AIR 2017 SUPREME COURT 5275
SUPREME COURT
(From : Punjab and Haryana)*
A. K. SIKRI , J. and ASHOK BHUSHAN , J.

Civil Appeal No. 9409 of 2017 (arising out of SLP (C) No. 28713 of 2013), D/- 21 - 7 - 2017

Jaswant Singh and Ors. v. Parkash Kaur and Anr.

(A)Civil P.C. (5 of 1908), O.43 R.1(c), O.43 R.1(d), O.9 R.9, O.9 R.13, S.141 - Appeal from orders - Maintainability - Restoration application filed against order of dismissal of O. 9, R. 13 application is application under O. 9, R. 9 and is 'miscellaneous proceeding' covered under S. 141 - In miscellaneous proceedings, rules of procedure in Civil Court relating to appeals or revision are applicable - Rejection of second application for restoration of original application falling under purview of R. 9 and S. 141, comes within purview of O. 43, R. 1(c) - Therefore, appeal against order of dismissal of restoration application and rejection of second application for restoration of original application - Is maintainable and appealable under O. 43, R. 1(c). (2013) 2 Pun LR 10, Reversed. AIR 1976 MP 136 (FB), Partly Overruled.

(Paras27 28 40 41 42 58 63)

(B)Civil P.C. (5 of 1908), O.43 R.1(c), O.43 R.1(d) - Appeal from orders - Use of terms 'rejecting an application' in R. 1(c), (d) - When right of appeal is provided on rejection of an application - Said right cannot be read to limit right of appeal only when application is rejected on merit - Taking such interpretation would result in adding words to statute which is impermissible.

(Para21)

(C)Civil P.C. (5 of 1908), O.9 R.9, O.9 R.13 - Limitation Act (36 of 1963), S.5 - Restoration application - Condonation of delay - Application of defendant under R. 13 for setting aside ex-parte decree dismissed in default - Restoration application filed belatedly by legal heirs of deceased, defendant for setting aside ex-parte decree - Heirs of deceased, defendant not aware of application filed by defendant - Sufficient cause shown by heirs of deceased, defendant for condoning delay - Rejection of application by High Court, improper. (2013) 2 Pun LR 10, Reversed.

(Paras61 62 63)

Cases Referred	Chronological Paras
(2004) 1 Cal LT 197	56
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AIR 1981 Cal 81	49
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AIR 1961 All 561	52 , 53
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AIR 1953 Mad 417	53
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Dhruv Mehta, Sr. Adv., P. N. Puri, AOR, Rakesh Chopra, Abhishek Puri and Ms. Reeta Dewan Puri, for Petitioners; Ms. Suresh Kumari, Ms. Divya Mishra, S. L. Aneja, AOR, Sanjay Kapur, AOR, Rajiv Kapur and Ms. Shubhra Kapur, for Respondents.

**C. R. No. 1009 of 2009, D/- 19-9-2012 (Reported in (2013) 2 Pun LR 10).(Details of case arising from, counsel's names etc. published herein, are as appearing in the Record of Proceedings uploaded on the official website of the Supreme Court - www.sci.gov.in).*

Judgement

1. ASHOK BHUSHAN, J.:-Leave granted.

2. This is an appeal by legal heirs of one Ranjit Singh who was defendant in Suit No. 123 of 1997 filed by Parkash Kaur, Respondent No. 1 praying for specific performance of an agreement dated 25.01.1995. The suit proceeded ex parte against the defendant and by judgment and order dated 06.12.1997 was decreed ex parte directing for specific performance of agreement in favour of respondent-plaintiff. Respondent plaintiff was also directed to get the suit land redeemed from Defendant No. 2 with whom the suit property was mortgaged. The defendant No.1, Ranjit Singh filed an application dated 20.07.1999 under Order IX, Rule 13, C.P.C. praying for setting aside the ex parte decree dated 06.12.1997.

3. Case of the defendant in the application was that he was never served in the above case and he had no knowledge regarding pendency at any stage. When the application filed by Ranjit Singh, defendant was called on 19.10.2001, the learned counsel appearing for applicant-defendant made a statement that he had no instructions from the applicant. Consequently, the application filed under Order IX, Rule 13, C.P.C. was dismissed in default. Ranjit Singh died on 20.11.2001. Legal heirs of the Ranjit Singh, who are appellants in the present appeal, filed an application dated 21.08.2002 praying that application under Order IX, Rule 13, C.P.C. be restored and applicants be allowed to pursue this application and be also allowed to file written statement and contest the suit. The said application dated 21.08.2002 was objected by the plaintiff.

4. The Trial Court vide its order dated 23.12.2005, dismissed the application filed by the appellants dated 21.08.2002. Aggrieved by the order dated 23.12.2005 of Trial Court, an appeal was filed by the appellants under Order 43, Rule 1, C.P.C. read with Section 104, C.P.C.

5. Learned District Judge after hearing both the parties allowed the appeal, setting aside the order of the Trial Court and further restoring the application dated 20.07.1999 filed by the Ranjit Singh, defendant. Aggrieved by the judgment of Appellate Court, plaintiff filed a Civil Revision under Article 227 of the Constitution of India before the High Court.

6. The High Court by impugned judgment dated 19.09.2012 allowed the Revision setting aside the order of the District Judge and restoring the order dated 23.12.2005 of the Trial Court. The plaintiff raised the issue of maintainability of appeal of the appellants before the District Judge filed against the order dated 23.12.2005. It was submitted by the Revisionist that when the suit or application for restoration of application under Order IX, Rule 13, C.P.C. is dismissed for non-appearance of the parties pursuing, then such

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order was not amenable to appeal and the said order is not covered under Order XLIII, Rule 1(c) or 1(d) of C.P.C.

7. Reliance was placed by learned counsel for the appellant on the Full Bench Judgment of the

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Madhya Pradesh High Court in Nathu Prasad v. Singhai Kapurchand, AIR 1976 MP 136. The High Court thus proceeded to examine the question of maintainability of the appeal and held that appeal filed by the appellant before the District Judge against the order of Trial Court dated 23.12.2005 was not maintainable. High Court has also observed that restoration application filed by the appellant was also barred by time.

8. The appellants aggrieved by the judgment of the High Court have come up in this appeal.

9. We have heard learned senior counsel Shri Dhruv Mehta, for the appellants and learned counsel, Shri Rajiv Kapur for respondent as well.

10. Learned counsel for the appellants in support of the appeal contends that High Court committed an error in holding the appeal filed by the appellant as not maintainable. He submits that learned District Judge has passed a just and equitable order setting aside the order, dismissing the application under Order IX, Rule 13, C.P.C. in default and reviving the said application for fresh consideration by the Trial Court. Ex parte decree was obtained by the plaintiff without any contest hence it was necessary to consider the application filed by the appellants for restoring the application under Order IX, Rule 13 filed by Ranjit Singh deceased, defendant.

11. Learned counsel appearing for the respondent has supported the judgment of the High Court and contends that the High Court has rightly held that the appeal filed by the appellant before the District Judge under Order XLIII, Rule 1 was not maintainable.

12. We have considered the submissions of counsel for both the parties and perused the record. The District Judge vide its order dated 30.01.2009 had set aside the order of the Trial Court, dismissing the application of appellants praying for recall of the order dismissing application under Order IX, Rule 13, C.P.C.in default. District Judge had remitted the matter to the Trial Court for consideration of the application under Order IX, Rule 13, C.P.C. filed by Ranjit Singh, deceased on merits. Appellate Court i.e. District Judge had held that the Trial Court committed an error in holding that there was no ground for restoration of the application. The fact that Ranjit Singh died within a span of one month from dismissal of the application in default and the case set up by the appellants that Ranjit Singh fell seriously ill and was busy in treatment, hence no one could appear and after he died the application was filed, was believed by the Appellate Court.

13. The High Court having allowed the Revision on the ground that appeal filed by the appellants against the order of the Trial Court dated 23.12.2005 was not maintainable, we need to consider, the question as to whether appeal filed by the appellants under Order XLIII, Rule 1, C.P.C. was maintainable or not?

14. From the facts, as noted above, it is clear that ex parte decree was passed in favour of plaintiff on 06.12.1997. Ranjit Singh who was defendant No. 1 filed an application under Order IX, Rule 13 of C.P.C. to set aside the ex parte decree on 20.07.1999 which application remained pending although the notices were issued to the plaintiff. The application, however, came on 19.10.2001 before the Court. On 19.10.2001 counsel appearing for Ranjit Singh made following statement:

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"I have no instruction from appellants, case be decided as per law."

15. The Trial Court consequently dismissed the application under Order IX, Rule 13, C.P.C. in

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default. Ranjit Singh died on 20.11.2001. The legal heirs of Ranjit Singh i.e. appellants filed an application dated 21.08.2002 in which following prayer was made:-

"It is, therefore, prayed that the application under Order IX, Rule 13 read with Section 151, C.P.C. which was dismissed in default on 19.10.2001 be restored and the applicants be allowed to pursue this application and they be also allowed to file the written statement and contest the suit."

16. The Trial Court proceeded to hear the application dated 21.08.2002 on merits and by order dated 23.12.2005, dismissed the application after holding that there is no sufficient ground for restoration of application under Order IX, Rule 13, C.P.C.

17. The provisions of Civil Procedure Code, which are relevant for the purposes of the present case need to be noted now.

18. Order IX of the CPC contains provisions relating to "appearance of parties and consequence of non-appearance". Order IX, Rule 9 and Order IX, Rule 13 which are relevant for the present case are quoted as below:-

"9.Decree against plaintiff by default bars fresh suit. -(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an Order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an Order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No Order shall be made under this rule unless notice of the application has been served on the opposite party.

13.Setting aside decree ex parte against defendants.-In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an Order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an Order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation.- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule of setting aside the ex parte decree."

19. Section 104 enumerates the orders from which the appeal lies. Order XLIII provides for "appeals from order". Order XLIII, Rule 1 (c) and (d) which are relevant for the present case are quoted as below:

"1.Appeal from orders- An appeal shall lie from following orders under the provisions of Section 104, namely:

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(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte;"

20. We may first examine, as to whether, the order dated 19.10.2001 by which application filed by Ranjit Singh, defendant was dismissed in default, was appealable or not? Order XLIII, Rule 1(d) permits appeal from "an order under Rule 13 of Order IX rejecting an application". There cannot be any dispute that ex parte decree passed by the Civil Judge dated 06.12.1997 was appealable and Ranjit Singh, the defendant chose to file an application under Order IX, Rule 13 praying for setting aside the ex parte decree dated 06.12.1997, with the further prayer that suit be decided on merits after giving opportunity to the appellant Ranjit Singh.

21. The statutory provision of Order XLIII, Rule 1(c) and 1(d), C.P.C. uses the words "rejecting an application". When the appeal is provided on rejection of an application, we need not read any further precondition in the word rejecting. When the right of appeal has been given on "rejecting" an application the said right cannot be read to limit the right of appeal only when application is rejected on merit. Taking any such interpretation will be nothing but adding words to statute which is clearly impermissible.

22. Full Bench of Madhya Pradesh High Court in Nathu Prasad (AIR 1976 MP 136 (FB)) (supra) case had occasion to consider the words "rejecting an application" as contained in Order XLIII, Rule 1(c), C.P.C. After considering the earlier judgments of the different High Courts the Full Bench opined as follows:

".......In our opinion, there is nothing in the wording of Order 43 Rule 1 (c), Civil P. C. to restrict it to rejection on merits. The words "rejecting an application" are comprehensive enough to include dismissal for default on rejection, in any other situation whatever."

Thus, there cannot be any dispute that when the application was rejected in default under Order IX, Rule 13, C.P.C., the right of appeal could have been exercised under Order XLIII, Rule 1(d), C.P.C.

23. In the present case against the order dated 19.10.2001, rejecting the application under Order IX, Rule 13, C.P.C. in default, no appeal was filed. Rather after the death of Ranjit singh on 20.11.2001 his legal heirs, who are appellants before us filed an application on 21.08.2002, praying for restoration of the application under Order IX, Rule 13, C.P.C. Further, they prayed that they may be allowed to contest the suit. The application dated 21.08.2002 was dismissed on merit by Trial Court holding that there was no sufficient cause for restoration. The appeal was filed against the order dated 23.12.2005 before the Appellate Court.

24. From the perusal of judgment of Appellate Court dated 30.01.2009, it is clear that although, various arguments were raised by counsel for the plaintiff including that application was barred by limitation but no argument was raised regarding maintainability of the appeal. Non-raising of the objection regarding maintainability of the appeal is relevant in another context. Supposing an objection was raised regarding maintainability of the appeal before the District Judge, in event the Appellate Court could have arrived that appeal was not maintainable, the District Judge could have been exercised its revisional jurisdiction under Section 115, C.P.C. Due to non-raising the objection regarding the maintainability,

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the above opportunity was lost both to the appellant as well as to the Revisional Court.

25. We are, however, of the view that High Court having allowed the plaintiff to raise the question of maintainability of the appeal which is a legal issue and the High Court having held that appeal is not maintainable the question need to be gone into on merits and answered.

26. The application filed by appellant dated 21.08.2002 for restoration of the application under Order IX, Rule 13, C.P.C., which was dismissed in default, is not expressly covered by the provisions of Order IX, C.P.C.. The application dated 21.08.2002 was miscellaneous proceeding on which Civil Miscellaneous Case No. 30 of 2002 was registered. What are the provisions and procedure for miscellaneous proceeding have to be looked into for deciding the issue. Section 141 of C.P.C. is relevant in this context. Section 141, C.P.C. deals with miscellaneous proceeding. An Explanation has been inserted under Section 141 by Act 104 of 1976. Section 141, C.P.C. after amendment w.e.f. 01.02.1977 is as follows:

"141.Miscellaneous proceedings.-The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

[Explanation. In this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution.]"

27. As per Section 141, the procedure provided in Civil Procedure Code in regard to suit shall be followed, as far as, it can be made applicable in all proceedings in any Court of civil jurisdiction. By insertion of explanation, it has now been expressly provided that expression "proceedings" includes proceedings under Order IX, C.P.C.

28. When Section 141 expressly refers to proceedings under Order IX, as miscellaneous proceedings and appeals from such orders are expressly provided by Order XLIII, Rule 1(c) and (d), it is clear that right of appeal has been given, from the orders arising out of the miscellaneous proceeding.

29. It is relevant to note that expression "proceedings" as referred to in explanation contains only an inclusive definition. What is explained in explanation is not exhaustive rather inclusive. Dismissal of an application under Order IX, Rule 13, C.P.C. in default, is an order passed in miscellaneous proceedings, which is expressly included in Section 141, C.P.C. explanation. But whether the application dated 21.08.2002 to recall the order dated 19.10.2001 is also a miscellaneous proceeding, covered by miscellaneous 'proceedings' under Section 141, C.P.C. The answer has to be 'yes' thus, application dated 21.08.2002 is also a miscellaneous proceeding in which proceeding, the procedure prescribed in the Code for suits is to be followed.

30. Order IX, Rule 9, C.P.C. refers to application filed by plaintiff for restoration of a suit which had been dismissed in default. Application dated 21.08.2002 prays for recalling of the order dated 19.10.2001, dismissing the application under Order IX, Rule 13, C.P.C. in default.

31. Before we proceed further, it is necessary to consider the Full Bench judgment of High Court of M.P. in Nathu Prasad case (AIR 1976 MP 136 (FB)) (supra). Before the Full Bench following three questions were referred to be answered:

"(1) Whether an appeal lies under Order 43, Rule 1 (c), rejecting/dismissing for default an application under Order 17, Rule 2, read with Order 9, B. 9, Civil P. C. ?

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(2) Whether the Division Bench which decided Komalchand v. Pooranchand could take a contrary view to the one taken in Pooranchand v. Komalchand, which had been decided by a Division Bench ?

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(3) Whether the earlier decision in Pooranchand v. Komalchand, operated as res judicata in the later case (Komalchand v. Pooranchand) ?"

32. The Full Bench further, split the first question in following three parts:

"(i) When an application under Order 9, Rule 9, Civil P.C., is dismissed for default, whether an application lies for its restoration under Order 9, Rule 9, Civil P.C.?

(ii) Whether an order dismissing an application under Order 9, Rule 9, Civil P.C. is appealable under Order 43, Rule 1 (c), Civil P.C.?

(iii) If both the questions are answered in the affirmative, whether both the remedies are concurrent or either of them excludes the other?"

33. We have already noticed that while considering the words "rejecting an application" Full Bench held that the words "rejecting an application" are comprehensive enough to include the dismissal for default or rejection on any other ground. The Full Bench has held that appeal will lie under Order XLIII, Rule 1(c), C.P.C., even when, application under Order IX, Rule 9, C.P.C. is dismissed in default. It is useful to extract the following observations of Full Bench:

"We have not come across any argument to demonstrate that the provisions of Order 43, Rule 1(c) led to any absurdity or hardship, if the plain meaning of the clause is accepted. Consequently, it is not permissible to add the words "on merits," or any other words, in the said Clause (c). It is the first principle of interpretation of statutes that effect must be given to the intention of the legislature. And, it is equally fundamental that the language of the law itself is the depository of the intention of the legislature. Therefore, where the language is clear, and the meaning plain, effect must be given to it. The Court cannot read a law as if its language is different from what it actually is. Otherwise, it will amount to amending the law, which is not permissible for the Court. See, for instance, Thakur Amarsinghji v. State of Rajasthan, (1955) 2 SCR 303 : (AIR 1955 SC 504) and Firm Hansraj Nathuram v. Firm Lalji Raja and Sons (1963) 2 SCR 619 : (AIR 1963 SC 1180). The primary duty of the Court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention See New Piece Goods Bazar Co. Ltd., Bombay v. Commissioner of Income-tax, Bombay, (1950) 1 SCR 553 : (AIR 1950 SC 165).

The result of this discussion is that in our view, an appeal lies from an order dismissing for default or on merits. an application under Order 9, Rule 9, Civil P. C."

34. The Full Bench, however, took the view that when an application under Order IX, Rule 9 C.P.C. for restoration of the suit is rejected and an application is made for restoration of the application although, such application also falls within the purview of Order IX, Rule 9, C.P.C., read with Section 141, Civil P.C., yet, the order rejecting the application does not fall within the Order 43, Rule 1(c), C.P.C. inasmuch as the subsequent application is not "for an order to set aside the dismissal of a suit"; it is for an order to set aside dismissal of the application. The Full Bench summed up its conclusion in following words:-

" Let it be mentioned for removal of doubt, and for making the picture complete, that when an

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application ('A') under Order 9, Rule 9, Civil P. C., for restoration of the suit is rejected and an application ('B') is made for restoration of the application ('A') although such application ('B') also falls within the purview of Order 9, Rule 9, read with Section 141, Civil P. C., yet, the order rejecting

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the application ('B') does not fall within Order 43, Rule 1 (c) inasmuch as the application ('B') is not "for an order to set aside the dismissal of a suit"; it is for an order to set aside dismissal of the application ('A').

We may now sum up the conclusions we have reached on the above discussion :

(i) When application ('A') under Order 9, Rule 9, Civil P. C, is itself dismissed for default of the plaintiff/petitioner's appearance, an application ('B') lies under Order 9, Rule 9, read with Section 141 of the same Code, for restoration of the application ('A'). In order to succeed in this proceeding ('B'), the petitioner has to satisfy the Court that he was prevented by sufficient cause from appearing on the date when the application ('A') was called on for hearing.

(ii) The order of dismissal for default of the application ('A') is appealable under Clause (c) of Rule 1, Order 43, Civil P. C.

(iii) Both the above remedies, i. e., application under Order 9, Rule 9, and appeal under Order 43, Rule 1 (c) are concurrent. They can be resorted to simultaneously. Neither excludes the other. The scope of each of the above proceedings is, however, different.

(iv) When an appeal (second remedy) is decided, one way or the other, the order of dismissal for default appealed from gets merged in the order of the appellate Court, so that thereafter the application ('B') under Order 9, Rule 9, becomes infructuous. When it comes to the notice of the appellate Court that an application has also been made under Order 9, Rule 9, for restoration, the appellate Court may do well to postpone the hearing of the appeal until the decision of the application under Order 9, Rule 9, Civil P. C.

(v) No appeal lies from an order rejecting an application ('B') for restoration of application ('A'), which latter application was for restoration of the suit.

(vi) As observed by their Lordships of the Supreme Court in Mahadeolal Kanodia v. Administrator General of West Bengal, AIR 1960 SC 936 and Jaisri v. Rajdewan, AIR 1962 SC 83, if a Division Bench does not agree with another Division Bench in a decision rendered earlier, the Second Division Bench must either follow the earlier decision or place the matter before the Chief Justice for being referred to a larger Bench. But, the second Division Bench cannot take upon itself the task of holding that the decision of the first Division Bench was wrong.

We answer this reference accordingly. The matter shall now be placed before the single Bench."

35. The reasoning given by the Full Bench as extracted above, is that, since the subsequent application is not for an order to set aside the dismissal of the suit and it is only for an order to set aside the dismissal of the application in default, it does not fall under Order XLIII, Rule 1 (c), C.P.C.

36. The High Court lost sight to the essence of the prayer in the second application. The prayer in the second application is to restore the earlier application which was dismissed in default and decide the said application. Thus, the ultimate prayer is to set aside the dismissal of the application under Order IX, Rule 13, C.P.C. which is a miscellaneous

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proceeding initiated by predecessor-in-interest of the appellants. The restoration application filed by appellants is referable to Order IX, Rule 9, C.P.C. since it prays for restoration of miscellaneous proceedings dismissed in default.

37. No one doubts that when first application, which sought to set aside the dismissal of the suit, was dismissed in default and appeal would lie under Order XLIII, Rule 1(c) C.P.C. which has also been held by the Full Bench of High Court of M.P. (AIR 1976 MP 136 (FB)) (supra). Because, the applicant

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or his legal heirs immediately, did not file an appeal and sought to get the order recalled to revive the application, the right of appeal cannot be held to be lost.

38. It is true that Section 141 only provides for procedure to be followed in a miscellaneous proceeding and that question of right of appeal has to be looked into from other provisions of the statute and not from Section 141. In the miscellaneous proceedings right of appeal has to read as has already laid down by this Court in Ram Chandra Aggarwal and another v. The State of Uttar Pradesh and another, AIR 1966 SC 1888(V 53 C 382).

39. The above judgment was rendered in context of Section 141 and Section 24 of the C.P.C. The question arose in the aforesaid case, as to whether, the proceeding of reference made by a Magistrate under Section 146 of Cr. P.C. is a "proceeding" within the meaning of Section 141/24 of the C.P.C. In the above case, the District Judge has exercised the power under Section 24 C.P.C. for transferring the reference proceeding from one Civil Court to another Civil Court. The order of transfer was complied with and no question of jurisdiction was raised before the transferee Court but after return of the finding by the Civil Court and after passing of the subsequent order the Revision Application was filed before the Court of Session where argument was raised that the transfer was without jurisdiction, and transferee Civil Court's order is nullity. It was further held that the District Judge could not have transferred the proceeding since it was not a civil proceeding. The argument was raised in the above case that if it is held that the proceeding before the Civil Court is a civil proceeding than all the Rules of procedure contained in the CPC including those relating to appeals or revision would apply to the proceeding. The said argument was repelled by this Court and following was laid down in Para 5:

"5. Mr. Iyengar tried to put the matter in a somewhat different way. In the first place, according to him,if we hold that the proceeding before the civil court is a civil proceeding then all the rules of procedure contained in the Civil Procedure Code, including those relating to appeals or revision would apply to the proceeding.This, he points out, would be contrary to the provisions of S. 146(1-D) of Code of Criminal Procedure which bar an appeal, review or revision from any finding of the civil Court. From this he wants us to infer that the proceeding does not take the character of a civil proceeding even though it takes place before a civil Court. We are not impressed by this argument.If sub-s. (1-D) had not been enacted (and this is really a new provision) an appeal or revision application would have been maintainable.Now that it is there, the only effect of it is that neither an appeal nor a revision is any longer maintainable. This consequence ensues because of the express provision and not because the proceeding before the civil Court is not a civil proceeding."

(underlined by us)

40. Noticing the provisions of Section 146 (1-D) of Cr.P.C. which contained a bar on appeal,

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review or revision from any finding of the Civil Court, this Court held that the normal appeal or revision as provided in Civil Court shall not be applicable. This Court, thus, clearly held that in a miscellaneous proceeding before a Civil Court the Rules of procedure contained in Civil Court including those relating to the appeals or revision would apply to the miscellaneous proceeding which were initiated before the Civil Court. In view of the above, the miscellaneous proceedings initiated by appellant by application dated 21.08.2002 was to be conducted by virtue of Section 141, C.P.C. and the right of appeal as is also available in accordance with the provisions of Order XLIII, Rule 1.

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41. When the application under Order IX, Rule 13, C.P.C., which was filed by deceased, Ranjit Singh was dismissed for nonappearance, an application to recall the said order and to restore the application can very well be treated as an application under Order IX, Rule 9, C.P.C. to restore a miscellaneous proceeding akin to suit and against the order rejecting such application an appeal is permissible under Order XLIII, Rule 1(c), C.P.C.

42. There is thus no reason for holding that appeal filed by the appellants before the District Judge against the order dated 23.12.2005, was not maintainable.

43. Further, when the appellants could have filed appeal against order dated 19.10.2001 under Order XLIII, Rule 1(c), C.P.C., said right shall not be lost on the ground that they tried to get that order recalled by filing an application.

44. When this Court in Ram Chandra Aggarwal (AIR 1966 SC 1888) (supra) has already laid down that miscellaneous proceedings are governed by the procedure prescribed in C.P.C. as far as possible including the right of appeal and revision. After dismissal of the application of the appellant dated 21.08.2002, the remedy of the appeal was not precluded to them for the reasons as noted above.

45. There are several judgments of different High Courts taking different views on the question of right of appeal, on question of interpretation of Order XLIII, Rules 1(c) and 1(d), C.P.C. It is useful to refer to some of the cases of the High Courts where divergent views are reflected.

46. One set of cases takes view that such application having been dismissed for default, the appeal shall lie under Order XLIII, Rule 1(c), C.P.C., whereas in other set of cases view has been taken that dismissal of an application to recall the order passed dismissing the application under Order 9, Rule 13, C.P.C. is not appealable. It is sufficient to take note of few of such cases taking divergent views.

47. In Anandrao Kesheorao Pande v. Krishnaji Baliram Dhapadkar, AIR 1964 Bom 232, Chandrachud, J.(as he then was) had considered the provisions of Order IX, Rule 8, and 9 as well as Order XLIII, Rule 1(c), C.P.C. in the context of proceedings which were initiated under Section 3 of Madhya Pradesh Temporary Postponement of Execution of Decrees Act, 1956. The proceedings were initiated by the revisionist under Section 3 of the above mentioned Act by filing application. The said application was dismissed for default on 21st December, 1961. After such dismissal, an application for restoration of application which was dismissed for default was filed as well as a fresh application was filed. The restoration application was dismissed on the ground that application under Order IX, Rule 9, C.P.C. was not maintainable and further there was no sufficient cause for the absence of the petitioner on 21st December, 1961. The facts of the case and the issue which arose before the Court were

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noticed in paragraphs 1 and 2 of the judgment which are quoted below:

1. This revisional application arises out of proceedings which were initiated by the petitioner (judgment debtor) under Section 3 of the Madhya Pradesh Temporary Postponement of Execution of Decrees Act, 1956 (M. P. Act No. V of 1956), which will hereinafter be referred to as the Act. On the 16th of June, 1960, the respondent filed a darkhast to execute the decree, which he had obtained against the petitioner for the refund of earnest money. On the 22nd of July, 1960, the petitioner filed an application for stay of execution of the decree under Section 3 (1) of the Act, which reads thus:

"All proceedings in execution of any decree for money, or proceedings for making final any

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preliminary decree for foreclosure or sale, or proceedings in execution of any final decree for sale, passed by a Civil Court on the basis of a liability incurred before this Act comes into force, in which a Judgment-debtor or defendant, as the case may be is on the date this Act comes into, force, an agriculturist, shall be stayed against such judgment-debtor or defendant, on an application made by him in this behalf during the period this Act remains in force."

On 21st of December, 1961, the application was dismissed for default, as the petitioner was absent. After the application was so dismissed, the petitioner adopted two different but parallel proceedings, one of them being an application for the restoration of the application which was dismissed for default and the other being the institution of a similar but fresh application The fresh application was filed on the 4th of January, 1962, whereas the application for restoration was filed on the 12th of January, 1962. On the 14th of February, 1962, the application for restoration was dismissed partly on the ground that an application under Order 9, Rule 9 of the Code of Civil Procedure was not maintainable and partly for the reason that there was no sufficient cause for the absence of the petitioner on the 21st of December 1961. On the 27th of September 1962 the fresh application was also dismissed for the obviously inconsistent reason that Order 9, Rule 9 would govern applications filed under Section 3 of the Act and as the petitioner had not preferred an appeal against the older dated 14th February 1962, the fresh application under Section 3 was not maintainable. It is against this order that the present revision application has been filed.

2. The main question, which arises in this revision application is whether the provisions contained in Order 9 of the Code of Civil Procedure would apply to applications which are filed under Section 3 (1) of the Madhya Pradesh Temporary Postponement of Execution of Decrees Act, 1956. If the proceedings initiated by an application filed under Section 3 of the Act are in the nature of execution proceedings, then it is indisputable that the provisions of Order 9 will not be attracted. On the other hand, if the proceedings, which a judgment-debtor takes under Section 3 of the Act, are not in the nature of execution proceedings, but are in the nature of substantive original proceedings, then it would be equally clear that the provisions of Order 9 would apply to the proceedings."

48. The Bombay High Court held that in proceedings under Madhya Pradesh Temporary Postponement of Execution of Decrees Act, 1956, the provisions of Order IX, Rule 8 would apply by reason of the provisions contained in Section 141 of C.P.C. It was held that the application which was filed by the petitioner for restoration was held to be competent and it was further held that it was open for the petitioner to file an appeal under Order XLIII, Rule 1(c) of

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C.P.C. Following was laid down in paragraphs 6 and 7 of the judgment:

"6. In my opinion, the proceedings initiated by a judgment-debtor under Section 3 (1) of the Madhya Pradesh Temporary Postponement of Execution of Decrees Act, are not in the nature of execution proceedings but are in substance, independent original proceedings undertaken by the judgment-debtor for assertion of substantive rights. To such proceedings, the provisions of Order 9, Rule 8 of the Code of Civil Procedure would apply by reason of the provisions contained in Section 141 of the Code which provides that the procedure provided in the Code with regard to suits shall be followed, as far as it can be made applicable, in all proceedings' in any Court of Civil jurisdiction. It is well settled that what Section 141 contemplates

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is original proceedings and to all such original proceedings which fall under the section, the provisions of Order 9 must apply. In the result, therefore, the application which was filed by the petitioner on the 12th of January, 1962, for the restoration of the application tiled under Section 3 of the Act which was dismissed for default on the 21st December, 1961, must he held to be competent.

7. It the application for restoration was maintainable and it the application was dismissed both on the ground that it did not lie and that the petitioner had no sufficient cause to remain absent on the 21st of December, 1961, then the proper remedy for the petitioner to adopt was to file an appeal under Order 43, Rule 1 (c) of the Code of Civil Procedure and not to tile a fresh application for restoration as the, petitioner did on 24-1-1962, The present application, which is a fresh Application under Section 3 of the Act cannot be held to be maintainable for the reason that if a suit is dismissed for default and an application for setting aside the dismissal is itself dismissed, a fresh suit on the same cause of action would be barred under the provisions of Order 9, Rule 9 of the Code of Civil Procedure. As these provisions apply to applications also by reason of Section 141 of the Civil Procedure Code, a fresh application must he held to be barred if the earlier application for setting aside the dismissal for default is itself dismissed."

49. In Hazi Rustam Ali v. Emamnuddin Khan and Ors., AIR 1981 Cal 81, an ex parte decree was passed on 21st January, 1977. An application under Order IX, Rule 13, C.P.C. was filed by the defendant to set aside the ex parte decree, registered as miscellaneous case, was dismissed in default on 9th September, 1978 and on the same day an application under Section 151, C.P.C. was filed for restoration of the petition which was dismissed by the Munsif holding that application under Section 151, C.P.C. is not maintainable. In the above case argument was raised that against the order dismissing the application in default, remedy was available to the defendant to file an appeal under Order XLIII, Rule 1(c), C.P.C. or make an application for restoration under Order IX, Rule 9, C.P.C. The said argument was accepted by the Court in paragraphs 5 and 6 which is as follows:

"5. In this connection, Mr. Bagchi has relied upon a decision reported in AIR 1976 MP 136 (FB). It has been held in this case that a proceeding in court in respect of an application under Order 9, Rule 9 is a proceeding in a court of civil jurisdiction within Section 141. An application under Order 9, Rule 9 of the Code of Civil Procedure is not an interlocutory application. By its nature an application under Order 9, Rule 9 is an independent application and it is registered as an independent Misc. Judicial case. Hence an application lies to restore the application which was dismissed for default which application had been made for setting aside the dismissal of a suit for default. It has

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been further held that there is nothing in the wordings of Order 43, Rule 1 (c) of the Civil Procedure Code to restrict it to rejection on merits. The words "rejecting an application" are comprehensive enough to include dismissal for default, rejection in any other situation whatever. Thus, an appeal lies under Order 43, Rule 1 (c) from an order dismissing for default or on merits, an application under Order 9, Rule 9. When an application is made for an order to set aside the dismissal of a suit and such an application is rejected by an order under Order 9, Rule 9, Civil Procedure Code, in terms, it falls under Order 41, Rule 1 (c). Now when a suit is decreed ex parte and an application under Order 9, Rule 13 is dismissed for default and an application is made to set aside the dismissal, it would

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attract the provisions of Order 9, Rule 9 it is in view of the amended provisions of Section 141 of the C. P. C. When an application under Order 9, Rule 13 is dismissed for default, both the remedies are available to the applicant, He can apply for restoration under Order 9, Rule 9, C. P. C. or he may appeal under Order 43, Rule 1 (c). Thus, side by side, two remedies are open to him.

6. Mr. Bagchi submitted that instead of making an application under Section 151 the proper course would have been to make an application for restoration of the application dismissed for default under Order 9, Rule 9 of the C. P. C. read with Section 141, Civil P. C. Hence there is no need to refer to the decision reported in AIR 1975 Cal 80 (FB). Since the Code provides for an alternative remedy, it is well known that the remedy under Section 151 is not available. There seems to be much substance in the contention of Mr. Bagchi which I uphold."

50. In K.P. Jayakumar v. K. Ravindran and Ors., AIR 2004 Ker 209, the Division Bench of the Kerala High Court had occasion to consider the maintainability of appeal under Order XLIII, Rule 1(c), C.P.C. as against an order refusing to restore the insolvency petition dismissed for default. Paragraph 2 of the judgment gives fact of the case which is to the following effect:

"2. Appellant herein preferred a petition under Section 7 of the Provincial Insolvency Act before the Subordinate Judge's Court, Tellicherry to declare him as insolvent. Insolvency petition was posted for evidence on 25-11-2002. On that day petitioner was absent. Case was adjourned to 28-11-2002. On that day also petitioner remained absent. Consequently that petition was dismissed for default. Petitioner then filed IA 312/03 under Order IX, Rules 4 and 8 of the Code of Civil Procedure for restoration of the insolvency petition dismissed for default. IA was dismissed holding that sufficient grounds have not been made out, against which this appeal has been preferred."

51. Section 5 of the Provincial Insolvency Act, 1920 provided that the Court, in regard to proceedings under Insolvency Act shall have the same powers and shall follow the same procedure as it follows in the exercise of original civil jurisdiction. The High Court held that Order IX was clearly applicable hence the aggrieved party could have filed the petition. In case such a petition was dismissed, the aggrieved party could file appeal under Order XLIII, Rule 1(c), of the C.P.C. Paragraph 3 of the judgment is relevant which is quoted below:

"3. We have already indicated that appeal was preferred under Order 43, Rule 1(c) of CPC which reads as follows :

An appeal shall lie from the following orders under the provisions of Section 104;

(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit. Provisions of

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the Code of Civil Procedure is made applicable to exercise powers of Courts under the Provincial Insolvency Act. Section 5 is relevant for our purpose which is extracted below :

5. General Powers of Courts (1) Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

(2) Subject as aforesaid, High Court and District Courts, in regard to proceedings under this Act in Courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits.

Under Section 5(1) the insolvency Court is given, subject to the provisions of the Act, the same

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powers to follow the same procedure under the provisions of the Code of Civil Procedure. Section 5 stipulates that provisions of Code of Civil Procedure are applicable subject to the provisions of the Act. Under Section 5, the provisions of the Civil Procedure Code, including those contained in Order IX, have been made applicable to proceedings under the Act except when they are in conflict with any of the provisions of the Insolvency Act. There is no provision in the Insolvency Act for restoration of an application dismissed for default. Consequently aggrieved party could file petition only under Order IX. In case such a petition is dismissed the aggrieved party could file appeal under Order 43, Rule 1(c). Under such circumstance we are of the view that this appeal is maintainable. Number the appeal and post for admission."

52. Now we refer to other set of cases where view has been taken that appeal is not maintainable. In Gaja v. Mohd. Farukh and Ors., AIR 1961 All 561, it was held:

"..An appeal is a substantive right and not a mere matter of procedure and unless it is conferred by Order 43, Civil Procedure Code, it cannot be inferred by implication from Section 141 of the Code. Order 43 does not provide for an appeal from an order dismissing for default an application for restoration of an application under Order 9, Rules 9 and 13, Civil P. C. No appeal therefore lay from the order of the Munsif dismissing the application dated the 3rd September, 1956."

53. In Kallianikutty Amma v. The State of Kerala, AIR 1974 Ker 171, the Kerala High Court had taken the same view. The Kerala High Court held that in the absence of specific provision in the Act conferring the substantive right of appeal, the provisions of Section 141 of the C.P.C. cannot be applied except to procedural matters. The right of appeal is a substantive right conferred specifically by a statute. In the above case proceedings in a land acquisition reference were dismissed in default. An application was filed to restore the land acquisition reference. The application for restoration of land acquisition reference was dismissed as barred by time against which revision was filed in the High Court. Preliminary objection was raised regarding the maintainability of the petition. It was contended that the appeal ought to be filed under Order XLIII, Rule 1(c), C.P.C., hence, the revision was not maintainable. The Kerala High Court has after noticing the various earlier cases of the High Court held the following:

"4. The learned Counsel appearing for the revision petitioner submits that reliance by the learned Government Pleader on the Full Bench decision of this Court in 1969 Ker LT 275 : (AIR 1970 Ker 30 (FB)) is rather misplaced, as the Full Bench made a distinction between the

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'proceedings' on the one hand and the 'suit' on the other. In the absence of specific provision in the Act conferring the substantive right of appeal, the appeal has to be filed in the High Court irrespective of the valuation of the subject-matter. What is to be underlined, according to the learned Counsel, is that the provisions of Section 141 of the Code of Civil Procedure, cannot be applied except to procedural matters, and it cannot be invoked in cases where the right of appeal is a substantive right conferred specifically by a statute. An appeal could arise only from such orders as are made appealable specifically by the statute, and that cannot be extended to other orders that may be passed in the course of the enquiry during the pendency of the proceedings in which such appealable order is passed. The proceeding under the provisions of the Land Acquisition Act arising out of references under Section 20 are to be deemed to be proceedings of a civil nature as referred to in the Full Bench decision of this Court in

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1969 KLT 275 : (AIR 1970 Ker 30 (FB)). The Madras High Court had occasion in Venkata Reddi v. Ramabrahman, AIR 1953 Mad 417 to consider the scope of the application of Order XLIII, Rule 1(a) of the Civil Procedure Code with respect to orders passed under Section 19 of the Madras Agriculturists' Relief Act. There the contention was that Section 25-A of the Act was wide enough to authorise an appeal against an order under Section 19 for presentation to the proper Court on the ground of want of jurisdiction in the court to which it is presented. In the said case Raghava Rao, J., held-

"............ The interpretation to be placed upon the language in Order 43, R. 1(a) is, in my opinion, this namely, that if under Order 7, Rule 10 an order for the return of a plaint has been made, that will certainly be appealable. I am inclined to think that the right of appeal under that provision cannot stand attracted to orders made in connection with matters other than suits or plaints merely because of Section 141, Civil P. C. which can only imply and involve that the mode of trial laid down by the Code in regard to suits will be available in the case of all original petitions as well."

The Calcutta High Court had occasion to consider the applicability of the provisions contained in Order XLIII, Rule 1(c) while dealing with the question whether an order on a petition for setting aside an order passed under Section 26-F of the Bengal Tenancy Act (Act 8 of 1885) is appealable. After referring to the scope of Section 141 and Order IX, Rule 9, Civil Procedure Code, Harries, C. J., held :- Birendranath v. Mono-rama Devi, AIR 1948 Cal 77-

"(8) It is to be observed that Sec. 141 speaks of procedure. What is made applicable to all proceedings in a Court of Civil jurisdiction is the procedure provided in the Code with regard to suits. Now, a right of appeal is admittedly a substantive right and not a procedural right. Section 141 does not deal with substantive rights and therefore Courts have held that though Order 9, Rule 9 is made applicable to applications other than suits no appeal would lie from a dismissal of such an application under Order 43, Rule 1."

In yet another decision of the Calcutta High Court in Habibar Rahaman v. Saidannessa Bibi:AIR 1924 Cal 327, a Division Bench consisting of Mookerjee, J., and Panton, J., has held as follows:

"It is well settled in this Court .... that mutawallis may be authorised to execute leases of this description, by the District Judge, who, for this purpose, is competent to discharge the functions of a Khazi under the Mahomedan law. The nature of the proceedings was considered in Fakhrunnessa Begum v. District Judge of 24

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Parganas ILR 1920 Cal 592) : AIR 1920 Cal 129, where it was pointed out that the proceeding is not a suit but merely a proceeding governed by Section 141 of the Civil P. C. The fact that the provisions of the Civil Procedure Code regulate the proceedings does not make the order which may be passed therein appealable ...."

In Gaja v. Mohd. Farukh, AIR 1961 All 561 the observation of J. D. Sharma, J. is as follows:

".........An appeal is a substantive right and not a mere matter of procedure and unless it is conferred by Order 43, Civil P. C., it cannot be inferred by implication from Section 141 of the Code. Order 43 does not provide for an appeal from an order dismissing for default an application for restoration of an application under Order 9, Rules 9 and 13, Civil P. C. No appeal therefore lay from the order of the Munsiff dismissing the application dated 3rd September, 1956." No doubt, this case decided by the Allahabad High Court was one of dismissal of an application

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for restoration of an application for setting aside the ex parte decree. In such matters also, even though Section 141, Civil P. C. would govern the procedure, that would not necessarily mean that a right of appeal is available to the aggrieved party.

5. Considering the scheme of the Land Acquisition Act it does not appear to be the intention of the legislature to confer a right on the party aggrieved by an order of dismissal of a petition for restoration of a proceeding to file an appeal from such an order. As has already been said, the enabling provision, namely Section 141, Civil P. C, which has relation only to procedural matters, cannot be stretched to govern substantive right of appeal which has been or has to be specifically conferred by the special statute like the Land Acquisition Act, as in the present case. I am, therefore, of the view that an appeal does not lie from an order dismissing an application for restoration of a reference under the Land Acquisition Act dismissed for default and therefore the revision is competent."

54. Similar view was taken by the Rajasthan High Court in Karni Dan Singh v. Ram Chandra and Ors., AIR 2003 Raj 98. An appeal under Order XLIII, Rule 1(d), C.P.C. read with Order IX, Rule 9, C.P.C. was directed against the order dated 19.12.1997 passed by the Additional District Judge whereby application filed by the plaintiff-appellant for restoration of suit was dismissed for want of payment of process fee. The suit was dismissed for default of plaintiff on 2.3.1994 and application was filed on 31.3.1994 praying for restoration of original suit which was dismissed on account of nonappearance of plaintiff. On second application notices for restoration of application were issued on defendants. Appellant failed to pay process fee and restoration application was dismissed on 19.12.1997. The High Court held that in the present case the application was not under Rule 9 of Order IX, C.P.C. No appeal lies under Order XLIII, Rule 1(c) or (d), C.P.C. following was held in paragraphs 12 and 13:

"12. In the instant case, indisputedly the order impugned came to be passed by the Trial Court on the application seeking restoration of original suit under Rule 4 of Order 9, C.P.C. and not under Rule 9 of Order 9, C.P.C. and therefore, no appeal lies under Order 43, Rule 1(c) or (d) or any other clause of Rule 1, Order 43, C.P.C. but the application under Order 9, Rule 4 read with Section 141. C.P.C. for restoration of misc. application is maintainable.

13. Right of appeal is the creature of a statute. It is for the Legislature to decide what type of order should be made appealable. Hon'ble Supreme Court in Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of

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Ahmedabad (1999) 4 SCC 468 : (AIR 1999 SC 1818) held that if the statute does not create any right of appeal, no appeal can be filed. There is a clear distinction between a suit and an appeal. While every person has an inherent right to bring a suit of a civil nature unless the suit is barred by statute, however, in regard to an appeal, the position is quite opposite. The right to appeal inheres in no one and therefore, for maintainability of an appeal there must be authority of law. Having considered the present case in the light of the observations made by the Hon'ble Supreme Court and the provisions of Order 43, Rule 1, Clauses (a) to (w) noticed above, I am of the considered opinion that against the order impugned, no appeal is provided under Order 43, Rule 1(a) to (w) and, therefore, present appeal is not maintainable."

55. Madras High Court in a case, namely, Swarnambai v. K. Thambal, decided on 31.10.1990 (Reported in (1994) 1 Mad LW 285)

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also has taken the same view that dismissal of an application of restoration praying for setting aside the order dismissing in default an application is not appealable.

56. Calcutta High Court in Sri Sushil Kumar De and Anr. v. Smt. Chhaya De and Anr. (2004) 1 Cal L T 197 (HC) decided on 08.08.2003 again took the same view after referring to certain earlier cases and Full Bench in Nathu Prasad (supra).

57. The application filed by Ranjit Singh, predecessor-in-interest of the appellants under Order IX, Rule 13, C.P.C. was dismissed on 19.10.2001 in default. When the appellants filed application dated 21.08.2002 to recall the order dated 19.10.2001, their application in the nature of proceeding seeking recall of an order dismissing the application, the miscellaneous proceedings dated 21.08.2002 were akin to application under Order IX, Rule 9, C.P.C. seeking recall of order dismissing their application under Order IX, Rule 13, C.P.C.. The order dated 23.12.2005 rejecting their application dated 21.08.2002 on merit by the Trial Court was thus clearly referable to order passed rejecting their application under Order IX, Rule 9. Hence, against such order the appeal was clearly maintainable under Order XLIII, Rule 1(c), C.P.C. In the case of K.P. Jayakumar v. K. Ravindran and Ors., AIR 2004 Ker 209, the Kerala High Court has taken correct view of the matter in which case application for restoration of insolvency proceeding was treated to be under Order IX and the appeal was held to be maintainable under Order XLIII, Rule 1(c), C.P.C. In the present case also the application filed by the appellants dated 21.08.2002 was an application referable to Order IX, Rule 9, C.P.C. The application filed by the appellants was registered in miscellaneous proceedings and as per Section 141, provisions of Order IX were applicable for the application dated 21.08.2002.

58. There cannot be any dispute to the view taken by the different High Courts in various judgments as noticed above that an appeal is a substantive right and not a mere matter of procedure and unless the right to appeal is specifically conferred it cannot be inferred under Section 141 of the C.P.C. The present is not a case where we are reading the right of appeal from Section 141, CPC. Section 141 now expressly provides that Order IX is applicable to all proceedings in civil jurisdiction. When Order IX is made applicable to the proceedings in the nature of application seeking recall of the order dismissing the application under Order IX, Rule 13, C.P.C. the order passed by the civil court rejecting such application is clearly referable to Order IX, Rule 9, C.P.C. and an order which is clearly referable to Order IX, Rule 9 C.P.C. shall also be appealable by virtue of Order XLIII, Rule 1(c), C.P.C. Rejection of application

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for restoration which is referable to Order IX, we cannot refuse to treat an order rejecting application under Order IX, Rule 9, C.P.C. for the purposes of Order XLIII, Rule 1(c), C.P.C. The Full Bench judgment of Madhya Pradesh High Court insofar as it answered question No.1 as framed in paragraph 1 of the judgment lays down the correct law. However, the view of the Full Bench that when application under Order IX, Rule 9, C.P.C. for restoration of suit is rejected, the second application for restoration of the original application although falls under the purview of the Order IX, Rule 9, C.P.C. read with Section 141, rejection of the application does not fall under Order XLIII, Rule 1(c), C.P.C., to the above extent, the view of the Full Bench cannot be approved. When the second application as held by Full Bench falls under Order IX, Rule 9, C.P.C., hence the right of appeal shall also accrue when such application is rejected. In view of the above discussion, we are of the considered opinion that the appeal filed by

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the appellants against order dated 23.12.2005 was clearly maintainable and the High Court erred in holding that such appeal was not maintainable.

59. Now, one more aspect which we need to consider is, whether the application filed on 21.08.2002 to recall the order dated 19.10.2001 by which order application under Order IX, Rule 13, C.P.C. was dismissed for default deserved to be rejected as barred by time. In the application, the appellants have come up with the case that the defendant Ranjit Singh was ill and he died on 20.11.2001 and appellants who were legal heirs of Ranjit Singh had no knowledge about the pendency of the application filed under Order IX, Rule 13, C.P.C. The Trial Court while hearing the said application framed only issues in paragraph 3 which are to the following effect:

"3. On the basis of pleadings of the parties, the following issues were framed:

1. Whether there are sufficient grounds for restoration of application u/O. 9, Rule 13 CPC as alleged ?

2. Relief."

60. However, while proceeding to examine such issue the Trial Court also noted the argument of the plaintiff that application filed by the appellants was barred by time. It was contended that limitation for filing such application was 30 days. Reliance was placed on Article 122 of Limitation Act, 1963. Without any discussion, the Trial Court accepted the submission and held the application as barred by time. The Appellate Court has reversed the view taken by the Trial Court and held that application filed by the appellants was within time. The Appellate Court held that Article 122 of Limitation Act shall not govern application filed by the appellants rather it shall govern by Article 137 of the Limitation Act.

61. The High Court in its judgment also touched the question of limitation. The High Court held that application for restoration could be under Order IX and the limitation for restoration is 30 days from the date of dismissal as per Article 122. For the purposes of this case, it is not necessary for us to enter into the question as to whether limitation for application filed by the appellants on 21.08.2002 was 30 days or 3 years. Even if it is assumed that limitation for filing application was only 30 days, the appellants in their application itself have already given sufficient explanation for filing the application on 21.08.2002. They were not aware of the application dated 20.07.1999 filed by Ranjit singh deceased who could not recover from illness and died on 20.11.2001. The Trial Court has held that reasons given by the appellants were not sufficient which finding has been

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reversed by the Appellate Court. In paragraphs 25 and 26 of the judgment of the Appellate Court following has been held:

"25. Keeping in view all these facts and circumstances, I am of the opinion that the statement of Jaswant Singh In the given facts and circumstances should be given due weight age. The death of Ranjit Singh within a short span when his application was dismissed give credibility to the statement of Jaswant Singh. The parties are villagers and it is not supposed that they will keep the medical record and even take the patient for proper medical treatment to a qualified doctor or a hospital.

26. In view of these facts and circumstances, I am of the considered opinion that the Ld. Trial Court has erred in holding that there was no sufficient ground for restoration of application. It is correct that evidence in the main application was not produced despite granting of several opportunity, but the Ld. Trial Court has not gone for concluding the evidence of the applicant by order rather dismissed the same as the counsel for the applicant pleaded 'no instructions'."

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62. Section 5 of the Limitation Act was attracted in application filed for restoration. The Appellate Court having found sufficient cause for restoration, it is just and equitable to conclude that there was sufficient cause for condonation of delay, if any. Thus, the rejection of the application of the appellants on the above ground also cannot be sustained.

63. In view of the foregoing discussion the judgment of the High Court is set aside. The order of the Appellate Court shall stand revived and Trial Court shall proceed as directed by the Appellate Court vide its judgment dated 30.01.2009. Sufficient time having been elapsed, we direct the Trial Court to decide the application under Order IX Rule 13, C.P.C. within three months from the date copy of this order is produced before the Trial Court.

64. The appeal is allowed accordingly.

Appeal Allowed .

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