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CIVIL PROCEDURE

P. Puneeth[*]

I INTRODUCTION

ENSURING MEANINGFUL participation in the adjudicative process to all stakeholders while "balancing cost, time and accuracy at the same time" is the larger objective of procedural law.[1] Law courts should always bear this in mind while dealing with various procedural questions that arise in varying contexts in which varieties of civil disputes come – up for adjudication.

In the survey year, many procedural questions arose before different benches of the apex court in large number of cases. The present survey examines how those questions were dealt with and answered by them. Though the primary focus is on the provisions of Civil Procedure Code, 1908 (CPC) that came -up for interpretation and/ or application, the survey also covers judicial decisions that dealt with the procedural provisions of certain other laws *viz*., the Punjab Courts Act, 1918; the Punjab Value Added Tax Act, 2005; Rajasthan Tenancy Act, 1955; the Wakf Act, 1995; Urban Land (Ceiling and Regulation) Act, 1976; Letters Patent Act, 1865; the Administrative Tribunals Act, 1985; Commercial Courts Act, 2015; National Green Tribunal Act, 2010; *etc.*, Attempt has been made to state the legal positions laid down by the court as lucidly and succinctly as possible. The present survey has been divided into twelve sections including 'introduction' and 'conclusion'. All the relevant cases have been discussed in the appropriate section.

II JURISDICTION

'Jurisdiction', as noted in *Nusli Neville Wadia* v. *Ivory Properties*,[2] "is the power to decide and not merely the power to decide correctly… It is the power to hear and determine… It does not depend upon the correctness of the decision made."[3] It refers to an authority of law court "to act officially in a particular matter in hand… and render binding decisions".[4] There is a difference between the 'existence' of jurisdiction

* Associate Professor of Law, Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Delhi.

1 *Ashok Kumar Kalra* v. *Wing Cdr Surendra Agnihotri*, 2019 SCC OnLine SC 1493.

2 (2020) 6 SCC 557.

3 *Id*., para 20.

4 *Ibid*.

and the 'exercise' thereof. If there is material irregularity or illegality in the exercise of jurisdiction it would, no doubt, amount to "jurisdictional error" but it is not the case of lack of jurisdiction.

What is more important to be noted about the word 'jurisdiction' is that it is a "verbal coat of many colours". It derives its true meaningfrom the context in which it is used. It has been used in CPC in several provisions and also in various other special or local laws. It does not carry uniform or same meaning everywhere. Its meaning differs from context to context.

Civil court's jurisdictions and their exclusion

Section 9, CPC confers on civil courts widest jurisdiction to try all suits of civil nature unless barred "either expressly or impliedly". In this provision, the word 'jurisdiction' correlates with the 'cognizance'.[5]

Questions regarding exclusion of the jurisdiction of civil courts, either expressly or impliedly, came – up before the apex court in several cases in the survey year.

In *Pyarelal* v. *Shubhendra Pilania*,[6] the apex court, taking into account the provisions contained in sections 88, 207 read with entry 5 of the third schedule, and section 256 of the Rajasthan Tenancy Act, 1955, held that the civil courts are barred from entertaining suits seeking determination of *Khatedari* rights. It observed that a claimant seeking, *inter alia*, a decree of *Khatedari* rights cannot approach the civil court with a civil suit as revenue courts, as per the Act, have exclusive jurisdiction to determine such rights. In cases, where *Khatedari* rights are yet to be determined, the revenue courts shall be approached first and only after the determination of such rights, a claimant may file a civil suit for any other relief.

In *Punjab Wakf Board* v. *Sham Singh Harike*,[7] the apex court dealt with an issue relating to the exclusion of jurisdiction of the civil courts by the Wakf Act, 1995, which provided for the establishment of tribunals for "the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act.…".[8] The Act also explicitly excluded the jurisdiction of the civil courts with regard to those matters "which is required by or under this Act to be determined by a Tribunal."[9]Section 83 of the said Act was amended by Act 27 of 2013 further expanding the jurisdiction of the tribunals to include cases relating to eviction of tenants from wakf property and determination of rights and obligations of the lessor and lessee of such property. In the instant case, the apex court, noting that both the suits giving rise to the appeal were filed before the 2013 amendment Act, decided the appeal by applying section 83 as it existed before the amendment Act. The apex court, after considering the provisions of the Act and the law laid down in *Ramesh Gobindram*[10] and other cases,

5 *Nusli Neville Wadia* v. *Ivory Properties*, *Supra* note 2.

6 (2019) 3 SCC 692.

7 (2019) 4 SCC 698.

8 Sec. 83, the Wakf Act, 1995.

9 Sec. 85, *Ibid*.

10 *Ramesh Gobindram* v. *SugraHumayunMirzaWakf* (2010) 8 SCC 726.

reiterated that the bar of jurisdiction of civil court is confined only to disputes, questions or other matters relating to wakf or wakf property which are required to be determined by the tribunal under the Act and does not extend to every dispute pertaining to wakf or wakf property. Civil courts can continue to exercise jurisdictions over the wakf or wakf property with regard to those disputes, questions or matters, which are not required under the law to be determined by the tribunal. Further, relying on *Haryana Wakf Board*,[11] it was also clarified that the tribunal has the jurisdiction to decide the question as to whether a suit property is wakf property or not. It, however, held that the tribunal does nothave jurisdiction to entertain the suit against the lessee of wakf property for delivery of possession and permanent injunction. For claiming such relief, as per the law as existed before the 2013 amendment Act, the wakf board had to approach the civil court.

In *Competent Authority Calcutta, Under the Land (Ceiling and Regulation) Act, 1976* v. *David Mantosh*,[12]the question as to whether the jurisdiction of the civil court is ousted by the Urban Land (Ceiling and Regulation) Act, 1976 in relation to the land which is subject to proceedings under the Act arose for consideration before the apex court. Relying on the first of the seven tests laid down by the constitution bench in *DhulaBai*[13] to determine when the jurisdiction of the civil court under section, 9 CPC can held to have been ousted either expressly or impliedly, the apex court answered the question in the affirmative. For holding that the jurisdiction of the civil court is impliedly ousted by the Act, 1976 the court gave the following reasons:[14]

> *First*, the Act in question gives finality to the orders passed by the appellate authority [refer to Section 33(3)].
>
> *Second*, the Act provides adequate remedies in the nature of appeals, such as first appeal to the Tribunal and second appeal to the High Court. [refer to Sections 12(4), 13 and 33(1)].
>
> *Third*, the Act is a complete code in itself and gives overriding powers on other laws (refer to Section 42).
>
> *Fourth*, the Act expressly excludes the jurisdiction of the Civil Court in relation to the cases falling under Sections 30 and 40 (refer to Section 30(5) and Section 40).

The court further held that since the civil court does not have the jurisdiction to entertain suit in relation to the land subject to the ceiling proceedings, it does not even have the jurisdiction to declare the proceedings under the Act "as void or illegal

11 *Haryana Wakf Board* v. *Mahesh Kumar* (2014) 16 SCC 45.

12 2019 SCC OnLine SC 277.

13 *DhulaBai* v. *State of MP*, AIR 1969 SC 78. The first of the seven tests laid down reads: "where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

14 *Supra* note 12, para 54.

or *non est*".[15] Again in *South Delhi Municipal Corpn.* v. *Today Homes & Infrastructure (P) Ltd*.,[16] relying on *Dhalubhai*, the apex court ruled that the jurisdiction of the civil courts are impliedly barred by sections 169 and 171 of the Delhi Municipal Corporation Act, 1957. Similarly, in *Meg Raj* v. *Manphool*,[17] the apex court ruled that by virtue of the express ouster of jurisdiction under section 26 (b) of Haryana Ceiling on Land Holdings Act, 1972, the civil court has no jurisdiction to examine the legality of the order passed by the competent authority under the Act. In *M. Hariharasudhan* v. *R. Karmegam*,[18] on the other hand, the apex court analyzing the provisions of the Tamil Nadu Property (Prevention of Damage and Loss) Act, 1992 and the rules framed thereunder in the light of the tests laid down by the constitutional bench in the aforesaid case, opined that the Act does not impliedly envisage the ouster of jurisdiction of the civil court.

Suits over immovable property situate within jurisdiction of different courts

Section 16, CPC contains a general rule that suits for claims regarding immovable property shall be instituted in "the court within the local limits of whose jurisdiction the property is situate". Section 17 engrafts an exception to the said rule. It permits, in cases where 'immovable property' in question situate within the jurisdiction of different courts, the suit can be filed in "any court within the local limits of whose jurisdiction any portion of the property is situate." In *Shivnarayan (D) by Lrs.* v. *Maniklal (D) Thr. Lrs*.,[19] the apex court delineated on the scope and ambit of the said section 17. After considering the several decisions of the Privy Council and different high courts in India, the apex court succinctly enunciated the correct legal position as follows:[20]

(i) The word 'property' occurring in Section 17 although has been used in 'singular' but by virtue of Section 13 of the General Clauses Act it may also be read as 'plural', i.e., "properties".

(ii) The expression any portion of the property can be read as portion of one or more properties situated in jurisdiction of different courts and can be also read as portion of several properties situated in jurisdiction of different courts.

(iii) A suit in respect to immovable property or properties situate in jurisdiction of different courts may be instituted in any court within whose local limits of jurisdiction, any portion of the property or one or more properties may be situated.

(iv) A suit in respect to more than one property situated in jurisdiction of different courts can be instituted in a court within local limits of jurisdiction where one or more properties are situated provided suit

15 *Id*.,para 72.
16 (2020) 12 SCC 680.
17 (2019) 4 SCC 636.
18 (2019) 10 SCC 94.
19 2019 SCC OnLine SC 136.
20 *Id*.,para 29.

> is based on same cause of action with respect to the properties situated in jurisdiction of different courts.

The court's ruling has brought much needed clarity. With this the court eliminated the necessity of initiating multiple proceedings in cases where claims over multiple properties situate in different places are based on the same cause of action.

Territorial jurisdiction of the high court under article 226

In *Cement Workers'Mandal* v. *Global Cements Ltd. (HMP Cements Ltd.),*[21] the apex court has laid down that "the question as to whether the cause of action for filing the petition, wholly or in part, arose in the context of territorial jurisdiction of the High Court is required to be decided keeping in view the provisions of Article 226(2) of the Constitution read with the provisions of Section 20 of CPC."[22]

Lack of territorial jurisdiction: Revocation of leave to sue

In *Isha Distribution House (P) Ltd.* v. *Aditya Birla Nuvo Ltd*.,[23] the appellant – plaintiff had filed a civil suit in the High Court of Calcutta after obtaining leave under clause 12 of Letters Patent Act, 1865. The respondents – defendants, upon entering their appearance, filed an application seeking revocation of the leave granted on the ground that no part of the cause of action did arise within the territorial jurisdiction of the High Court of Calcutta. The respondents – defendants had only filed the said application and not the written statement. The single judge of the high court allowed the application and revoked the leave. The division bench of the high court confirmed the same. The question that arose before the apex court was whether the high court was justified in revoking the leave granted based on the application of the respondents – defendants, who had not filed the written statement. Relying on the law laid down by the High Court of Calcutta as early as in 1932 in *Secy. of State for India in Council*,[24] which was later affirmed by the apex court in *Indian Mineral and Chemicals Co.*,[25] the court answered the question in the negative. It observed thus:[26]

> [s]ince in this case the respondents did not file any written statement and instead raised the plea of territorial jurisdiction by filing the application for revocation of leave, in our view, the High Court should not have entertained the said application and instead should have granted liberty to the respondent-defendants to file the written statement in the suit and to raise therein a plea of territorial jurisdiction of the Court.

The matter was accordingly remanded back to the single judge of the high and the respondents – defendants were granted the liberty to file written statement, wherein

21 2019 SCC OnLine SC 201.

22 *Id*.,para 29.

23 (2019) 12 SCC 205.

24 *Secy. of State for India in Council* v. *GolabraiPaliram*, AIR 1932 Cal 146.

25 *Indian Mineral & Chemicals Co.* v. *Deutsche Bank* (2004) 12 SCC 376.

26 *Supra* note 23,para 17.

they could raise a plea regarding territorial jurisdiction, which is essentially a mixed question of law and fact.

Return of plaint to be presented before appropriate court

In *EXL Careers* v. *Frankfinn Aviation Services Pvt. Ltd*.,[27] the apex court had to deal with one of the important questions as to when the plaint is returned, in terms of order 7 rule 10, CPC, to be presented before the appropriate court, should the trial in that court start *de novo* or from the stage at which the plaint was ordered to be returned?

On this question the conflicting opinions were expressed by different division benches of the apex court in the past. In *JoginderTuli*,[28] it was held that the second court, where the plaint is presented, can start from the stage at which it was transferred whereas in *Oil and Natural Gas Corporation Ltd*.,[29] it was held that "after presentation before the court of competent jurisdiction, the plaint is to be considered as a fresh plaint and the trial is to be conducted de novo even if it stood concluded before the court having no competence to try the same."[30] Noting this apparent conflict, the apex court in *EXL Careers*,[31] referred the question to be authoritatively and conclusively decided by a larger bench. In the referral judgment, it had endorsed the view expressed in *JoginderTuli*.

In *Oriental Insurance Co. Ltd.* v. *Tejparas Associates and Exports (P) Ltd*.,[32] the court considered an identical question as to whether the returned plaint, when presented before the court having jurisdiction, should be deemed to institute the proceedings afresh? The respondent contended so by relying upon *Amar Chand Inani*.[33] While rejecting the contention, the apex court said that the decision relied upon by the respondent was rendered before the insertion of rule 10-A in the order 7, CPC through amendment made in 1977. After the insertion, the court said, "the matter is not left in a limbo". It observed:[34]

> Presently through Rule 10-A of Order 7 CPC on an application being made a date is to be specified for its presentation so as to enable the appearance before the court in which it would be re-presented. Therefore, the re-presentation of the petition in the court which is indicated in the order for return cannot be considered as a fresh filing in all circumstances when, it is returned to the plaintiff for such re-representation.

Further, the court attempted to buttress its conclusion by placing reliance on *JoginderTuli*,[35] where it was held that the subsequent court can proceed from the

27 2019 SCC OnLine 1294.

28 *JoginderTuli* v. *S.L. Bhatia* (1997) 1 SCC 502.

29 *Oil and Natural Gas Corporation Ltd.* v. *Modern Construction and Company* (2014) 1 SCC 648.

30 *Id*.,para 17.

31 *Supra* note 27.

32 (2019) 9 SCC 435.

33 *Amar Chand Inani* v. *Union of India* (1973) 1 SCC 115.

34 *Id*., para 8.

35 *Supra* note 28.

stage at which the suit stood transferred. If that is so, then presentation of the plaint in a subsequent court cannot be deemed to institute proceedings afresh. Unfortunately, as it seems,the fact that the question regarding correctness of the position taken in *JoginderTuli* has been referred to a larger bench nearly a month before in the current survey year itself was not brought to the notice of the court. Relying on decisions without checking their credentials is a matter of serious concern. The courts place, though not often but at times, reliance on overruled or *per incuriam*decisions or the ones that have been referred to larger benches for reconsideration. This could happen because of various reasons. It is a serious issue that needs to be addressed. The courts should evolve a mechanism for having the status of cases on which they place reliance checked before finalizing the judgments. With the availability of databases like SCC OnLine, it does not seem to be too arduous a task.

In *Ambalal Sarabhai Enterprises Ltd*. v. *K.S. Infraspace LLP*,[36] an application was filed by the defendant before the commercial court under order 7 rule 10, CPC seeking an order to return the plaint to be presented before the competent court. Defendant's contention was that the dispute involved in the suit is not a 'commercial dispute' within the meaning of section 2 (1) (c) (vii) of the Commercial Courts Act, 2015. The commercial court rejected the application. Aggrieved by the same, the defendant had filed a petition before the high court, which set aside the order of the commercial court and allowed the application. While upholding the decision of the high court, the apex court interpreted section 2 (1) (c) (vii), which reads "agreements relating to immovable property *used exclusively* in trade or commerce."[37] Relying on the decision of the High Court of Gujarat,[38] the apex court construed the word "used" in the provision to mean "actually used" or "being used". Keeping in view the objectives of the legislation, it also agreed with the high court, which had opined that if the intention of the legislature was to expand the scope, they would have employed the phraseology "likely to be used" or "to be used". Thus, it opined that dispute arising out of agreements relating to immovable property which is *not being used* exclusively but *likely to be used* in future for trade or commerce is not a commercial dispute. It accordingly ordered for return of the plaint.

Objection to 'jurisdiction': When to be decided as preliminary Issue?

The word 'jurisdiction' in section 9-A, CPC as inserted by the Maharashtra Amendment Act, 1977 came to be interpreted by the a three judge bench of the apex court in *Nusli Neville Wadia* v. *Ivory Properties*.[39] Reference to a three judge bench was made by a division bench in view of the two conflicting opinions rendered in 2015[40] on the meaning of the word 'jurisdiction' used in the aforesaid provision.

Section 9-A requires the court to decide objection to jurisdiction, if any taken at the hearing of any application relating to any interim relief, as a preliminary issue. In

36 2019 SCC OnLine SC 1311.

37 Emphasis supplied.

38 *Vasu Healthcare Private Limited* v. *Gujarat Akruti TCG Biotech Limited*, AIR 2017 Gujarat 153.

39 *Supra* note 2.

KamalakarEknathSalunkhe,[41] a two judge bench construed the word 'jurisdiction' in section 9 –A narrowly and opined that the issue of limitation cannot be considered as an issue of jurisdiction and thus need not be decided as a preliminary issue. In *Foreshore Coop. Housing Society Ltd*.,[42] on the other hand, another division bench had held that the word 'jurisdiction' in the said provision has been used in a broader sense and is wide enough to include issue of limitation as well.

The three judge bench of the apex court, while noting that the word 'jurisdiction' derives its meaning from the context and also considering the statement of objects and reasons of the Act that inserted section 9 – A, opined that the word carries a narrower meaning in the context and does not include issue of limitation. It observed:[43]

> The word "jurisdiction" in Section 9-A is qualified with expression to "entertain" the suit. Thus, it is apparent that the scope of Section 9-A has been narrowed down by the legislature as compared to the provisions contained in Order 14 Rule 2(2) by not including the provisions as to "a bar created by any other law for the time being in force".

It further observed that "[T]he expression 'bar to file a suit under any other law for the time being in force' includes the one created by the Limitation Act. It cannot be said to be included in the expression 'jurisdiction to entertain' suit used in Section 9-A."[44] In the opinion of the bench "[T]he word "entertain" cannot be said to be the inability to grant relief on merits, but the same relates to receiving a suit to initiate the very process for granting relief."[45] What is intended by section 9 – A, "is the defect of jurisdiction. It may be *inter alia* territorial or concerning the subject matter."[46]

The bench, however, clarified that though section 9 – A is not as comprehensive as that of order 14 rule 2, CPC, the concept in the latter provision applies to the former as well. It observed thus:[47]

> [t]he concept of Order 14 Rule 2 with respect to what can be treated as preliminary issue will be applicable under Section 9-A only in case question of "jurisdiction to entertain" arises i.e. if it can be decided purely as question of law, at the stage contemplated under Section 9-A, not in case if it is a mixed question of law and fact, no evidence can be recorded to decide the question under Section 9-A CPC.

40 See P. Puneeth, "Civil Procedure" LI *Annual Survey of Indian Law* 131 – 162 (ILI, 2015).

41 *Kamalakar Eknath Salunkhe* v. *Baburav Vishnu Javalkar* (2015) 7 SCC 321.

42 *Foreshore Coop. Housing Society Ltd*. v. *Praveen D. Desai* (2015) 6 SCC 412.

43 *Supra* note 2, para 48.

44 *Id*., para 50.

45 *Ibid*.

46 *Id*., para 54.

47 *Id*., para 59.

The bench, accordingly, overruled *Foreshore Coop. Housing Society Ltd*.[48] as well as the decision rendered by the full bench of the High Court of Bombay in *Meher Singh*,[49] where it was held that the issue of jurisdiction under section 9 – A can be decided by recording evidence if required. It upheld *Kamalakar Eknath Salunkhe*[50] and also clarified that it is not *per incurium* decision as stated in *Foreshore Coop. Housing Society Ltd*.

The law, thus, clarified by the three judge bench was relied upon by a two judge bench in the survey year itself in *Shyam Madan Mohan Ruia* v. *Messer Holdings Ltd*.[51]

Jurisdiction of NCLT and NCLAT

In *Embassy Property Developments (P) Ltd.* v. *State of Karnataka*,[52] the apex court dealt with certain questions relating to the jurisdiction of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT). After a detailed analysis of the relevant statutory laws and case law, it categorically held that they have the jurisdiction to enquire into questions of fraud. The court also held in equally unequivocal terms that they do not have jurisdiction to adjudicate upon disputes arising under the Mines and Minerals (Development and Regulation) Act, 1957 and the Rules made thereunder particularly when they revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by constitutional courts in exercise of their power of judicial review over administrative actions.

III RES JUDICATA

The concept of *res judicata*, like the doctrine of precedent, has its origin in common law. Whereas the doctrine of precedent aims at ensuring consistency, stability and predictability of judicial outcomes on questions of law, the principles of *res judicata* operate to prevent multiplicity of litigation on the same cause of action between the same parties. In *State of Rajasthan* v. *Nemi Chand Mahela*,[53]the apex court very succinctly restated the difference between the two:[54]

> Res judicata operates in *personam* i.e. the matter in issue between the same parties in the former litigation, while law of precedent operates in *rem* i.e. the law once settled is binding on all under the jurisdiction of the High Court and the Supreme Court. Res judicata binds the parties to the proceedings for the reason that there should be an end to the litigation and therefore, subsequent proceeding inter se parties to the litigation is barred. Therefore, law of res judicata concerns the same matter, while law of precedent concerns application of law in a similar

48 *Supra* note 42.
49 *Meher Singh* v. *Deepak Sawhny*, 1998 SCC OnLine Bom. 452.
50 *Supra* note 41.
51 (2020) 5 SCC 252.
52 (2020) 13 SCC 308.
53 (2019) 14 SCC 179.
54 *Id*.,para 11.

> issue. In res judicata, the correctness of the decision is normally immaterial and it does not matter whether the previous decision was right or wrong, unless the erroneous determination relates to the jurisdictional matter of that body.

The CPC embodies both *res judicata* and constructive *res judicata* as statutory principles under section 11. Both principles aim at achieving the common objective of providing finality to litigation. The principle of *res judicata* bars the court from trying "any suit or an issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties".[55] The principle of constructive *res judicata*, contained in explanation – IV appended to the section 11, extends the bar further. It prohibits the court fromtrying any matter which "might and ought to have been made ground of defence or attack" in a previous suit but had not been made. The words "might and ought" used in explanation IV has been subjected to judicial interpretation in several cases. It has been the consistent view of the courts that these words are used in a conjunctive sense. The apex court, in *Asgar* v. *Mohan Varma*,[56] relying on the catena of judicial decisions including that of the Privy Council,[57] has reiterated that for invoking constructive *res judicata* to bar a subsequent trial "a matter must be of such a nature as could have been raised as a ground of defence or attack and should have been raised in the earlier suit."[58] In *Asgar* v. *Mohan Verma*,[59] an execution petition was filed seeking delivery of possession of the suit scheduled property in terms of the final decree passed in the partition suit. In the execution proceedings, appellants, who are strangers to the partitionsuit, filed certain applications under order 21 rule 99, CPC, *inter alia*, seeking "a declaration that they were entitled to possession of the property as lessees and were not liable to be dispossessed." The district judge allowed those applications but in appeal, the high court over turned the decision and dismissed those applications. Special leave petition filed in the apex court challenging the decision of the high court also came to be dismissed. The apex court, while dismissing the petition, opined that lessees/ appellants are, however, free to pursue appropriate course for seeking compensation for improvements made by them in the property. Accordingly, the appellants instituted fresh proceedings before the execution court seeking directions, *inter alia*, for payment of value of improvements made by them over the property. The respondents opposed the same on the ground that the appellants claim was barred by the principles of constructive *res judicata*. Their plea was that the claim for the payment of value of improvements made in the property "might and ought" to have been made in the earlier proceedings initiated by the appellants for the protection of their possession of the property. The execution court dismissed the appellants claim on merits, the high court, in the writ petition filed under article 227 against the decision of the execution

55 S. 11, CPC.

56 2019 SCC OnLine SC 131.

57 *KameswarPershad* v. *Rajkumari Ruttun Koer,* 1892 SCC OnLine PC 16.

58 *Supra* note 56,para 33.

59 *Ibid*.

court, upheld the same as well as the contention that the appellant's claim was barred by constructive *res judicata*.

In the appeal against the said decision of the high court, the apex court answered the question - as to whether the appellants might and ought to have raised the issue regarding payment of value of improvements made over the property in the earlier round of proceedings itself - in the affirmative. It upheld the decision of the high court that the appellants' claim was barred by constructive *res judicata*. It also held that the observation made by it while dismissing the earlier special leave petition that the lessees were free to pursue appropriate remedy for claiming the value of improvements cannot be construed to mean that "the respondents would be deprived of their right to set up a plea of constructive *res judicata* if the appellants were to raise such a claim".[60] While dismissing the appeal, the apex court categorically held, relying on the judicial precedents on rules 97 to 103 of order 21 and the provisions of the Kerala Compensation for Tenants Improvements Act, 1958 that:[61]

> A claim under Section 4 (1) [of the Act, 1958] has to be addressed to the court which passes a decree for eviction. In the present case, the appellants are strangers to the decree. They were required to get that claim adjudicated in the course of their Execution Application which was referable to the provisions of Order XXI Rule 97. Having failed to assert the claim at that stage, the deeming fiction contained in Explanation IV to Section 11 is clearly attracted.

In *Indian Oil Corpn. Ltd.* v. *State of U.P.*,[62] the court dealt with a different set of facts. In this case the plea of "leviability of interest" was specifically raised in the previous writ petition but the bench, having restricted the consideration to other questions, did not entertain the said plea. In the circumstance, the apex court said the subsequent writ petition where plea of leviability of the interest was raised cannot be thrown on the ground of *res judicata*. Even explanation IV to section 11, CPC is not attracted in such cases.

A question relating to applicability of the principles of *res judicata* to labour proceedings arose for consideration in *Fertilisers& Chemicals Travancore Ltd.* v. *Employees Assn*.[63] In this case, the appellant public sector undertaking issued an order reducing the age for superannuation of its employees from sixty to fifty – eight years. It was challenged before the high court, which upheld the order. Both intra – court appeal and the special leave petition against the same were dismissed. Thereafter, the state government at the instance of the trade union referred the issue to the labour court to decide on the justifiability of reduction of age of superannuation. The labour court was of the opinion that the reference was barred by the principles of *res judicata*. The award of the labour court was challenged before the high court. The single judge allowed the writ petition and granted some relief; the division bench dismissed the

60 *Id*., para 3.
61 *Id*., para 51.
62 (2019) 16 SCC 482.
63 (2019) 11 SCC 323.

intra – court appeal against the judgment of the single judge. The apex court, while reiterating that the principle of *res judicata* applies to labour proceedings, set aside the judgments of both the single judge and the division bench of the high court and restored the award of the labour court.

In *Anant Shankar Bhave* v. *Kalyan Dombivali Municipal Corpn*.,[64] the appellant – plaintiff had filed a misconceived suit and claimed certain improper reliefs. The trail court decreed the suit. The first appellate court allowed the appeal and set aside the suit and the high court dismissed the second appeal. The appellant – plaintiff approached the apex court challenging the dismissal of his second appeal. The apex court, even after finding that there is no merit in the appeal, gave liberty to the appellant – plaintiff to file a fresh suit against the respondent to claim proper reliefs in relation to the suit land. It also made it clear that the findings recorded by the courts below in the present proceedings shall not operate as *res judicata* against the parties in the fresh suit. This ruling gives rise to certain questions *viz*., does the apex court have discretion to exclude the operation of *res judicata* in certain cases? If it is so, is it only the apex court which has such discretion? In what kind of cases, such discretion is to be exercised? In the present case, the court, in its cryptic order, simply excluded the operation of *res judicata*. It neither provided any cogent reason nor relied upon any case law. If two judge benches continue to exercise such discretion, without providing any justifications, very objective of doctrine of *res judicata* would be defeated.

Embargo in order 2 rule 2, CPC

The order 2 rule 2, CPC requires the plaintiff to include in the pliant "whole of the claim" to which he or she is entitled to in respect of "the cause of action". It, however, allows the plaintiff to relinquish "any portion of his claim in order to bring the suit within the jurisdiction of any court." Where the plaintiff relinquishes any portion of his or her claim, he or she is not allowed to sue afterwards in respect of the claim so relinquished. In *Pramod Kumar* v. *Zalak Singh*,[65] the apex court categorically held that "the embargo in Order 2 Rule 2 will arise only if the claim, which is omitted or relinquished and the reliefs which are omitted and not claimed, arise from one cause of action. If there is more than one cause of action, Order 2 Rule 2 will not apply."[66]

In order to prove the identity of the cause of action to establish the bar under order 2 rule 2, it is necessary for the defendant, as held by a constitution bench of the apex court in *Gurubux Singh*,[67] to file pleadings in the previous suit in evidence. Relying on the same in *Vurimi Pullarao* v. *Vemari Vyankata Radharani*,[68] it was argued by the plaintiff that the bar is not attracted since the defendant has not submitted and proved the plaint in the earlier suit. The apex court, while noting that "[T]he situation as it obtained in the case before the Constitution Bench is distinct from the events as

64 (2019) 4 SCC 348.

65 (2019) 6 SCC 621.

66 *Id*.,para 44.

67 *Gurubux Singh* v. *Bhooralal*, AIR 1964 SC 1810.

68 2019 SCC OnLine SC 1682.

they transpired in the present case", dismissed the contention of the plaintiff/ respondent. The facts of the present case reveal that the certified copy of the plaint in the earlier suit was in fact submitted to the court in order to invoke order 2 rule 2, CPC.

IV PLEADINGS

Fresh plea before the high court

The short question arose for the consideration of the apex court in *Deepak Tandon* v. *Rajesh Kumar Gupta*,[69] was whether a plea not taken by the parties in the pleadings either before the court of first instance or the first appellate court can be allowed to be raised before the high court for the first time in a petition filed under article 227 of the Constitution challenging the decisions of the both the courts below? The apex court answered the question in the negative. Relying on the law, it particularly observed:[70]

> [i]t is a settled law that if the plea is not taken in the pleadings by the parties and no issue on such plea was, therefore, framed and no finding was recorded either way by the trial court or the first appellate court, such plea cannot be allowed to be raised by the party for the first time in third court whether in appeal, revision or writ, as the case may be, for want of any factual foundation and finding.

The apex court, further added that, the high court shall not entertain such plea particularly when it is "founded on factual pleadings and requires evidence to prove i.e. it is a mixed question of law and fact and not pure jurisdictional legal issue requiring no facts to probe."[71] In the context of the case, the court specifically pointed out that "the question as to whether the tenancy is solely for residential purpose or for commercial purpose or for composite purpose *i.e.*, for both residential and commercial purpose, is not a pure question of law but is a question of fact…"[72] Such a question should have been specifically pleaded and then proved by adducing evidence before the courts below. The high court cannot decide such a question for the first time at the third stage of litigation.

Further, the apex court also reiterated that the concurrent findings of facts, which are based on appreciation of evidence, recorded by the court of first instance and the first appellate court are binding on the writ court.[73]

Particulars in the pleadings

In *Rengali Hydro Electric Project* v. *Giridhari Sahu*,[74] the court emphasized on the necessity to provide relevant particulars in the pleading when the plaintiff alleges misrepresentation, fraud or undue influence. It observed:[75]

69 (2019) 5 SCC 537.

70 *Id*., para 15.4.

71 *Id*., para 15.5.

72 *Id*., para 15.6.

73 *Id*., para 15.8.

74 (2019) 10 SCC 695. Also see *Govindbhai Chhotabhai Patel* v. *Patel Ramanbhai Mathurbhai*, 2019 SCC OnLine SC 1245.

75 *Id*., para 38.

> [i]n a civil suit, if the plaintiff alleges fraud, misrepresentation or undue influence, he is obliged to give particulars. An allegation of fraud is a matter of a grave nature. So is the allegation of undue influence and misrepresentation. The intention underlying Order 6 Rule 4 CPC is that the opposite party is to be put on sufficient notice as to the case which he is called upon to meet. The law loathes, parties to the lis being taken by surprise resulting in the violation of the basic principle of justice that a party should be able to effectively meet the case set up against him.

Commercial suits: Filing of written statements

Whether the court, in commercial suits, can allow the defendants to file the written statement after the expiry of one hundred and twenty days was a question arose before the apex court in *SCG Contracts (India) (P) Ltd*. v. *K.S. Chamankar Infrastructure (P) Ltd.*[76] defendant had not filed the written statement within time i.e., one hundred and twenty days from the date of service of summons. Meanwhile the defendant had filed an application under order 7 rule 11, CPC for rejection of the plaint. The said application was not allowed. While rejecting it, the court, however, granted ten days' time to file the written statement and the same was filed within that time. Thereafter the plaintiff filed an application averring that the same should not be taken on record as it was filed after the expiry of statutorily mandated 120 days. The high court rejected the application of the plaintiff and took the written statement on record. The same was challenged in the apex court. While opposing the appeal, it was even contended before the apex court that "since this judgment permitted him to file the written statement beyond 120 days, it was an act of the court which should prejudice no man."[77] The extension of the time granted was sought to be justified also on the ground that the high court had the power under section 151, CPC.

The apex court rejected all these contentions of the defendant/respondent and allowed the appeal. Relying on order 5 rule 1 (1) and order 8 rules (1) and (10), CPC as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 in their application to commercial disputes, the apex court categorically answered the question in the negative. It observed thus:[78]

> A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be

76 (2019) 12 SCC 210.

77 *Id*.,para 15.

78 *Id*., para 8.

> taken on record. This is further buttressed by the proviso in Order 8 Rule 10 also adding that the court has no further power to extend the time beyond this period of 120 days.

The court also made it clear that the doctrine – the act of court should prejudice none – cannot be invoked "when the *res*is not yet *judicata*."[79] When the appeal challenging the correctness of the decision of the lower court is pending before the higher court, then the *res* is *sub-judice* and not *judicata*.

Further, as regards the question of invocation of the inherent power under section 151, CPC to grant extension beyond the period prescribed for filing of written statement, the apex court unequivocally stated: "the clear, definite and mandatory provisions of Order 5 read with Order 8 Rules 1 and 10 cannot be circumvented by recourse to the inherent power under Section 151 to do the opposite of what is stated therein."[80]

Cross – objections by respondent in appeal

In *VithaldasJagannathKhatri (D) Through Shakuntala Alias Sushma* v. *State of Maharashtra Revenue and Forest Department*,[81] the apex court dealt with the question as whether cross – objections can be filed by the respondent in an appeal against the party, who is not a party to the appellate proceedings. It reiterated that:

> [t]he Code of Civil Procedure, 1908 does not contemplate filing of cross -objections against a party who is not a party to the appeal. In case such objections have to be filed two distinct operations are necessary. He must implead the persons as parties *qua* whom he intends to file cross-objections then he must file the memorandum of cross-objections. The position would be no different *qua* a judicial or quasi-judicial authority as a party to be effected must get a right of hearing.

In *Prabhakar Gones Prabhu Navelkar (Dead) Through Lrs.* v. *Saradchandra Suria Prabhu Navelkar (Dead) Through Lrs*.,[82] the apex court, relying on the law laid down in regard to order 41 rule 22, held that the if the respondent in an appeal is not seeking any variation in the impugned decree and he is merely supporting it, then it is not necessary for him to file an appeal or cross objection only to have one of the findings overturned. He can seek overturning of the finding without filing a cross objection as long as he is not seeking variation in the decree.

Amendment of pleadings

In *M. Revanna* v. *Anjanamma*,[83] the apex court very succinctly stated the circumstances under which and the conditions subject to which applications seeking amendment of pleadings shall be allowed. It observed:[84]

79 *Id*., para 15.
80 *Id*., para 16.
81 2019 SCC OnLine SC 1125.
82 2019 SCC OnLine SC 1066.
83 (2019) 4 SCC 332.
84 *Id*.,para 7.

> Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order 6 Rule 17 CPC virtually prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money.

In *Vijay Hathising Shah* v. *Gitaben Parshottamdas Mukhi*,[85] the application seeking amendment of the pleading was rejected by the trial court against which the high court allowed the appeal. The apex court upheld the order of the trial court and opined that the high court was wrong in allowing the application for amendment of pleadings. The apex court gave three reasons in support of its decisions:[86]

> First, it was wholly belated; second, Respondent 1-plaintiff filed the application for amendment of the plaint when the trial in the suit was almost over and the case was fixed for final arguments; and third, the suit could still be decided even without there being any necessity to seek any amendment in the plaint. In our view, amendment in the plaint was not really required for determination of the issues in the suit.

In *Mehboob-Ur-Rehman* v. *Ahsanul Ghani*,[87] the apex court dealt with an issue relating to the mandatory averments to be made in the plaint instituting suit for specific performance. As per section 16 (c) of the Specific Relief Act, 1963, as it stood before the amendment made in 2018, it was mandatory for the plaintiff to 'aver' in the plaint and 'prove' that he/she has either already performed or "has always been ready and willing to perform" his/her part of the contract. Without such averments and proof thereof, specific performance of contract cannot be enforced in favour of such person. The amendment made in 2018 substituted the words "who fails to aver and prove" in the aforesaid section 16 (c) with "who fails to prove." Since, in the instant case, the original suit was instituted much before amendment was brought to the Act, the apex court held that in the absence of such averments in the plaint, a suit for specific performance of contract cannot be decreed in favour of the plaintiff. The court,

85 (2019) 5 SCC 360.

86 *Id*.,para 9.

87 (2019) 19 SCC 415.

however, taking note of the amendment made in 2018 has also stated, by way of an *obiter dictum*, that even after the amendment the position remained the same in all material respects. Unless the person proves that he has either already performed or has always been ready and willing to perform his part of the contract, the court cannot grant decree of specific performance of contract in his favour.

Further, in this case, the court also upheld the decisions of the first appellate court and of the high court, in the second appeal, which rejected the belated prayer of the plaintiff to amend the plaint to insert that specific averment since the decree passed in his favour by the trial court was challenged by the defendant, in appeal, on ground that the plaint did not contain the specific averment. While upholding the decision of the courts below, the apex court observed:[88]

> As noticed, the averment and proof on readiness and willingness to perform his part of the contract has been the threshold requirement for a plaintiff who seeks the relief of specific performance. The principle that the requirement of such averment had not been a matter of form, applied equally to the proposition for amendment at the late stage whereby, the plaintiff only attempted to somehow improve upon the form of the plaint and insert only the phraseology of his readiness and willingness. In such a suit for specific performance, the Court would be, and had always been, looking at the substance of the matter if the plaintiff, by his conduct, has established that he is unquestionably standing with the contract and is not wanting in preparedness as also willingness to perform everything required of him before he could be granted a relief whereby, the performance of other part of the contract could be enjoined upon the defendant.

Having regard to the facts and circumstances of the case, the apex court came to the conclusion that "the late attempt to improve upon the pleadings of the plaint at the appellate stage was only an exercise in futility in the present case."[89]

Rejection of plaint: Order 7 rule 11

Order 7 rule 11 (a) requires the court to reject the plaint if it does not disclose a cause of action. In *Colonel Shrawan Kumar Jaipuriyar* v. *Krishna Nandan Singh*,[90] while reiterating that "[i]f the plaint is manifestly vexatious, meritless and groundless, in the sense that it does not disclose a clear right to sue, it would be right and proper to exercise power under Order VII Rule 11…",[91] the apex court held that "[A] mere contemplation or possibility that a right may be infringed without any legitimate basis for that right, would not be sufficient to hold that the plaint discloses a cause of action."[92]

88 *Id*.,para 19.

89 *Ibid*.

90 2019 SCC OnLine SC 1358.

91 *Id*., para 10.

92 *Ibid*.

It is well settled law that if the suit is found, based on the averments made in the plaint, to be barred by law of limitation, the court can reject the plaint in exercise of its power under order 7 rule 11 (d), CPC. While applying the said law in *RaghwendraSharan Singh* v. *Ram Prasanna Singh (Dead) by LRs*,[93]the apex court frustrated the futile effort of the advocate for plaintiff, who cleverly drafted the plaint to bring the suit, which is otherwise barred, within limitation.

While considering the application under order 7 rule 11, the court has to take into account the entirety of the averments made in the plaint.[94]

In *Madhav Prasad Aggarwal* v. *Axis Bank Ltd.*,[95] the apex court relying on *Sejal Glass Ltd*.,[96] reiterated that in exercise of the power under order 7 rule 11 (d), "it is not permissible to reject plaint qua any particular portion of a plaint including against some of the defendant(s) and continue the same against the others... if the plaint survives against certain defendant(s) and/or properties, Order 7 Rule 11(d) CPC will have no application at all, and the suit as a whole must then proceed to trial."[97] In any case, if one or some of the reliefs claimed against the one of the defendants is barred by any law, objections can be raised by invoking other provisions including order 6 rule 16 at the appropriate stage but recourse to order 7 rule 11 (d) is not available.

In *Pawan Kumar* v. *Babulal*,[98] an application was filed under order 7 rule 11 for rejection of the plaint on the ground that the suit is barred by section 4 of the Benami Transactions (Prohibition) Act, 1988. The same was allowed by the trial court and the high court dismissed the appeal against the decision of the trial court. The question before the apex court was whether the courts below were right in holding that the suit was barred by the aforesaid provision. Clause (1) of section 4 of the aforesaid Act provides that "[N]o suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property." Clause (3) of section 4 carves out two exceptions to clause (1). Relying on the said provisions and the observations made in *Popat and Kotecha Property*,[99] the apex court observed:[100]

> Whether the matter comes within the purview of Section 4(3) of the Act is an aspect which must be gone into on the strength of the evidence on record. Going by the averments in the plaint, the question whether the plea raised by the appellant is barred under Section 4 of the Act or not could not have been the subject-matter of assessment at the stage

93 2019 SCC OnLine SC 372.

94 *Shaukathussain Mohammed Patel* v. *Khatunben Mohmmedbhai Polara* (2019) 10 SCC 226.

95 (2019) 7 SCC 158.

96 *Sejal Glass Ltd.* v. *Navilan Merchants (P) Ltd.* (2018) 11 SCC 780.

97 *Supra* note 95,para 10.

98 (2019) 4 SCC 367.

99 *Popat and Kotecha Property* v. *SBI Staff Assn*. (2005) 7 SCC 510.

100 *Supra* note 98,para 13.

> when application under Order 7 Rule 11 CPC was taken up for consideration. The matter required fuller and final consideration after the evidence was led by the parties. It cannot be said that the plea of the appellant as raised on the face of it, was barred under the Act. The approach must be to proceed on a demurrer and see whether accepting the averments in the plaint the suit is barred by any law or not.

The court, accordingly, allowed the appeal and set aside the judgments of the courts below.

In *Alpana Gupta* v. *APG Towers (P) Ltd*.,[101] it was held that the plea that can be raised by the defendant only in the written statement cannot be raised in an application filed under order 7 rule 11, CPC.

Judgment on admission of facts: Order 12 rule 6

Order 12 rule 6, CPC confers discretionary power on the court to pass any order or judgment at any stage of the suit in cases where admission of facts are made either in the 'pleading' or 'otherwise'. Since the provision empowers the court to pass judgment without trial, it is a settled law that the power under the said provision has to be exercised judiciously. In *Hari Steel and General Industries Ltd.* v. *Daljit Singh*,[102] the apex court ruled that the discretionary power under the said provisions can be exercised only when there are categorical and unconditional admissions of facts. The court further observed that:[103]

> It is a trite principle that any amount of evidence is of no help, in absence of pleading and foundation in the application. It is true that when categorical and unconditional admissions are there, judgment on admission can be ordered, without narrowing down the rule but at the same time the judicious discretion conferred on the court is to be exercised within the framework of the rule but not beyond.

V PARTIES

Procedures relating to joinder, non-joinder and mis-joinder of parties are contained in Order 1, CPC. The underlying object of the provisions contained therein is to, as stated in *Anil Kumar Singh*, "bring on record all the persons who are parties to the dispute relating to the subject -matter so that the dispute may be determined in their presence at the same time without any protraction, inconvenience and to avoid multiplicity of proceedings"[104] and to remove the participation of others whose presence is not required either as 'necessary party' or as 'proper party'.

In *Globe Ground (India) Employees Union* v. *Lufthansa German Airlines*,[105] the apex court elucidated the distinction between 'necessary' and 'proper' parties. It observed:[106]

101 (2019) 15 SCC 46.

102 (2019) 20 SCC 425.

103 *Id*.,para 30.

104 *Anil Kumar Singh* v. *Shivnath Mishra* (1995) 3 SCC 147, para 7.

105 (2019) 15 SCC 273.

106 *Id*.,para 10.

The expressions "necessary" or "proper" parties have been considered time and again and explained in several decisions. The two expressions have separate and different connotations. It is fairly well settled that necessary party, is one without whom no order can be made effectively. Similarly, a proper party is one in whose absence an effective order can be made but whose presence is necessary for complete and final decision on the question involved in the proceedings.

The question involved in the case was, whether the first respondent Lufthansa German Airlines can be impleaded as a party in an industrial dispute between M/s Globe Ground India Pvt. Ltd. and its employees referred by the central government to industrial tribunal-cum-labour court. The appellants, who sought the impleadment, contended that the M/s Globe Ground India Pvt. Ltd. is the subsidiary of the first respondent Lufthansa German Airlines, thus, the first respondent needs to be impleaded in the industrial dispute. The apex court, while rejecting the contention of the appellants, reiterated that whenever an application for impleadment of any other party to any judicial proceedings is filed, what is required to be considered is whether such party, who is sought to be impleaded, is either a necessary or proper party to decide the *lis*. The said question, in its opinion, needs to be decided keeping in view the facts of each case. Keeping in view the facts of the case on hand and the limited scope of the reference made to the industrial tribunal-cum-labour court, the apex court held that the first respondent Lufthansa German Airlines is neither a necessary nor a proper party to decide the *lis*. The court was also of the view that since subsidiary company is an independent corporate entity, the parent company holding the shares *per se* is no ground to order its impleadment in the proceedings.

In *R. Dhanasundari alias R. Rajeswari* v. *A.N. Umakanth*,[107] the apex court elucidated the law relating to transposition of defendant(s) as plaintiff(s) in a suit. After examining order 1 rule 10 (2) and order 23 rule 1-A, CPC the court observed as under:[108]

> As per Rule 1-A *ibid*., in the eventuality of plaintiff withdrawing the suit or abandoning his claim, a pro forma defendant, who has a substantial question to be decided against the co-defendant, is entitled to seek his transposition as plaintiff for determination of such a question against the said co-defendant in the given suit itself. The very nature of the provisions contained in Rule 1-A *ibid*. leaves nothing to doubt that the powers of the Court to grant such a prayer for transposition are very wide and could be exercised for effectual and comprehensive adjudication of all the matters in controversy in the suit. The basic requirement for exercise of powers under Rule 1-A *ibid*. would be to examine if the plaintiff is seeking to withdraw or to abandon his claim under Rule 1 of Order XXIII and the defendant seeking transposition is having an interest in the subject-matter of the suit and thereby, a

107 2019 SCC OnLine SC 331.

108 *Id*.,para 11.

> substantial question to be adjudicated against the other defendant. In such a situation, the pro forma defendant is to be allowed to continue with the same suit as plaintiff, thereby averting the likelihood of his right being defeated and also obviating the unnecessary multiplicity of proceedings.

In *Vijay A. Mittal* v. *KulwantRai*,[109] the apex court observed that "if out of all the legal representatives, majority of them are already on record and they contested the case on merits, it is not necessary to bring other legal representatives on record. The reason is that the estate and the interest of the deceased devolved on the legal representatives is sufficiently represented by those who are already on record."[110] This rule shall not be treated as a general rule to be applied in all, somewhat similar, cases without regard to facts and circumstances of the case. Those who file collusive suits might take advantage of the same. The possibility of plaintiffs colluding with some of the legal representatives and excluding others cannot be overruled.

In *C.J. Baby* v. *Fr. Jiju Varghese*,[111] the court reiterated that "[T]he decision rendered in representative suit is binding on all."[112] It also underscored that the idea is to prevent multiplicity of litigation on the same subject.

Effect of abetment of appeal *qua* the deceased appellant on others

When the appeal is abeted *qua* the deceased appellant/defendant as his legal heirs are not brought on record, can the remaining appellants/defendants continue to prosecute the appeal was a question that arose for consideration in *Goli Vijayalakshmi* v. *Yendru Sathiraju*.[113] The apex court noting that in such a case the judgment passed by the trial court has become final *qua* the deceased appellant, has reiterated the test to be applied to decide whether the remaining appellants/defendants can prosecute the appeal after it is abeted *qua* the deceased. The test is as follows:[114]

> [w]hether the judgment/decree passed in the proceedings *vis-à-vis* the remaining parties would suffer from the vice of contradictory or inconsistent decrees inasmuch as the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other.

If the answer to the above question is in the affirmative, the remaining appellants/ defendants are not entitled to prosecute the appeal. They cannot seek to do so even by relying on the provisions contained in order 41 rules 4 and 33, CPC. The answer to the above question is most likely to be in the affirmative where the decree challenged in the appeal is joint and indivisible.

109 (2019) 3 SCC 520.

110 *Id*.,para 24.4.

111 (2020) 5 SCC 420.

112 *Id*.,para 2.

113 (2019) 11 SCC 352. Also see, *Hemareddi* v.*Ramachandra Yallappa Hosmani* (2019) 6 SCC 756.

114 *Id*.,para 20.

Compromise in a representative suit

As per order 23 rule 3 – B, CPC, representative suits cannot be compromised without obtaining the leave of the court. It is also incumbent upon the court, before granting such leave, to give notice to such persons, who may be interested in the suit in the opinion of the court. These are mandatory requirements. Compromise decree passed without complying with these requirements is illegal and void. While reiterating the position, the apex court in *Aliyathammuda Beethathebiyyappura Pookoya* v. *Pattakal Cheriyakoya*,[115] underscored the significance of the provision by observing that:

> [s]uch violations of Order 22 Rule 3-B cannot be said to be merely procedural, and go to the root of the matter since they deprive the affected parties of the chance to question the terms of the compromise that they are going to be bound by.

***Locus* to challenge redemption decree**

Whether a decree passed in a redemption suit against the mortgagee can be challenged by his tenants was the question considered by the apex court in *Mohan Chandra Tamta* v. *Ali Ahmad*.[116] The court answered the question in the negative by holding that in the absence of challenge to the decree by the mortgagee himself, his tenants have no *locus* to challenge the decree passed in a suit for redemption.

Application for impleadment: Relevant provision

In *Pruthvirajsinh Nodhubha Jadeja* v. *Jayeshkumar Chhakaddas Shah*,[117] a land owner had filed a suit against his power of attorney holder challenging the sale of land by the latter on the ground that the power of attorney did not confer power to sell the land. The power of attorney holder had also admitted that the power to sell was not conferred on him. But before the final order was passed in the suit, the land owner had sold the property to another person without informing about the pendency of suit. On the death of the land owner, the purchaser of the property filed an application under order 1 rule 10, CPC seeking impleadment. Same was contested on the ground that the purchaser cannot be impleaded under order 1 rule 10. The apex court, though agreed with the contention, upheld the right of the purchaser to be impleaded. While noting that the application was wrongly filed under order 1 rule 10 instead of order 22 rule 10, the court observed "[I]t is well-settled law that mere non-mentioning of an incorrect (*sic*) provision is not fatal to the application if the power to pass such an order is available with the court."[118]

VI APPEAL

Second appeal: Substantial question of law

As per section 100, CPC, the second appeal lie to the high court and it lie only on 'substantial question of law' and not on 'question of law' or 'question of fact'. It

115 (2019) 16 SCC 1.
116 (2019) 9 SCC 471.
117 (2019) 9 SCC 533.
118 *Id*.,para 8.

is, thus, required that the memorandum of appeal must state the substantial question(s) of law involved and the high court, if satisfied that the case involves substantial question(s) of law, must formulate such question(s) and proceed to hear the appeal on such question(s). It is important to note that substantial question(s) of law need to be formulated by the high court at the time of admission of the second appeal. As it has been held "[E]ven if the High Court is of the view that the substantial questions of law, as framed in the memorandum of appeal, are substantial questions of law, the order admitting the appeal should specifically state what are the questions of law on which the appeal is admitted."[119] It cannot formulate such questions(s) for the first time while delivering the judgment. It is impermissible to do so.[120] The respondent, at the time of hearing, has the right to object to any question framed by the high court at the time of admission of the second appeal. The proviso to clause (5) of section 100, however, empowers the high court to hear the appeal, after recording reasons, on any other substantial question of law not originally formulated by it. The apex court, in *Mehboob-Ur-Rehman* v. *Ahsanul Ghani*,[121] has held that the power under the said *proviso* can be used only in exceptional cases. The court observed thus:[122]

> We are clearly of the view that the proviso to sub-section (5) of Section 100 CPC is not intended to annul the other requirements of Section 100 and it cannot be laid down as a matter of rule that irrespective of the question(s) formulated, hearing of the second appeal is open for any other substantial question of law, even if not formulated earlier. The said proviso, by its very nature, could come into operation only in exceptional cases and for strong and convincing reasons, to be specifically recorded by the High Court.

In *Tanuku Taluk Village Officers' Assn.* v. *Tanuku Municipality*,[123] the high court had admitted the second appeal after framing three substantial questions of law but it had not answered any of them. It dismissed the appeal by answering a different question that was not framed. The apex court held that the high court is not justified in dismissing the second appeal. In its opinion the disposal of the second appeal by answering the question not framed either at the time of the admission of the second appeal or subsequently, after complying with the mandatory procedure prescribed in the proviso to section 100 (5), CPC is not legally sustainable. If the high court had realized subsequently that the additional substantial question, which it had not framed at the time of admission, is involved in the case, it should have framed it after complying with the mandatory procedure and heard the appeal on the said question as well. The second appeal cannot be heard on the question(s) not framed.

119 *Sudam Kisan Gavane (D) Thr. Lrs*. v. *Manik Ananta Shikketod (D) By Lrs*. 2019 SCC OnLine SC 1223.

120 *Arulmighu Nellukadai Mariamman Tirukkoil* v. *Tamilarasi* (2019) 6 SCC 686.

121 *Supra* note 87.

122 *Id*.,para 22.

123 (2019) 4 SCC 397. Also see *Ranjit Kumar Karmakar* v. *Hari Shankar Das* (2019) 5 SCC 477.

In *State of Rajasthan* v. *Gram Vikas Samiti*,[124] apex court dealt with an appeal by special leave challenging the decision of the high court, which had dismissed *in limine* the second appeal filed by the state on the ground that the same does not involve any 'substantial question of law'- a statutory requirement for entertaining second appeal under section 100, CPC. Though none of the advocates appeared for either of the parties, the apex court perused the records on its own and allowed the appeal and remanded the case back to the high court to decide the second appeal in accordance with law. Though it was of the view that "even the cursory reading of the judgments of the trial court and the first appellate court would show that the second appeal does involve substantial question(s) of law",[125] the apex court did not venture to formulate the same for the consideration of the high court. In some of the similar cases in the past, the apex court had actually formulated such substantial question(s) of law, which it had thought that the high courts should have formulated, while remanding the case back. The apex court, in the instant case, only highlighted some of the issues[126] that high court should consider but not formulated the substantial question of law, which it thought exists in the case.

Similar approach was adopted by the apex court in *Rajendra Lalitkumar Agrawal* v. *Ratna Ashok Muranjan*[127] as well. In this case too, the high court had dismissed the second appeal on the ground that the same did not involve substantial question of law. The apex court, in appeal, felt otherwise and remanded the case back to the high court with a direction to formulate appropriate substantial questions of law and decide the appeal. The apex court observed, while remanding the case back, that "[I]t cannot be disputed that the interpretation of any terms and conditions of a document (such as the agreement dated 8-8-1984 in this case) constitutes a substantial question of law within the meaning of Section 100 of the Code. It is more so when both the parties admit the document."[128]

Unlike the above two cases, in *Gurnam Singh* v. *Lehna Singh*,[129] where the high court had entertained second appeal after formulating two questions as substantial questions of law, the apex court categorically stated that questions formulated by the high court "cannot be said to be substantial questions of law at all."[130]

In yet another case *i.e.*, *Chand Kaur* v. *Mehar Kaur*,[131] where the High Court of Punjab and Haryana had allowed bunch of second appeals without framing any substantial questions of law, the apex court simply set aside the judgment of the high

124 (2019) 3 SCC 711.

125 *Id*.,para 11.

126 See *Id*.,para 12.

127 (2019) 3 SCC 378.

128 *Id*.,para 10.

129 (2019) 7 SCC 641.

130 *Id*.,para 15.1. The two questions formulated by the high court were: "(*i*) Whether the appellate court can reverse the findings recorded by the learned trial court without adverting to the specific finding of the trial court? (*ii*) Whether the judgment passed by the learned lower appellate court is perverse and outcome of misreading of evidence?"

131 (2019) 12 SCC 202.

court and remanded the case back to it to hear the second appeals after framing substantial question(s) of law arising in the respective appeals.

Does the mandatory requirement of formulating substantial question of law in terms of section 100, CPC apply to the State of Punjab notwithstanding the contrary provision contained in the local law *i.e.*, section 41 of the Punjab Courts Act, 1918 was the question that arose before the apex court in *Kirodi* v. *Ram Parkash*.[132] The court, relying on the constitution bench decision rendered in *Pankajakshi*,[133]had answered the question in the negative. It reiterated that the aforesaid section 41 is not hit by section 97[134] of the Civil Procedure (Amendment) Act, 1976. Section 97 only repealed amendments made or provision inserted in the CPC providing for the contrary and not the provisions contained in the other special or local laws. It also said that article 254 of the Constitution of India does not apply to the pre-constitutional laws (Punjab Courts Act, 1918 in this case) and it is only article 372 that governs the application of such laws. Unless altered or repealed by the competent legislature such pre-constitutional laws continue to be in force. The court also declared judgments in *Chand Kaur*[135] and *Surat Singh*[136] as *per incuriam* for being inconsistent with the constitution bench decision rendered in *Pankajakshi*.[137] It is, thus, become clear that it is not necessary to formulate substantial question of law for admitting second appeal in the State of Punjab by virtue of section 41 of the Punjab Courts Act, 1918.

Second appeal: Interference with the concurrent findings of facts

In *Gurnam Singh* v. *Lehna Singh*,[138]the apex court reminded the high courts of the jurisdictional limits under section 100, CPC. It observed thus:[139]

> Before parting with the present judgment, we remind the High Courts that the jurisdiction of the High Court, in an appeal under Section 100 CPC, is strictly confined to the case involving substantial question of law and while deciding the second appeal under Section 100 CPC, it is not permissible for the High Court to reappreciate the evidence on record and interfere with the findings recorded by the courts below and/or the first appellate court and if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. We have noticed and even as repeatedly observed by this Court … despite the catena of decisions of

132 (2019) 11 SCC 317. Also see, *ChamanLal* v. *Kamlawati* (2020) 11 SCC 693.

133 *Pankajakshi* v. *Chandrika* (2016) 6 SCC 157.

134 Sec. 97 deals with repeal and *savings*. It reads "(1) Any amendment made, or any provision inserted in the Principal Act by a State Legislature or a High Court before the commencement of this Act shall, except insofar as such amendment or provision is consistent with the provisions of the Principal Act as amended by this Act, stand repealed."

135 *Chand Kaur* v. *Mehar Kaur* (2019) 12 SCC 202.

136 *Surat Singh* v. *Siri Bhagwan* (2018) 4 SCC 562.

137 *Supra* note 133.

138 *Supra* note 129.

139 *Id*.,para 19.

> this Court and even the mandate under Section 100 CPC, the High Courts under Section 100 CPC are disturbing the concurrent findings of facts and/or even the findings recorded by the first appellate court, either without formulating the substantial question of law or on framing erroneous substantial question of law.

In *S. Subramanian* v. *S. Ramasamy*,[140]the apex court categorically stated that the high court can substitute its own opinion for that of the first appellate court only in cases, where conclusions drawn by such court is:[141]

(i) Contrary to the mandatory provisions of the applicable law; or

(ii) Contrary to the law as pronounced by the apex court; or

(iii) Based on inadmissible evidence or no evidence.

The court quoted with approval the observations made in *IshwarDass Jain*[142]particularly on the question of interference with findings of fact. According to that it is permissible for the high court to interfere, in second appeal, with the findings of facts by courts below only in two situations.

(i) When relevant material or evidence was not considered by the courts below and the high court is of the view that its consideration would have led to an opposite conclusion;

(ii) Where the court below has reached the findings by placing reliance on inadmissible evidence and the high court is of the view that its exclusion would have possibly led to opposite conclusion.

Interference by the high court with the concurrent findings of the courts below was once again noticed by the apex court in *T. Ramalingeswara Rao* v. *N. Madhava Rao*.[143] In this case, the apex court once again reiterated that:[144]

> When the two courts below have recorded concurrent findings of fact against the plaintiffs, which are based on appreciation of facts and evidence, in our view, such findings being concurrent in nature are binding on the High Court. It is only when such findings are found to be against any provision of law or against the pleading or evidence or are found to be wholly perverse, a case for interference may call for by the High Court in its second appellate jurisdiction.

This was reiterated in *State of Rajasthan* v. *Shiv Dayal*[145] as well. The court, however, clarified that concurrent findings of the courts below do not become

140 (2019) 6 SCC 46.

141 *Id*., para 7.4.

142 *IshwarDass Jain* v. *Sohan Lal* (2000) 1 SCC 434.

143 (2019) 4 SCC 608. Also see *Thulasidhara* v. *Narayanappa* (2019) 6 SCC 409; *Ravi Setia* v. *Madan Lal* (2019) 9 SCC 381; *M.P.* v. *Sabal Singh* (2019) 10 SCC 595; *Madhukar Nivrutti Jagtap* v. *Pramilabai Chandulal Parandekar*, 2019 SCC OnLine SC 1026; *Naresh* v. *Hemant*, 2019 SCC OnLine 1490.

144 *Id*., para 11.

145 (2019) 8 SCC 637.

unassailable in the second appeal. The court enumerated the circumstances in which a party to the appeal can seek to assail the concurrent findings. It observed:[146]

> [t]he appellant is entitled to point out that it is bad in law because it was recorded dehors the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached.

Though, in the State of Punjab, by virtue of section 41 of the Punjab Courts Act, 1918, it is not necessary for the high court to formulate substantial questions of law while allowing second appeal, the said provision does not allow the high court to interfere with the findings of fact recorded by the courts below. This was pointed out by the apex court in *RandhirKaur* v. *Prithvi Pal Singh*.[147] Relying on catena of cases, the court observed thus:[148]

> A perusal of the aforesaid judgments would show that the jurisdiction in second appeal is not to interfere with the findings of fact on the ground that findings are erroneous, however, gross or inexcusable the error may seem to be. The findings of fact will also include the findings on the basis of documentary evidence. The jurisdiction to interfere in the second appeal is only where there is an error in law or procedure and not merely an error on a question of fact.

Appeal to the high court under section 260-A, the IT Act, 1961

In *CIT* v. *Rashtradoot (HUF)*,[149] the apex court while noting that section 260-A of the Income Tax Act is akin to section 100, CPC, has elucidated the cases in which high court can either allow or dismiss the appeal under the said provision. According to the apex court, the high court has the power to dismiss the appeal *inlimine* if the same does not involve substantial question of law. In addition, it can also dismiss the appeal after answering the substantial question(s) framed on merits or if it comes to the conclusion that the question(s) so framed did not, in fact, arise in the appeal. Further, just as under section 100, CPC, even under section 260-A of the IT Act, the high court need not confine to the question framed at the time of admission, it has the power to frame additional substantial question(s) of law at a later stage before final hearing. Appeal under section 260-A can be allowed by the high court only – (i) if it finds and frames the substantial question(s) of law; (ii) after hearing the respondent, and (iii) if it answers the question(s) so framed in appellant's favour. Except in case of *in limine* dismissal, the high court, after hearing the parties, can neither allow nor dismiss the appeal without framing or answering the substantial question(s) of law either way.

146 *Id*., para 16.
147 (2019) 17 SCC 71.
148 *Id*.,para 15.
149 (2019) 5 SCC 149.

Readmission of appeal dismissed for default

What is the remedy available against the refusal to readmit the appeal dismissed for default was the question considered by the apex court in *Mysore Urban Development Authority* v. *S.S. Sarvesh*.[150] In this case the appellant authority had filed the first appeal, which was dismissed for default since no one appeared on behalf of it on the day when the appeal was called on for hearing. The appellant authority, thereafter, got an application filed under order 41 rule 19, CPC before the first appellate court seeking restoration of the appeal for hearing on merits. The first appellate court dismissed the said application. The same was challenged in a writ petition filed under article 227 of the Constitution, which also came to be dismissed by the high court. The apex court allowed the appeal against the orders of the high court as well as the first appellate court. It, however, pointed out an error committed by the appellate authority in approaching the high court under article 227 against the order of the first appellate court refusing to readmit the appeal, which it had dismissed for default. Instead, in the opinion of the apex court, the appellant authority should have approached the high court under order 43 rule 1 (t), CPC as "[A]n order of refusal to readmit the appeal passed by the appellate court under Order 41 Rule 19 of the Code is made expressly appealable under Order 43 Rule 1(t) of the Code to the High Court."[151] It also pointed out that the high court too had committed an error in entertaining a petition under article 227 and dismissing the same on merits. The apex court was of the view that the high court should have declined to entertain the said writ petition and adopted either of the following two courses:

(i) Convert the writ petition into an appeal under order 43 rule 1 (t), CPC, or

(ii) Permit the appellant authority to withdraw the writ petition with liberty to file an appeal under the aforesaid provision of the CPC.

Further, relying on *Sangram Singh*,[152] the apex court also emphasized on "the necessity to do substantial justice to both the parties to the lis"[153] in cases like this. Noting that the right to file first appeal is a valuable right, the apex court was of the opinion that the courts below should not have deprived the appellant authority of its right. The first appellate court could have imposed costs on appellant for default to compensate the respondent and allowed the appellant authority to prosecute its case on merits.

Disposal of cross-objections in appeal

A question regarding proper mode of disposal of cross – objections filed in an appeal by the respondent arose before the apex court in *Badru* v. *NTPC*.[154] In this case, the high court had simply dismissed the cross-objections *in limine* without assigning ay reasons while dismissing the appeal on merits. The apex court opined

150 (2019) 5 SCC 144.

151 *Id*.,para 12.

152 *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425.

153 *Supra* note 150, para 19.

154 (2019) 20 SCC 652.

that in view of order 41 rule 22 (4), CPC it is impermissible for the high court to do so. The appellate court is bound to examine the cross objections independently and dispose it of on merits even if the appeal itself is dismissed "though on merits". As far as the text of order 41 rule 22 (4) is concerned, it requires the appellate court to hear and determine the cross-objections even if "the original appeal is withdrawn or is dismissed for default". In this case, the court extended the scope of the provision to include even the cases of dismissal of appeal on merits. No authorities cited in support and no reasons assigned to justify it.

Special leave petitions in the apex court

In *Sudhakar Baburao Nangnure* v. *Noreshwar Raghunathrao Shende*,[155] the apex court dealt with a question regarding the maintainability of the second special leave petition (SLP) filed after exhausting other remedies for pursuing which the first SLP was withdrawn earlier. In this case, a seniority list of officers in the service of Government of Maharashtra was challenged before the Maharashtra Administrative Tribunal. The tribunal set aside the same and the high court allowed the writ petition against the order of the tribunal. Challenging the decision of the high court, a SLP was filed in the apex court, where it was argued that though the issue of applicability of catch-up rule was raised before the high court, the same was not considered by it while allowing the writ petition. Noting the submission, the apex court allowed the petitioner to withdraw the SLP and gave him liberty to pursue remedies available under law. The apex court made it clear that it has not considered the matter on merits and stated that "it will be open to the parties on both the sides to take all available contentions before the High Court on the point of catch up."[156] The petitioner, accordingly, went back to the high court and filed the review petition, which was dismissed by the high court. Aggrieved by the judgments of the high court both in writ petition as well as in review petition, the petitioner filed a fresh SLP under article 136 of the Constitution. A miscellaneous application was also filed seeking clarification of the order that allowed withdrawal of the earlier SLP as to whether liberty granted would include the liberty to move the apex court again in case of adverse decision in the review petition. The respondent had raised a preliminary objection on the maintainability of the fresh SLP. According to them, since the apex court, in the earlier order, did not specifically grant liberty to approach it again by filing fresh SLP, it is not maintainable against the original judgment passed in the writ petition and it is a settled law that no SLP is maintainable solely against the order passed in review. The respondents relied upon certain precedents to fortify their contention.[157] The apex court rejected the contentions while distinguishing, on facts, the present case with the ones replied upon by the respondent. It observed thus:[158]

155 2019 SCC OnLine SC 326.

156 *Id*.,para 13.

157 *Finance & Leasing Co*. v. *M Lata* (2004) 13 SCC 675; *Abhishek Malviya* v. *Additional Welfare Commissioner* (2008) 3 SCC 108; *Vinod Kapoor* v. *State of Goa* (2012) 12 SCC 378; *Sandhya Educational Society* v. *Union of India* (2014) 7 SCC 701; *Bussa Overseas and Properties Private Limited* v. *Union of India* (2014) 4 SCC 696.

158 *Supra* note 155,para 34.

> In the present case, we find, for the reasons which we have indicated above, a clear distinction on facts. While disposing of the earlier Special Leave Petition to enable the appellant to pursue his remedies on the contention that the issue of catch-up though raised was not considered by the High Court, this Court expressly clarified that it had not considered the matter on merits. In the absence of such a clarification, the withdrawal of the Special Leave Petition would have led to the inference that the appellant had not been granted liberty to move this Court afresh. On the other hand, the clear purpose and intent of the observation that this Court had not considered the matter on merits was to keep open all the remedies of the appellant before the High Court in the first instance and thereafter before this Court on the issue of the catch-up rule.

Accordingly, fresh SLP was held to be maintainable.

In appeals under article 136 of the Constitution, the apex court does not interfere with the concurrent findings of facts except where it is warranted by compelling reasons. It interferes when it is shown to it that the findings of the first appellate court as well as of the high court are perverse.[159]

Doctrine of merger: Maintainability of review petition in the high court after dismissal of SLP

The question as to whether the review petition filed in the high court against the order passed by it is maintainable after the SLP challenging the same has been dismissed by the apex court had arose before different benches of the apex court in several cases in the past and they had rendered conflicting judgments.*Abbai Maligai Partnership Firm*[160] and *Kunhayammed*[161] are the two main cases, in which conflicting views were expressed. Both are three-judge bench decisions. Following them several two-judge benches have rendered conflicting judgments. In the year 2011 alone, two different benches took contradictory positions in two different cases. The same was pointed out in the *Annual Survey* of that year.[162] In the following year *i.e.*, in 2012, another two judge bench of the apex court, in *Khoday Distilleries,* [163] noted these contradictory decisions and referred the question to be answered authoritatively by a larger bench. The said question, thus, came to be examined in the current survey year by a three-judge bench in *Khoday Distilleries Ltd.* v. *Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd.*[164] It is axiomatic to state that the answer to the aforesaid question depends on whether or not the impugned judgment of the high court stands merged with the order passed by the apex court while dismissing the SLP. If the answer to this

159 *Jagdish Prasad Patel* v. *Shivnath*(2019) 6 SCC 82.

160 *Abbai Maligai Partnership Firm* v. *K. Santhakumaran* (1998) 7 SCC 386.

161 *Kunhayammed* v. *State of Kerala* (2000) 6 SCC 359.

162 P. Puneeth, "Civil Procedure" XLVII *Annual Survey of Indian Law* 2011, 89-129 (ILI, 2012).

163 *Khoday Distilleries Ltd.* v. *Mahadeswara S.S.K. Ltd.*, (2012) 12 SCC 291.

164 (2019) 4 SCC 376. On doctrine of merger in general, also see, *Surinder Pal Soni* v. *Sohan Lal (D) Thru Lr*. 2019 SCC ONLineSc 900.

question is in the affirmative, then the review petition against the self-same order/judgment is not maintainable. If the answer is in the negative, then it is open to the high court to entertain review petition against its order/judgment. The three-judge bench, which decided *Abbai Maligai Partnership Firm*,[165] had not examined this question at all whereas the three-judge bench, which decided *Kunhayammed*,[166] on the other hand, had painstakingly examined the legal position in great detail and clearly articulated when the decision of the high court is said to be merged with that of the apex court. In *Khoday Distilleries Ltd.* v. *Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd,*[167] the bench, which re-examined the question, has "affirmed and reiterated" the law laid down in *Kunhayammed*.[168] The legal positions now stand crystallized as follows:

(i) If the apex court dismisses the SLP at the threshold without assigning reasons, then the impugned order does not get merged with the order dismissing the SLP.

(ii) If the apex court dismisses the SLP at the threshold through a speaking order, where it gives reasons for refusing to grant special leave, even then the impugned judgment does not get merged with the order of the apex court. It is, however, important to note that such a speaking order passed by the apex court has two implications. *Firstly*, if it contains a statement of law, by virtue of article 141 of the Constitution of India, it is binding on all the courts below. *Secondly,* other findings, if any, recorded by the apex court binds the both the parties as well as, by virtue of judicial discipline, other courts and tribunals.

(iii) If the special leave has been granted by the apex court and the petition is converted into an appeal, the impugned order/judgment stands merged with the order passed in appeal. The doctrine of merger would be attracted notwithstanding whether the order passed by the apex court reverses, modifies or merely affirms the impugned order.

(iv) Once the apex court grants the special leave and the petition is converted into an appeal before it, the high court cannot entertain review petition against the same impugned order/judgment by virtue of order 47 rule 1 (1).

(v) In cases of (i) and (ii) above, it is open to the high court to entertain review petition after the dismissal of special leave petition at the threshold with or without assigning reasons. In cases, where reasons are assigned, the high court is bound by them.

With regard to the high court power to entertain review petition, the apex court also clarified that "it will not make any difference whether the review petition was

165 *Supra* note 160.
166 *Supra* note 161.
167 *Supra* note 164.
168 *Supra* note 161.

filed before the filing of special leave petition or was filed after the dismissal of special leave petition."[169]

Appeal to the Supreme Court under NGT Act, 2010

Section 22 of the National Green Tribunal Act, 2010 provides for appeal from any award, decision or order passed by the National Green Tribunal to Supreme Court on "any one or more of the grounds specified in Section 100" of the CPC. In *Mantri Techzone (P) Ltd.* v. *Forward Foundation*,[170] the apex court held that the appeal under the said provision can be filed only if the case involves substantial question of law(s) and not otherwise. It reiterated the settled law that "there is no vested right of appeal unless the statute so provides. Further, if a statute provides for a condition subject to which the appropriate appellate court can exercise jurisdiction, the court is under an obligation to satisfy itself whether the condition prescribed is fulfilled."[171] Further, while relying on the tests laid down by a constitutional bench in *Chunilal* v. *Mehta and Sons Ltd*.,[172] for determining whether a question involved is a substantial question of law or not, the court observed:[173]

> It is equally settled that merely because the remedy of appeal is provided against the decision of the Tribunal on a substantial question of law alone, that does not ipso facto permit the appellants to agitate their appeal to seek reappreciation of the factual matrix of the entire matter. The appellants cannot seek to re-argue their entire case to seek wholesale reappreciation of evidence and the factual matrix that has been considered by the Tribunal is ex facie impermissible under Section 22. There cannot be fresh appreciation or reappreciation of facts and evidence in a statutory appeal under this provision.

Pre-deposit requirement for filing appeal: Validity thereof

In *Tecnimont Pvt. Ltd. (Formerly Known As Tecnimont ICB Private Limited)* v. *State of Punjab*,[174] the apex court considered the constitutional validity of section 62(5) of the Punjab Value Added Tax Act, 2005 which imposed a condition of "prior minimum payment of twenty-five per cent of the total amount of additional demand created, penalty and interest, if any" for entertaining the first appeal.

The apex court, relying on plethora of cases, upheld the view of the high court that the aforesaid provision is legal and valid and condition of prior – deposit of twenty – five percent of the amount is not onerous, harsh, unreasonable and, thus, does not violate article 14 of the Constitution of India. It, however, disagreed with the high court on the question as to whether the appellate authority, even when it does not have the discretion under the statute, can grant relief against requirement of prior deposit and entertain the first appeal. The high court had opined that the appellate authority can do so in exercise of its inherent powers. The apex court said that the

169 *Supra* note 164, para 26.3.

170 (2019) 18 SCC 494.

171 *Id*., para 36.

172 *Chunilal* v. *Mehta and Sons Ltd.* v. *Century Spg. and Mfg. Co. Ltd.*, AIR 1962 SC 1314.

authority cannot be allowed to exercise the inherent or implied power under the statute to grant such relief. In the opinion of the apex court, in extreme cases of hardship the appropriate remedy is to file writ petition in the high court.

VII REVIEW AND REVISION

It is well settled that "[T]he review… is not a re-hearing of the main matter. A review would lie only on detection without much debate of an error apparent."[175]The apex court has clarified, as in many other cases, in *Perry Kansagra* v. *Madan Kansagra*[176] that "an error which is required to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record. To justify exercise of review jurisdiction, the error must be self-evident."[177]

Maintainability of writ petition against the order of civil court

It is a settled law that order of 'judicial courts' (civil or criminal) cannot be challenged in a writ petition filed either under article 226 or article 32 of the Constitution of India. They can only be challenged by way of appeal or revision provided by the relevant statute or under article 227 of the Constitution. A three judge bench of the apex court had clarified the position in *Radhey Shyam*[178] in 2015. In the survey year, an identical question arose in *State of Jharkhand* v. *Surendra Kumar Srivastava*.[179] In this case, a writ petition was filed before the High Court of Jharkhand seeking a writ of *certiorari* to quash the order passed by adistrict judge in a miscellaneous appeal. The single judge of the high court had allowed the writ petition and set aside the impugned orders. In an appeal by special leave of the apex court, the appellants contended, *inter alia*, that in view of *Radhey Shyam*,[180] the writ petition filed before the high court challenging the judicial order was not maintainable. In *Surendra Kumar Srivastava*,[181] the apex court, though accepted the contention of the appellants and endorsed the law laid down as undisputed, did not choose to unsettle the impugned judgment passed by the high court on the said ground. It gave two reasons for not applying the well settled law in the instant case, *firstly*, the appellants, who were respondents in the writ petition, did not challenge its maintainability in the high court, and *secondly*, had they challenged it before the high court, the course open for the petitioner was to amend the cause title of the writ petition and file it under article 227 instead of article 226. A petition under article 227 challenging the orders passed by the civil court would have been undoubtedly maintainable. Since, the petitioner did not get that opportunity to amend the cause – title, the apex court was not inclined to set aside the impugned order of the high court on the said ground and instead proceeded to decide the appeal on merits.

173 *Supra* note 170, para 38.
174 2019 SCC OnLine 1228.
175 *High Court of Tripura* v. *Tirtha Sarathi Mukherjee* (2019) 16 SCC 663.
176 2019 SCC OnLine SC 211.
177 *Id*., para 19.
178 *Radhey Shyam* v. *Chhabi Nath* (2015) 5 SCC 423.
179 (2019) 4 SCC 214.
180 *Supra* note 178.
181 (2019) 4 SCC 214.

Invocation of article 227

In *Virudhunagar Hindu Nadargal Dharma Paribalana Sabai* v. *Tuticorin Educational Society*,[182] the question as to whether it is permissible for a party to invoke the supervisory jurisdiction of the high court, without exhausting the alternative remedy available under CPC, to challenge injunction granted by the trial court came up for consideration. In this case, the injunction order granted by the trial court was challenged by one of the defendants before the sub-court by filing an appeal under order 41 rule 1 (r), CPC but the two other defendants have approached the high court under article 227 challenging the same order. The high court had allowed the same. The apex court, by placing reliance on *Venkatasubbiah Naidu,*[183] held that the high court was wrong in entertaining the petition in the facts and circumstances of the case. It observed:[184]

> It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In *A. Venkatasubbiah Naidu* v. *S. Chellappan*, this Court held that "though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well-recognised principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a constitutional remedy.

The court further opined that in certain cases the availability of alternative remedy shall be construed as near total bar for invoking the jurisdiction of the high court under article 227. It observed:[185]

> [c]ourts should always bear in mind a distinction between (i) cases where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure, and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi-judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit…

Thus, wherever the alternative remedy is available under the CPC, high courts shall not exercise their jurisdiction under article 227 "not merely as a measure of self-imposed restriction, but as a matter of discipline and prudence…"[186]

182 (2019) 9 SCC 538.

183 *A. Venkatasubbiah Naidu* v. *S. Chellappan* (2000) 7 SCC 695.

184 *Supra* note 182, para 11.

185 *Id*.,para 12.

186 *Id*.,para 13.

Challenging the order passed in review without challenging the main order

In *Asharfi Devi* v. *State of U.P.*,[187]a declaration that the appellant was holding land in excesses of the ceiling limits prescribed under the Urban Land (Ceiling and Regulation) Act, 1976 was made in the proceedings initiated under the said Act. The states claimed to have taken the possession of the excess land way back in 1982. Later, the said Act came to be repealed in 1999. Thereafter the appellant filed a writ petition in the high court claiming that she continued to be in possession of the excess land and, hence, all proceeding in relation to the land in question stood lapsed in terms of the repealing Act. The high court dismissed the writ petition on the ground that the petitioner/appellant could not prove the actual possession of the land in question as on the date of repeal of the Act. The review petition filed challenging the said order was also dismissed on the ground that there was no error apparent on face of the record. The order dismissing the review petition was challenged in the apex court without challenging the order dismissing the main writ petition. When the court pointed out that while examining the legality of the review order, it cannot examine the correctness of the main order, permission was sought to challenge the main order as well. The apex court declined the permission stating that the appellant does not have justification for not challenging the main order for over eleven years. Having regard to the facts and circumstances of the case, it also opined that the case is not a fit one to invoke its power under article 142 of the Constitution to allow the appellant to challenge the main order after such a long gap. The apex court only examined the legality of the order passed in the review petition and found it to be legally sustainable. It reiterated the following settled positions:

(i) Any factual or legal error in the judgment or order, which can be made subject-matter of appeal arising out of such judgment or order, cannot be made subject-matter of review under order 47 rule 1, CPC. Review under the said rule can be filed only if the error is "apparent on the face of the record."[188]

(ii) If any finding is recorded on a disputed question of fact by the high court in a writ petition, such finding cannot be examined *de novo*in the review unlike in appeal.[189]

Revision

In *Tek Singh* v. *ShashiVerma*,[190] an application seeking temporary injunction filed under order 39 rule 1 was dismissed by the trial court on the ground that granting the same, in the facts and circumstances of the case, amounts to decreeing the suit itself. The first appellate court upheld the said order of the trial court. A revision petition was filed against the said orders and the high court allowed the same and set aside the concurrent decisions of both the trial court and the first appellate court. The

187 (2019) 5 SCC 86.

188 *Id*.,para 18.

189 *Id*.,para 23.

190 (2019) 16 SCC 678.

apex court, taking note of the fact that the high court, while allowing the revision petition, had not dealt with any of the aspects set out by the first appellate court and had not observed any of the legal principles, has castigated the approach adopted by it. It remarked that "every legal canon has been thrown to the winds by the impugned judgment".[191] Further, while setting aside the judgment of the high court and restoring the judgments of the trial court and the first appellate court, the apex court also clarified that:

(i) As per the proviso to section 115, CPC, which was added in 1999, revision petitions are not maintainable against interlocutory orders.[192]

(ii) As it is enunciated in *DLF Housing & Construction Co. (P) Ltd.*,[193] it is well settled that the revisional jurisdiction of the high court under section 115, CPC can be exercised to correct jurisdictional errors only.[194]

(iii) As per*DorabCawasji Warden,*[195] for seeking mandatory injunction at the interim stage, "much more than mere prima facie case has to be made out."[196]

In *D. Sasi Kumar* v. *Soundararajan*,[197] the apex court briefly delineated the scope of revisional jurisdiction.[198]

> [t]he civil revision petition before the High Court is not to be considered as in the nature of an appeal. The scope of consideration is only to take note as to whether there is any perversity in the satisfaction recorded by the original Court… in that light as to whether the appellate authority under the statute has considered the aspect in the background of the evidence to arrive at the conclusion to its satisfaction. The reappreciation of the evidence in the civil revision petition to indicate that another view is possible would not arise.

VIII JUDGMENT, DECREE AND ORDERS

It has been the consistent view of the apex court that "every order/judgment, which decides the lis between the parties, must contain the reason(s)/ground(s) for arriving at a particular conclusion."[199] It is not the conclusion alone that is decisive in deciding a case, the reasons assigned in support of such conclusion is also equally decisive.[200]

191 *Id*., para 5.
192 *Ibid*.
193 *DLF Housing & Construction Co. (P) Ltd.* v. *Sarup Singh* (1969) 3 SCC 807.
194 *Supra* note 190, para 6.
195 *Dorab Cawasji Warden* v. *Coomi Sorab Warden* (1990) 2 SCC 117.
196 *Supra* note 190, para 7.
197 (2019) 9 SCC 282.
198 *Id*.,para 8.
199 *CIT* v. *Rashtradoot (HUF)*, (2019) 5 SCC 149 [Para 13].
200 *Ibid*.

In *R.S. Anjayya Gupta* v. *Thippaiah Setty*,[201] the apex court remanded the case back to the high court precisely for the reason that the high court has disposed of the first appeal by a cryptic order without assigning any reasons for affirming the opinion of the trial court. While remanding the case back, the apex court observed:[202]

> The first is that, the High Court has disposed of the first appeal by a cryptic judgment. For, the first five paragraphs of the impugned judgment are only reproduction of the submissions made by the counsel for the parties concerned. After doing so, in para 6 of the impugned judgment, the High Court straight away proceeded to affirm the opinion of the trial court that the suit properties forming part of Schedule A and Schedule B to the plaint, are the joint family properties.

In *State of Andhra Pradesh* v. *B. Ranga Reddy (D) By Lrs*.,[203] the apex court distinguished between the "decree" and "judgment". It stated that the "[D]ecree in terms of Section 2(2) of the Code means formal expression of an adjudication conclusively determining the rights of the parties…"[204] whereas "the reasons for passing such decree is judgment as defined in Section 2(9) of the Code."[205]

IX EXECUTION

Application for execution: Compliance with the requirements

In *Sir Sobha Singh and Sons Pvt. Ltd*. v. *Shashi Mohan Kapur (Deceased) Thr. L.R*.,[206] the apex court succinctly described the three requirements to be complied with by the decree holder for filing an application for execution of a decree. They are:[207]

> First, the written application filed under Order 21 Rules 10 and 11 (2) of the Code must be duly signed and verified by the applicant or any person, who is acquainted with the facts of the case, to the satisfaction of the Court; Second, the application must contain the details, which are specified in clauses (a) to (j) of Rule 11(2) of the Code, which include mentioning of the date of the judgment and the decree; and Third, filing of the certified copy of the decree, if the Court requires the decree holder to file it under Order 21 Rule 11(3) of the Code.

In this case, the court also dealt with the question as to whether in case of compromise of suit, order recording compromise under order 23 rule 3 itself can be considered as 'decree' and, thus, becomes executable. Keeping in view the clear language of the provision, the court opined that the order passed under the said provision itself does not amount to 'decree' and, thus, not executable. It, however,

201 (2019) 7 SCC 300.
202 *Id*., para 16.
203 2019 SCC OnLine SC 1009.
204 *Id*., para 36.
205 *Id*., para 38.
206 2019 SCC OnLine SC 856.
207 *Id*., para 32.

clarified that even if the certified copy of the decree is not filed along with the application for execution for the reason that the decree was not passed by the court, it does not affect the maintainability of the execution application. In the opinion of the court, the execution application is still maintainable since by virtue of order 20 rule 6A (2), the order passed under order 23 rule 3, CPC has to treated as a 'decree' during the interregnum.

Further, the court observed that in cases, where the court has not passed the decree after recording the compromise as required under order 23 rule 3, the party can make an application under section 151 read with order 20 rule 6 (A) to the concerned court for passing a decree. It was clarified that section 152, CPC is not the relevant provision to make such an application praying for passing of decree in such cases.

Execution proceedings: Objections to the territorial jurisdiction of the court whose decree is to be executed

Whether a respondent in an execution proceeding can file an objection, under section 41, CPC, contending that the decree sought to be executed is a nullity as it was passed by a court, which did not have the territorial jurisdiction was a question that arose before the apex court in *SnehLataGoel* v. *Pushplata*.[208] The court, relaying on section 21, CPC and the catena of judicial precedents, categorically reiterated that unlike the objection to the subject-matter jurisdiction, the objection to the territorial jurisdiction does not "travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit."[209] According to the apex court, objection to the territorial jurisdiction, if any, has to be raised before the court of first instance at the earliest opportunity. In cases where issues are to be settled, such objections are to be raised on or before such settlement. It is only where there is a consequent failure of justice that an objection as to the place of suing can be entertained." The court, thus, answered the question in the negative.

In *S. Bhaskaran* v. *Sebastian*,[210] the court reiterated that "the execution court cannot travel beyond the order or decree under execution."[211]

Executability of decree against LRs of a partner

In *S.P. Misra* v. *Mohd.Laiquddin Khan*,[212] the question considered by the apex court was whether the decree obtained by one of the partners against the other for enforcement of certain rights under the partnership deed is executable against the legal representatives of the judgment debtor after his death?

In this case, plaintiff and defendants were the only two partners. One of them filed a suit against the other for enforcement of certain rights under the partnership deed. After the suit was decreed, the judgment debtor died and subsequently the decree – holder also died. Later, the legal representatives of the decree – holder filed an

208 (2019) 3 SCC 594.

209 *Id*., para 13.

210 (2019) 9 SCC 161.

211 *Id*., para 9.

212 (2019) 10 SCC 329.

execution petition, which was contested by the legal representatives of the judgment – debtor on the ground that the decree is not enforceable against them. While upholding the contention of the respondents, the apex court observed that "[I]n view of death of one of the partners, the partnership itself stands dissolved statutorily, by operation of law… When the respondents are not parties to the partnership firm, they are not bound by the decree obtained by the predecessor of the appellant."[213]

Police assistance for delivery of possession

Whether it is permissible to take the police assistance to deliver the possession of land to the decree – holder without obtaining specific court order for the purpose was the question came – up for consideration in *Om Parkash* v. *Amar Singh*.[214] In this case, the judgment – debtor has prevented the decree – holder from obtaining the possession of the land for long. Various warrants of possession issued by the execution courts were returned without being executed. In the circumstances, the authorities on their own decided to take the help of police and delivered the possession to the decree – holder.

The apex court, even though appreciated the apprehensions of the authorities that compelled them to adopt such a course, did not approve of the course adopted by them. Referring to order 21 rules 25 and 35 (3), CPC, the court observed that if the officer entrusted with the execution is unable to do so, he should have submitted an endorsement to the court stating the reasons for non – execution and it is for the court to pass appropriate orders. In the opinion of the court, executive authorities were completely unjustified in taking the assistance of the police without following the procedure and obtaining the appropriate court orders. Keeping in view the circumstances of the case, though the court did not order an enquiry into executive misadventure, it has passed a stern warning:[215]

> We may not be understood to have pardoned or overlooked the executive authorities for the manner in which they have acted and any misadventure in future without appropriate orders of a court will be obviously at their own risks, costs and consequences.

X LIMITATION

In *Sanjay Singh* v. *Central Himalayan Land Development Co. Ltd.*,[216] the respondent herein had filed a regular first appeal in the high court along with the application for condonation of delay of 721 days. The condonation of delay was sought for on the ground that they were not informed by their advocate about the disposal of the suit by the trial court. The respondent also stated that they had, if fact, filed a complaint against the advocate before the Bar Council and the same is pending for adjudication. They had contended that they should not be made to suffer on account of the failure on the part of their advocate. The high court condoned the delay and

213 *Id*.,para 21.
214 (2019) 10 SCC 136.
215 *Id*.,para 13.
216 (2019) 12 SCC 218.

admitted the appeal for hearing. When this was challenged, the apex court, after looking into the facts and circumstances of the case, opined that the explanation offered by the respondent for condonation of delay was not satisfactory. The apex court observed:[217]

> In our view, there was gross negligence on the part of the respondent and the explanation offered in support of the prayer for condonation does not appear to be correct. This is evident from the fact that no effective steps were taken to pursue the complaint which was lodged against the then advocate. In the petition for special leave, it was asserted that the complaint against the advocate was not being proceeded with and the respondent had remained absent on the relevant date. The said assertion was not answered satisfactorily in the affidavit-in-reply filed in this Court. Taking totality of the circumstances, in our view the delay ought not to have been condoned by the High Court.

The apex court, therefore, set aside the order condoning delay as result the regular first appeal pending before the high court stands dismissed.

In *HUDA* v. *Gopi Chand Atreja*,[218] the Haryana Urban Development Authority had filed a second appeal in the high court along with the application for condonation of delay of 1942 days. The high court dismissed the said application on the ground that 'sufficient cause' was not shown for condonation of delay. As a consequence second appeal was also dismissed. The apex court, holding that the delay "is wholly inordinate and the cause pleaded for its condonation is equally unexplained by the appellants… the Explanation given does not constitute a sufficient cause within the meaning of Section 5 of the Limitation Act", refused to interfere with the order of the high court. The major lacuna in the judgment of the apex court is that it neither mentions the 'cause' pleaded nor the 'explanation' offered for seeking condonation of delay. The judgment simply states that cause pleaded is unexplained and explanation does not constitute 'sufficient cause'. It would have been instructive to first mention them and then pass judgment on their sufficiency or otherwise.

Further, it is important to note that the apex court ordered, in the instant case, that since the officers of the HUDA, "who were in charge of the legal cell failed to discharge their duty assigned to them promptly and with due diligence despite availability of all facilities and infrastructure… (they) shall be made answerable for the lapse on their part and make good the loss suffered by the appellant HUDA."[219]

Similarly, in *University of Delhi* v. *Union of India*,[220] a letter patent appeal was filed by the appellant in the high court with an application for the condonation of delay of 916 days. The division bench of the high court after considering the reasons

217 *Id*., para 15.
218 (2019) 4 SCC 612.
219 *Id*., para 14.
220 (2020) 13 SCC 745.

stated declined to condone the delay. The apex court, while upholding the decision of the division bench, observed:[221]

> From a consideration of the view taken by this Court through the decisions cited supra the position is clear that, by and large, a liberal approach is to be taken in the matter of condonation of delay. *The consideration for condonation of delay would not depend on the status of the party, namely, the Government or the public bodies so as to apply a different yardstick but the ultimate consideration should be to render even-handed justice to the parties*. Even in such case the condonation of long delay should not be automatic since the accrued right or the adverse consequence to the opposite party is also to be kept in perspective. In that background while considering condonation of delay, the routine explanation would not be enough but it should be in the nature of indicating "sufficient cause" to justify the delay which will depend on the backdrop of each case and will have to be weighed carefully by the courts based on the fact situation.

In *Sameer Kapoor* v. *State*,[222]certain questions relating to applicability of limitation prescribed under article 137 of the Limitation Act, 1963 to petitions filed under sections 276 and 228 of the Indian Succession Act, 1925 arose before the apex court. After detailed analyses of the law, the apex court clarified the legal positions and laid down:

(i) Article 137 of the Limitation Act, 1963 applies to petitions filed under section 276 of the Succession Act, 1925 for grant of probate or letters of administration.[223]

(ii) Article 137 of the Limitation Act, 1963 applies also to applications filed under section 228 of the Succession Act, 1925,[224] which empowers the court to grant letter of administration based on the will that has been "proved and deposited in a Court of competent jurisdiction situated beyond the limits of the State, whether within or beyond the limits of India…"[225]

(iii) If the will is probated by any competent court beyond the limits of the state as contemplated under section 228 of the Act, the"right to get the letters of administration is a continuous right which can be exercised any time, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed."[226]

In *Ganesan* v. *T.N. Hindu Religious & Charitable Endowments Board*,[227] the question as to whether section 5 of the Limitation Act, 1963 applies to proceedings

221 *Id*., para 23. Emphasis supplied.
222 (2020) 12 SCC 480.
223 *Id*., para 10.
224 *Ĭd*., para 11.
225 Sec. 228, the Indian Succession Act, 1925.
226 *Supra* note 222, para 17.
227 (2019) 7 SCC 108.

before the commissioner under section 69 of the T.N. Hindu Religious and Charitable Endowments Act, 1959 arose for consideration before the apex court.

While answering the question in the negative, the apex court observed that though the provisions of the Limitation Act can be made applicable, through a statutory scheme of special or local laws, to proceedings before the statutory authority which is not a court, in the absence of such statutory provision in the special or local laws, the statutory authorities under such laws cannot apply the provisions of the Limitation Act to condone delays. The court also clarified that the commissioner acting under the aforesaid provision cannot be treated as "court".

Adverse possession

The concept of 'adverse possession' is a common law concept. It is not statutorily defined in India. The Limitation Act, 1963 only prescribes, under article 65, period for recovery of possession of an immovable property based on title as twelve years. It does not define the concept of adverse possession nor does it specify the rights of adverse possessee on the expiry of twelve years – period prescribed for recovery of possession by a person based on title. In *Ravinder Kaur Grewal* v. *Manjit Kaur*,[228] a three judge bench of the apex court has elucidated the concept of adverse possession and the nature of rights acquired by such possession. The precise question considered by the bench in the case was whether article 65 of the Limitation Act, 1963 allows the person claiming adverse possession of immovable property only to set up such a plea as a defendant and not as a plaintiff by filing a suit for protection of his possession or to recover it in case of dispossession? In other words, whether the plea of adverse possession can only be used as a shield or can it also be used as a sword by the person claiming to have perfected his title through adverse possession?

Though the question was answered, either expressly or implicitly, in the affirmative in many cases in the past, contrary views have also been expressed by the apex court[229] and the High Court of Punjab and Haryana[230] in couple of cases.

In the instant case, the three judge bench, after considering the various judicial decisions rendered in the past by the Supreme Court of India, Privy Council and courts in other jurisdictions, has answered the question categorically in the affirmative. It held that the suit filed by the plaintiff for declaration of title and protection or restoration of possession on the basis of adverse possession is maintainable. The bench reinforced the point that the plea of adverse possession can be used both as a shield as well as a sword. The bench explicitly overruled judgments in which contrary views were expressed. While countering the reasons based on which contrary views were expressed, the bench observed:[231]

228 (2019) 8 SCC 729.

229 *Gurdwara Sahib* v. *Gram Panchayat Village Sirthala*, (2014) 1 SCC 669; *State of Uttarakhand* v. *Mandir Sri Laxman Sidh Maharaj* (2017) 9 SCC 579; *Dharampal* v. *Punjab Wakf Board* (2018) 11 SCC 449.

230 *Gurdwara Sahib Sannauli* v. *State of Punjab*, 2009 SCC OnLine P and H 3826 : PLR (2009) 154 P and H 756; *Bhim Singh* v. *Zile Singh*, 2006 SCC OnLine P and H 362 : (2006) 3 RCR (Civil) 97 : AIR 2006 P and H 195.

231 *Supra* note 228,para 49. Emphasis supplied.

> The conclusion reached … is based on an inferential process because of the language used in the IIIrd Column of Article 65… the limitation of 12 years runs from the date when the possession of the *defendant* becomes adverse to the plaintiff. Column 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... 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 the Privy Council, High Courts and of English courts… and observations made in *Halsbury's Laws* based on various decisions indicate that suit can be filed by the 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 the 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… 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.

The bench, while holding that the suit can be filed for declaration of title based on adverse possession, explained the consequence of expiry of period of limitation for recovery of possession by the original owner. It observed:[232]

> There is the acquisition of title in favour of the 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 the Act.

In the opinion of the bench, the expression 'title' in the opening part of article 65 "would include the title acquired by the plaintiff by way of adverse possession."[233] Because, as has been held in many cases "[T]he title is perfected by adverse possession."[234] The bench rejected the argument that "there is no conferral of right by adverse possession."[235] In its opinion, on the lapse of limitation prescribed under article 65, the right of the original owner over the immovable property extinguishes by virtue of section 27 of the Limitation Act, 1963. After the extinguishment of the

232 *Id*., para 56.
233 *Id*., para 57.
234 *Ibid*.
235 *Id*.,para 58.

right of the original owner, the common law concept of adverse possession, which goes beyond the statutory stipulation, confers the same right on the possessor.

The bench, however, clarified that "[T]he possession as trespasser is not adverse nor long possession is synonymous with adverse possession." Elucidating it further, it observed:[236]

> 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 *necprecario* 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 synonymous 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.

Further, the bench also opined that the adverse possession is heritable and tacking is also possible. It observed:[237]

> Adverse possession is heritable and there can be tacking of adverse possession by two or more persons as the right is transmissible one... Tacking is based on the fulfilment of certain conditions, tacking may be 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.

The owner cannot, by re-entry, defeat the right perfected by adverse possession except as provided in article 65 of the Act. On the expiry of period of limitation prescribed therein, "even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner…"[238] and the right, title and interest so acquired "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."[239] Not only that "[I]n 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."[240]

236 *Id*., para 60.
237 *Id*., para 61.
238 *Id*., para 62.
239 *Ibid*.
240 *Ibid*.

In the end, the bench, however, struck a different chord with regard to property dedicated to public use. Noting that such properties are often encroached and then plea of adverse possession is set-up, the bench expressed its opinion that the right shall not be made to accrue in such cases. Keeping in view the harsh consequences of law of adverse possession, it has advised that an amendment to the Limitation Act shall be carried out to ensure that with regard to properties dedicated to public use, right shall not accrue by adverse possession.

XI MISCELLANEOUS

Summary suit: Leave to defend

In *Sudin Dilip Talaulikar* v. *Polycap Wires (P) Ltd*.,[241] the apex court cited with approval the principles laid down in *Hubtown Ltd*.[242] for guiding the exercise of discretion to grant leave to defend under order 37 rule 3, CPC. In *Hubtown Ltd*.,[243] the apex court had laid down in what cases the defendant can seek unconditional leave to defend as a matter of right; in what cases, the court can grant leave to defend by imposing certain conditions, and when the court can refuse to grant such leave. The criteria laid down therein are broad and leave enough scope for subjective decisions. The courts shall examine the facts, particularly, merits and authenticity of the claim made by the defendant in each case for applying those criteria.

Order 44 rule 1: Filing appeal as an "indigent person"

In *Sushil Thomas Abraham* v. *Skyline Builders*,[244] the apex court dealt with an interesting question as to whether a person whose prayer to file a suit as an "indigent person" under order 33 rule 1, CPC was rejected by the trial court in the first round of litigation, can file an appeal, in the second round of litigation, under order 44 rule 1 as an "indigent person"?

In this case, the appellant, in the first round of litigation, filed a civil suit against the respondent for recovery of certain sum and he had also pleaded that he should be allowed to file the suit as an indigent person as he was not in a position to pay the *ad valorem* court fees. The trial court rejected the prayer on the ground that he has failed to prove that he is an indigent person. The appeal against the said order was dismissed by the high court, which granted him one month's time to pay the requisite court fee. Then the appellant converted the suit in the trial court into original suit. He also filed another suit against the respondent seeking certain other relief. Both suits were dismissed by the trial court. Aggrieved by the same, he filed an appeal before the high court along with an application under order 44 rule 1, CPC pleading that he is not in a position to pay the *ad valorem* court fees for filing the appeal as "his financial condition is further deteriorated from what it was earlier when he had filed a civil suit."He, thus, prayed for filing of the first appeal as an indigent person. The high court rejected his prayer holding that the appellant is not entitled to file the appeal as an indigent person having regard to the fact that his earlier prayer to file a suit as an

241 (2019) 7 SCC 577.

242 *Hubtown Ltd.* [*IDBI Trusteeship Services Ltd.* v. *Hubtown Ltd.* (2017) 1 SCC 568.

243 *Id*., para 17.

244 (2019) 3 SCC 415.

indigent person under order 33 rule 1 was rejected by the trial court and the said rejection was also upheld by the high court in the earlier round. It accordingly directed the appellant to pay the court fee on memorandum of appeal. The apex court, while allowing the appeal against the said order, has clarified the legal position. It opined that a person is entitled to file a suit under order 33 as an indigent person provided he is able to prove that he does not possess sufficient means to pay the requisite court fee. Whether or not the person possesses the sufficient means to pay the court fee is a question that is required to be decided by holding an enquiry under rules 4 to 7 of the said order 33. While deciding the sufficiency of means, the apex court clarified that, two properties shall not be taken into consideration *viz*., (i) the property that is exempted from attachment in execution of a decree, and (ii) the subject matter of the suit. On the other hand, the property acquired by a person after filing of the application to sue as an indigent person and before the decision on the said application is made, has to be taken into consideration.

The provisions of order 33 are made applicable to appeals by virtue of order 44 rule 1. Merely because his application under order 33 was rejected by the trial court in the initial round of litigation, which was also upheld in appeal, the high court cannot reject an application under order 44 to file an appeal as an indigent person without conducting an enquiry when the person has particularly pleaded that his position got further deteriorated since the date of the decree appealed from. The apex court accordingly set aside the order of the high court and remanded the case to the high court for holding an inquiry as contemplated under order 44 rule 3 (2).

Manner of adjudication of the suits and counterclaims under section 9, CPC

The apex court, in *Monsanto Technology LLC* v. *Nuziveedu Seeds Ltd*.,[245] briefly outlined the manner of adjudication of suits instituted under section 9, CPC and the counterclaims filed in such suits. Relying on *Alka Gupta*,[246] the court observed:[247]

> The Civil Procedure Code provides a detailed procedure with regard to the manner in which a suit instituted under Section 9, including a counterclaim has to be considered and adjudicated. The Code mandates a procedure by settlement of issues, examination and cross-examination of witnesses by the parties, including discovery/inspection of documents, culminating in the hearing of the suit and decree. A suit can be disposed of at the initial stage only on an admission *inter alia* under Order 12 Rule 6 or when the parties are not in issue under Order 16 Rule 1 and the other grounds mentioned therein.

Irregularity in the local investigation report: Course to be adopted

Section 75, CPC empowers the court to issue a commission, with such conditions and limitations, for the purpose, *inter alia*, of making local investigations. Rule 10 of order 26, CPC specifies the procedures to be followed by the commissioner and

245 (2019) 3 SCC 381.

246 *Alka Gupta* v. *Narender Kumar Gupta* (2010) 10 SCC 141.

247 *Supra* note 245, at 22.

thereafter by the court on receipt of the report by the commissioner. As per clause (3) of the said rule 10, if the court for any reasons dissatisfied with the investigation proceedings or report, it has the power to direct further enquiry. Relaying on the said provision, the apex court in *Ram Lal* v. *Salig Ram*[248] has opined that:[249]

> [i]f the Local Commissioner's report was found wanting in compliance of applicable instructions for the purpose of demarcation, it was only a matter of irregularity and could have only resulted in discarding of such a report and requiring a fresh report but any such flaw, by itself, could have neither resulted in nullifying the order requiring appointment of Local Commissioner and for recording a finding after taking his report nor in dismissal of the suit.

The apex court, accordingly, set aside the decision of the high court, which had, after rejecting the commissioner's report because of the irregularities therein, straightway proceeded to dismiss the suit itself. It reiterated that as per the provision, if the commissioner's report is rejected, the court is required to order a fresh enquiry and not dismiss the suit.

Powers of the chairperson of CAT

An important question as to whether the chairperson of the Central Administrative Tribunal, sitting singly and exercising power to transfer proceedings from one bench to another under section 25 of the Administrative Tribunals Act, 1985, could have stayed proceedings pending before a two member bench arose for consideration in *All India Institute of Medical Sciences* v. *Sanjiv Chaturvedi*.[250] In this case, the chairperson, on the application filed by the Union of India (one of the parties to the case) seeking transfer of the case pending before a two member bench at Nainital to the principal bench at Delhi, passed an *ex parte* order staying the proceedings before the Nainital bench for six weeks while issuing notice to the respondent. The apex court, while answering the question in the negative, accorded the following reasons in support.

(i) A tribunal created under the Act as well as the chairperson thereof derive their powers from the Act and can only exercise such powers as are conferred by the Act. Section 25 of the Administrative Tribunals Act, 1985 confers power on the chairpersonto transfer any case pending before any bench to any other bench after following the procedure laid down therein. The said provision does not, however, confer on the Chairperson power to grant, during the pendency of transfer proceedings, interim stay of proceedings pending before a bench, from where transfer is sought to another bench.[251]

(ii) The power to grant interim order under section 24 of the Act is conferred on the tribunal, which power can be exercised by a bench of the tribunal

248 2019 SCC OnLine SC 121.

249 *Id*., para 18.

250 2019 SCC OnLine SC 118.

251 *Id*.,paras 59 and 61.

competent to exercise the jurisdiction and powers of the tribunal. The chairperson of the tribunal, while exercising his/her power under section 25, does not act as a tribunal and, thus, cannot grant interim order staying the proceedings.[252]

(iii) Tribunals constituted under the Administrative Tribunals Act, 1985, enacted in furtherance of the objectives sought to be achieved by article 323A of the Constitution of India, have all the attributes of a court of law except that they are not bound by the strict rules of procedure and evidence as are envisaged under CPC and the Evidence Act respectively. All norms of judicial propriety and judicial discipline as are applicable to the courts apply to the Tribunals in equal measure.[253]

(iv) It is well established that the judicial decorum and propriety requires that a judicial order of a bench – whether ad interim, interim or final – may be vacated, varied, modified, recalled or reviewedby a coordinate or larger bench. It is impermissible for the smaller benches or lower courts/tribunals to do so unless they have been authorized either expressly or implicitly in the judicial order sought to be vacated, varied, modified, recalled or reviewed.[254]

(v) A judicial order passed by a Tribunal isbinding on all concerned unless set aside or modified by a competent forum. A chairperson cannot issue an order nullifying the same under any circumstances.[255]

(vi) The chairperson of a tribunal, like the Chief Justice of the High Court or Supreme Court or the chief judge of lower courts, may be higher in order of protocol and may have additional administrative responsibilities but while acting judicially, he/she is equal to any other member. Thus, the chairperson sitting singly cannot stay proceedings pending before a larger bench.[256]

(vii) As per section 12 of the Administrative Tribunals Act, 1985, the chairperson can exercise only such financial and administrative powers over the benches as are conferred on him/her under the Rules. The chairperson has the power to constitute benches, transfer members from one bench to another, allocate cases to the benches, and transfer them from one bench to another, but he/she cannot interfere with the functioning of the benches or modify their orders while exercising powers under section 25.[257]

252 *Id*., paras 60 and 61.
253 *Id*., para 62.
254 *Id*., para 65.
255 *Id*., para 63.
256 *Id*., para 73.
257 *Id*., para 64.

(viii) Neither *L. Chandra Kumar*[258] nor *Dr. Mahabal Ram*[259] is an authority for the proposition that the Chairperson, sitting singly and exercising powers under section 25 of the Act, can interfere with the orders of larger benches.[260]

The apex court for the above stated reasons upheld the order of the high court, which had set aside the interim order of stay issued by the chairperson of CAT. While doing so, the apex court has also pointed out that if there was any urgency in the matter, it was open to the chairperson to adopt any one of the two courses *viz.*, (i) the application seeking vacation of interim order could have been transferred to a different bench of two or more members, or (ii) Using the *suo motu* powers, entire proceedings could have been transferred to a different bench without prior notice, which the chairperson is competent to do under section 25.[261]

***Ex parte* decree**

It was indicated by the apex court, in *Bhivchandra Shankar More* v. *Balu Gangaram More*,[262] that the defendant who suffers an *ex parte* decree has two remedies under CPC:

(i) To file an application under order 9 rule 13 before the court, which passed such a decree to set it aside; or

(ii) To file a regular appeal before the first appellate court under section 96 challenging the *ex parte* decree.

The relative scopes of these two remedies are entirely different. The apex court elucidated it as follows:[263]

> It is to be pointed out that the scope of Order 9 Rule 13 CPC and Section 96(2) CPC are entirely different. In an application filed under Order 9 Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any "sufficient cause" from appearing when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for "sufficient cause", the court may set aside the ex parte decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex parte. In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different.

The court also clarified that "[M]erely because the defendant pursued the remedy under Order 9 Rule 13 CPC, it does not prohibit the defendant from filing the appeal

258 *L. Chandra Kumar* v. *Union of India* (1997) 3 SCC 261.

259 *Dr. Mahabal Ram* v. *Indian Council of Agricultural Research* (1994) 2 SCC 401.

260 *Supra* note 250,para 69.

261 *Id*., para 68.

262 (2019) 6 SCC 387.

263 *Id*.,para 11.

if his application under Order 9 Rule 13 CPC is dismissed." Further, the court opined, the time spent in prosecuting application under order 9 rule 13 constitute "sufficient cause" for condonation of delay in filing the first appeal. The court may refuse to condone the delay "only in cases where the defendant has adopted dilatory tactics or where there is lack of bona fides in pursuing the two remedies consecutively".[264] The court also cautioned that the principle that "*the remedies provided as simultaneous and cannot be converted into consecutive remedies* cannot be applied in a rigid manner and as a straitjacket formula. It has to be considered depending on the facts and circumstances of each case and whether the defendant in pursuing the remedy consecutively has adopted dilatory tactics."[265]

Whether a decree passed in a suit, where defendants were served, entered their appearance and also filed written statement but did not appear when the case was posted for recording defendants' evidence, can be treated as *ex parte* decree was the question arose for consideration in *G. Ratna Raj* v. *Sri Muthukumarasamy Permanent Fund Ltd*.[266] In this case, defendants appeared and also filed written statement. They had also appeared, when the plaintiff was examined and also cross-examined him, but when the case was posted for recording their evidence, they did not appear. The trial court proceeded and passed the preliminary decree against the defendants. The defendant no. 1, thereafter, filed an application under order 9 rule 13 for setting aside the preliminary decree. The trial judge did dismissed the same on the ground that the said application was not maintainable under order 9 rule 13 as the decree sought to be set aside was not an *ex parte* decree. The appeal against the said order was allowed by the division bench of the high court and the order of dismissal passed by the trial judge was set aside. The division bench held that the preliminary decree was an *ex parte* decree and, thus, an application under order 9 rule 13 for setting aside the said decree was maintainable. The suit was accordingly restored to be disposed of on merits. When the appeal against the decision of the division bench came up before the apex court, it opined that the question involved in the case had to be decided in the light of the provisions contained in order 9 rule 6 (1) (a) and order 17 rules 2 and 3, CPC.

Order 9 rule 6 (1) (a) empowers the court to order that the suit may be heard *ex parte* in cases where the plaintiff appears and the defendant does not even though the summons was duly served. Order 17 rule 2 empowers the court to proceed to dispose of the suit according to any one of the modes prescribed under order 9 or make any other order as it thinks fit if the parties or any of them fail to appear on the day to which the suit is adjourned. Explanation appended to rule 2 of order 17 confers discretionary power on the court to proceed with the case, even though one of parties was not present, as if such party was present provided the conditions laid down therein is satisfied. The court can exercise the said discretion only if the evidence or substantial portion of the evidence of that party, who failed to appear, had already been recorded.

264 *Id.*,para 14.

265 *Ibid.*

266 (2019) 11 SCC 301.

Rule 3 of order 17 deals with cases where party to whom time has been granted for specific purposes fails to comply or defaults. The relative scope of rules 2 and 3 of order 17 had been expounded in *B. Janakiramaiah Chetty*,[267] which had been relied upon by the apex court in the instant case.

Taking into account the facts of the instant case, the apex court opined that since the defendants' evidence was not recorded either fully or substantially as envisaged under explanation appended to rule 2 of order 17, the trail judge could have proceeded as if the defendants were present. As the defendants failed to appear on the day when the case was posted for recording their evidences, the trial judge had proceeded *ex parte* and the decree passed by the trial judge, in the opinion of the apex court, was an *ex parte* decree. Thus, it was held the application filed under order 9 rule 13 for setting aside the preliminary decree was maintainable.

Joinder of causes of action

In *Shivnarayan (D) by Lrs.* v. *Maniklal (D) Thr. Lrs*.,[268] the apex court clarified in what cases causes of action can be joined. It observed:[269]

> The cause of action according to Order II Rule 2 sub-clause (1) is one cause of action. What is required by Order II Rule 2 sub-clause (1) is that every suit shall include the whole of the claim on the basis of a cause of action. Order II Rule 2 cannot be read in a manner as to permit clubbing of different causes of action in a suit... A perusal of sub-clause (1) of Order II Rule 3 provides that plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly. What is permissible is to unite in the same suit several causes of action against the same defendant, or the same defendants jointly.

In the instant case, as there were not only different causes of action, there were also different set of defendants, the apex court categorically ruled that those causes of action cannot be joined.

***Ad interim* mandatory injunction**

In *Hammad Ahmed* v. *Abdul Majeed*,[270] the apex court elucidated the conditions to be satisfied for grant of *ad interim* mandatory injunction. It observed that "[T]he *ad interim* mandatory injunction, is to be granted not at the asking but on strong circumstance so that to protect the rights and interest of the parties so as not to frustrate their rights regarding mandatory injunction."[271] Relying on *Deoraj*,[272] it reiterated that the "[C]ourt would grant such an interim relief only if it is satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice,

267 *B. Janakiramaiah Chetty* v. *A.K. Parthasarthi* (2003) 5 SCC 641.

268 *Supra* note 19.

269 *Id*., para 30.

270 (2019) 14 SCC 1.

271 *Id*., para 58.

272 *Deoraj* v. *State of Maharashtra* (2004) 4 SCC 697.

resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate the cause of justice."[273] Further, it has also clarified that "[T]he argument that under Order 39 Rules 1 and 2 of the Code, the Court has the jurisdiction to maintain the status of the parties on the date of filing of the suit or on the date of passing of the order but cannot direct the parties to do something which was not in existence at the time of filing of the suit, is not a general rule of universal application."

Disobedience of injunction order

Order 39 rule 2-A, CPC, authorizes the court to order attachment of property and/or detention in the civil prison of person(s) guilty of disobeying or committing breach of the injunction order granted by the court or terms thereof. The provision does not state that the 'disobedience' must be 'wilful'. A two judge bench, in *Ramasamy* v. *Venkatachalapathi*,[274] has observed that "[V]iolation of the order of injunction is a serious matter and unless there is a clear evidence that the party has wilfully disobeyed the order of the court, the party cannot be punished for disobedience and sent to imprisonment."[275]

Once again in *U.C. Surendranath* v. *Mambally's Bakery*,[276]a bench headed by the same judge, in a rather cryptic order, observed that for finding a person guilty under order 39 rule 2-A, "there has to be not mere 'disobedience' but it should be a 'wilful disobedience'".[277] The court added further that:[278]

> The allegation of wilful disobedience being in the nature of criminal liability, the same has to be proved to the satisfaction of the court that the disobedience was not mere "disobedience" but a "wilful disobedience".

The requirement of 'willfulness' is, no doubt, desirable particularly when the provision provides for detention of a person, which curtails his basic liberties.But when the statute does not specifically provide for it, the court should have ideally provided reasons or cited authorities in support of its decision to read 'disobedience' as 'wilful disobedience.' Simply stating so is not sufficient.

Rights of third person dispossessed by decree – holder

Whether a third party *i.e.*, other than the judgment – debtor, who has been dispossessed by the decree – holder can seek reinstatement of the possession, by making an application under rule 99 of order 21, CPC only by establishing that he was in possession of the immovable property prior to being dispossessed by the decree – holder was the question arose before the apex court in *Shamsher Singh* v. *Nahar*

273 *Supra* note 270, para 58.
274 (2019) 3 SCC 544.
275 *Id*., para 7.
276 (2019) 20 SCC 666.
277 *Id*., para 7.
278 *Ibid*.

Singh.[279] The court, after taking into account the provisions contained in order 21 rules 99, 100 and 101 as they stand after amendment in 1976, opined that the third party cannot seek reinstatement of possession merely by establishing his prior possession as was the case before the amendment. As for the amended provision, he is required to prove, in addition to the factum of prior possession, "his right, title or interest in the property" to claim to be put back in possession. Mere proof of prior possession is not sufficient to claim such relief.

Doctrine of restitution

Section 144, CPC empowers the court to pass, on the application made by any party, an order of restitution to be made in certain cases. The apex court, in *Bansidhar Sharma* v. *State of Rajasthan*,[280] elucidated the underlying principle of the doctrine of restitution envisaged in the said provision. It observed:[281]

> The principle of doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the decree which has been set aside or an order is varied or reversed and the court in making restitution is bound to restore the parties, so far as they can be restored, to the same position as they were in at the time when the court by its action had displaced them.

In *Murti Bhawani Mata Mandir* v. *Ramesh*,[282] the apex court delineated the scope of the provision.[283]

> Section 144 applies to a situation where a decree or an order is varied or reversed in appeal, revision or any other proceeding or is set aside or modified in any suit instituted for the purpose. In that situation, the Court which has passed the decree may cause restitution to be made, on an application of any party entitled, so as to place the parties in the position which they would have occupied but for the decree or order or such part thereof as has been varied, reversed, set aside or modified. The court is empowered to pass orders which are consequential in nature to the decree or order being varied or reversed.

XII CONCLUSION

In the survey year, procedural issues came up before the apex court in large number of cases. From the analysis above, it seems, as in the previous years, the dilemma of the court over when to overlook the prescriptions of procedural law to

279 (2019) 17 SCC 279.
280 (2019) 19 SCC 701.
281 *Id*., para 16.
282 (2019) 3 SCC 707.
283 *Id*.,para 9.

meet the ends of justice and when to insist on their compliance continues unabated.In certain cases, the apex court either overlooked the procedural requirements or upheld their overlooking by the courts below whereas in some other cases it insisted on their compliance. This dilemma is evident from the following observation as well:[284]

> Procedure is the handmaiden of justice, the technicalities of law should not be allowed to prevail over the demands of justice and obstacles in the path of the court considering a case on merit should not ordinarily become insuperable. On the other hand, if the so-called procedural requirement is drawn from a wholesome principle of substantive law to advance the cause of justice, the same may not be overlooked.

There are no indications as to what procedural requirements are said to be "drawn from the wholesome principles of substantive law". Does, for example, doctrine of *res judicata*, which is based on both 'public policy' and 'private justice', falls in that category? If yes, can the apex court simply make it inapplicable in certain cases as it did in *Anant Shankar Bhave*?[285] These are some of the difficult questions that need to be answered.

In the survey year, certain other important questions, on which conflicting opinions were rendered earlier, have been resolved by larger benches. Different three judge benches have authoritatively answered the questions as to when does the high court's judgment get merged with the order of the apex court disposing of SLPs?Whether the question of limitation can be decided as a preliminary issue under section 9-A, CPC (inserted by the State of Maharashtra)? Whether the plea of adverse possession can be used by the plaintiff as a sword or can it be used only by a defendant as a shield? With the decisions of larger benches, the legal positions on these questions stand settled for the time being.

Some of the decisions rendered by the division benches have also clarified legal positions and cleared ambiguities with regard to transposition of parties; jurisdiction to entertain suit over immovable property situate within jurisdiction of different courts; powers of the chairperson of CAT; manner of disposal of cross-objections in an appeal, *etc.*, Further, the question of constitutional validity of section 62(5) of the Punjab Value Added Tax Act, 2005 which imposed a condition of prior minimum payment for filing first appeal also came up before one of the division benches, which upheld the same.

One question *i.e.*, when the plaint is returned, in terms of order 7 rule 10, CPC, to be presented before the appropriate court, should the trial in that court start *de novo* or from the stage at which the plaint was ordered to be returned was referred to a larger bench in view of the conflicting opinions expressed by two different division benches in the past.

284 *Hemareddi* v. *Ramachandra Yallappa Hosmani* (2019) 6 SCC 756 [para 11].

285 *Supra* note 64.

In few cases decided during the period, procedural issues have been dealt with too casually. In *Anant Shankar Bhave*,[286] the court simply made the doctrine of *res judicata* inapplicable without assigning any reasons and in *Ramasamy*[287] and *U.C. Surendranath,*[288] it was held that a person cannot be detained in civil prison for disobeying an injunction order unless the disobedience is proved to be 'wilful'. No reasons assigned and no authorities cited in support of the conclusion.

On the whole, judicial decisions rendered during the year brought much needed clarity on many questions of procedural law.

286 *Ibid.*

287 *Supra* note 274.

288 *Supra* note 276.