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CIVIL PROCEDURE

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I INTRODUCTION

IN THE year under survey, the Code of Civil Procedure (CPC) has not undergone any significant change either in the form of legislative amendment or through judicial decisions. However, much of valuable judicial time of the Supreme Court seems to have been spent in repeatedly correcting the decisions of the High Courts on second appeals under section 100, CPC and violations of some well-settled principles. Further, the Supreme Court decided the issue of jurisdiction of civil court in respect of matters covered by the Financial Institution Act, 1993 and the Industrial Disputes Act, 1947. This survey attempts to analyze the important cases decided by the Supreme Court as reported in the year 2009.

II SECOND APPEAL

Without formulating any substantial questions of law

In *Koppisetty Venkat Ratnam* v. *Parmarti Venkayamma*,[1] the apex court, after tracing the history of second appeals from *sadar diwani adalat* onwards and also citing various judgments since 1976 amendment of the CPC, reiterated that the High Courts have only limited jurisdiction to adjudicate the substantial questions of law under section 100, CPC. The court observed: [1a]

> We have cited only some cases and these cases can be easily multiplied further to demonstrate that this Court is compelled to interfere in a large number of cases decided by the High Courts under Section 100 CPC. The Supreme Court has eventually to set aside these judgments and remit them to the respective High Courts for being decided *de novo* after formulating substantial questions of law. Unfortunately, several years are lost in the process. Litigants find it both extremely expensive and time consuming. This is one of

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1 (2009) 4 SCC 244.

1a *Id*. at 254.

> the main reasons of delay in the administration of justice in civil matters.

While remitting the case to the High Court, the court expressed its concerns over this tendency of the High Courts which is the primary cause of accumulation of arrears of second appeals. The Supreme Court also fixed a specific date for appearance of the parties before the High Court.

In *Narayanan Rajendran* v. *Lekshmy Sarojini*,[2] in a case from the Kerala High Court, the Supreme Court again deplored the frequent interference with concurrent findings of facts being made by High Courts in second appeals, without formulating any substantial question of law. Similarly, in *Rur Singh* v. *Bachan Kaur*,[3] the Supreme Court held that a finding of fact arrived at by the trial court and/or the first appellate court may be interfered with in a second appeal only when a substantial question of law arises for consideration.[4]

Dismissing second appeal *in limine*

In *Kausalyabai & Akkabai* v. *Hanschandra Munnalal Gupta*,[5] the apex court cautioned the Bombay High Court in dismissing a second appeal *in limine*. In this case, a suit was filed for recovery of possession of ancestral property among brothers and sisters which they had inherited from their father. The respondent had filed a suit contending that he held permanent lease over the property and the appellant's possession was only as a licensee. The appellant contended before the trial court that she was in possession of the property much before her father's death and was also the owner of the property through adverse possession. The trial court dismissed the suit but the first appellate court reversed this order holding that the respondent was already having title to the property. The High Court dismissed the second appeal *in limine*. On appeal, the Supreme Court held that a second appeal cannot be dismissed *in limine* without considering all the relevant questions of law. It observed:[6]

> If the contention of the appellant that the property belonged to her father, and the same devolved on the plaintiff and his brother in equal shares, is correct, the subsequent events which have taken place, in our opinion, should have been taken into consideration by the High Court. If the other brother of the plaintiff had an equal share in the property, who is now dead, and whose heirs and legal

2 (2009) 5 SCC 264.
3 (2009) 11 SCC 1.
4 The same view was reiterated in *Tara Chand* v. *Municipality Gharaunda* (2009) 13 SCC 412; *Rameshwar Dayal Mangala alias Ramesh Chand* v. *Harish Chand* (2009) 4 SCC 800; *Ragulavalasa Chiranjeevi Rao* v. *State of Andhra* (2009) 13 SCC 33; *Kamla* v. *Gaurav Kumar Gupta* (2009) 13 SCC 25; *Bonder* v. *Hem Singh* (2009) 12 SCC 310, *etc.*
5 (2009) 5 SCC 130.
6 *Id.* at 131.

representatives are said to be residing in the same premises, the High Court may have to consider the effect of their non-impleadment in the suit.

Dismissal of second appeal on the basis of a factually incorrect conclusion

The apex court, while deciding an appeal against the decision of the High Court in *Katla Muthyal Naidu* v. *Kothapalle Venkatappa Naidu*,[7] found that the High Court had dismissed the second appeal primarily on the ground that there was no plea of adverse possession anywhere in the plaint. The apex court found that the conclusion of the High Court was factually incorrect. In view of this, the impugned judgment of the High Court was set aside and the matter was remitted for fresh consideration.

Sale for enforcement of security in restitution proceedings

The important question in *Chinnakarupathal* v. *A.D. Sundarabai*,[8] was regarding the applicability of order 34, rule 5 and order 21 of CPC when a property was being sold for enforcing a security in a restitution proceedings under sections 144 and 145 of CPC. While distinguishing such a sale from a sale arising out of a mortgage proceeding, the apex court held that such a sale would be governed by the provisions of order 21 and not order 34, rule 5. The court held that on reversal of a decree, an appellant is entitled to restitution of the pre-appeal deposit withdrawn by the respondent/plaintiff, by sale of the land given as security by the respondent/plaintiff while withdrawing the pre-appeal deposit.

Review petition after dismissal of a special leave petition on the same issue and interim orders before deciding on its maintainability

In *Director General of Police, CRPF, New Delhi* v. *Ramalingam*,[9] case related to disciplinary proceedings initiated against the respondent and two promotions claimed by him during the pendency of the disciplinary proceedings. The respondent filed a special leave petition against the dismissal of writ appeal by the High Court. But the special leave petition was dismissed. Thereafter, the respondent again filed a review petition in the High Court seeking review of the dismissal of writ appeal. He also filed two miscellaneous petitions on which the High Court passed *interim* orders allowing respondent to continue in service till the review petition was decided. The Supreme Court held that such a review petition was not maintainable considering the fact that a special leave petition on the same issue was dismissed. The apex court further opined that the High Court ought not to have given *interim* orders without deciding on the maintainability of the review petition. The court held that the High Court could not have passed the *interim* order, which virtually meant allowing the

7 (2009) 12 SCC 305.
8 (2009) 1 SCC 86.
9 (2009) 1 SCC 193.

review petition, without deciding the question of maintainability of the review petition, as it was not permissible in law.[10]

Transferring the case from one district court to another

In *Jitendra Singh* v. *Bhanu Kumari,*[11] the Rajasthan High Court transferred a case under section 24 of the CPC from one district court to another without issuing notice and hearing the party against whom the transfer order was sought. The Supreme Court observed:[12]

> The purpose of Section 24 CPC is merely to confer on the court a discretionary power. A court acting under Section 24 CPC may or may not in its judicial discretion transfer a particular case. Section 24 does not prescribe any ground for ordering the transfer of a case. In certain cases it may be ordered suo motu and it may be done for administrative reasons. But when an application for transfer is made by a party, the court is required to issue notice to the other side and hear the party before directing transfer. To put it differently, the court must act judicially in ordering a transfer on the application of a party. In the instant case the reason which has weighed with the High Court for directing transfer does not really make out a case for transfer.

Power to grant injunction *suo motu*

Can an injunction be granted without any application from the aggrieved party? This issue was raised in *Rikhabsao Nathusao Jain* v. *Corporation of the City of Nagpur*.[13] The facts of the case in nutshell were thus: The respondent no. 2 filed an application before the corporation of Nagpur (respondent no. 1) for sanctioning a construction plan in his plot. But respondent no. 1 did not sanction it within the stipulated time. Invoking the deemed sanction provision of the concerned law, respondent no. 2 started construction. Aggrieved by this, the appellant, who had a piece of land adjacent to that of the respondent no. 2, filed an injunction application under section 286(5) of the City of Nagpur Corporation Act, 1948 before the district judge for mandatory and temporary injunction against the unauthorized constructions of respondent no. 2. The district judge granted *interim* injunction against the construction by respondent no. 2. Thereafter, respondent no. 1 returned the plan of respondent no. 2, as they were found to be defective. Subsequently, on 21.10.1983, the district judge *suo motu* directed the respondent no. 1 corporation to reconsider the plan of respondent no. 2. The district judge even sent a contempt notice for compliance. Consequently, the respondent no. 1 sanctioned a second plan

10 *Id.* at 195.
11 (2009) 1 SCC 130.
12 *Id.* at 133.
13 (2009) 1 SCC 240.

of respondent no. 2. Thereafter, the district judge vacated the stay order and construction was completed. Aggrieved by this, the appellant approached the High Court and subsequently to the Supreme Court. On appeal, the apex ruled:[13a]

> District court had no jurisdiction to direct Respondent 1 to reconsider the matter of granting sanction of building plan without the defect pointed out by it rectified. In terms of Section 287 of the City of Nagpur Corporation Act, 1948 the jurisdiction of the District Judge is limited. It is difficult to comprehend that the District Judge has an implied power to grant mandatory injunction and that too *suo motu*. If the contention that the District Judge has all the powers, whether incidental or supplemental, it is difficult to comprehend as to why the legislature has barred the jurisdiction of the civil court. Respondent 2 did not file any application for a direction upon Respondent 1 to consider his application for grant of sanction of the bulding plan. The District Judge passed the order *suo motu*…. Even assuming that the court has the implied power to grant injunction and that too mandatory in nature *de hors* the provisions of Section 286(5) of the Act, principles enunciated by the Supreme Court, from time to time in this behalf must be borne in mind. An implied power on that part of civil court is conceived of having regard to the interest of the parties, as for example, power to admit appeal includes power to stay. But the power to grant injunction is a special power, which may be found to be absent in certain jurisdictions, as for example, the provisions of the Consumer Protection Act. If a jurisdiction is confined to grant mandatory injunction, the court may in a given case also exercise its power to pass prohibitory injunction. Again if an order of injunction can be passed in favour of the applicant, in a given case, it may be passed in favour of the non-applicant also. But such a power must be exercised whether in favour of the applicant or non-applicant, having regard to the scope of the limited jurisdiction to be exercised by the District Judge in terms of Section 286(5) of the Act.[14]

Non-disposal of redetermination application under section 28-A of Land Acquisition Act when several connected matters were *sub judice*

In *Kendriya Karamchari Sehkari Grah Nirman Samiti Ltd* v. *State of U.P.*,[15] the question of law before the court was regarding an increase in the compensation amount in a particular land acquisition case when several other connected matters were pending before the High Court. Several acres of land was acquired for 'public purpose' under the Land Acquisition Act,

13a. *Id*. at 241-242
14 *Id*. at 251-252.
15 (2009) 1 SCC 754.

1894 and compensation was awarded to landowners at the rate of Rs 43.64 per square yard. Thereafter, on a reference by the land acquisition officer under section 18 of the Act, the reference court enhanced it to Rs 148.75 per square yard with 30 per cent *solatium* and 12 per cent *per annum* interest. The authorities preferred an appeal against this order in the High Court, which passed *interim* order of stay. According to the order of the High Court, the claimants were permitted to withdraw 25 per cent of the compensation amount without furnishing security and further 25 per cent on furnishing security. The remaining amount (50 per cent) was to be invested in fixed term deposit in a nationalised bank.

The appellant, another land owner in the same locality whose land was also acquired, could not make reference along with other landowners under section 18 of the Act. The appellant, therefore, filed an application to the additional district magistrate, land acquisition, under section 28-A of the Act praying, *inter alia*, that the land of the applicant had been acquired for public purpose and could not challenge the award passed by the land acquisition officer. The main grievance of the appellant was that though in the light of the decision of the reference court allowing the reference and granting enhanced compensation to other landowners, the appellant also ought to have been granted similar benefit. But the additional district magistrate quoting two government orders[16] took no decision on his application and kept the same pending. Aggrieved by the long pendency of his case before the additional district magistrate, the appellant filed a writ petition before the High Court challenging the government orders, which was dismissed. A subsequent revision petition was also dismissed.

The apex court considered the matter in detail and decided that there was "no illegality in keeping the applications under Section 28-A of the Act pending till the issue is finally settled by the Court and a decision has been arrived at."[17] The court held:[18]

> It is true that once the Reference Court decides the matter and enhances the compensation, a person who is otherwise eligible to similar relief and who has not sought reference, may apply under Section 28-A of the Act. If the conditions for application of the said provision have been complied with, such person would be entitled to the same relief which has been granted to other persons seeking reference and getting enhanced compensation. But, it is

16 The government orders provided that if an order passed by a reference court enhancing compensation was challenged by the authorities and the matter was pending before a High Court or the Supreme Court and an application under section 28-A had been made by the persons who had not sought reference, such applications should be kept pending till the matter was finally disposed of by the High Court or by the Supreme Court. The government orders also mandated that no enhanced compensation should be paid to the applicants under section 28-A of the Act at the enhanced rate.

17 *Id.* at 765.

18 *Ibid.*

> equally true that if the Reference Court decides the matter and the State or acquiring body challenges such enhanced amount of compensation and the matter is pending either before the High Court or before this Court (the Supreme Court), the Collector would be within his power or authority to keep the application under Section 28-A of the Act pending till the matter is finally decided by the High Court or the Supreme Court as the case may be. The reason being that the decision rendered by the Reference Court enhancing compensation has not attained "finality" and is sub judice before a superior court. It is, in the light of the said circumstance that the State of U.P. issued two Government Orders....

Power of the executing court to modify decree

Can an executing court vary or modify a decree? This issue was raised in *Deepa Bhargava* v. *Mahesh Bhargava*.[19] In this case, as per a consent decree, the plaintiffs were entitled to claim interest on the decreed amount at the rate of 18 per cent *per annum* if the defendants failed to pay the amount within the stipulated time. The High Court sitting in revision remitted the matter to the executing court to decide whether the stipulated interest rate was in the nature of a penalty. The High Court also directed the executing court to decide on the legality of such a high rate of interest within the meaning of section 74 of the Indian Contract Act, 1872. Pursuant to this order, the executing court directed that the amount of interest payable should be calculated at the rate of 14 per cent *per annum*. In the writ petition that followed, the High Court further reduced the interest rate to 9 per cent *per annum*. On appeal, the apex court held that the executing court had no jurisdiction to travel beyond the decree. The court also observed that the High Court, while exercising revisional jurisdiction, had no jurisdiction to invoke the provisions of section 74 of the Contract Act, which for all intent and purport, amounted to modification of a valid decree passed by a competent court of law. The court further held that even if the interest rate was penal in nature, the executing court was bound by the terms of the decree.

Inclusion of property in the list of properties after preliminary decree

Can a new property be included in the list of properties after passing of the preliminary decree in a partition suit? Answering this question in *Satnam Singh* v. *Surender Kaur*,[20] the Supreme Court reminded the courts below that they must be ready and willing to rectify their mistakes. The facts in brief are as follows: In a suit for partition the written statement was filed and subsequently amended whereby another property was also included. In

19 (2009) 2 SCC 294.
20 (2009) 2 SCC 562.

the preliminary decree, the trial court left out this newly added property. On an application filed by the defendant under section 152 read with order 20, rule 18, CPC for including the left out property in the preliminary decree, the trial court amended the decree accordingly. But in a revision, this order of the trial court was set aside by the High Court. The Supreme Court held that as no issue regarding the left out property was framed, trial court rightly rectified its mistake by amending the decree to that effect. The apex court also cautioned the High Court, holding that the courts must be ready and willing to rectify their mistakes. The court opined, "The trial court felt that it had committed a mistake. In such a situation, the court, in our opinion, committed no infirmity in directing rectification of its mistake."[21]

Non-consideration of relevant factors while disposing an appeal

In *Nicholas V. Menezes* v. *Jospeh M. Menezes*,[22] the Supreme Court reminded the Bombay High Court about the elementary principle that a first appeal cannot be decided without calling for the records and proceedings of the trial court, without examining the reasons given by the trial court and without passing a reasoned speaking order. The court held:[23]

> It is well settled that while deciding a first appeal, the High Court must consider the evidence on record, oral and documentary and also the questions of law raised before it and at the same time it was the duty of the Court to consider the reasons given by the trial court against which the first appeal was filed and thereafter dispose of the same after passing a speaking and reasoned order in accordance with law.

Purpose of recalling witnesses after their examination was completed

In *Vadiraj Naggappa Vernekar* v. *Sharadchandra Prabhakar Gogate*,[24] the Bombay High Court cautioned that recalling of a witness under order 18, rule 7, CPC was not for the purpose of filling up omissions in the evidence of that witness who had already been cross-examined after his evidence by way of an affidavit. In this case, the apex court corrected the decision of the High Court by holding that order 18, rule 17, CPC was not intended to be used to fill up omissions in the evidence of a witness who had already been examined. But the main purpose was to enable the court to clarify any doubts that may have arisen during the course of his examination. The court may exercise this provision by recalling the witness on its own motion or through an application by any party to the suit.

21 *Id*. at 569.
22 (2009) 4 SCC 791.
23 *Ibid*.
24 (2009) 4 SCC 410.

Writ jurisdiction in pending civil suits

In *Radhey Shyam* v. *Chhabi Nath*,[25] a question arose whether writ proceedings under article 226 of the Constitution of India can be used for interfering in pending civil suits in the trial court wherein all the parties are private individuals. The appellants had filed a civil suit for restraining the defendants from interfering with the possession of the disputed land. An interlocutory application seeking temporary injunction was also filed along with the plaint. Even though the trial court issued notices to the defendants it did not grant any *ad interim ex parte* injunction. Being aggrieved thereby, the appellants filed a civil revision before the district judge which was admitted and an order of maintenance of *status quo* was passed till the disposal of the application for temporary injunction. It was also observed by the district judge that after the plaintiff's suit was decided, the revision petition would become infructuous. Against the said order, the respondent-defendants filed a writ petition before the High Court and the same was dismissed. Thereafter, the earlier interlocutory application for *interim* injunction was considered by the trial court and the same was allowed. Being aggrieved thereby, the respondent-defendants filed a miscellaneous civil appeal before the district Judge. This miscellaneous civil appeal was allowed by the district judge and the order of the trial court granting *interim* injunction was set aside. The matter was also remanded to the trial court with a direction to rehear the interlocutory application for *interim* injunction. Thereafter, the trial court dismissed the interlocutory application for *interim* injunction as its earlier order granting injunction became infructuous by the effect of the order passed by the district judge. Aggrieved by this, the appellants preferred a revision before the district judge and it was allowed. Against this order, the respondents filed a writ petition in the High Court. The High Court held that the district judge committed an error in remanding the matter to the trial court when in fact the said application had become infructuous. The High Court, therefore, allowed the writ petition and held that the impugned order of the district judge could not be sustained.

The apex court on appeal examined the issue as to whether the High Court in exercise of its extraordinary writ jurisdiction can interfere with a judicial order passed by a civil court of competent jurisdiction. The court felt that an in-depth analysis of this question was necessary because the proceedings in this case arose out of purely civil disputes relating to property and the parties had filed suits before the civil court which were pending. The court also noted that all the parties to the proceedings were private individuals and the state authority under article 12 was not a party to this proceeding. It then examined whether private individuals were amenable to the jurisdiction of writ court in connection with private disputes relating to property, possession and title between private individuals. The

25 (2009) 5 SCC 616.

court found that in the past, the judiciary in India had held that the writ jurisdiction could not be used for deciding private disputes, for which remedies under the general law, both civil or criminal, were available.[26]

Out of above cases, a nine-judge bench in *Naresh Shridhar Mirajkar* v. *State of Maharashtra*[27] had categorically held that a writ "does not lie to quash the judgments of inferior courts of civil jurisdiction."[28] The only exception to this settled position was *Surya Dev Rai* v. *Ram Chander Rai*,[29] where a division bench of the Supreme Court held that "orders and proceedings of a judicial court subordinate to the High Court are amenable to writ jurisdiction of the High Court under Article 226 of the Constitution."[30]

Determination of an issue without any pleading, framing of issue or evidence

The apex court in *Vimalchand Ghevarchand Jain* v. *Ramakant Eknath Jadoo*[31] has held that the Bombay High Court went wrong in deciding that in terms of Order 14, rule 2, Order 6, rule 1 and Order 18, rule 2, CPC, an issue in a civil suit can be determined without any pleading thereon, without any issue having been framed and without any evidence. The court also held that the pleadings of the parties were required to be read as a whole. The defendants, although were entitled to raise alternative and inconsistent plea but should not be permitted to raise pleas which were mutually destructive of each other. It is also a cardinal principle of appreciation of evidence that the court in considering as to whether the deposition of a witness and/or a party was truthful or not may consider his conduct. Equally well settled was the principle of law that an admission made by a party in his pleadings was admissible against him *proprio vigore*.[32]

Nature of order 39, rule 2-A, CPC

In *Food Corporation of India* v. *Sukhdeo Prasad*,[33] criticising the decisions of the lower courts as absurd, perverse, arbitrary,[34] shocking[35] and unfortunate,[36] the Supreme Court explained the purpose and objective

26 See *P.R. Murlidharan* v. *Swami Dharmananda Theertha Padar* (2006) 4 SCC 501; *Sohan Lal* v. *Union of India,* AIR 1957 SC 529; *Mohd. Hanif* v. *State of Assam* (1969) 2 SCC 782; *T.C. Basappa* v. *T. N. Nagappa,* AIR 1954 SC 440; *Hindustan Steel Ltd*. v. *Kalyani Banerjee* (1973) 1 SCC 273; *State of Rajasthan* v. *Bhawani Singh,* 1993 Supp (1) SCC 306; *Mohan Pandey* v. *Usha Rani Rajgaria* (1992) 4 SCC 61 and *Prasanna Kumar Roy Karmakar* v. *State of W.B.* (1996) 3 SCC 403.

27 AIR 1967 SC 1.

28 *Id.,* para 63.

29 (2003) 6 SCC 675.

30 *Id.* at 688.

31 (2009) 5 SCC 713.

32 *Id*. at 726.

33 (2009) 5 SCC 665.

34 *Id*. at 676.

35 *Id.* at 677.

36 *Ibid*.

of order 39, rule 2-A, CPC. The respondents in this case had constructed godowns for the food corporation of India (FCI) after availing a loan from the state bank of India (SBI). After the construction was over, the FCI occupied the godowns for about 5 years on rent. During this period FCI used to deposit the rent due in the loan account in SBI. Thereafter, the FCI vacated the said godowns and surrendered possession to the respondents. On failure to repay the loan amount, SBI filed a suit for recovering the loan amount against respondent. The respondent while contesting the claim of SBI contended that the loan was obtained for the purpose of constructing godowns for FCI which had agreed to continue in occupation of those godowns as tenant until the entire loan due by the respondent to SBI was cleared. They further contended that FCI had vacated the godowns prematurely and that therefore it should be made a party to the suit and made liable for payment of the suit claim. The trial court framed an issue in the suit as to whether the suit was bad for non-joinder of FCI. The court considered it as a preliminary issue and directed FCI to be impleaded as a defendant in the suit. FCI was not given any opportunity to show cause before being impleaded.

While the suit was pending, one of the godowns was again leased to FCI, but on a temporary basis. The tenancy agreement made it clear that FCI could surrender back the godown without any notice whenever the same was not required. On the basis of new development, SBI filed an application in the suit seeking an interim direction to FCI to restrain it from paying the rent for the said godown to the respondent and instead pay it to the loan account of the respondents. The trial court allowed this application by holding that when FCI had earlier taken the godowns on rent for five years, the respondents had authorised the SBI to receive the rent with the condition that if the lease were not continued by FCI, the respondents would be liable to pay the loan amount from their own resources. But since the respondents had disputed depositing the rent amount in their loan account with SBI, the court directed the FCI to deposit the amount in another nationalised bank. The court also directed that the amount so deposited should be dealt with as decided by the court in its final judgement.

After three years, FCI terminated the tenancy agreement after a notice. Through a notice it also informed the respondents that it had deposited the rents in SBI and sent the FD receipt to the court. On receipt of such notice from FCI, the respondent filed an application under order 39, rule 2-A, CPC alleging that FCI had disobeyed the order of the court for depositing the amount in another nationalised bank and instead deposited the amount in SBI itself. The respondents contended that the district manager of FCI should be sent to civil jail and properties of FCI should be attached and auctioned. After this application was dismissed, the respondent filed another application under the same provisions of CPC but this time against FCI, its senior regional manager and three district managers. In the second application also, the respondent prayed that action should be taken against FCI and its officers for contempt, by seizing and auctioning the movable and

immovable properties of FCI and by sending its four officers to prison for not depositing the rents in terms of court order. The FCI and its officers resisted the application.

The trial court allowed the second application by holding that since the amount was not deposited according to the order of the court, the FCI was liable to be punished under order 39, rule 2-A, CPC. It, therefore, directed that the assets of FCI, both movable and immovable, should be attached under order 39, rule 2-A, CPC. Feeling aggrieved, FCI filed an appeal before the Allahabad High Court. The High Court dismissed the appeal by a brief order without prejudice to the rights of FCI to challenge the order of injunction, with an observation that it was not competent to consider the validity of the "injunction order" in an appeal against an order passed under order 39, rule 2-A, CPC for disobedience of the "injunction order." The said order was challenged by FCI before the apex court by special leave.

The Supreme Court held that an injunction was different from prohibitory garnishee order. It was also held that a final or interim order directing payment of money was not an injunction. In the present case, the SBI filed a suit against the respondents. Thereafter at the instance of the respondents, his tenant was also impleaded as another defendant. The SBI claimed the rents of the mortgaged property. Because the respondent disputed such a claim, the trial court ordered the FCI to deposit the rents due in another bank. Subsequently, the respondent filed an application under order 39, rule 2-A against his tenant for alleged disobedience of the directions of the court. The court held that in such a circumstance, the status of the FCI was that of a 'garnishee defendant' and not a 'principal defendant' and the said direction were merely an *interim* prohibitory (garnishee) order and not an injunction. The court held that since the courts direction to FCI was not under order 39, rule 1 or 2, the said application filed by the respondent under order 39, rule 2-A was not maintainable. The apex court also observed that the direction to the FCI not having been made at the instance of the respondent or for his benefit, the respondent had no *locus standi* to maintain the application under order 39, rule 2-A. The court held that order 39, rule 2-A was punitive and akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971 and it should be exercised with great caution and responsibility. It observed:[37]

> The power exercised by a court under Order 39 Rule 2-A of the CPC is punitive in nature, akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. The person who complains of disobedience or breach has to clearly make out beyond any doubt that there was an injunction or order directing the person against whom the application is made, to do or desist from doing some specific thing or act and that there was disobedience or

37 *Id* at 676.

> breach of such order. While considering an application under Order 39 Rule 2-A, the court cannot construe the order in regard to which disobedience/breach is alleged, as creating an obligation to do something which is not mentioned in the "order", on surmises, suspicions and inferences. The power under Rule 2-A should be exercised with great caution and responsibility.

The court held that in such an event, the proper remedy was to levy execution and neither an action under order 39, rule 2-A nor a proceeding under the Contempt of Courts Act, 1971 could be taken. The court also held that contempt jurisdiction cannot be used for enforcement of money decrees or directions/orders of payment of money.

Principles to be followed before allowing an *interim* injunction

In *Kishorsinh Ratansinh Jadeja* v. *Maruti Corpn*,[38] the Gujarat High Court was cautioned that while passing *interim* injunction orders under order 39, rules 1 and 2, it had to consider certain basic principles, namely (i) *prima facie* case (ii) balance of convenience and inconvenience and (iii) irreparable loss and injury. The apex court also deplored the High Court for hearing the application for injunction on the very next day after it was filed without giving an opportunity of controverting the allegations even to those who were parties to the suit. The injunction order restrained a builder from any construction on land bought by them. Setting aside the injunction order, the court said that if the order was set aside, the respondent could be compensated in terms of money and no irreparable loss and injury will be caused to it on that account. On the other hand, if the owners of the property remain restrained from developing the same, it is they who would suffer severe prejudice, as they would be deprived of the benefit of user of their land during the said period.

Whether a complaint to a consumer disputes redressal forum is a suit?

The word "suit" has a technical meaning, which denotes proceedings instituted under section 9 of CPC. All legal proceedings in the country are not suits. There are petitions/complaints/applications before various tribunals or authorities but they are not suits as per section 9. In this context, the apex court in *EICM Exports Ltd.* v. *South Indian Corporation (Agencies) Ltd*,[39] held that a complaint before consumer forum was not a suit.

Judgement based on surmises and conjectures

In *Navanath* v. *State of Maharashtra*,[40] a land acquisition case, the High Court interfered with the decision of the lower court merely on the

38 (2009) 11 SCC 229.
39 (2009) 14 SCC 412.
40 (2009) 14 SCC 480.

basis of 'conjectures and surmises'. Holding such interferences unsustainable, the apex court said that as per section 33 and order 20, CPC, a court of law must base its decision on appreciation of evidence brought on record by applying correct legal principles. The court opined: "The manner, in which the High Court has dealt with the issue, in our opinion, cannot be appreciated. A court of law must base its decision on appreciation of evidence brought on record by applying the correct legal principles. Surmises and conjectures alone cannot form the basis of a judgment."[41]

Non-appreciation of relevant evidence

In *Payappar Sree Dharmsastha Temple Advisory Committee* v. *A.K.Joseph*,[42] the Supreme Court cautioned the High Court for not appreciating the relevant evidence on record. The apex court held that it could not treat as *res judicata* and thereby dismiss a suit of the appellant for eviction of trespassers, when in the earlier suit the trespassers had obtained a decree against the appellant without making the appellant a party even though it was a necessary party.

Difference between review and appeals

The Supreme Court in *Inderchand Jain* v. *Motilal*,[43] held that a High Court sitting as a review court cannot sit in appeal on its own order, rehear the matter as if hearing an appeal and invoke its inherent jurisdiction of reviewing any order.

Amending the plaint twenty years after the preliminary decree

In *Mahavir Prasad* v. *Ratan Lal*,[44] the High Court allowed an amendment in the plaint twenty years after the preliminary decree. Setting aside the High Court order, the apex court held that such an application was highly belated.

Transferring the possession to judgment-debtor after the decree-holder takes possession of suit property

Inderjeet v. *Kulbhushan Jain*,[45] was an appeal against an *interim* mandatory order passed by the High Court by which the appellant/decree-holder was directed to put the respondent/judgment-debtor in possession of the property. Setting aside this order of the High Court, the Supreme Court ruled:[46]

> Since the appellant decree-holder has taken possession of the property in question in execution of the decree, at this stage

41 *Id.* at 493.
42 (2009) 14 SCC 628.
43 (2009) 14 SCC 663.
44 (2009) 15 SCC 61.
45 (2009) 15 SCC 79.
46 *Id.* at 80.

> question of redelivering possession to the judgment-debtor cannot arise at all. This can be done only when a final order is passed by the High Court in the pending revision petition.

Jurisdiction of division bench of the High Court under clause 15 of the letters patent

In *Narendra S. Chavan* v. *Vaishali V. Bhadekar*,[47] the respondent tenant after losing his case before the rent control appellate authority filed a writ petition which was dismissed. The single judge of the High Court also dismissed a restoration petition that was filed against the order of the rent control appellate authority. Instead of challenging these orders in appeal, the respondent tenant filed a letters patent appeal before the division bench of the High Court. The division bench, allowing the same, set aside the orders of the rent control appellate authority on merits. The apex court, holding all this exercise of the division bench as without jurisdiction, observed:[48]

> (T)here was no justification for the Division Bench to go straight into the merits of the matter and all that the Division Bench could have done was to send back the matter to the Single Judge for being decided on merits. That was not done. Instead, the Division Bench went into the merits of the matter…It is stated that this course was adopted because the parties agreed that the writ petition should be restored to file and should be heard and disposed of on merits. We do not understand as to how the Division Bench had the jurisdiction under Clause 15 of the Letters Patent because even if the matter was decided by the Single Judge then the Division Bench would not have had the jurisdiction to decide the matter on merits. Consent does not confer jurisdiction.

Holding the defendant to be a trespasser without framing such issue

In Bis*wanath Agarwalla* v. *Sabitri Bera*,[49] the appellant was enjoying possession of the suit premises in furtherance of a sale agreement dated 18.3.1970 that was entered between him and one A, father of S. The respondents purchased the suit premises from S on 23.7.1980 by a registered sale deed. After that, the respondents served a notice on the appellant in terms of section 106 of the Transfer of Properties Act, 1882, asking the appellant to hand over vacant and peaceful possession alleging that he had been a tenant under S on a monthly rent of Rs 45. The respondent filed a suit in the *munsif* court praying for eviction of the appellant and *mesne* profits. The trial court found that the respondents had proved that they had purchased the suit property from S and the appellant failed to prove his

47 (2009) 15 SCC 166.
48 *Ibid.*
49 (2009) 15 SCC 693.

independent title. The first appellate court, despite finding that relationship of landlord and tenant had not been established, held that respondents were entitled to decree of possession on basis of their general title. The second appellate court held the appellant to be a trespasser and upheld the decree of eviction passed against him. The review application filed against this order was also dismissed. On appeal, the Supreme Court held that to hold the appellant as a trespasser an issue to effect should have been framed. Had such an issue been framed, the defendant could have produced evidence to establish that he had the requisite *animus possidendi*. He could have also taken the plea of adverse possession since he was enjoying the suit premises for more than 12 years prior to the institution of the suit. Remanding the case to the trial court, the apex court opined:[50]

> (K)eeping in view the peculiar facts and circumstances of this case and as the plaintiffs have filed the suit as far back as in the year 1990, the interests of justice should be subserved if we in exercise of our jurisdiction under Article 142 of the Constitution of India issue the following directions with a view to do complete justice to the parties.
>
> (i) The plaintiffs may file an application for grant of leave to amend their plaint so as to enable them to pray for a decree for eviction of the defendant on the ground that he is a trespasser.
> (ii) For the aforementioned purpose, he shall pay the requisite court fee in terms of the provisions of the Court Fees Act, 1870.
> (iii) Such an application for grant of leave to amend the plaint as also the requisite amount of court fees should be tendered within four weeks from date.
> (iv) The appellant-defendant would, in such an event, be entitled to file his additional written statement.
> (v) The learned trial Judge shall frame an appropriate issue and the parties would be entitled to adduce any other or further evidence on such issue.
> (vi) All the evidences brought on record by the parties shall, however, be considered by the court for the purposes of disposal of the suit.
> (vii) The learned trial Judge is directed to dispose of the suit as expeditiously as possible and preferably within three months from the date of filing of the application by the plaintiffs in terms of the aforementioned direction (*i*).

50 *Id*. at 704.

From the above, it is evident that there exists an endemic problem of High Courts entertaining and deciding cases in violation of well settled elementary principles of civil law. This probably calls for formulation of a 'minimum judicial performance standards'. On the basis of this *standard*, the performance of High Court judges may be marked by the Supreme Court collegium, and considered while deciding upon the elevation of High Court judges to the Supreme Court.

III NEW THINKING ON CIVIL JUSTICE FAIRNESS

Uniform procedure for *lok adalats*

The need for 'minimum judicial performance standards' is acutely underlined by the obvious precautions that the Supreme Court had to lay down in *B.P. Moideen Sevamandir* v. *A.M. Kutty Hassan*,[51] for functioning of the *lok adalats*. The *lok adalats* under section 89 aim at lessening the strife among disputants and the case burden of the courts. In this case, the members of the *lok adalat* did not function within their powers. Taking note of this, the apex court observed:[52]

> Thousands of Lok Adalats are held all over the country every year. Many members of the Lok Adalats are not judicially trained. There is no fixed procedure for the Lok Adalats and each Adalat adopts its own procedure. Different formats are used by different Lok Adalats when they settle the matters and make awards. We have come across Lok Adalats passing "orders", issuing "directions" and even granting declaratory relief, which are purely in the realm of courts or specified tribunals, that too when there is no settlement.

The court added: [52a]

> As an award of a Lok Adalat is an executable decree, it is necessary for the Lok Adalats to have a uniform procedure, prescribed registers and standardised formats of awards and permanent record of the awards, to avoid misuse or abuse of the ADR process. We suggest that the National Legal Services Authority as the apex body, should issue uniform guidelines for the effective functioning of the Lok Adalats. The principles underlying following provisions in the Arbitration and Conciliation Act, 1996 relating to conciliators, may also be treated as guidelines to members of Lok Adalats, till uniform guidelines are issued. Section 67 relating to role of

51 (2009) 2 SCC 198.
52 *Id.* at 203.
52a. *Id*. at 203.

> conciliators; Section 75 relating to confidentiality; and Section 86 relating to admissibility of evidence in other proceedings.

The court cautioned:

> The Lok Adalats should also desist from the temptation of finding fault with any particular litigant, or making a record of the conduct of any litigant during the negotiations, in their failure report submitted to the court, lest it should prejudice the mind of the court while hearing the case.

In *Shub Karan Bubna* v. *Sita Saran Bubna*,[53] the Supreme Court recognized the reality that many times a party exhausts his finances and energy by the time he secures the preliminary decree. There is no guarantee that the party will see the fruits of the preliminary decree because the final decree proceeding and execution take decades for completion. The court felt that a conceptual change was required in the CPC so that the emphasis was not only on disposal of suits but also on securing the relief to the litigant. The court held:[54]

> The century old civil procedure contemplates judgments, decrees, preliminary decrees and final decrees and execution of decrees. They provide for a "pause" between a decree and execution. A "pause" has also developed by practice between a preliminary decree and a final decree. The "pause" is to enable the defendant to voluntarily comply with the decree or declaration contained in the preliminary decree. The ground reality is that defendants normally do not comply with decrees without the pursuance of an execution. In very few cases the defendants in a partition suit voluntarily divide the property on the passing of a preliminary decree. In very few cases, defendants in money suits pay the decretal amount as per the decrees. Consequently, it is necessary to go to the second stage, that is, levy of execution, or applications for final decree followed by levy of execution in almost all cases.

The court added:[55]

> A litigant coming to court seeking relief is not interested in receiving a paper decree when he succeeds in establishing his case. What he wants is relief. If it is a suit for money, he wants the money. If it is a suit for property, he wants the property. He

53 (2009) 9 SCC 689.
54 *Id.* at 698.
55 *Ibid.*

> naturally wonders why when he files a suit for recovery of money, he should first engage a lawyer and obtain a decree and then again engage a lawyer and execute the decree. Similarly, when he files a suit for partition, he wonders why he has to first secure a preliminary decree, then file an application and obtain a final decree and then file an execution to get the actual relief. The commonsensical query is: why not a continuous process? The litigant is perplexed as to why when a money decree is passed, the court does not fix the date for payment and if it is not paid, proceed with the execution; when a preliminary decree is passed in a partition suit, why the court does not forthwith fix a date for appointment of a Commissioner for division and make a final decree and deliver actual possession of his separated share. Why is it necessary for him to remind the court and approach the court at different stages?

Suggesting a conceptual change regarding civil litigation, where the emphasis is not only on disposal of suits, but also on securing relief to the litigant, the court held: [55a]

> We hope that the Law Commission and Parliament will bestow their attention on this issue and make appropriate recommendations/ amendments so that the suit will be a continuous process from the stage of its initiation to the stage of securing actual relief.

Exemplary costs in civil cases

In *Ashok Kumar Mittal* v. *Ram Kumar Gupta*, in a suit for specific performance, the courts were of the opinion that both the parties had not approached the court with clean hands. The High Court found that both sides were guilty of having lied on oath and deserved to be prosecuted. On the ground that courts were overburdened with litigation, the High Court decided that instead of directing prosecution, heavy costs should be levied on both the petitioner and the respondents 'to be paid to the State which spends money on providing the judicial infrastructure.'[56] The High Court then imposed exemplary costs of Rs 1,00,000 on the petitioner and respondent and directed that the costs should be deposited with the Delhi High Court legal services committee.

The counsel for the petitioner contended that levying such costs against the petitioner was not warranted. He also submitted that, as the appeal before the High Court was in a civil suit, costs were governed by sections 35 and 35-A, CPC and cannot exceed what is leviable under those provisions. Under section 35, award of costs is discretionary but subject to the conditions and

55a. *Id*. at 699-700.
56 *Id*. at 658.

limitations as may be prescribed and the provisions of any law for the time being in force. Under section 35-A, compensatory costs for vexatious claims and defences may not exceed Rs 3,000. Both these provisions aim to recompense a litigant for the expense incurred by him in litigation to vindicate or defend his right. It is, therefore, payable by a losing litigant to his successful opponent.

The apex court held that the question when a party has already paid the prescribed court fee, on what grounds such an order is passed is debatable. One contention can be that these provisions do not in any way affect the wide discretion vested in the High Court in exercise of its inherent power to award costs in the interests of justice in appropriate civil cases. Another contention is that though award of costs is within the discretion of the court, it is subject to such conditions and limitations as may be prescribed and subject to the provisions of any law for the time being in force and where the issue is governed and regulated by these sections, there is no question of exercising inherent power. It may also be pointed that huge costs are normally awarded only in writ proceedings and public interest litigations, and not in civil litigation. Under these circumstances, the court held that "the principles and practices relating to levy of costs in administrative law matters cannot be imported mechanically in relation to civil litigation governed by the Code."[57] However, the court held that the present system of levying meagre costs in civil matters, no doubt, was wholly unsatisfactory and did not act as a deterrent to vexatious or luxury litigation borne out of ego or greed, or resorted to as a 'buying-time' tactic[58] and held that a "more realistic approach relating to costs may be the need of the hour" and kept this issue open for the present as this question involved moral and ethical issues.

Civil courts and tribunals

In *Nahar Industrial Enterprises Ltd* v. *Hongkong & Shanghai Banking Corporation*,[59] the Supreme Court held that all courts are tribunals but all tribunals are not courts. Similarly, all civil courts are courts but all courts are not civil courts. Accordingly, it resolved the troublesome relationship between the debt recovery tribunals under the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 and the civil courts on the issue of transfer of cases from civil courts to the tribunal. It held that a debt recovery tribunal under the aforesaid Act was not a civil court because a debtor can initiate no independent proceedings before it. The fact that a legal fiction has been created that the tribunal shall be deemed to be a civil court for purposes of section 195 and Chapter XXVI of Cr PC suggests that the Parliament did not intend to oust the jurisdiction of a civil court for

57 *Ibid.*
58 *Ibid.*
59 (2009) 8 SCC 646.

debtors; that the tribunal does not come in the hierarchy of court in section 3 of the CPC. It is also a reason that a tribunal cannot pass a decree but can issue only recovery certificates. Similarly even the continuance in the tribunal of a counterclaim of a debtor was dependent on the continuance of the applications for recovery of debt filed by a bank. Another reason is that a civil court's jurisdiction has been statutorily ousted under sections 17 and 18 of the 1993 Act. On the basis of these reasons, the court held that a debtor's suit in the civil court against a bank cannot be transferred to the debt recovery tribunal by use of the transfer power of the High Court or of the Supreme Court under section 25 of the CPC.[60]

60 See *Rajasthan State Road Transport Corporation* v. *Bal Mukund Bairwa* (2009) 4 SCC 299.