for the support of his possession on the title vested in him, as he clearly may do by English law. This would also appear to be the view taken by West J., in (1881) ILR 5 Bom 387."

15. In our opinion, the law on this point has been correctly stated by the Privy Council, by Chagla C.J., and by the Full Bench of the Allahabad High Court, in the cases cited above." (emphasis supplied) This Court has approved the decision of the Privy Council as well as Full Bench of the Allahabad High Court in *Yar Mohammad v. Laxmi Das* AIR 1959 All. 1.

13. In *Somnath Berman v. Dr. S.P. Raju & Anr.* AIR 1970 SC 846, this Court has recognized the right of a person having possessory title to obtain a declaration that he was the owner of the land in a suit and an injunction restraining the defendant from interfering with his possession.

This Court has further observed that section 9 of the Specific Relief Act, 1963 is in no way inconsistent with the position that as against a wrong-doer, prior possession of the plaintiff, in an action of ejectment is sufficient title even if the suit is brought more than six months after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and the right to possession vested in a third party. This Court has observed:

"10. In *Narayana Row v. Dharmachar*, (1903) ILR 26 Mad 514 a bench of the Madras High Court consisting of Bhashyam Ayyangar and Moore, JJ. held that possession is, under the Indian, as under the English law, good title against all but the true owner. Section 9 of the Specific Relief Act is in no way inconsistent with the position that as against a wrongdoer, prior possession of the plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. The same view was taken by the Bombay High Court in *Krishnarao Yashwant v. Vasudev Apaji Ghotikar*, (1884) ILR 8 Bom 871. That was also the view taken by the Allahabad High Court-see *Umrao Singh v. Ramji Das*, ILR 36 All 51, *Wali Ahmad Khan v. Ahjudhia Kandu*, (1891) ILR 13 All 537. In *Subodh Gopal Bose v. Province of Bihar*, AIR 1950 Pat 222 the Patna High Court adhered to the view taken by the Madras, Bombay and Allahabad High Courts. The contrary view taken by the Calcutta High Court in *Debi Churn Boldo v. Issur Chunder Manjee*, (1883) ILR 9 Cal 39; *Ertaza Hossein v. Bany Mistry*, (1883) ILR 9 Cal 130, *Purmeshur Chowdhry v. Brij Lal Chowdhry*, (1890) ILR 17 Cal 256 and *Nisa Chand Gaita v. Kanchiram Bagani*, (1899) ILR 26 Cal 579, in our opinion does not lay down the law correctly."

(emphasis supplied) It is apparent from the aforesaid decision that a person is entitled to bring a suit of possessory title to obtain possession even though the title may vest in a third person. A person in

the possessory title can get injunction also, restraining the defendant from interfering with his possession.

14. Given the aforesaid, a question to ponder is when a person having no title, merely on the strength of possessory title can obtain an injunction and can maintain a suit for ejectment of a trespasser. Why a person who has perfected his title by way of adverse possession cannot file a suit for obtaining an injunction protecting possession and for recovery of possession in case his dispossession is by a third person or by an owner after the extinguishment of his title. In case a person in adverse possession has perfected his title by adverse possession and after the extinguishment of the title of the true owner, he cannot be successfully dispossessed by a true owner as the owner has lost his right, title and interest.

15. In *Padminibai v. Tangavva & Ors.*, AIR 1979 SC 1142, a suit was filed by the plaintiff for recovery of possession on the basis that her husband was in exclusive and open possession of the suit lands adversely to the defendant for a period exceeding 12 years and his possession was never interrupted or disturbed. It was held that he acquired ownership by prescription. The suit filed within 12 years of his death was within limitation. Thus, the plaintiff was given the right to recover possession based on adverse possession as Tatya has acquired ownership by adverse possession. This Court has observed thus:

“1. Tatya died on February 2, 1955. The respondents, Tangava and Sundra Bai are the co widows of Tatya. They were co-plaintiffs in the original suit.

11. We have, therefore, no hesitation in holding in agreement with the courts below that Tatya had acquired title by remaining in exclusive and open possession of the suit lands adversely to Padmini Bai for a period far exceeding 12 years, and this possession was never interrupted or disturbed. He had thus acquired ownership by prescriptions.” (emphasis supplied)

16. In *State of West Bengal v. The Dalhousie Institute Society*, AIR 1970 SC 1778, this Court considered the question of adverse possession of Dalhousie Institute Society based on invalid grant. It was held by this Court that title was acquired by adverse possession based on invalid grant and the right was given to the claimant/applicant to claim compensation. This Court held that a person acquires title by adverse possession and observed:

“16. There is no material placed before us to show that the grant has been made in the manner required by law though as a fact a grant of the site has been made in favour of the Institute. The evidence relied on by the Special Land Acquisition Judge and the High Court also clearly establishes that the respondent has been in open, continuous and uninterrupted possession and enjoyment of the site for over 60 years. In this respect, the material documentary evidence referred to by the High Court clearly establishes that the respondent has been treated as owner of the site not only by the Corporation but also by the Government. The possession of the respondent must have been on the basis of the grant made by the Government, which, no doubt, is invalid in law. As to what exactly is the legal effect of such possession has been considered by this Court in *Collector of Bombay v. Municipal Corporation of the City of Bombay*, [1952] SCR 43 as follows:

“...the position of the respondent Corporation and its predecessor in title was that of a person having no legal title but nevertheless holding possession of the land under colour of an invalid grant of the land in perpetuity and free from rent for the purpose of a market. Such possession not being referable to any legal title it was prima facie adverse to the legal title of the Government as owner of the land from the very moment the predecessor in title of the respondent Corporation took possession of the land under the invalid grant. This possession has continued openly, as of right and uninterruptedly for over 70 years and the respondent Corporation has acquired the limited title to it and its predecessor in title had been prescribing for during all this period, that is to say, the right to hold the land in perpetuity free from rent but only for the purposes of a market in terms of the Government Resolution of 1865. ”

17. The above extract establishes that a person in such possession clearly acquires title by adverse possession. In the case before us, there are concurrent findings recorded by the High Court and the Special Land Acquisition Judge in favour of the respondent on this point and we agree with those findings.”

(emphasis supplied) It is apparent from the aforesaid discussion that title is acquired by adverse possession.

17. In *Mohammed Fateh Nasib v. Swarup Chand Hukum Chand & Anr.* AIR 1948 PC 76, Privy Council considered the question of adverse possession by a plaintiff. In the plaint, his case was based upon continuous, open, exclusive and undisturbed possession. He averred that he had acquired an indefeasible title to the suit property by adverse possession against the whole world. In 1928, he was surreptitiously dispossessed from the suit property. The question arose for consideration whether the plaintiff remained in adverse possession for 12 years and whether it was adverse to the wakf. The Privy Council agreed with the findings of the High Court that the “plaintiff” and his predecessors-in-interest had remained in possession of the suit property for more than 12 years before 1928 to acquire a title under section 28 of the Act and the plaintiff was not a mere trespasser. The court further held that title by the adverse possession can be established against wakf property also. The Privy Council observed:- “On that basis the first question to be determined is whether the plaintiff proved continuous, open exclusive and undisturbed possession of the property in suit for 12 years and upwards before 1928 when he was dispossessed, that being the relevant date under Article 142 of the Limitation Act. If that question is answered in the affirmative then the further question arises whether such possession was adverse to the wakf.

Their Lordships agree that this is the correct test to apply and, having examined the evidence, oral and documentary, they agree with the finding of the High Court that the plaintiff and his predecessors-in-interest had been in possession of the suit property for more than 12 years prior to 1928 so as to acquire a title under Section 28 of the Limitation Act. It is no doubt true, as the learned Subordinate Judge held, that the claim of a mere trespasser to title by adverse possession will be confined strictly to the property of which he has been in actual possession. But that principle has no application in the present case. The plaintiff is not a mere trespasser; he himself purchased the property for a large sum and Aberjan, upon whose possession the claim ultimately rests, was put into possession by an order of the Court, whether or not such order was rightly made. Apart from this, their Lordships think that the character of the possession established by the plaintiff was adequate to found title even in a trespasser.

Their Lordships feel no hesitation in agreeing with the High Court that adverse possession by the plaintiff and his predecessors- in-interest has been proved for the requisite period. The only question which then remains is whether such possession was adverse to the wakf. It is not disputed that in law a title by adverse possession can be established against wakf property, but it is clear that a trustee for a charity entering into possession of property belonging to the charity cannot, whilst remaining a trustee, change the character of his possession, and assert that he is in possession as a beneficial owner.” (emphasis supplied) The plaintiff's title was declared based on adverse possession.

18. The question of perfecting title by adverse possession again came to be considered by the Privy Council in *Gunga Govind Mundul & Ors. v. The Collector of the Twenty-Four Pergunnahs & Ors.* 11 M.I.A. 212, it observed that there is an extinguishment of title by the law of limitation. The practical effect is the extinction of the title of the owner in favour of the party in possession and this right is an absolute interest. The Privy Council has observed thus:

“4. The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon ; and if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession; see Sel. Rep., vol. vi., p. 139, cited in Macpherson, Civil Procedure, p. 81 (3rd ed.). Now, in this case, the family represented by the Appellants is proved to have been upwards of thirty years in possession. The High Court has decided that the Prince's title is barred, and the effect of that bar must operate in favour of the party in possession.

Supposing that, on the extinction of the title of a person having a limited interest, a right to enter might arise in favour of a remainderman or a reversioner, the present case has no resemblance to

that.”

8. It is of the utmost consequence in India that the security which long possession efforts should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands, -- contiguous owners are apt to charge one another with encroachment. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may take that title in safety; but, if the party out of possession could set up a sixty years' law of limitation, merely by making common cause with a Collector, who could enjoy security against interruption? The true answer to such a contrivance is; the legal right of the Government is to its rent; the lands owned by others; as between private owners contesting interest in the title of the lands, the law has established a limitation of twelve years; after that time, it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor. The Government has no title to intervene in such contests, as its title to its rent in the nature of jumma is unaffected by transfer simply of proprietary right in the lands. The liability of the lands of Jumma is not affected by a transfer of proprietary right, whether such transfer is affected simply by transfer of title, or less directly by adverse occupation and the law of limitation.” (emphasis supplied)

19. In *S.M. Karim v. Mst. Bibi Sakina*, AIR 1964 SC 1254, a question arose under section 66 of the Code of Civil Procedure, 1908 which provides that no suit shall be maintained against a certified purchaser. The question arose for consideration that in case possession is disturbed whether a plaintiff can take the alternative plea that the title of the person purchasing benami in court auction was extinguished by long and uninterrupted adverse possession of the real owner. If the possession of the real owner ripens into title under the Act and he is dispossessed, he can sue to obtain possession. This Court has held that in such a case it would be open for the plaintiff to take such a plea but with full particulars so that the starting point of limitation can be found. A mere suggestion in the relief clause that there was an uninterrupted possession for several 12 years or that the plaintiff had acquired an absolute title was not enough to raise such a plea. Long possession was not necessarily an adverse possession and the prayer clause is not a substitute for a plea of adverse possession. The opinion expressed is that plaintiff can take a plea of adverse possession but with full particulars. The Court has observed:

“5. As an alternative, it was contended before us that the title of Hakim Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the plaintiff. The High Court did not accept this case. Such a case is, of course, open to a plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benami nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two courts below. The plea of adverse possession is raised here. Reliance is placed before us on *Sukhan Das v. Krishanand*, ILR 32 Pat 353 and *Sri Bhagwan Singh v. Ram Basi Kuer*, AIR 1957 Pat 157, to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, benami in the name of his son-in-law Hakim Alam, Syed Aulad Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakim Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in *Bishun Dayal v. Kesho Prasad*, AIR 1940 PC 202 the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea.” (emphasis supplied)

20. There is an acquisition of title by adverse possession as such, such a person in the capacity of a plaintiff can always use the plea in case any of his rights are infringed including in case of dispossession. In *Mandal Revenue Officer v. Goundla Venkaiah & Anr.*, (2010) 2 SCC 461 this Court has referred to the decision in *State of Rajasthan v. Harphool Singh* (2000) 5 SCC 652 in which the suit was filed by the plaintiff based on acquisition of title by adverse possession. This Court has referred to other decisions also in *Annakili v. A. Vedanayagam* (2007) 14 SCC 308 and *P.T. Munichikkanna Reddy v. Revamma* (2007) 6 SCC 59. It has been observed that there can be an acquisition of title by adverse possession. It has also been observed that adverse possession effectively shifts the title already distanced from the paper owner to the adverse possessor. Right thereby accrues in favour of the adverse possessor. This Court has considered the matter thus:

"48. *In State of Rajasthan v. Harphool Singh*, 2000 (5) SCC 652, this Court considered the question whether the respondents had acquired title by adverse possession over the suit land situated at Nohar-Bhadra Road at Nohar within the State of Rajasthan. The suit filed by the respondent against his threatened dispossession was decreed by the trial court with the finding that he had acquired title by adverse possession. The first and second appeals preferred by the State Government were dismissed by the lower appellate court and the High Court respectively. This Court reversed the judgments and decrees of the courts below as also of the High Court and held that the plaintiff-respondent could not substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below:

(SCC p. 660, para 12) "12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in *P. Lakshmi Reddy v. L. Lakshmi Reddy*, AIR 1957 SC 314, adverted to the ordinary classical requirement - that it should be *nec vi, nec clam, nec precario* - that is the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus."

50. Before concluding, we may notice two recent judgments in which law on the question of acquisition of title by adverse possession has been considered and reiterated. In *Annakili v. A. Vedanayagam*, 2007 (14) SCC 308, the Court observed as under:

(SCC p. 316, para 24) "24. Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well-settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more does not ripen into a title."

51. In *P.T. Munichikkanna Reddy v. Revamma*, 2007 (6) SCC 59, the Court considered various facets of the law of adverse possession and laid down various propositions including the following: (SCC pp. 66 & 68, paras 5 & 8) xxx

8. ... to assess a claim of adverse possession, two-pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially "wilful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.

2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper-owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

(emphasis in original)" (emphasis supplied)

21. In *P.T. Munichikkanna Reddy v. Revamma*, (2007) 6 SCC 59, this Court has observed as under:

2. The defendant-respondents in their written statement denied and disputed the aforementioned assertion of the plaintiffs and pleaded their own right, title and interest as also possession in or over the said 1 acre 21 guntas of land. The learned trial Judge decreed the suit inter alia holding that the plaintiff-appellants have acquired title by adverse possession as they have been in possession of the lands in question for a period of more than 50 years. On an appeal having been preferred thereagainst by the respondents before the High Court, the said judgment of the trial court was reversed holding: “(i) ... The important averments of adverse possession are twofold. One is to recognise the title of the person against whom adverse possession is claimed. Another is to enjoy the property adverse to the title-holder’s interest after making him known that such enjoyment is against his own interest. These two averments are basically absent in this case both in the pleadings as well as in the evidence....

(ii) The finding of the court below that the possession of the plaintiffs became adverse to the defendants between 1934-36 is again an error apparent on the face of the record. As it is now clarified before me by the learned counsel for the appellants that the plaintiffs’ claim in respect of the other land of the defendants is based on the subsequent sale deed dated 5-7-1936.

It is settled law that mere possession even if it is true for any number of years will not clothe the person in enjoyment with the title by adverse possession. As indicated supra, the important ingredients of adverse possession should have been satisfied.”

6. Efficacy of adverse possession law in most jurisdictions depends on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one’s right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See American Jurisprudence, Vol. 3, 2d, p. 81.) It is important to keep in mind while studying the American notion of adverse possession, especially in the backdrop of limitation statutes, that the intention to dispossess cannot be given a complete go-by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim.

8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially “wilful neglect” element on part of the owner established.

Successful application in this regard distances the title of the land from the paper-owner.

2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper-owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

30. In Karnataka Wakf Board the law was stated, thus: (SCC p. 785, para 11) “11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is ‘nec vi, nec clam, nec precario’, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity, and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See *S.M. Karim v. Bibi Sakina, Parsinni v. Sukhi* and *D.N. Venkatarayappa v. State of Karnataka*.) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important



factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party,

(d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.”

22. In *State of Haryana v. Mukesh Kumar & Ors.*, (2011) 10 SCC 404, the court considered the question whether the plaintiff had become the owner of the disputed property by way of adverse possession and in that context considered the decisions in *Revamma* (supra) and *Fairweather v. St. Marylebone Property Co. Ltd.* (1962) 2 AER 288 (HL) and *Taylor v. Twinberrow* 1930 All ER Rep 342 (DC) and observed that adverse possession confers negative and consequential right effected only as somebody else's positive right to access the court is barred by operation of law. Right of the paper owner is extinguished and that competing rights evolve in favour of adverse possessor as he cared for the land, developed it as against the owner of the property who had ignored the property. This Court has observed thus:

“32. This Court in *Revamma* (2007) 6 SCC 59 observed that to understand the true nature of adverse possession, *Fairweather v. St Marylebone Property Co. Ltd.* (1962) 2 All ER 288 (HL) can be considered where the House of Lords referring to *Taylor v. Twinberrow* (1930) 2 K.B. 16 termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law. As against the rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property.” (emphasis supplied)

23. In *Krishnamurthy S. Setlur (dead) by LRs. v. O.V. Narasimha Setty & Ors.*, (2007) 3 SCC 569, the Court pointed out that the duty of the plaintiff while claiming title based on adverse possession. The suit was filed by the plaintiff on 11.12.1981. The trial court held that the plaintiff has perfected the title in the suit lands based on adverse possession, and decreed the suit. This Court has observed that the plaintiff must plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question arose for consideration whether tenant's possession could be treated as possession of the owner for computation of the period of 12 years under the provisions of the Act. What is the nature of pleading required in the plaint to constitute a plea of adverse possession has been emphasised by this Court and another question also arose whether the plaintiff was entitled to get back the possession from the defendants? This Court has observed thus:

"12. Section 27 of the Limitation Act, 1963 operates to extinguish the right to property of a person who does not sue for its possession within the time allowed by law. The right extinguished is the right which the lawful owner has and against whom a claim for adverse possession is made, therefore, the plaintiff who makes a claim for adverse possession has to plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question whether possession is adverse or not is often one of simple fact but it may also be a conclusion of law or a mixed question of law and fact. The facts found must be accepted, but the conclusion drawn from them, namely, ouster or adverse possession is a question of law and has to be considered by the court.

13. As stated, this civil appeal arises from the judgment of the High Court in RFA No. 672 of 1996 filed by the original defendants under Section 96 CPC. The impugned judgment, to say the least, is a bundle of confusion. It quotes depositions of witnesses as findings. It quotes findings of the courts below which have been set aside by the High Court in the earlier round. It criticizes the findings given by the coordinate Bench of the High Court in the earlier round of litigation. It does not answer the question of law which arises for determination in this case. To quote an example, one of the main questions which arises for determination, in this case, is whether the tenant's possession could be treated as possession of the owner in computation of the period of twelve years under Article 64 of

the Limitation Act, 1963. Similarly, as an example, the impugned judgment does not answer the question as to whether the decision of the High Court dated 14.8.1981 in RSA No. 545 of 1973 was at all binding on the LR's. of Iyengar/their alienees. Similarly, the impugned judgment does not consider the effect of the judgment dated 10.11.1961 rendered by the trial court in Suit No. 94 of 1956 filed by K.S. Setlur against Iyengar inter alia for reconveyance in which the court below did not accept the contention of K.S. Setlur that the conveyance executed by Kalyana Sundram Iyer in favour of Iyengar was a benami transaction. Similarly, the impugned judgment has failed to consider the effect of the observations made by the civil court in the suit filed by Iyengar for permanent injunction bearing Suit No. 79 of 1949 to the effect that though Shyamala Raju was in possession and cultivation, whether he was a tenant under Iyengar or under K.S. Setlur was not conclusively proved. Similarly, the impugned judgment has not at all considered the effect of Iyengar or his LR's. not filing a suit on title despite being liberty given to them in the earlier Suit No. 79 of 1949. In the matter of adverse possession, the courts have to find out the plea taken by the plaintiff in the plaint. In the plaint, the plaintiff who claims to be owner by adverse possession has to plead actual possession. He has to plead the period and the date from which he claims to be in possession. The plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show a hostile title. He has to communicate his hostility to the real owner. None of these aspects have been considered by the High Court in its impugned judgment. As stated above, the impugned judgment is under Section 96 CPC, it is not a judgment under Section 100 CPC. As stated above, adverse possession or ouster is an inference to be drawn from the facts proved (sic) that work is of the first appellate court.” (emphasis supplied)

24. In *P.T. Munichikkanna Reddy v. Revamma*, (2007) 6 SCC 59, the plaintiff claimed the title based on adverse possession. The court observed:

“5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See *Downing v. Bird* 100 So. 2d 57 (Fla. 1958); *Arkansas Commemorative Commission v. City of Little Rock* 227 Ark. 1085: 303 S.W. 2d 569 (1957); *Monnot v. Murphy* 207 N.Y. 240 100 N.E. 742 (1913); *City of Rock Springs v. Sturm* 39 Wyo. 494: 273 P. 908: 97 A.L.R. 1 (1929).

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess cannot be given a complete go by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim.” (emphasis supplied)

25. In Halsbury's Laws of England, 4th Edn., Vol. 28, para 777 positions of person in adverse possession has been discussed and it has been observed on the basis of various decisions that a person in possession has a transmissible interest in the property and after expiration of the statutory period, it ripens as good a right to possession. Para 777 is as under:

“777. Position of person in adverse possession: While a person who is in possession of land without title continues in possession, then, before the statutory period has elapsed, he has a transmissible interest in the property which is good against all the world except the rightful owner, but an interest

which is liable at any moment to be defeated by the entry of the rightful owner; and, if that person is succeeded in possession by one claiming through him who holds until the expiration of the statutory period, the successor has then as good a right to the possession as if he himself had occupied for the whole period.” (emphasis supplied)

26. In Halsbury's Laws of England, extinction of title by the effect of the expiration of the period of limitation has also been discussed in Para 783 and once right is lost to recover the possession, the same cannot be re-vested by any re-entry or by a subsequent acknowledgment of title. Para 783 is extracted hereunder:

“783. Extinction of title: At the expiration of the periods prescribed by the Limitation Act 1939 for any person to bring an action to recover land (including a redemption action) or an action to enforce an advowson, the title of that person to the land or advowson is extinguished. This is subject to the special provisions relating to settled land and land held on trust and the provisions for constituting the proprietor of registered land a trustee for the person who has acquired title against him. The extinguished title cannot afterward be re-vested either by re-entry or by a subsequent payment or acknowledgment of title. A rent-charge is extinguished when the remedy to recover it is barred.” (emphasis supplied)

27. Nature of title acquired by adverse possession has also been discussed in the Halsbury's Laws of England in Para 785. It has been observed that adverse possession leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the rights of others to eject him. Same is a “good title”, both at law and in equity. Para 785 is also extracted hereunder:

“785. Nature of title acquired: The operation of the statutory provision for the extinction of title is merely negative; it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him.

A title gained by the operation of the statute is a good title, both at law and in equity, and will be forced by the court on a reluctant purchaser. Proof, however, that a vendor and those through whom he claims have had independent possession of an estate for twelve years will not be sufficient to establish a saleable title without evidence to show the state of the title at the time that possession commenced. If the contract for purchase is an open one, possession for twelve years is not sufficient, and a full length of the title is required. Although possession of land is prima facie evidence of seisin in fee, it does not follow that a person who has gained a title to land from the fact of certain persons being barred of their rights has the fee simple vested in himself; for, although he may have gained an indefeasible title against those who had an estate in possession, there may be persons entitled in reversion or remainder whose rights are quite unaffected by the statute.” (emphasis supplied)

28. In an article published in Harvard Law Review on "Title by Adverse Possession" by Henry W. Ballantine, as to the question of adverse possession and acquisition of title it has been observed on strength of various decisions that adverse possession vests the possessor with the complete title as effectually as if there had been a conveyance by the former owner. As held in *Toltec Ranch Co. v. Cook*, 191 U.S. 532, 542 (1903). But the title is independent, not derivative, and “relates back” to the inception of the adverse possession, as observed. (see *Field v.*

*Peoples*, 180 Ill. 376, 383, 54 N.E. 304 (1899); *Bellefontaine Co. v. Niedringhaus*, 181 Ill. 426, 55 N.E. 184 (1899). Cf. *La Salle v. Sanitary District*, 260 Ill. 423, 429, 103 N.E. 175 (1913); AMES, LECTURES ON LEGAL HIST. 197; 3 ANGLO-AMERICAN ESSAYS, 567). The adverse possessor does not derive his title from the former owner, but from a new source of title, his possession. The “investitive fact” is the disseisin and exercise of possession as observed in *Camp v. Camp*, 5 Conn. 291 (1824); *Price v. Lyon*, 14 Conn. Conn. 279, 290 (1841); *Coal Creek, etc. Co. v. East Tenn. I. & C. Co.*, 105 Tenn. 563; 59 S.W. 634, 636 (1900). It has also been observed that titles to property should not remain uncertain and in dispute, but that continued de facto exercise and assertion of a right should be conclusive evidence of the de jure existence of the right.

29. In *Lala Hem Chand v. Lala Pearey Lal & Ors.*, AIR 1942 PC 64, the question arose of the adverse possession where a trustee had been in possession for more than 12 years under a trust which is void under the law, the Privy Council observed that if the right of a defendant owner is extinguished the plaintiff acquires it by adverse possession. In case the owner suffers his right to be barred by the law of limitation, the practical effect is the extinction of his title in favour of the party in possession. The relevant portion is extracted hereunder:

“.... The inference from the evidence as a whole is irresistible that it was with his knowledge and implied consent that the building was consecrated as a Dharmasala and used as such for charitable and religious purposes and that Lala Janaki Das, and after him, Ramchand, was in possession of the property till 1931. As forcibly pointed out by the High Court in considering the merits of the case, "during the course of more than 20 years that this building remained in the charge of Janaki Das, and on his death in that of his son, Ramchand, the defendant had never once claimed the property as his own or objected to its being treated as dedicated property." This Board held in ('66) 11 M.I.A. 345: 7 W.R. 21: 1 Suther. 676: 2 Sar. 284 (P.C.), *Gunga Gobindas Mundal v. The Collector of the Twenty Four Pergunnahs*, at page 361, that if the owner whose property is encroached upon suffers his right to be barred by the law of limitation the practical effect is the extinction of his title in favour of the party in possession." Section 28, Limitation Act, says:

“At the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished." Lala Janaki Das and Ramchand having held the property adversely for upwards of 12 years on behalf of the charity for which it was dedicated, it follows that the title to it, acquired by prescription, has become vested in the charity and that of the defendant, if he had any, has become extinguished by operation of S. 28, Limitation Act. Their Lordships have no doubt that the Subordinate Judge would also have come to the conclusion that the title of the defendant has become barred by limitation, had he not been of the view that Lala Janaki Das retained possession of the suit property as trustee for the benefit of the author of the trust and his legal representatives, and that presumably S. 10, Limitation Act, would apply to the case, though he does not specifically refer to the section. For the above reasons, their Lordships hold that the plaintiffs have established their title to the suit property by adverse possession for upwards of 12 years before the defendant obtained possession of it; and since the suit was brought in January 1933, within so short a time as two years of dispossession, the plaintiffs are entitled to recover it from the defendant, whose title to hold it if he had any has become extinct by limitation, in whichever manner he may have obtained possession permissively or by trespass.” (emphasis supplied)

30. In *Tichborne v. Weir*, (1892) 67 LT 735, it has been observed that considering the effect of limitation is not that the right of one person is conveyed to another, but that the right is extinguished and destroyed. As the mode of conveying the title is not prescribed in the Act, the Act does not confer it. But at the same time, it has been observed that yet his “title under the Act is acquired” solely by the extinction of the right of the prior rightful owner; not by any statutory transfer of the estate. In the said case question arose for transfer of the lease formerly held by Baxter to Giraud who for over 20 years had been in possession of the land without any acknowledgment to Baxter who had equitably mortgaged the lease to him. The question arose whether the statute transferred the lease to Giraud and he became the tenant of the landlord. In that context, the aforesaid observations have been made. It has been held what is acquired would depend upon what right person has against whom he has prescribed and acquisition of title by adverse possession would not more be than that. The lease is not transferred under a statute but by the extinguishment of rights. The other person ripens the right. Thus, the decision does not run counter to the various decisions which have been discussed above and deals with the nature of title conferred by adverse possession.

31. The decision in *Taylor v. Twinberrow*, (1930) 2 K.B. 16 has also been referred to submit to the contrary. In that case, also it was a case of a dispute between the tenant and sub-tenant. The Kings Bench considered the effect of the expiration of 12 years' adverse possession under section 7 of the Act of 1833 and observed that that does confer a title, whereas its effect is merely negative to destroy the power of the then tenant Taylor to claim as a landlord against the sub-tenant in possession. It would not destroy the right of the freeholder, if Taylor's tenancy was determined, by the freeholder, he could eject the sub-tenant. Thus, Taylor's right would be defeated and not that of the freeholder who was the owner and gave the land on the tenancy to Taylor. In our opinion, the view is in consonance with the law of adverse possession as administered in India. As the basic principle is that if a person is having a limited right, a person against him can prescribe only to acquire that limited right which is extinguished and not beyond that. There is a series of decisions laying down this proposition of law as to the effect of adverse possession as against limited owner if extinguishing title of the limited owner not that of reversion or having some other title. Thus, the decision in *Taylor v. Twinberrow* (supra) does not negate the acquisition of title by way of adverse possession but rather

affirms it.

32. The operation of the statute of limitation in giving a title is merely negative; it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him. *Perry v. Clissold* (1907) AC 73 has been referred to in *Nair Service Society Ltd. v. K.C. Alexander* (supra) in which it has been observed that it cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the original owner, and if the original owner does not come forward and assert his title by the process of law within the period prescribed under the statute of limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title. In *Ram Daan (Dead) through LRs. v. Urban Improvement Trust*, (2014) 8 SCC 902, this Court has observed thus:

“11. It is settled position of law laid down by the Privy Council in *Perry v. Clissold* 1907 AC 73 (PC) (AC p. 79) “It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.” The above statement was quoted with the approval by this Court in *Nair Service Society Ltd. v. K.C. Alexander*, AIR 1968 SC 1165. Their Lordships at para 22 emphatically stated: (AIR p. 1175) “22. The cases of the Judicial Committee are not binding on us but we approve of the dictum in *Perry v. Clissold* 1907 AC 73 (PC).””

33. The decision in *Fairweather v. St. Marylebone Property Co. Ltd.* (1962) 2 AER 288 (HL) has also been referred, to submit that adverse possession is a negative concept where the possession had been taken against the tenant, its operation was only to bar his right against men in possession. As already discussed above, it was a case of limited right possessed by the tenant and a sub-tenant could only perfect his right against the tenant who inducted him as sub-tenant prescribed against the tenant and not against the freeholder. The decision does not run counter to any other decision discussed and is no help to hold that plaintiff cannot take such a plea or hold that no right is conferred by adverse possession. It may be a negative right but an absolute one. It confers title as owner in case extinguishment is of the right of ownership.

34. The plaintiff's right to raise the plea of adverse possession has been recognized in several decisions of the High Court also. If such a case arises on the facts stated in the plaint and the defendant is not taken by surprise as held in *Nepen Bala Debi v. Siti Kanta Banerjee*, (1910) 8 Ind Cas 41 (DB) (Cal), *Ngasepam Ibotombi Singh v. Wahengbam Ibohal Singh & Anr.*, AIR 1960 Manipur 16, *Aboobucker s/o Shakhi Mahomed Laloo v. Sahibkhatoon*, AIR 1949 Sindh 12, *Bata Krista Pramanick v. Shebait of Thakur Jogendra Nath Maity & Ors.*, AIR 1919 Cal. 339, *Ram Chandra Sil & Ors. v. Ramanmani Dasi & Ors.* AIR 1917 Cal. 469, *Shiromani Gurdwara Parbhandhak Committee, Khosakotla & Anr. v. Prem Das & Ors.*, AIR 1933 Lah 25, *Rangappa Nayakar v. Rangaswami Nayakar*, AIR 1925 Mad. 1005; *Shaikh Alimuddin v. Shaikh Salim*, 1928 IC 81 (PC).

35. In *Pannalal Bhagirath Marwadi v. Bhaiyalal Bindraban Pardeshi Teli*, AIR 1937 Nagpur 281, it has been observed that in-between two trespassers, one who is wrongly dispossessed by the other trespasser, can sue and recover possession. A person in possession cannot be dispossessed otherwise than in due course of law and can sue for injunction for protecting the possession as observed in *Krishna Ram Mahale (dead) by L.Rs v. Shobha Venkat Rao*, (1989) 4 SCC 131, *State of U.P. v. Maharaja Dharmander Prasad Singh*, (1989) 2 SCC 505.

36. In *Radhamoni Debi v. The Collector of Khulna & Ors.* (1900) ILR 27 Cal. 943 it was observed that to constitute a possessory title by adverse possession, the possession required to be proved must be adequate in continuity in publicity, and in the extent to show for a period of 12 years.

37. In *Somnath Burman v. S.P. Raju*, (1969) 3 SCC 129, the Court recognized the right of the plaintiff to such declaration of title and for an injunction. Section 9 of the Specific Relief Act is in no way inconsistent, the wrongdoer cannot resist suit on the ground that title and right are in a third person. Right to sue is available to the plaintiff against owners as well as others by taking the plea of adverse possession in the plaint.

38. In *Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan & Ors.*, (2009) 16 SCC 517, relying on *T. Anjanappa v. Somalingappa* (2006) 7 SCC 570, observed that title can be based on adverse possession. This Court has observed thus:

“23. This Court had an occasion to examine the concept of adverse possession in *T. Anjanappa v. Somalingappa*, 2006 (7) SCC 570.

The court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The court further observed that: (SCC p.577, para 20) “20.... The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.” At the same time, this Court has also observed that the law of adverse possession is harsh and Legislature may consider a change in the law as to adverse possession.

39. In the light of the aforesaid discussion, when we consider the decision in *Gurdwara Sahib v. Gram Panchayat Village Sirthala & Anr.*, (2014) 1 SCC 669 decided by two-Judge Bench wherein a question arose whether the plaintiff is in adverse possession of the suit land this Court referred to the Punjab & Haryana High Court decision on *Gurdwara Sahib Sannauli v. State of Punjab* (2009) 154 PLR 756 and observed that there cannot be ‘any quarrel’ to the extent that the judgments of courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. The discussion made is confined to para 8 only. The same is extracted hereunder:

“4. In so far as the first issue is concerned, it was decided in favour of the plaintiff returning the findings that the appellant was in adverse possession of the suit property since 13.4.1952 as this fact had been proved by a plethora of documentary evidence produced by the appellant. However, while deciding the second issue, the court opined that no declaration can be sought on the basis of adverse possession inasmuch as adverse possession can be used as a shield and not as a sword. The learned Civil Judge relied upon the judgment of the Punjab and Haryana High Court in *Gurdwara Sahib Sannauli v. State of Punjab* (2009) 154 PLR 756 and thus, decided the issue against the plaintiff. Issue 3 was also, in the same vein, decided against the appellant.

8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence.” (emphasis supplied) It is apparent that the point whether the plaintiff can take the plea of adverse possession was not contested in the aforesaid decision and none out of the plethora of the aforesaid decisions including of the larger Bench were placed for consideration before this Court. The judgment is based upon the proposition of law not being questioned as the point was not disputed. There no reason is given, only observation has been recorded in one line.

40. It is also pertinent to mention that the decision of this court in *Gurudwara Sahib v. Gram Panchayat Village, Sirthala* (supra) has been relied upon in *State of Uttarakhand v. Mandir Sri Laxman Sidh Maharaj*, (2017) 9 SCC 579. In the said case, no plea of adverse possession was taken nor issue was framed as such this Court held that in the absence of pleading, issue and evidence of adverse possession suit could not have been decreed on that basis. Given the aforesaid, it was not necessary to go into the question of whether the plaintiff could have taken the plea of adverse possession. Nonetheless, a passing observation has been made without any discussion of the aspect that the court below should have seen that declaration of ownership rights over the suit property

could be granted to the plaintiff on strength of adverse possession (see:

*Gurudwara Sahib v. Gram Panchayat, Sirthala*). The Court observed:

“24. By no stretch of imagination, in our view, such a declaration of ownership over the suit property and right of easement over a well could be granted by the trial court in the plaintiff’s favour because even the plaintiff did not claim title in the suit property on the strength of “adverse possession”. Neither were there any pleadings nor any issue much less evidence to prove the adverse possession on land and for grant of any easementary right over the well. The courts below should have seen that no declaration of ownership rights over the suit property could be granted to the plaintiff on the strength of “adverse possession” (see *Gurudwara Sahib v. Gram Panchayat Village Sirthala*, (2014) 1 SCC 669. The courts below also should have seen that courts can grant only that relief which is claimed by the plaintiff in the plaint and such relief can be granted only on the pleadings but not beyond it. In other words, courts cannot travel beyond the pleadings for granting any relief. This principle is fully applied to the facts of this case against the plaintiff.” (emphasis supplied)

41. Again in *Dharampal (Dead) through LRs v. Punjab Wakf Board*, (2018) 11 SCC 449, the court found the averments in counterclaim by the defendant do not constitute plea of adverse possession as the point of start of adverse possession was not pleaded and Wakf Board has filed a suit in the year 1971 as such perfecting title by adverse possession did not arise at the same time without any discussion on the aspect that whether plaintiff can take plea of adverse possession. The Court held that in the counterclaim the defendant cannot raise this plea of adverse possession. This Court at the same relied upon to observe that it was bound by the decision in *Gurudwara Sahib v. Gram Panchayat Village Sirthala* (supra), and logic was applied to the counterclaim also. The Court observed:

“28. In the first place, we find that this Court in *Gurudwara Sahib v. Gram Panchayat Village Sirthala*, (2014) 1 SCC 669 has held in para 8 that a plea of adverse possession cannot be set up by the plaintiff to claim ownership over the suit property but such plea can be raised by the defendant by way of defence in his written statement in answer to the plaintiff’s claim. We are bound by this view.

34. Applying the aforementioned principle of law to the facts of the case on hand, we find absolutely no merit in this plea of Defendant 1 for the following reasons:

34.1. First, Defendant 1 has only averred in his plaint (counterclaim) that he, through his father, was in possession of the suit land since 1953. Such averments, in our opinion, do not constitute the plea of “adverse possession” in the light of law laid down by this Court quoted supra.

34.2. Second, it was not pleaded as to from which date, Defendant 1’s possession became adverse to the plaintiff (the Wakf Board).

34.3. Third, it was also not pleaded that when his adverse possession was completed and ripened into the full ownership in his favour.

34.4. Fourth, it could not be so for the simple reason that the plaintiff (Wakf Board) had filed a suit in the year 1971 against Defendant 1’s father in relation to the suit land. Therefore, till the year 1971, the question of Defendant 1 perfecting his title by “adverse possession” qua the plaintiff (Wakf Board) did not arise.

The plaintiff then filed present suit in the year 1991 and, therefore, again the question of perfecting the title up to 1991 qua the plaintiff did not arise.” (emphasis supplied)

42. In *State of Uttarakhand v. Mandir Shri Lakshmi Siddh Maharaj* (supra) and *Dharampal (dead) through LRs v. Punjab Wakf Board* (supra), there is no discussion on the aspect whether the plaintiff can later take the plea of adverse possession. It does not appear that proposition was contested and earlier binding decisions were also not placed for consideration of the Court. As there is no independent consideration of the question, we have to examine mainly the decision in *Gurudwara Sahib v. Gram Panchayat Village Sirthala* (supra).

43. When we consider the decision rendered by Punjab & Haryana High Court in *Gurudwara Sahib Sannauli* (supra), which has been referred by this Court in *Gurudwara Sahib v. Gram Panchayat, Sirthala* (supra), the following is the discussion made by the High Court in the said decision:

“10. I have heard learned Counsel for the parties and perused the record of the appeal. I find force in

the contentions raised by learned counsel for the respondents. In *Bachhaj Nahar v. Nillima Mandal and Anr.* J.T. 2008 (13) S.C. 255 the Hon'ble Supreme Court has authoritatively laid down that if an argument has been given up or has not been raised, same cannot be taken up in the Regular Second Appeal. It is also relevant to mention here that in *Bhim Singh and Ors. v. Zile Singh and Ors.*, (2006) 3 RCR Civil 97, this Court has held that no declaration can be sought by a plaintiff about ownership based on adverse possession as such plea is available only to a defendant against the plaintiff. Similarly, in R.S.A. No. 3909 of 2008 titled as *State of Haryana v. Mukesh Kumar and Ors.* (2009) 154 P.L.R. 753, decided on 17.03.2009 this Court has also taken the same view as aforesaid in Bhim Singh's case (supra).” There is no independent consideration. Only the decision of the same High Court in *Bhim Singh & Ors. v. Zila Singh & Ors.* AIR 2006 P&H 195 has been relied upon to hold that no declaration can be sought by the plaintiff based on adverse possession.

44. In *Bhim Singh & Ors.* (supra) the plaintiffs had filed a suit for declaration and injunction claiming ownership based on adverse possession. Defendants contended that plaintiffs were not in possession. The Punjab & Haryana High Court in *Bhim Singh & Ors. v. Zila Singh & Ors.* (supra) has assigned the reasons and observed thus:

"11. Under Article 64 of the Limitation Act, as suit for possession of immovable property by a plaintiff, who while in possession of the property had been dispossessed from such possession, when such suit is based on previous possession and not based on title, can be filed within 12 years from the date of dispossession. Under Article 65 of the Limitation Act, a suit for possession of immovable property or any interest therein, based on title, can be filed by a person claiming title within 12 years. The limitation under this Article commences from the date when the possession of the defendant becomes adverse to the plaintiff. In these circumstances, it is apparent that to contest a suit for possession, filed by a person on the basis of his title, a plea of adverse possession can be taken by a defendant who is in hostile, continuous and open possession, to the knowledge of the true owner, if such a person has remained in possession for a period of 12 years. It, thus, naturally has to be inferred that plea of adverse possession is a defence available only to a defendant. This conclusion of mine is further strengthened from the language used in Article 65, wherein, in column 3 it has been specifically mentioned: "when the possession of the defendant becomes adverse to the plaintiff." Thus, a perusal of the aforesaid Article 65 shows that the plea is available only to a defendant against a plaintiff. In these circumstances, natural inference must follow that when such a plea of adverse possession is only available to a defendant, then no declaration can be sought by a plaintiff with regard to his ownership on the basis of an adverse possession.

12. I am supported by a judgment of Delhi High Court in 1993 3 105 PLR (Delhi Section) 70, *Prem Nath Wadhawan v. Inder Rai Wadhawan*.

13. The following observations made in the Prem Nath Wadhawan's case (supra) may be noticed: "I have given my thoughtful consideration to the submissions made by the learned Counsel for the parties and have also perused the record. I do not find any merit in the contention of the learned Counsel for the plaintiff that the plaintiff has become absolute owner of the suit property by virtue of adverse possession as the plea of adverse possession can be raised in defence in a suit for recovery of possession but the relief for declaration that the plaintiff has become absolute owner, cannot be granted on the basis of adverse possession." (emphasis supplied) The Punjab & Haryana High Court has proceeded on the basis that as per Article 65, the plea of adverse possession is available as a defence to a defendant.

45. Article 65 of the Act is extracted hereunder:

Description of suit		Period of limitation	Time from which period begins to run
65.	For possession of immovable property or any interest therein based on title. Explanation.— For the purposes of this article—  (a) where the suit is	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.



	<p>by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession;</p> <p>(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;</p> <p>(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.</p>		
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46. The conclusion reached by the High Court is based on an inferential process because of the language used in the III<sup>rd</sup> Column of Article 65. The expression is used, the limitation of 12 years runs from the date when the possession of the defendant becomes adverse to the plaintiff. Column No.3 of Schedule of the Act nowhere suggests that suit cannot be filed by the plaintiff for possession of immovable property or any interest therein based on title acquired by way of adverse possession. There is absolutely no bar for the perfection of title by way of adverse possession whether a person is suing as the plaintiff or being sued as a defendant. The inferential process of interpretation employed by the High Court is not at all permissible. It does not follow from the language used in the statute. The large number of decisions of this Court and various other decisions of Privy Council, High Courts and of English courts which have been discussed by us and observations made in Halsbury Laws based on various decisions indicate that suit can be filed by plaintiff on the basis of title acquired by way of adverse possession or on the basis of possession under Articles 64 and 65. There

is no bar under Article 65 or any of the provisions of Limitation Act, 1963 as against a plaintiff who has perfected his title by virtue of adverse possession to sue to evict a person or to protect his possession and plethora of decisions are to the effect that by virtue of extinguishment of title of the owner, the person in possession acquires absolute title and if actual owner dispossesses another person after extinguishment of his title, he can be evicted by such a person by filing of suit under Article 65 of the Act. Thus, the decision of *Gurudwara Sahib v. Gram Panchayat, Sirthala* (supra) and of the Punjab & Haryana High Court cannot be said to be laying down the correct law. More so because of various decisions of this Court to the contrary.

47. In *Gurudwara Sahib v. Gram Panchayat, Sirthala* (supra) proposition was not disputed. A decision based upon concession cannot be treated as precedent as has been held by this Court in *State of Rajasthan v. Mahaveer Oil Industries*, (1999) 4 SCC 357, *Director of Settlements, A.P. v. M.R. Apparao*, (2002) 4 SCC 638, *Uptron India Limited v. Shammi Bhan* (1998) 6 SCC 538. Though, it appears that there was some expression of opinion since the Court observed there cannot be any quarrel that plea of adverse possession cannot be taken by a plaintiff. The fact remains that the proposition was not disputed and no argument to the contrary had been raised, as such there was no decision on the aforesaid aspect only an observation was made as to proposition of law, which is palpably incorrect.

48. The statute does not define adverse possession, it is a common law concept, the period of which has been prescribed statutorily under the law of limitation Article 65 as 12 years. Law of limitation does not define the concept of adverse possession nor anywhere contains a provision that the plaintiff cannot sue based on adverse possession. It only deals with limitation to sue and extinguishment of rights. There may be a case where a person who has perfected his title by virtue of adverse possession is sought to be ousted or has been dispossessed by a forceful entry by the owner or by some other person, his right to obtain possession can be resisted only when the person who is seeking to protect his possession, is able to show that he has also perfected his title by adverse possession for requisite period against such a plaintiff.

49. Under Article 64 also suit can be filed based on the possessory title. Law never intends a person who has perfected title to be deprived of filing suit under Article 65 to recover possession and to render him remediless. In case of infringement of any other right attracting any other Article such as in case the land is sold away by the owner after the extinguishment of his title, the suit can be filed by a person who has perfected his title by adverse possession to question alienation and attempt of dispossession.

50. Law of adverse possession does not qualify only a defendant for the acquisition of title by way of adverse possession, it may be perfected by a person who is filing a suit. It only restricts a right of the owner to recover possession before the period of limitation fixed for the extinction of his rights expires. Once right is extinguished another person acquires prescriptive right which cannot be defeated by re-entry by the owner or subsequent acknowledgment of his rights. In such a case suit can be filed by a person whose right is sought to be defeated.

51. In India, the law respect possession, persons are not permitted to take law in their hands and dispossess a person in possession by force as observed in *Late Yashwant Singh* (supra) by this Court. The suit can be filed only based on the possessory title for appropriate relief under the Specific Relief Act by a person in possession. Articles 64 and 65 both are attracted in such cases as held by this Court in *Desh Raj v. Bhagat Ram* (supra). In *Nair Service Society* (supra) held that if rightful owner does not commence an action to take possession within the period of limitation, his rights are lost and person in possession acquires an absolute title.

52. In *Sarangadeva Periya Matam v. Ramaswami Gounder*, (supra), the plaintiff's suit for recovery of possession was decreed against Math based on the perfection of the title by way of adverse

possession, he could not have been dispossessed by Math. The Court held that under Article 144 read with Section 28 of the Limitation Act, 1908, the title of Math extinguished in 1927 and the plaintiff acquired title in 1927. In 1950, he delivered possession, but such delivery of possession did not transfer any title to Math. The suit filed in 1954 was held to be within time and decreed.

53. There is the acquisition of title in favour of plaintiff though it is negative conferral of right on extinguishment of the right of an owner of the property. The right ripened by prescription by his adverse possession is absolute and on dispossession, he can sue based on 'title' as envisaged in the opening part under Article 65 of Act. Under Article 65, the suit can be filed based on the title for recovery of possession within 12 years of the start of adverse possession, if any, set up by the defendant. Otherwise right to recover possession based on the title is absolute irrespective of limitation in the absence of adverse possession by the defendant for 12 years. The possession as trespasser is not adverse nor long possession is synonym with adverse possession.

54. In Article 65 in the opening part a suit "for possession of immovable property or any interest therein based on title" has been used. Expression "title" would include the title acquired by the plaintiff by way of adverse possession. The title is perfected by adverse possession has been held in a catena of decisions.

55. We are not inclined to accept the submission that there is no conferral of right by adverse possession. Section 27 of Limitation Act, 1963 provides for extinguishment of right on the lapse of limitation fixed to institute a suit for possession of any property, the right to such property shall stand extinguished. The concept of adverse possession as evolved goes beyond it on completion of period and extinguishment of right confers the same right on the possessor, which has been extinguished and not more than that. For a person to sue for possession would indicate that right has accrued to him in presenti to obtain it, not in futuro. Any property in Section 27 would include corporeal or incorporeal property. Article 65 deals with immovable property.

56. Possession is the root of title and is right like the property. As ownership is also of different kinds of viz. sole ownership, contingent ownership, corporeal ownership, and legal equitable ownership. Limited ownership or limited right to property may be enjoyed by a holder. What can be prescribable against is limited to the rights of the holder. Possession confers enforceable right under Section 6 of the Specific Relief Act. It has to be looked into what kind of possession is enjoyed viz. *de facto* i.e., actual, 'de jure possession', constructive possession, concurrent possession over a small portion of the property. In case the owner is in symbolic possession, there is no dispossession, there can be formal, exclusive or joint possession. The joint possessor/co-owner possession is not presumed to be adverse. Personal law also plays a role to construe nature of possession.

57. The adverse possession requires all the three classic requirements to co-exist at the same time, namely, *nec-vi* i.e. adequate in continuity, *nec-clam* i.e., adequate in publicity and *nec-precario* i.e. adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. *Animus possidendi* under hostile colour of title is required. Trespasser's long possession is not synonym with adverse possession. Trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point in time. Possessor looks after the property, protects it and in case of agricultural property by and the large concept is that actual tiller should own the land who works by dint of his hard labour and makes the land cultivable. The legislature in various States confers rights based on possession.

58. Adverse possession is heritable and there can be tacking of adverse possession by two or more persons as the right is transmissible one. In our opinion, it confers a perfected right which cannot be defeated on reentry except as provided in Article 65 itself. Tacking is based on the fulfillment of

certain conditions, tacking maybe by possession by the purchaser, legatee or assignee, etc. so as to constitute continuity of possession, that person must be claiming through whom it is sought to be tacked, and would depend on the identity of the same property under the same right. Two distinct trespassers cannot tack their possession to constitute conferral of right by adverse possession for the prescribed period.

59. We hold that a person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner as the case may be against whom he has prescribed. In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. In case of dispossession by another person by taking law in his hand a possessory suit can be maintained under Article 64, even before the ripening of title by way of adverse possession. By perfection of title on extinguishment of the owner's title, a person cannot be remediless. In case he has been dispossessed by the owner after having lost the right by adverse possession, he can be evicted by the plaintiff by taking the plea of adverse possession. Similarly, any other person who might have dispossessed the plaintiff having perfected title by way of adverse possession can also be evicted until and unless such other person has perfected title against such a plaintiff by adverse possession. Similarly, under other Articles also in case of infringement of any of his rights, a plaintiff who has perfected the title by adverse possession, can sue and maintain a suit.

60. When we consider the law of adverse possession as has developed vis-à-vis to property dedicated to public use, courts have been loath to confer the right by adverse possession. There are instances when such properties are encroached upon and then a plea of adverse possession is raised. In Such cases, on the land reserved for public utility, it is desirable that rights should not accrue. The law of adverse possession may cause harsh consequences, hence, we are constrained to observe that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no rights can accrue by adverse possession.

61. Resultantly, we hold that decisions of *Gurudwara Sahab v. Gram Panchayat Village Sirthala* (supra) and decision relying on it in *State of Uttarakhand v. Mandir Shri Lakshmi Siddh Maharaj* (supra) and *Dharampal (dead) through LRs v. Punjab Wakf Board* (supra) cannot be said to be laying down the law correctly, thus they are hereby overruled. We hold that plea of acquisition of title by adverse possession can be taken by plaintiff under Article 65 of the Limitation Act and there is no bar under the Limitation Act, 1963 to sue on aforesaid basis in case of infringement of any rights of a plaintiff.

62. Let the matters be placed for consideration on merits before the appropriate Bench.

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***State of Punjab v. Gurdev Singh***  
(1991) 4 SCC 1

**AGANNATHA SHETTY, J.** - These appeals against the decision of the High Court of Punjab and Haryana raise a short issue concerning limitation governing the suit for declaration by a dismissed employee that he continues to be in service since his dismissal was void and inoperative. The High Court has observed that if the dismissal of the employee is illegal, void or inoperative being in contravention of the mandatory provisions of any rules or conditions of service, there is no limitation to bring a suit for declaration that the employee continues to be in service.

2. The facts giving rise to these appeals, as found by the courts below, may be summarised as follows:

***C.A. No. 1852 of 1989***

3. The respondent in this appeal was appointed as an ad hoc sub-inspector in the District Food and Supply Department of Punjab State. He absented himself from duty with effect from September 29, 1975. On January 27, 1977, his services were terminated. On April 18, 1984, he instituted the suit for declaration that the termination order was against the principles of natural justice, terms and conditions of employment, void and inoperative and he continues to be in service. The State resisted the suit contending inter alia, that the plaintiff's services were terminated in accordance with the terms and conditions of his ad hoc appointment and the suit was barred by time. The trial court accepted the plea of limitation and dismissed the suit, but on appeal the Additional District Judge, Jullundhar decreed the suit. He observed that the termination order though simpliciter in nature was passed as a measure of punishment. The plaintiff's services were terminated for unauthorised absence without an enquiry and he should have been given an opportunity to explain his conduct by holding proper enquiry. On the plea of limitation, learned Additional District Judge held that no limitation is prescribed for challenging an illegal order. Since the order of termination was bad, the suit was not barred by time. In the second appeal preferred by the State the High Court agreed with the view following its earlier decisions.

***C.A. No. 4772 of 1982***

4. The respondent in this appeal was a Railway Police Constable. He was appointed on November 14, 1977. On March 15, 1979, he was discharged from service for some misconduct. On June 15, 1979, his appeal was rejected by AIG, Railways, Patiala, Punjab. On November 30, 1979, his revision petition was dismissed by the Inspector General of Police, Punjab. On February 12, 1985 he brought a suit seeking declaration that the order discharging him from service and confirmed in the appeal and revision, was illegal, ultra vires, unconstitutional and against the principles of natural justice and he continues to be in service as constable. The trial court dismissed the suit. The appeal preferred by the plaintiff was accepted by the Additional District Judge who decreed the suit as prayed for. He has inter alia stated that the plaintiff was discharged from service in contravention of the mandatory provisions of the rules and as such it has no legal effect. There is no period of limitation for instituting the suit for declaration that

such a dismissal order is not binding upon the plaintiff. While affirming that principle, the High Court dismissed the second appeal in limine.

5. These are not the only cases in which the Punjab and Haryana High Court has taken the view that there is no limitation for instituting the suit for declaration by a dismissed or discharged employee on the ground that the dismissal or discharge was void or inoperative. The High Court has repeatedly held that if the dismissal, discharge or termination of services of an employee is illegal, unconstitutional or against the principles of natural justice, the employee can approach the court at any time seeking declaration that he remains in service. The suit for such reliefs is not governed by any of the provisions of the Limitation Act [See (i) *State of Punjab v. Ajit Singh* [(1988) 1 SLR 96 (P & H)] and (ii) *State of Punjab v. Ram Singh* [(1986) 3 SLR 379 (P & H)].

6. First of all, to say that the suit is not governed by the law of limitation runs afoul of our Limitation Act. The statute of limitation was intended to provide a time limit for all suits conceivable. Section 3 of the Limitation Act provides that a suit, appeal or application instituted after the prescribed “period of limitation” must subject to the provisions of Sections 4 to 24 be dismissed although limitation has not been set up as a defence. Section 2(j) defines the expression “period of limitation” to mean the period of limitation prescribed in the Schedule for suit, appeal or application. Section 2(j) also defines, “prescribed period” to mean the period of limitation computed in accordance with the provisions of the Act. The court’s function on the presentation of plaint is simply to examine whether, on the assumed facts, the plaintiff is within time. The court has to find out when the “right to sue” accrued to the plaintiff. If a suit is not covered by any of the specific articles prescribing a period of limitation, it must fall within the residuary article. The purpose of the residuary article is to provide for cases which could not be covered by any other provision in the Limitation Act. The residuary article is applicable to every variety of suits not otherwise provided for. Article 113 (corresponding to Article 120 of the Act of 1908) is a residuary article for cases not covered by any other provisions in the Act. It prescribes a period of three years when the right to sue accrues. Under Article 120 it was six years which has been reduced to three years under Article 113. According to the third column in Article 113, time commences to run when the right to sue accrues. The words “right to sue” ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted (See (i) *Mt. Bolo v. Mt. Koklan* [AIR 1930 PC 270] and (ii) *Gannon Dunkerley and Co. Ltd. v. Union of India* [(1969) 3 SCC 607]).

7. In the instant cases, the respondents were dismissed from service. May be illegally. The order of dismissal has clearly infringed their right to continue in the service and indeed they were precluded from attending the office from the date of their dismissal. They have not been paid their salary from that date. They came forward to the court with a grievance that their dismissal from service was no dismissal in law. According to them the order of dismissal was illegal, inoperative and not binding on them. They wanted the court to declare that their dismissal was void and inoperative and not binding on them and they continue to be in service.

For the purpose of these cases, we may assume that the order of dismissal was void, inoperative and *ultra vires*, and not voidable. If an Act is void or *ultra vires* it is enough for the court to declare it so and it collapses automatically. It need not be set aside. The aggrieved party can simply seek a declaration that it is void and not binding upon him. A declaration merely declares the existing state of affairs and does not ‘quash’ so as to produce a new state of affairs.

8. But nonetheless the impugned dismissal order has at least a de facto operation unless and until it is declared to be void or nullity by a competent body or court. In ***Smith v. East Elloe Rural District Council*** [1956 AC 736, 769] Lord Radcliffe observed:

“An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.”

9. Apropos to this principle, Prof. Wade states<sup>7</sup>: “the principle must be equally true even where the ‘brand’ of invalidity” is plainly visible; for there also the order can effectively be resisted in law only by obtaining the decision of the court. Prof. Wade sums up these principles:

“The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff’s lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the ‘void’ order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another.”

10. It will be clear from these principles, the party aggrieved by the invalidity of the order has to approach the court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the court within the prescribed period of limitation. If the statutory time limit expires the court cannot give the declaration sought for.

11. Counsel for the respondents however, has placed strong reliance on the decision of this Court in ***State of M.P. v. Syed Qamarali*** [(1967) 1 SLR 228 (SC)]. The High Court has also relied upon that decision to hold that the suit is not governed by the limitation. We may examine the case in detail. The respondent in that case was a Sub-Inspector in the Central Province Police Force. He was dismissed from service on December 22, 1945. His appeal against that order was dismissed by the Provincial Government, Central Provinces and Berar on April 9, 1947. He brought the suit on December 8, 1952 on allegation that the order of dismissal was contrary to the para 241 of the Central Provinces and Berar Police Regulations and as such contrary to law and void, and prayed for recovery of Rs 4724/5/- on account of his pay and dearness allowance as Sub-Inspector of Police for the three years immediately preceding the date of the institution of the suit. The suit was decreed and in the appeal before the Supreme Court, it was urged that even if the order of dismissal was contrary to the provisions of law, the dismissal remained valid until and unless it is set aside and no relief in respect of salary could

be granted when the time for obtaining an order setting aside the order of dismissal had elapsed. It was observed: (SLR p. 234, para 20)

“We therefore hold that the order of dismissal having been made in breach of a mandatory provision of the rules subject to which only the power of punishment under Section 7 could be exercised, is totally invalid. The order of dismissal had therefore no legal existence and it was not necessary for the respondent to have the order set aside by a court. The defence of limitation which was based only on the contention that the order had to be set aside by a court before it became invalid must therefore be rejected.”

12. These observations are of little assistance to the plaintiffs in the present case. This Court only emphasized that since the order of dismissal was invalid being contrary to para 241 of the Berar Police Regulations, it need not be set aside. But it may be noted that Syed Qamarali brought the suit within the period of limitation. He was dismissed on December 22, 1945. His appeal against the order of dismissal was rejected by the Provincial Government on April 9, 1947. He brought the suit which has given rise to the appeal before the Supreme Court on December 8, 1952. The right to sue accrued to Syed Qamarali when the Provincial Government rejected his appeal affirming the original order of dismissal and the suit was brought within six years from that date as prescribed under Article 120 of the Limitation Act, 1908.

13. The Allahabad High Court in *Jagdish Prasad Mathur v. United Provinces Government* [AIR 1956 All 114] has taken the view that a suit for declaration by a dismissed employee on the ground that his dismissal is void, is governed by Article 120 of the Limitation Act. A similar view has been taken by Oudh Chief Court in *Abdul Vakil v. Secretary of State* [AIR 1943 Oudh 368]. That in our opinion is the correct view to be taken. A suit for declaration that an order of dismissal or termination from service passed against the plaintiff is wrongful, illegal or ultra vires is governed by Article 113 of the Limitation Act. The decision to the contrary taken by the Punjab and Haryana High Court in these and other cases (*State of Punjab v. Ajit Singh* and *State of Punjab v. Ram Singh*) is not correct and stands overruled.

14. In the result, we allow the appeals; set aside the judgment and decree of the High Court and dismiss the suit in each case. In the circumstances, however, we make no order as to costs.

\* \* \* \* \*



***Ajaib Singh v. Sirhind Cooperative Marketing-Cum-Processing  
Service Society Limited***

AIR 1999 SC 1354

**R.P. SETHI, J.** - 2. The services of the appellant workman were terminated by the respondent management allegedly without compliance of the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). The dispute regarding his termination of services was referred to the Labour Court by the appropriate Government on 19-3-1982. The management justified their action on the ground that as the workman, being a salesman, had embezzled thousands of rupees, the termination of his services was justified. The jurisdiction of the Labour Court to entertain and adjudicate the reference was also disputed. However, after the evidence of the parties, the Labour Court vide its award dated 16-4-1986 directed reinstatement of the workman with full back wages from 8-12-1981. It may be worth noticing that the issue regarding jurisdiction of the Labour Court to entertain the reference was not pressed by the management. Not satisfied with the award of the Labour Court, the management filed a writ petition in the High Court praying for quashing the award of the Labour Court mainly on the ground of the workman having approached the Court for the grant of the relief after a prolonged delay. The learned Single Judge of the High Court held that the workman was not entitled to any relief as he was allegedly shown to have slept over the matter for 7 years and confronted the management at a belated stage when it might have been difficult for the employer to prove the guilt of the workman. The judgment of the learned Single Judge was upheld by the Division Bench vide the impugned judgment in this appeal.

3. Supporting the impugned judgment, the learned counsel appearing for the respondent management has contended that the principle incorporated under Article 137 of the Limitation Act, 1963 though not specifically made applicable yet would be deemed to be applicable in a case under the Act for the purpose of making a reference in terms of Section 10 thereof. In support of his contentions, he has referred to different judgments under various enactments. The learned counsel appearing for the workman has, however, submitted that the principles incorporated under Article 137 of the Limitation Act cannot be held to be applicable under the Act for the purposes of making a reference of the dispute to the Labour Court and that reliance of the learned counsel on different judgments was misconceived for reasons of not taking note of the special provision of the Act which admittedly is a social welfare legislation intended to protect the interests of the workmen employed in various industries.

4. It is not in dispute that the services of the workman were terminated on 16-7-1974 and he had issued the notice of demand only on 8-12-1981. It is also not disputed that no plea regarding delay appears to have been taken by the management before the Labour Court. It is also acknowledged that Article 137 of the Limitation Act has not been specifically made applicable to the proceedings under the Act seeking reference of industrial disputes to the Labour Court. This Court, in no case, has so far held that either Article 137 of the Limitation Act or the principle incorporated therein is applicable to the proceedings under the Act.

5. Before appreciating the rival contentions urged on behalf of the parties, it has to be noticed as to under what circumstances the Act was enacted and what were the objectives sought to be achieved by its legislation. It cannot be disputed that the Act was brought on the

statute-book with the object to ensure social justice to both the employers and employees and advance the progress of industry by bringing about the existence of harmony and cordial relationship between the parties. It is a piece of legislation providing and regulating the service conditions of the workers. The object of the Act is to improve the service conditions of industrial labour so as to provide for them the ordinary amenities of life and by the process, to bring about industrial peace which would in its turn accelerate productive activity of the country resulting in its prosperity. The prosperity of the country in its turn helps to improve the conditions of labour *Hindustan Antibiotics Ltd. v. Workmen* [AIR 1967 SC 948]. The Act is intended not only to make provision for investigation and settlement of industrial disputes but also to serve industrial peace so that it may result in more production and improve the national economy. In the present socio-political economic system, it is intended to achieve cooperation between the capital and labour which has been deemed to be essential for maintenance of increased production and industrial peace. The Act provides to ensure fair terms to workmen and to prevent disputes between the employer and the employees so that the large interests of the public may not suffer. The provisions of the Act have to be interpreted in a manner, which advances the object of the legislature contemplated in the Statement of Objects and Reasons. While interpreting different provisions of the Act, attempt should be made to avoid industrial unrest, secure industrial peace and to provide machinery to secure the end. Conciliation is the most important and desirable way to secure that end. In dealing with industrial disputes, the courts have always emphasized the doctrine of social justice, which is founded on the basic ideal of socioeconomic equality as enshrined in the Preamble of our Constitution. While construing the provisions of the Act, the courts have to give them a construction, which should help in achieving the object of the Act.

7. This Court in *Bombay Gas Co. Ltd. v. Gopal Bhiva* [AIR 1964 SC 752] held that the provisions of Article 181 (now Article 137) of the Limitation Act apply only to applications which were made under the Code of Civil Procedure and its extension to applications under Section 33-C (2) of the Act Was not justified. This position was further reiterated and explained by this Court in *Town Municipal Council, Athani v. Presiding Officer, Labour Courts* [(1969) 1 SCC 873, 882-83]:

11. It appears to us that the view expressed by this Court in those cases must be held to be applicable, even when considering the scope and applicability of Article 137 in the new Limitation Act of 1963. The language of Article 137 is only slightly different from that of the earlier Article 181 inasmuch as, when prescribing the three years' period of limitation, the first column giving the description of the application reads as 'any other application for which no period of limitation is provided elsewhere in this division'. In fact, the addition of the word 'other' between the words 'any' and 'application' would indicate that the legislature wanted to make it clear that the principle of interpretation of Article 181 on the basis of *ejusdem generis* should be applied when interpreting the new Article 137. This word 'other' implies a reference to earlier articles, and, consequently, in interpreting this article, regard must be had to the provisions contained in all the earlier articles. The other articles in the third division to the Schedule refer to applications under the Code of Civil Procedure, with the exception of applications

under the Arbitration Act and also in two cases applications under the Code of Criminal Procedure. The effect of introduction in the third division of the Schedule of reference to applications under the Arbitration Act in the old Limitation Act has already been considered by this Court in the case of ***Sha Mulchand & Co. Ltd. [Sha Mulchand and Co. Ltd. v. Jawahar Mills Ltd., AIR 1953 SC 98.]*** We think that, on the same principle, it must be held that even the further alteration made in the articles contained in the third division of the Schedule to the new Limitation Act containing references to applications under the Code of Criminal Procedure cannot be held to have materially altered the scope of the residuary Article 137 which deals with other applications. It is not possible to hold that the intention of the legislature was to drastically alter the scope of this article so as to include within it all applications, irrespective of the fact whether they had any reference to the Code of Civil Procedure.

12. This point, in our opinion, may be looked at from another angle also. When this Court earlier held that all the articles in the third division to the Schedule, including Article 181 of the Limitation Act of 1908, governed applications under the Code of Civil Procedure only, it clearly implied that the applications must be presented to a court governed by the Code of Civil Procedure. Even the applications under the Arbitration Act that were included within the third division by amendment of Articles 158 and 178 were to be presented to courts whose proceedings were governed by the Code of Civil Procedure. At best, the further amendment now made enlarges the scope of the third division of the Schedule so as also to include some applications presented to courts governed by the Code of Criminal Procedure. One factor at least remains constant and that is that the applications must be to courts to be governed by the articles in this division. The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than courts, such as a quasi-judicial tribunal, or even an executive authority. An Industrial Tribunal or a Labour Court dealing with applications or references under the Act are not courts and they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure. We cannot, therefore, accept the submission made that this article will apply even to applications made to an Industrial Tribunal or a Labour Court. The alterations made in the article and in the new Act cannot, in our opinion, justify the interpretation that even applications presented to bodies, other than courts, are now to be governed for purposes of limitation by Article 137.

8. In ***Sakuru v. Tanaji*** [AIR 1985 SC 1279] it was held that the provisions of the Limitation Act applied only to proceedings in courts and not to appeals or applications before the bodies other than courts such as quasi-judicial tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. The view taken by this Court in ***Municipal Council, Athani*** [(1969) 1 SCC 873] and ***Nityananda M. Joshi v. LIC of India*** [(1969) 2 SCC 199] was reiterated with approval.

9. In *Jai Bhagwan v. Ambala Central Coop. Bank Ltd.* [AIR 1984 SC 286] this Court declined to set aside the order of reinstatement of the workman who was shown to have approached the Court after a prolonged delay. However, in the circumstances of the case, the Court directed the workman to be reinstated in service with continuity from the date on which his services were terminated but having regard to the fact that he had raised the industrial dispute after a considerable delay without doing anything in the meanwhile, he was not awarded the back wages. The grant of half back wages from the date of termination of service until the date of order and full back wages from that date till his reinstatement was found in the circumstances to meet the ends of justice. In *H.M.T. Ltd. v. Labour Court* ((1994) 2 SCC 38) where there was a delay of 14 years in invoking the jurisdiction of the court, this Court found that instead of full back wages, the grant of 60 per cent of the back wages upon the reinstatement of the workman would meet the ends of justice.

10. It follows, therefore, that the provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defense. No reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. Reliance of the learned counsel for the respondent management on the Full Bench judgment of the Punjab and Haryana High Court in *Ram Chander Morya v. State of Haryana* [(1999) 1 SCT 141 (P & H)] is also of no help to him. In that case the High Court nowhere held that the provisions of Article 137 of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided nor any guidelines to determine as to what shall be the period of limitation in such cases". However, it went on further to say that "reasonable time in the cases of labour for demand of reference or dispute by appropriate Government to labour tribunals will be five years after which the Government can refuse to make a reference on the ground of delay and laches if there is no explanation to the delay".

We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an application under Section 33-C of the Act to be adjudicated. It is not the function of the court to prescribe the limitation where the legislature in its wisdom had thought it fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal views of the Judges presiding over the Court cannot be stretched to authorise them to interpret law in such a manner, which would amount to legislation intentionally left over by the legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purposes of invoking the jurisdiction of the courts/boards and tribunal under the Act.

11. In the instant case, the respondent management is not shown to have taken any plea regarding delay as is evident from the issues framed by the Labour Court. The only plea raised in defense was that the Labour Court had no jurisdiction to adjudicate the reference and the termination of the services of the workman was justified. Had this plea been raised, the workman would have been in a position to show the circumstances preventing him in approaching the Court at an earlier stage or even to satisfy the Court that such a plea was not sustainable after the reference was made by the Government. The learned Judges of the High Court, therefore, were not justified in holding that the workman had not given any explanation as to why the demand notice had been issued after a long period. The findings of facts returned by the High Court in writ proceedings, even without pleadings were, therefore, unjustified. The High Court was also not justified in holding that the courts were bound to render an even-handed justice by keeping balance between the two different parties. Such an approach totally ignores the aims and object and the social object sought to be achieved by the Act. Even after noticing that "it is true that a fight between the workman and the management is not a just fight between equals", the Court was not justified to make them equals while returning the findings, which if allowed to prevail, would result in frustration of the purpose of the enactment. The workman appears to be justified in complaining that in the absence of any plea on behalf of the management and any evidence, regarding delay, he could not be deprived of the benefits under the Act merely on the technicalities of law. The High Court appears to have substituted its opinion for the opinion of the Labour Court, which was not permissible in proceedings under Articles 226/227 of the Constitution.

12. We are, however, of the opinion that on account of the admitted delay, the Labour Court ought to have appropriately moulded the relief by denying the appellant workman some part of the back wages. In the circumstances, the appeal is allowed, the impugned judgment is set aside by upholding the award of the Labour Court with the modification that upon his reinstatement the appellant would be entitled to continuity of service, but back wages to the extent of 60 per cent with effect from 8-12-1981 when he raised the demand for justice till the date of award of the Labour Court, i.e., 16-4-1986 and full back wages thereafter till his reinstatement would be payable to him. The appellant is also held entitled to the costs of litigation assessed at Rs. 5000 to be paid by the respondent management.

\* \* \* \* \*

THE END