Judicial Academy Jharkhand

READING MATERIAL
ON
THE CODE OF CIVIL PROCEDURE, 1908
(VOL. I)

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Why this Compilation

One of the biggest challenges faced by the Indian Judicial System is the pendency of large number of civil cases. This delay in justice can be prevented by effective application of the provisions of The Code of Civil Procedure, 1908 (hereinafter referred to as, 'CPC'). CPC in itself contains multiple provisions for speedy and effective disposal of cases. Strategies to effectively resolve this issue are frequently discussed in the public arena, with far too many experts and those of the intelligentsia voicing the need to develop "tools and techniques" to speed up the process of meting out justice. However, although one cannot question the thoughts conveyed in William Gladstone's often repeated famous words, "Justice delayed is justice denied," the idea of developing "tools and techniques" might not be the right way to do this.

This compilation is an attempt to elucidate that what is needed is first to understand the fundamentals of law and then be well-versed in its nuances. Knowledge eliminates the need for shortcuts. However, in the pursuit of truth and justice, it is equally important that truth always prevails, and the way to ensure that is to analyse the system and locate the bottlenecks.

An attempt has been made here to identify the causes of delay in civil cases, and a corpus of relevant judgements has been compiled, which will hopefully prove to be a ready reckoner for guidelines regarding the applicability of those provisions of the Code of Civil Procedure, 1908 which are required for the speedy and effective disposal of cases.

In this reading material, we have endeavoured to make a compilation of judgments related to provisions of CPC that can aid in speedy disposal of civil cases. Resources like this compilation will go miles in fulfilling a long-felt need that will be beneficial to those who seek justice and those who deliver it.

Sudhanshu Kumar Shashi
Director
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(2010) 7 Supreme Court Cases 417 : (2010) 3 Supreme Court Cases (Civ) 87 : 2010 SCC OnLine SC 680

(BEFORE R.V. RAVEENDRAN AND K.S.P. RADHAKRISHNAN, JJ.)

MUMBAI INTERNATIONAL AIRPORT PRIVATE LIMITED . . Appellant;

Versus

REGENCY CONVENTION CENTRE AND HOTELS PRIVATE LIMITED AND OTHERS . . Respondents.

Civil Appeal No. 4900 of 2010, decided on July 6, 2010

A. Civil Procedure Code, 1908 — Or. 1 R. 10(2) — Discretion of court to add parties — Nature and scope of, and mode of exercise — Or. 1 R. 10(2), held, is an exception to general rule in regard to impleadment of parties that plaintiff may choose defendants and he cannot be compelled to sue a person against whom he seeks no relief

— Discretion of court to add a person as party, held, is limited to persons found to be necessary party or proper party — Moreover, such discretion is judicial discretion and has to be exercised according to reason and fair play and not according to whims and caprice — Expressions "necessary party" and "proper party" explained

— Further held, mere likelihood of a third party to secure a right/interest in suit property in case of dismissal of specific performance suit does not make such party a necessary or proper party to that suit — Hence, application of such party for impleadment therein as additional defendant, rightly dismissed by High Court — Infrastructure Laws — Aircraft and Airports — Airports Authority of India Act, 1994 — Ss. 12 and 12-A — Scope of assignment under S. 12 — Specific Relief Act, 1963 — S. 10 — Suit for specific performance — Necessary and proper parties to

B. Property Law — Ownership and Title — Mere expectation as to or likelihood of conveyance of title, however well-founded, does not create any interest in the property — Transfer of Property Act, 1882, S. 5

Acting under Section 12-A of the Airports Authority of India Act, 1994 (the Act), the Airport Authority of India (AAI), by an agreement, handed over the Mumbai Airport to the appellant for operation, maintenance, development and expansion into a world class airport. Pursuant thereto, AAI leased the Mumbai Airport to the appellant. The lease deed, while demising all the land and assets thereon, carved out a parcel of land measuring 31,000 sq m. That parcel was the subject-matter of a suit for specific performance filed before the High Court by the respondent herein against AAI, and the said Court had, by an interim order, prohibited any transfer thereof without leave of the Court. The lease deed added that the said parcel might become part of the demised premises subject to the Court verdict.

The appellant filed an application seeking impleadment as an additional defendant in the said suit. The plea raised therein was that in view of the appellant's object to make the Airport a world class airport, the appellant's

interest was likely to be directly affected if any relief was granted to the plaintiff i.e. the respondent herein. The said application was resisted by both, the plaintiff and AAI. A Single Judge of the High Court dismissed that application. That decision was upheld by a Division Bench on the ground that the appellant was not a necessary party in that suit. The present appeal was then preferred thereagainst by special leave.

The question before the Supreme Court was whether the appellant was a necessary or proper party to the suit in question.

Dismissing the appeal, the Supreme Court

Held :

The general rule in regard to impleadment of parties is that the plaintiff in a suit, being *dominus litis*, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But that general rule is subject to the provisions of Order 1 Rule 10(2) CPC by which the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

(Paras 13 to 15)

A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

(Para 15)

Kasturi v. *Iyyamperumal*, (2005) 6 SCC 733, *followed*

Sumtibai v. *Paras Finance Co.*, (2007) 10 SCC 82, *explained*

Ramesh Hirachand Kundanmal v. *Municipal Corpn. of Greater Bombay*, (1992) 2 SCC 524; *Anil Kumar Singh* v. *Shivnath Mishra*, (1995) 3 SCC 147, *referred to*

Rule 10(2) CPC is not about the *right* of a non-party to be impleaded as a party, but about the *judicial discretion* of the court to strike out or add parties at any stage of a proceeding. In exercising its judicial discretion under the said rule, the court will of course act according to reason and fair play and not according to whims and caprice.

(Para 22)

Ramji Dayawala & Sons (P) Ltd. v. *Invest Import*, (1981) 1 SCC 80, *followed*

R. v. *Wilkes*, (1770) 4 Burr 2527 : 98 ER 327 : (1558-1774) All ER Rep 570, *cited*

The court has the discretion to either to allow or reject an application of a person claiming to be a proper party, depending upon the facts and circumstances and no person has a right to insist that he should be impleaded as a party, merely because he is a proper party.

(Para 25)

On the facts of the present case, it is held that the appellant is neither a necessary party nor a proper party. The appellant is neither a purchaser nor the lessee of the suit property and has no right, title or interest therein. The respondent-plaintiff in the suit has not sought any relief against the appellant.

The presence of the appellant is not necessary for passing an effective decree in the suit for specific performance. Nor is its presence necessary for complete and effective adjudication of the matters in issue in the suit for specific performance filed by the respondent-plaintiff against AAI. A person who expects to get a lease from the defendant in a suit for specific performance in the event of the suit being dismissed, cannot be said to be a person having some semblance of title in the property in dispute.

(Para 27)

Sumtibai v. *Paras Finance Co.*, (2007) 10 SCC 82, *distinguished on facts*

The contention of the appellant that in view of Section 12-A of the Act when AAI granted a lease of the premises of an airport, to carry out any of its functions enumerated in Section 12 thereof, the appellant lessee should be deemed to have stepped into the shoes of AAI in respect of the airport

premises, has no basis. What was assigned were the functions of operation, management and development agreement *with reference to the area that had been demised*. Obviously the appellant as lessee of the Airport cannot step into the shoes of AAI for performance of any functions with reference to an area which had not been demised or leased to it.

(Para 28)

The fact that if AAI succeeded in the suit, the suit land might also be leased to the appellant is not sufficient to hold that the appellant has any right, interest or a semblance of right or interest in the suit property. When the appellant is neither claiming any right or remedy against the respondent and when the respondent is not claiming any right or remedy against the appellant, in a suit for specific performance by the respondent against AAI, the appellant cannot be a party. The allegations that the land was crucial for a premier airport or in public interest, are not relevant to the issue.

(Para 29)

C. Civil Procedure Code, 1908 — Or. 1 R. 10(2) — Discretion of court to strike out or add parties — Mode of exercise of — Specific illustrations given

(Para 24)

H-D/46440/CV

Advocates who appeared in this case:

Dr. A.M. Singhvi and Harish N. Salve, Senior Advocates [Amar Dave, Ashish Jha and Ms Meenakshi Chatterjee (for M/s "Coac"), Advocates] for the Appellant;

Mukul Rohatgi, Senior Advocate [S.V. Mehta, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma, E.C. Agrawala, Mahesh Agarwal, Rishi Agrawala, Gaurav Goel, Praveen Jain, Mukesh Kumar and Ms Padma Priya (for M/s M.V. Kini & Associates), Advocates] for the Respondents.

Chronological list of cases cited	***on page(s)***
1. (2007) 10 SCC 82, *Sumtibai* v. *Paras Finance Co.*	423*e-f*, 424*b-c*, 424*g*, 424*h*, 426*g-h*, 426*h*
2. (2005) 6 SCC 733, *Kasturi* v. *Iyyamperumal*	423*f-g*, 424*b-c*, 424*d-e*, 424*f-g*, 424*g*, 426*g-h*, 427*a*
3. (1995) 3 SCC 147, *Anil Kumar Singh* v. *Shivnath Mishra*	425*b*
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5. (1981) 1 SCC 80, *Ramji Dayawala & Sons (P) Ltd.* v. *Invest Import*	425*d-e*
6. (1770) 4 Burr 2527 : 98 ER 327 : (1558-1774) All ER Rep 570, *R.* v. *Wilkes*	425*d-e*

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J.— Leave granted. Heard the learned counsel.

2. The Airport Authority of India (the second respondent herein, "AAI", for short) was established under the Airports Authority of India Act, 1994 ("the Act", for short) to be responsible for the development, operation and maintenance of airports in India. The Government of India took a policy decision to amend the Act by Amendment Act 43 of 2003 enabling AAI to lease the airport premises to private operators with prior approval of the Central Government and assign its functions to its lessees except air traffic services and watch and ward.

3. In pursuance of the policy of the Government in this behalf, AAI decided to entrust the work of modernisation and upgradation of the Mumbai Airport to a private operator, to serve the sharply increasing volume of passengers and for better utilisation of the Airport. AAI initiated a competitive bidding process in that behalf. In the information memorandum that was issued to the prospective bidders it was represented that the entire airport premises will be included in the transaction including all encroached land but excluding only the following areas: (*i*) New ATC tower; (*ii*) AAI staff colony; (*iii*) Hotel Leela Venture; and (*iv*) All retail fuel outlets outside the airport operational boundary.

4. Pursuant to the competitive bidding process, the Chhatrapati Shivaji International Airport, Mumbai was handed over to the appellant for operation, maintenance, development and expansion into a world class airport under an agreement dated 4-4-2006. In pursuance of it, AAI entered into a lease deed dated 26 -4-2006 leasing the Mumbai Airport to the appellant on "as is where is" basis for a period of 30 years. The subject-matter of the lease was described as "all the land (along with any buildings, constructions or immovable assets, if any, thereon) which is described, delineated and shown in Schedule I hereto, other than (*i*) any lands (along with any buildings, constructions or immovable assets, if any, thereon) granted to any third party under any existing lease(s), constituting the Airport on the date hereof; and (*ii*) any and all of the carved out assets".

5. Schedule I to the lease deed, instead of giving a detailed description of the demised property, referred to the map demarcating the demised premises annexed to the lease deed by way of description of the demised premises. The map annexed as Schedule I was the "plan showing the demised premises, indicating carved out assets and lands vested with IAF and Navy". The carved out assets were:

(*1*) new ATC tower;

(*2*) & (*2-A*) the NAD staff colony of AAI;

(*3*) land leased to Hotel Leela Venture;

(*4*) all retail fuel outlets which were outside the airport operational boundary; and

(*5*) convention centre.

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The map also contains a note below the list of carved out assets, reading as under:

"A: The parcel of land measuring 31,000 sq m is currently not made a part of the lease deed but may become part of the demised premises subject to the court verdict."

6. According to the appellant the said parcel measuring 31,000 sq m was also part

Airport that was to be handed over by AAI to the appellant but it could not be ed in view of a pending case (Suit No. 6846 of 1999 on the file of the Bombay Court) filed by the first respondent wherein the High Court had made an interim dated 2-5-2001, relevant portion of which is extracted below:

The defendant Airport Authority should also separately demarcate an area of 000 sq m for which the plaintiff is making a claim in this suit. After the land is demarcated, a copy of the plan would be handed over to the plaintiff through r advocate. The learned counsel further states that *the land admeasuring 000 sq m, which would be separately demarcated will not be alienated, sold and nsferred and no third-party interest in that land would be created by the endant Airport Authority without seeking leave of this Court*. He further states : Defendant 1 would use the 31,000 sq m of land only for its own purpose as far possible without raising any permanent construction on that land, and if it omes necessary for Defendant 1 to raise any permanent construction on that l, the work of construction would not be started without giving two weeks' ce to the plaintiff, after the building plan is finally sanctioned by the Planning hority."

(emphasis supplied)

n pursuance of the lease of the Airport in its favour, the appellant claims to have aken several developmental activities to make it a world class airport. The ant alleges that it was expecting that the litigation initiated by the first ident would end and it would be able to get the said 31,000 sq m land also as it dire need of land for developing the Airport. According to the appellant, the ai Airport is surrounded by developed (constructed) areas with very limited unities to acquire any land and the site constraints limit the possibilities for pment and therefore it was necessary to make optimum use of the existing land Airport for the purpose of modernisation and upgradation; and therefore, the ed land which was lying idle, was required for modernisation. It therefore filed plication seeking impleadment as an additional defendant in the pending suit y the first respondent against AAI, contending that its interest was likely to be y affected if any relief is granted to the first respondent-plaintiff in the suit.

The appellant alleged that the information memorandum proposing to privatise anagement did not exclude the area which was the subject-matter of the suit; at the suit plot could not however be leased to the appellant in view of the n order in the pending suit of the first

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ident. The appellant therefore claimed that it had, or would have, an interest in it land; and at all events, it was interested in acquiring it by lease depending he decision in the suit and therefore it was a necessary party and in any event a party.

The said application was resisted by the first respondent inter alia on the ground ne appellant did not have any interest in the suit property and therefore the ant was neither a necessary party nor a proper party to the suit. It was also ded that AAI itself being a substantial shareholder, having 26% share in the ant Company, would protect the interest of the appellant by contesting the suit erefore the appellant was not a necessary party. AAI has also filed a response to ppellant's application for impleadment raising two contentions: (*i*) any dment at that stage of the suit would delay the recording of evidence and final

hearing thereby seriously affecting the interests of AAI; and (*ii*) the suit plot measuring 31,000 sq m was not leased to the appellant.

10. A learned Single Judge dismissed the appellant's application by an order dated 1-4-2008. The learned Single Judge was of the view that as the appellant was yet to acquire any interest in the suit land and as the pending suit by the first respondent was for specific performance of an agreement which was a distinct earlier transaction between the first respondent and AAI to which the appellant was not a party, and as the first respondent was not a party to the arrangement between AAI and the appellant, the Court cannot permit impleadment of the appellant with reference to some future right which may accrue in future, after the decision in the suit.

11. The appeal filed by the appellant was also dismissed by a Division Bench by an order dated 25-8-2008. The Division Bench held that the appellant did not make out that he was a necessary party and the application merely disclosed that he was only claiming to be a proper party; that the appellant's claim was not based on a present demise but a future expectation based on *spes successionis*; and that therefore, the impleadment of the appellant either as a necessary party or proper party or formal party was not warranted.

12. The said order is challenged in this appeal by special leave. The question for consideration is whether the appellant is a necessary or proper party to the suit for specific performance filed by the first respondent.

13. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being *dominus litis*, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10(2) of the Code of Civil Procedure ("the Code", for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

> "10. (2) *Court may strike out or add parties.*—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be

struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

14. The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (*a*) any person who ought to have been joined as plaintiff or defendant, but not added; or (*b*) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper

party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

16. The learned counsel for the appellants relied upon the following observations of a two-Judge Bench of this Court in *Sumtibai* v. *Paras Finance Co.*[1] to contend that a person need not have any subsisting right or interest in the suit property for being impleaded as a defendant, and that even a person who is likely to acquire an interest therein in future, in appropriate cases, is entitled to be impleaded as a party: (SCC pp. 85 & 87, paras 9 & 14)

> "9. Learned counsel for the respondent relied on a three-Judge Bench decision of this Court in *Kasturi* v. *Iyyamperumal*[2]. He has submitted that in this case it has been held that in a suit for specific performance of a contract for sale of property a stranger or a third party to the contract cannot be added as defendant in the suit. In our opinion, the aforesaid decision is clearly distinguishable. In our opinion, the aforesaid decision can only be understood to mean that a third party cannot be impleaded in a suit for specific performance *if he has no semblance of title in the property in dispute*. Obviously, a busybody or interloper with no semblance of title cannot be impleaded in such a suit. That would unnecessarily protract or obstruct the proceedings in the suit. However,

the aforesaid decision will have no application where a third party shows some semblance of title or interest in the property in dispute. ...

* * *

> *14.* ... it cannot be laid down as an absolute proposition that whenever a suit for specific performance is filed by *A* against *B*, a third party *C* can never be impleaded in that suit. ... if *C* can show a fair semblance of title or interest he can certainly file an application for impleadment."

(emphasis in original)

17. The learned counsel for the first respondent on the other hand submitted that the decision in *Sumtibai*[1] is not good law in view of an earlier decision of a three-Judge Bench decision of this Court in *Kasturi* v. *Iyyamperumal*[2].

18. In *Kasturi*[2] this Court reiterated the position that necessary parties and proper parties can alone seek to be impleaded as parties to a suit for specific performance. This Court held that necessary parties are those persons in whose absence no decree can be passed by the court or those persons against whom there is a right to some relief in respect of the controversy involved in the proceedings; and that proper parties are those whose presence before the court would be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person.

19. Referring to suits for specific performance, this Court in *Kasturi*[2], held that the following persons are to be considered as necessary parties: (*i*) the parties to the contract which is sought to be enforced or their legal representatives; (*ii*) a transferee of the property which is the subject-matter of the contract. This Court also explained

that a person who has a direct interest in the subject-matter of the suit for specific performance of an agreement of sale may be impleaded as a proper party on his application under Order 1 Rule 10 CPC. This Court concluded that a purchaser of the suit property subsequent to the suit agreement would be a necessary party as he would be affected if he had purchased it with or without notice of the contract, but a person who claims a title adverse to that of the defendant vendor will not be a necessary party.

20. The first respondent contended that *Kasturi*[2] held that a person claiming a title adverse to the title of defendant vendor, could not be impleaded, but the effect of *Sumtibai*[1] would be that such a person could be impleaded; and that therefore, the decision in *Sumtibai*[1] is contrary to the larger Bench decision in *Kasturi*[2].

21. On a careful consideration, we find that there is no conflict between the two decisions. The two decisions were dealing with different situations requiring application of different facets of sub-rule (2) of Rule 10 of Order 1. This is made clear in *Sumtibai*[1] itself. It was observed that every judgment must be governed and qualified by the particular facts of the case in which such expressions are to be found; that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision and

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that even a single significant detail may alter the entire aspect; that there is always peril in treating the words of a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. The decisions in *Ramesh Hirachand Kundanmal* v. *Municipal Corpn. of Greater Bombay*[3] and *Anil Kumar Singh* v. *Shivnath Mishra*[4] also explain in what circumstances persons may be added as parties.

22. Let us consider the scope and ambit of Order 1 Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the *right* of a non-party to be impleaded as a party, but about the *judicial discretion* of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo motu or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice.

23. This Court in *Ramji Dayawala & Sons (P) Ltd.* v. *Invest Import*[2] reiterated in SCC p. 96, para 20 the classic definition of "discretion" by Lord Mansfield in *R.* v. *Wilkes*[6] (ER p. 334) that "discretion"

> "when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular."

24. We may now give some illustrations regarding exercise of discretion under the said sub-rule.

24.1 If a plaintiff makes an application for impleading a person as a defendant on the ground that he is a necessary party, the court may implead him having regard to the provisions of Rules 9 and 10(2) of Order 1. If the claim against such a person is barred by limitation, it may refuse to add him as a party and even dismiss the suit for

inder of a necessary party.

2 If the owner of a tenanted property enters into an agreement for sale of such ty without physical possession, in a suit for specific performance by the ıser, the tenant would not be a necessary party. But if the suit for specific nance is filed with an additional prayer for delivery of physical possession from nant in possession, then the tenant will be a necessary party insofar as the for actual possession.

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3 If a person makes an application for being impleaded contending that he is a ary party, and if the court finds that he is a necessary party, it can implead him. plaintiff opposes such impleadment, then instead of impleading such a party, found to be a necessary party, the court may proceed to dismiss the suit by g that the applicant was a necessary party and in his absence the plaintiff was titled to any relief in the suit.

4 If an application is made by a plaintiff for impleading someone as a proper subject to limitation, bona fides, etc., the court will normally implead him, if he ıd to be a proper party. On the other hand, if a non-party makes an application g impleadment as a proper party and the court finds him to be a proper party, ıurt may direct his addition as a defendant; but if the court finds that his ın will alter the nature of the suit or introduce a new cause of action, it may s the application even if he is found to be a proper party, if it does not want to the scope of the specific performance suit; or the court may direct such ınt to be impleaded as a proper party, either unconditionally or subject to terms. ample, if *D* claiming to be a co-owner of a suit property, enters into an nent for sale of his share in favour of *P* representing that he is the co-owner with ıare, and *P* files a suit for specific performance of the said agreement of sale in t of the undivided half-share, the court may permit the other co-owner who ds that *D* has only one-fourth share, to be impleaded as an additional defendant roper party, and may examine the issue whether the plaintiff is entitled to c performance of the agreement in respect of half a share or only one-fourth alternatively the court may refuse to implead the other co-owner and leave he question in regard to the extent of share of the defendant vendor to be d in an independent proceeding by the other co-owner, or the plaintiff; atively the court may implead him but subject to the term that the dispute, if etween the impleaded co-owner and the original defendant in regard to the of the share will not be the subject-matter of the suit for specific performance, at it will decide in the suit only the issues relating to specific performance, that ether the defendant executed the agreement/contract and whether such contract be specifically enforced.

In other words, the court has the discretion to either to allow or reject an ıtion of a person claiming to be a proper party, depending upon the facts and stances and no person has a right to insist that he should be impleaded as a merely because he is a proper party.

If the principles relating to impleadment are kept in view, then the purported ence in the two decisions will be found to be non-existent. The observations in [2] and *Sumtibai*[1] are with reference to the facts and circumstances of the tive cases. In *Kasturi*[2] this Court held that in suits for specific performance, only

the parties to the contract or any legal representative of a party to the contract, or a transferee from a party to the contract are necessary parties. In *Sumtibai*[1] this Court held that a person having semblance of a title can be considered as a proper party. *Sumtibai*[1] did

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not lay down any proposition that anyone claiming to have any semblance of title is a necessary party. Nor did *Kasturi*[2] lay down that no one, other than the parties to the contract and their legal representatives/transferees, can be impleaded even as a proper party.

27. On a careful examination of the facts of this case, we find that the appellant is neither a necessary party nor a proper party. As noticed above, the appellant is neither a purchaser nor the lessee of the suit property and has no right, title or interest therein. The first respondent-plaintiff in the suit has not sought any relief against the appellant. The presence of the appellant is not necessary for passing an effective decree in the suit for specific performance. Nor is its presence necessary for complete and effective adjudication of the matters in issue in the suit for specific performance filed by the first respondent-plaintiff against AAI. A person who expects to get a lease from the defendant in a suit for specific performance in the event of the suit being dismissed, cannot be said to be a person having some semblance of title in the property in dispute.

28. The learned counsel for the appellants contended that in view of Section 12-A of the Act when AAI granted a lease of the premises of an airport, to carry out any of its functions enumerated in Section 12 of the said Act, the lessee who has been so assigned any function of AAI, shall have the powers of AAI, necessary for the performance of such functions in terms of the lease. The learned counsel for the appellant submitted that in view of this provision, it should be deemed that the appellant has stepped into the shoes of AAI so far as the Airport premises are concerned. This contention has no merit. The appellant as lessee may certainly have the powers of AAI necessary for performance of the functions that have been assigned to them. What has been assigned are the functions of operation, management and development agreement *with reference to the area that has been demised*. Obviously the appellant as lessee of the Airport cannot step into the shoes of AAI for performance of any functions with reference to an area which has not been demised or leased to it.

29. The learned counsel for the appellant contended that Mumbai Airport being one of the premier airports in India with a very high and ever increasing passenger traffic, needs to modernise and develop every inch of the airport land; that the suit land was a part of the airport land and that but for the pendency of the first respondent's suit within an interim order, AAI would have included the suit land also in the lease in its favour. It was submitted that therefore a note was made in the lease that the land measuring 31,000 sq m was not being made a part of the lease but may become part of the demised premises subject to the court verdict. This does not in any way help the appellant to claim a right to be impleaded. If the interim order in the suit filed by the first respondent came in the way of granting the lease of the suit land, it is clear that the suit land was not leased to the appellant. The fact that if AAI succeeded in the suit, the suit land may also be leased to the appellant is not sufficient to hold that the appellant has any right, interest or a semblance

of right or interest in the suit property. When the appellant is neither claiming any right or remedy against the first respondent and when the first respondent is not claiming any right or remedy against the appellant, in a suit for specific performance by the first respondent against AAI, the appellant cannot be a party. The allegations that the land is crucial for a premier airport or in public interest, are not relevant to the issue.

30. In the result, the appeal is dismissed.

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[*] Arising out of SLP (C) No. 2085 of 2009. From the Judgment and Order dated 25-8-2008 of the High Court of Judicature of Bombay in Appeal No. 273 of 2008 in Chamber Summons No. 170 of 2008 in Suit No. 6864 of 1999

[1] (2007) 10 SCC 82

[2] (2005) 6 SCC 733

[3] (1992) 2 SCC 524

[4] (1995) 3 SCC 147

[5] (1981) 1 SCC 80

[6] (1770) 4 Burr 2527 : 98 ER 327 : (1558-1774) All ER Rep 570

(2005) 6 Supreme Court Cases 733 : 2005 SCC OnLine SC 847

(BEFORE N. SANTOSH HEGDE, TARUN CHATTERJEE AND P.K. BALASUBRAMANYAN, JJ.)

KASTURI . . Appellant;

Versus

IYYAMPERUMAL AND OTHERS . . Respondents.

Civil Appeal No. 2831 of 2005, decided on April 25, 2005

A. **Civil Procedure Code, 1908 — Or. 1 R. 10(2) — Suit for specific performance of contract — Necessary parties thereto — Held, are only the parties to the contract or parties claiming under them, or a person who had purchased the contracted property from the vendor with or without notice of the contract — Person who claims independent title and possession adversely to title of vendor is not a necessary party, since an effective decree can be passed in his absence and no relief can be claimed against such party — Specific Relief Act, 1963 — S. 19**

B. **Civil Procedure Code, 1908 — Or. 1 R. 10(2) — Necessary party — Who is — Tests for, held, are that (1) there must be a right to some relief against such party in respect of controversies involved in the proceedings, or, (2) no effective decree can be passed in his absence**

Allowing the appeal, the Supreme Court

Held :

The question of jurisdiction of the court to invoke Order 1 Rule 10 CPC to add a party who is not made a party in the suit by the plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit. A person is legally interested in the answers to the controversies only if he can satisfy the court that it may lead to a result that will affect him legally. A bare reading of Order 1 Rule 10(2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. Two tests are to be satisfied for determining the question who is a necessary party. Tests are — (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party. In a suit for specific performance the first test can be formulated in the following manner, that is, to determine whether a party is a necessary party there must be a right to the same relief against the party claiming to be a necessary party, relating to the same subject-matter involved in the proceedings for specific performance of contract for sale.

(Paras 7, 13, 17 and 20)

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Respondents 1 and 4 to 11 had no direct interest in the suit for specific performance because they are not parties to the contract nor do they claim any interest from the parties to the litigation. Respondents 1 and 4 to 11 are not necessary parties as an effective decree could be passed in their absence as they had not purchased the contracted property from the vendor after the contract was entered into. They were also not necessary parties as they would not be affected by the contract entered into between the appellant and Respondents 2 and 3.

(Paras 20 and 14)

C. **Civil Procedure Code, 1908 — Or. 1 R. 10(2) — Expression "all the questions involved**

suit" — Scope — Held, does not include controversies which may arise between ffs or defendants inter se, or questions between the parties to the suit and third

Civil Procedure Code, 1908 — Or. 1 R. 10(2) — Suit for specific performance of ct — Proper party thereto — Who is — Held, is a party whose presence is necessary to cate the controversies involved in the suit — Hence parties claiming independent title ssession adverse to title of vendor, and not on basis of the contract, are not proper , for if such parties are impleaded scope of the suit for specific performance shall be ed to a suit for title and possession, which is impermissible — A third party or er to the contract cannot be added in a suit for specific performance merely in order out who is in possession of the contracted property or to avoid multiplicity of suits — c Relief Act, 1963 — S. 19

n a plain reading of the expression "all the questions involved in the suit" used in Order 1 Rule CPC it is abundantly clear that the legislature clearly meant that only the controversies raised veen the parties to the litigation must be gone into, that is to say, controversies with regard right which is set up and the relief claimed on one side and denied on the other and not the ersies which may arise between the plaintiffs or the defendants inter se or questions between ies to the suit and a third party.

(Para 16)

deciding the question who is a proper party in a suit for specific performance the guiding e is that the presence of such a party is necessary to adjudicate the controversies involved in for specific performance of the contract for sale. Thus, the question is to be decided keeping the scope of the suit. In a suit for specific performance of a contract for sale, the issue to be is the enforceability of the contract entered into between the appellant purchaser and dents 2 and 3 vendors and whether contract was executed by the appellant and Respondents for sale of the contracted property, whether the plaintiffs were ready and willing to perform rt of the contract and whether the appellant is entitled to a decree for specific performance of act for sale against Respondents 2 and 3. It is an admitted position that Respondents 1 and 4 d not seek their addition in the suit on the strength of the contract in respect of which the suit cific performance of the contract for sale has been filed. Admittedly, they based their claim on ident title and possession of the contracted property. It is, therefore, obvious that in the Respondents 1 and 4 to 11 are added or impleaded in the suit, the scope of the suit for performance of the contract for sale shall be enlarged from the suit for specific performance t for title and possession which is not permissible in law. This addition, if allowed, would lead nplicated litigation by which the trial and decision of serious

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ns which are totally outside the scope of the suit would have to be gone into. Moreover, if r asserts his independent possession of the contracted property has to be added in the suit, is process may continue without a final decision of the suit. A third party or a stranger to the t cannot be added so as to convert a suit of one character into a suit of different character. In or specific performance of a contract for sale the lis between the appellant and Respondents 2 hall only be gone into and it is also not open to the Court to decide whether Respondents 1 o 11 have acquired any title and possession of the contracted property as that would not be e for decision in the suit for specific performance of the contract for sale. Merely in order to who is in possession of the contracted property, a third party or a stranger to the contract be added in a suit for specific performance of the contract for sale.

(Paras 11, 15 to 17 and 19)

v. *Small*, (1834) 40 ER 848 : 3 My & Cr 63; *Anil Kumar Singh* v. *Shivnath Mishra*, (1995) 3 147; *Vijay Pratap* v. *Sambhu Saran Sinha*, (1996) 10 SCC 53; *Amon* v. *Raphael Tuck and Ltd.*, (1956) 1 All ER 273 : (1956) 1 QB 357 : (1956) 2 WLR 372, *relied on*

hton v. *Money*, (1866) 2 Ch 164 : 15 LT 403, *approved*

ne event the appellant purchaser obtains a decree for specific performance of the contracted y against Respondents 2 and 3 vendors, to obtain possession of the contracted property he

has to put the decree in execution. Since Respondents 1 and 4 to 11 are not parties in the suit for specific performance of a contract for sale of the contracted property, a decree passed in such a suit shall not bind them and in that case, Respondents 1 and 4 to 11 would be at liberty either to obstruct execution in order to protect their possession by taking recourse to the relevant provisions of CPC, if they are available to them, or to file an independent suit for declaration of title and possession against the appellant or Respondent 3. The third party to the agreement for sale without challenging the title of Respondent 3, even assuming they are in possession of the contracted property, cannot protect their possession without filing a separate suit for title and possession against the vendor. Alternatively, the strangers to the contract being Respondents 1 and 4 to 11, and being in possession of the suit property have to be sued by the appellant for execution of the decree for specific performance for taking possession. Therefore, for effective adjudication of the controversies involved in the suit for specific performance, presence of Respondents 1 and 4 to 11 cannot be said to be necessary at all.

(Paras 15, 11, 18 and 19)

The appellant, who has filed the instant suit for specific performance of the contract for sale is dominus litis and cannot be forced to add parties against whom he does not want to fight unless it is a compulsion of the rule of law. If the appellant, even after receiving the notice of claim of title and possession by Respondents 1 and 4 to 11 does not want to join Respondents 1 and 4 to 11 in the pending suit, it is always done at the risk of the appellant because he cannot be forced to join Respondents 1 and 4 to 11 as party-defendants in such suit.

(Paras 18 and 21)

The contention that to avoid multiplicity of suits it would be appropriate to join Respondents 1 and 4 to 11 as party-defendants, as the question relating to the possession of the suit property would be finally and effectively settled, has no substance.

(Para 20)

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E. **Specific Relief Act, 1963 — S. 19 — Exhaustive nature of — Parties against whom specific performance may be enforced — Held, party claiming adverse to title of vendor does not fall in any of the categories enumerated in cls. (a) to (e) of S. 19**

(Paras 10 and 9)

F. **Civil Procedure Code, 1908 — Or. 1 R. 10 — Misjoinder of parties — Interference by appellate court — When warranted — Constitution of India — Art. 136 — Practice and Procedure — Parties**

It is always open to the appellate court to interfere with an order allowing an application for addition of parties when it is found that the courts below had gone wrong in concluding that the persons sought to be added in the suit were necessary or proper parties to be added as defendants in the suit instituted by the plaintiff-appellant or if it is held that two courts below had acted without jurisdiction or acted illegally and with material irregularity in exercise of their jurisdiction in the matter of allowing the application for addition of parties filed under Order 1 Rule 10 CPC.

(Paras 21 and 20)

Ramesh Hirachand Kundanmal v. *Municipal Corpn. of Greater Bombay*, (1992) 2 SCC 524, *relied on*

Such being the position, it cannot be said that the Supreme Court cannot set aside the impugned orders of the courts below on the ground that jurisdiction to invoke power under Order 1 Rule 10 CPC has already been exercised by the two courts below in favour of Respondents 1 and 4 to 11.

(Para 21)

D-M/ATZ/31820/C

Advocates who appeared in this case:

Siddhartha Dave, Senthil Jagadeesan and V. Ramasubramanian, Advocates, for the Appellant;

Raju Ramachandran, Senior Advocate (U.A. Rana and Madhup Singhal, Advocates,

for Gagrat & Co., Advocates, with him) for the Respondents.

Chronological list of cases cited	***on page(s)***
1. (1996) 10 SCC 53, *Vijay Pratap* v. *Sambhu Saran Sinha*	741*d-e*
2. (1995) 3 SCC 147, *Anil Kumar Singh* v. *Shivnath Mishra*	740*f-g*
3. (1992) 2 SCC 524, *Ramesh Hirachand Kundanmal* v. *Municipal Corpn. of Greater Bombay*	745*a*
4. (1956) 1 All ER 273 : (1956) 1 QB 357 : (1956) 2 WLR 372, *Amon* v. *Raphael Tuck and Sons Ltd.*	742*g-h*
5. (1866) 2 Ch 164 : 15 LT 403, *De Hoghton* v. *Money*	740*b-c*
6. (1834) 40 ER 848 : 3 My & Cr 63, *Tasker* v. *Small*	739*g*, 740*b-c*, 740*c*

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J.— Leave granted.

2. The only question that needs to be decided in this case is whether in a suit for specific performance of contract for sale of a property instituted by a purchaser against the vendor, a stranger or a third party to the contract, claiming to have an independent title and possession over the contracted property, is entitled to be added as a party-defendant in the said suit.

3. Before we take up this question for decision in detail, the material facts leading to the filing of this case may be narrated at a short compass. The appellant herein filed the suit against Respondents 2 and 3 for specific performance of a contract entered into between the second respondent acting

as a power of attorney of the third respondent on one hand and the appellant on the other for sale of the contracted property. In this suit for specific performance of the contract for sale, Respondents 1 and 4 to 11, who were admittedly not parties to the contract and setting up a claim of independent title and possession over the contracted property, filed an application to get themselves added in the suit as defendants. The trial court allowed the application on the ground that as Respondents 1 and 4 to 11 were claiming title and possession of the contracted property, they must be held to have a direct interest in the subject-matter of the suit, and therefore, entitled to be added as party-defendants in the suit as their presence would be necessary to decide the controversies raised in the present suit. The High Court in revision confirmed the said order and accordingly this special leave petition was filed against the aforesaid order of the High Court at the instance of the appellant which on grant of special leave was taken up for hearing in presence of the parties.

4. In order to decide the question, as framed hereinearlier, it is necessary to

consider the relevant provisions of the Code of Civil Procedure (in short CPC) under which the court is empowered to add a party in the suit. However, our answer to the question framed, as raised by the learned counsel for the parties, is that the High Court as well as the trial court had acted illegally in the exercise of their jurisdiction in allowing the application of Respondents 1 and 4 to 11 for their addition as defendants in the suit. There are certain special statutes which clearly provide as to who are the persons to be made as parties in the proceeding/suit filed under that special statute. Let us take the example of the provisions made under the Representation of the People Act. Section 82 of the aforesaid Act clearly provides who are the persons to be made parties in election petitions. There are other special statutes which also postulate who can be joined as parties in the proceedings instituted under that special statute, otherwise the provisions of CPC should be applicable. So far as addition of parties under CPC is concerned, we find that such power of addition of parties emanates from Order 1 Rule 10 CPC. As we are concerned in the instant case with Order 1 Rule 10 CPC, we do not find it necessary to refer to other provisions of CPC excepting Order 1 Rule 10 CPC which reads as under:

> "10. (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.
>
> (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that *the name of any party improperly joined, whether as plaintiff or defendant, be struck out*, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the

court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

> (3)-(5) (omitted since not necessary)"
>
> (emphasis supplied)

5. In deciding whether a stranger or a third party to the contract is entitled to be added in a suit for specific performance of contract for sale as a defendant, it is not necessary for us to delve in depth into the scope of Order 1 Rule 10 sub-rule (1) CPC under which only the addition of a plaintiff in the suit may be directed.

6. Let us therefore confine ourselves to the provision of Order 1 Rule 10 sub-rule (2) CPC which has already been quoted hereinabove. From a bare perusal of sub-rule (2) of Order 1 Rule 10 CPC, we find that power has been conferred on the court to strike out the name of any party improperly joined whether as plaintiff or defendant and also when the name of any person ought to have been joined as plaintiff or defendant or in a case where a person whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. In the present case, since we are not concerned with striking out the name of any plaintiff or defendant who has been improperly joined in the suit, we will therefore only consider whether the second part of sub-rule (2) Order 1 Rule 10 CPC empowers the court to add a person who ought to

have been joined or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

7. In our view, a bare reading of this provision, namely, second part of Order 1 Rule 10 sub-rule (2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are — (*1*) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (*2*) no effective decree can be passed in the absence of such party.

8. We may look to this problem from another angle. Section 19 of the Specific Relief Act provides relief against parties and persons claiming under them by subsequent title. Except as otherwise provided by *Chapter II, specific* performance of a contract may be enforced against:

"19. (*a*) either party thereto;

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(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(*c*) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(*d*) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(*e*) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

9. We have carefully considered sub-sections (*a*) to (*e*) of Section 19 of the Act. From a careful examination of the aforesaid provisions of clauses (*a*) to (*e*) of the Specific Relief Act we are of the view that the persons seeking addition in the suit for specific performance of the contract for sale who were not claiming under the vendor but they were claiming adverse to the title of the vendor do not fall in any of the categories enumerated in sub-sections (*a*) to (*e*) of Section 19 of the Specific Relief Act.

10. That apart, from a plain reading of Section 19 of the Act we are also of the view that this section is exhaustive on the question as to who are the parties against whom a contract for specific performance may be enforced.

11. As noted hereinearlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of a contract for sale. For deciding the question who is a

proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all. Lord Chancellor Cottenham in *Tasker* v. *Small*[1] made the following observations: (ER pp. 850-51)

> "It is not disputed that, generally, to a bill *for a specific performance of a contract of sale, the parties to the contract only are the proper parties*; and, when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a court of law, giving

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damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. *But, in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it.*"

(emphasis supplied)

12. The aforesaid decision in *Tasker*[1] was noted with approval in *De Hoghton* v. *Money*[2]. Turner, L.J. observed at Ch p. 170:

> "Here again his case is met by *Tasker*[1] in which case it was distinctly laid down that a purchaser cannot, before his contract is carried into effect, enforce against strangers to the contract equities attaching to the property, a rule which, as it seems to me, is well founded in principle, for if it were otherwise, this Court might be called upon to adjudicate upon questions which might never arise, as it might appear that the contract either ought not to be, or could not be performed."

13. From the aforesaid discussion, it is pellucid that necessary parties are those persons in whose absence no decree can be passed by the court or that there must be a right to some relief against some party in respect of the controversy involved in the proceedings and proper parties are those whose presence before the court would be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person.

14. Keeping the principles as stated above in mind, let us now, on the admitted facts of this case, first consider whether Respondents 1 and 4 to 11 are necessary parties or not. In our opinion, Respondents 1 and 4 to 11 are not necessary parties as an effective decree could be passed in their absence as they had not purchased the contracted property from the vendor after the contract was entered into. They were also not necessary parties as they would not be affected by the contract entered into

between the appellant and Respondents 2 and 3. In the case of *Anil Kumar Singh* v. *Shivnath Mishra*[1], it has been held that since the applicant who sought for his addition is not a party to the agreement for sale, it cannot be said that in his absence, the dispute as to specific performance cannot be decided. In this case at para 9, the Supreme Court while deciding whether a person is a necessary party or not in a suit for specific performance of a contract for sale made the following observation: (SCC p. 150)

> *"Since the respondent is not a party to the agreement of sale, it cannot be said that without his presence the dispute as to specific*

performance cannot be determined. Therefore, he is not a necessary party."

(emphasis supplied)

15. As discussed hereinearlier, whether Respondents 1 and 4 to 11 were proper parties or not, the governing principle for deciding the question would be that the presence of Respondents 1 and 4 to 11 before the court would be necessary to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. As noted hereinearlier, in a suit for specific performance of a contract for sale, the issue to be decided is the enforceability of the contract entered into between the appellant and Respondents 2 and 3 and whether contract was executed by the appellant and Respondents 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against Respondents 2 and 3. It is an admitted position that Respondents 1 and 4 to 11 did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance of the contract for sale has been filed. Admittedly, they based their claim on independent title and possession of the contracted property. It is, therefore, obvious as noted hereinearlier that in the event, Respondents 1 and 4 to 11 are added or impleaded in the suit, the scope of the suit for specific performance of the contract for sale shall be enlarged from the suit for specific performance to a suit for title and possession which is not permissible in law. In the case of *Vijay Pratap* v. *Sambhu Saran Sinha*[2] this Court had taken the same view which is being taken by us in this judgment as discussed above. This Court in that decision clearly held that to decide the right, title and interest in the suit property of the stranger to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be turned into a regular title suit. Therefore, in our view, a third party or a stranger to the contract cannot be added so as to convert a suit of one character into a suit of different character. As discussed above, in the event any decree is passed against Respondents 2 and 3 and in favour of the appellant for specific performance of the contract for sale in respect of the contracted property, the decree that would be passed in the said suit, obviously, cannot bind Respondents 1 and 4 to 11. It may also be observed that in the event, the appellant obtains a decree for specific performance of the contracted property against Respondents 2 and 3, then, the Court shall direct execution of deed of sale in favour of the appellant in the event Respondents 2 and 3 refusing to execute the deed of sale and to obtain possession of the contracted property he has to put the decree in execution. As noted hereinearlier, since Respondents 1 and 4 to 11 were not parties in the suit for specific performance of a contract for sale of the contracted property, a decree passed in such a suit shall not bind them and in that case, Respondents 1 and 4 to 11 would be at liberty either to obstruct execution in order to protect their possession by taking recourse to the

relevant provisions

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of CPC, if they are available to them, or to file an independent suit for declaration of title and possession against the appellant or Respondent 3. On the other hand, if the decree is passed in favour of the appellant and sale deed is executed, the stranger to the contract being Respondents 1 and 4 to 11 have to be sued for taking possession if they are in possession of the decretal property.

16. That apart, from a plain reading of the expression used in sub-rule (2) Order 1 Rule 10 CPC "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiff-appellant and the defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiff-appellant on one hand and Respondents 2 and 3 and Respondents 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of Respondents 1 and 4 to 11 in respect of the contracted property and in view of the detailed discussion made hereinearlier, Respondents 1 and 4 to 11 would not, at all, be necessary to be added in the instant suit for specific performance of the contract for sale.

17. It is difficult to conceive that while deciding the question as to who is in possession of the contracted property, it would be open to the court to decide the question of possession of a third party or a stranger as first the lis to be decided is the enforceability of the contract entered into between the appellant and Respondent 3 and whether contract was executed by the appellant and Respondents 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against Respondents 2 and 3. Secondly in that case, whoever asserts his independent possession of the contracted property has to be added in the suit, then this process may continue without a final decision of the suit. Apart from that, the intervener must be directly and legally interested in the answers to the controversies involved in the suit for specific performance of the contract for sale. In *Amon* v. *Raphael Tuck and Sons Ltd.*[5] it has been held that a person is legally interested in the answers to the controversies only if he can satisfy the court that it may lead to a result that will affect him legally.

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18. That apart, there is another principle which cannot also be forgotten. The appellant, who has filed the instant suit for specific performance of the contract for sale is dominus litis and cannot be forced to add parties against whom he does not

want to fight unless it is a compulsion of the rule of law, as already discussed above. For the reasons aforesaid, we are, therefore, of the view that Respondents 1 and 4 to 11 are neither necessary parties nor proper parties and therefore they are not entitled to be added as party-defendants in the pending suit for specific performance of the contract for sale.

19. The learned counsel appearing for Respondents 1 and 4 to 11, however, contended that since Respondents 1 and 4 to 11 claimed to be in possession of the suit property on the basis of their independent title to the same, and as the appellant had also claimed the relief of possession in the plaint, the issue with regard to possession is common to the parties including Respondents 1 and 4 to 11, therefore, the same can be settled in the present suit itself. Accordingly, it was submitted that the presence of Respondents 1 and 4 to 11 would be necessary for proper adjudication of such dispute. This argument which also weighed with the two courts below although at the first blush appeared to be of substance but on careful consideration of all the aspects as indicated hereinearlier, including the scope of the suit, we are of the view that it lacks merit. Merely in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract for sale because Respondents 1 and 4 to 11 are not necessary parties as there was no semblance of right to some relief against Respondent 3 to the contract. In our view, the third party to the agreement for sale without challenging the title of Respondent 3, even assuming they are in possession of the contracted property, cannot protect their possession without filing a separate suit for title and possession against the vendor. It is well settled that in a suit for specific performance of a contract for sale the lis between the appellant and Respondents 2 and 3 shall only be gone into and it is also not open to the Court to decide whether Respondents 1 and 4 to 11 have acquired any title and possession of the contracted property as that would not be germane for decision in the suit for specific performance of the contract for sale, that is to say in a suit for specific performance of the contract for sale the controversy to be decided raised by the appellant against Respondents 2 and 3 can only be adjudicated upon, and in such a lis the Court cannot decide the question of title and possession of Respondents 1 and 4 to 11 relating to the contracted property.

20*.** It was also argued on behalf of Respondents 1 and 4 to 11 that to avoid multiplicity of suits it would be appropriate to join Respondents 1 and 4 to 11 as party -defendants as the question relating to the possession of the suit property would be finally and effectively settled. In view of our discussions made hereinabove, this argument also which weighed with the

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two courts below has no substance. In view of the discussions made hereinearlier, the two tests by which a person who is seeking addition in a pending suit for specific performance of the contract for sale must be satisfied. As stated hereinearlier, first, there must be a right to the same relief against a party relating to the same subject-matter involved in the proceedings for specific performance of contract for sale, and secondly, it would not be possible for the court to pass effective decree or order in the absence of such a party. If we apply these two tests in the facts and circumstances of the present case, it would be evident that Respondents 1 and 4 to 11 cannot satisfy the above two tests for determining the question whether a stranger/third party is entitled to be added under Order 1 Rule 10 CPC only on the ground that if the decree for specific performance of the contract for sale is passed in absence of Respondents 1

and 4 to 11, their possession over the contracted property can be disturbed or they can be dispossessed from the contracted property in execution of the decree for specific performance of the contract for sale obtained by the appellant against Respondents 2 and 3. Such being the position, in our view, it was not open to the High Court or the trial court to join other cause of action in the instant suit for specific performance of the contract for sale, and therefore, the two courts below acted illegally and without jurisdiction in allowing the application for addition of parties in the pending suit for specific performance of contract for sale filed at the instance of Respondents 1 and 4 to 11. The learned counsel for Respondents 1 and 4 to 11, however, urged that since the two courts below had exercised their jurisdiction in allowing the application for addition of parties, it was not open to this Court to interfere with such order of the High Court as well as of the trial court. We are unable to accept this contention of the learned counsel for Respondents 1 and 4 to 11. As discussed hereinearlier, it is open to the Court to interfere with the order if it is held that two courts below had acted without jurisdiction or acted illegally and with material irregularity in exercise of their jurisdiction in the matter of allowing the application for addition of parties filed under Order 1 Rule 10 CPC. The question of jurisdiction of the court to invoke Order 1 Rule 10 CPC to add a party who is not made a party in the suit by the plaintiff shall not arise unless a party proposed to be added has direct interest in the controversy involved in the suit. Can it be said that Respondents 1 and 4 to 11 had any direct interest in the subject-matter of the instant suit for specific performance of the contract for sale? In our view Respondents 1 and 4 to 11 had no direct interest in the suit for specific performance because they are not parties to the contract nor do they claim any interest from the parties to the litigation. One more aspect may be considered in this connection. It is that the jurisdiction of the court to add an applicant shall arise only when the court finds that such applicant is either a necessary party or a proper party.

21. It may be reiterated here that if the appellant who has filed the instant suit for specific performance of contract for sale even after receiving the notice of claim of title and possession by Respondents 1 and 4 to 11 does not

want to join Respondents 1 and 4 to 11 in the pending suit, it is always done at the risk of the appellant because he cannot be forced to join Respondents 1 and 4 to 11 as party-defendants in such suit. In the case of *Ramesh Hirachand Kundanmal* v. *Municipal Corpn. of Greater Bombay*[6] on the question of jurisdiction this Court has clearly laid down that it is always open to the Court to interfere with an order allowing an application for addition of parties when it is found that the courts below had gone wrong in concluding that the persons sought to be added in the suit were necessary or proper parties to be added as defendants in the suit instituted by the plaintiff-appellant. In that case also this Court interfered with the orders of the courts below and rejected the application for addition of parties. Such being the position, it can no longer be said that this Court cannot set aside the impugned orders of the courts below on the ground that jurisdiction to invoke power under Order 1 Rule 10 CPC has already been exercised by the two courts below in favour of Respondents 1 and 4 to 11.

22. For the reasons aforesaid, in our view, the stranger to the contract, namely, Respondents 1 and 4 to 11 making claim independent and adverse to the title of Respondents 2 and 3 are neither necessary nor proper parties, and therefore, not

d to join as party-defendants in the suit for specific performance of contract for

The judgments and orders of the High Court and the trial court are therefore :o be set aside. The impugned orders are thus set aside and the application for ın of the parties filed at the instance of Respondents 1 and 4 to 11 stands :d. The appeal is thus allowed. We, however, make it clear that we have not d in this judgment as to the title and possession of Respondents 1 and 4 to 11 suit property and all such questions are kept open in the event any approach is either by Respondents 1 and 4 to 11 or by the appellant in any appropriate

There will be no order as to costs.

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out of SLP (C) No. 4235 of 2003. From the Judgment and Order dated 10-10-2002 of the Madras High CRP No. 1818 of 2001 : (2003) 2 Mad LW 547

ara 7 corrected vide Official Corrigendum No. F.3/Ed.B.J./78/2005 dated 5-9-2005.

40 ER 848 : 3 My & Cr 63

2 Ch 164 : 15 LT 403

3 SCC 147

10 SCC 53

ara 17 corrected vide Official Corrigendum No. F.3/Ed.B.J./78/2005 dated 5-9-2005.

1 All ER 273 : (1956) 1 QB 357 : (1956) 2 WLR 372

Para 20 corrected vide Official Corrigendum No. F.3/Ed.B.J./78/2005 dated 5-9-2005.

2 SCC 524

(1964) 7 SCR 831 : AIR 1964 SC 1810

In the Supreme Court of India

(BEFORE P.B. GAJENDRAGADKAR, C.J. AND K.N. WANCHOO, M. HIDAYATULLAH, K.C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR, JJ.)

GURBUX SINGH ... Appellant;

Versus

BHOORALAL ... Respondent.

Civil Appeal No. 583 of 1961*, decided on April 22, 1964

Advocates who appeared in this case:

Gopal Singh, Advocate, for the Appellant;

B.P. Maheshwari, Advocate, for the Respondent.

The Judgment of the Court was delivered by

N. RAJAGOPALA AYYANGAR, J.— The facts giving rise to this appeal, by special leave, are briefly as follows : The respondent—Bhooralal—brought a suit-Civil Suit 20 of 1954—in the Court of the Subordinate Judge, First Class, Kekri against the appellant claiming possession of certain property which was described in the plaint and for mesne profits. The allegation in the plaint was that the plaintiff was the absolute owner of the said property of which the defendant was in wrongful possession and that in spite of demands he had failed to vacate the same and was therefore liable to pay the mesne profits claimed. In the plaint he made reference to a previous suit that had been filed by him and his mother (CS 28 of 1950) wherein a claim had been made against the defendant for the recovery of the mesne profits in regard to the same property for the period ending with February 10, 1950. It was also stated that mesne profits had been decreed in the said suit. In the Written Statement that was filed by the present appellant, besides disputing the claim of the plaintiff to the reliefs prayed for on the merits, a technical plea to the maintainability of the suit was also raised in these terms:

> "That Order 2 Rule 2 of the Civil Procedure Code is a bar to the suit. When the suit referred to in paragraph 2 of the plaint was filed the plaintiff had a cause of action for the reliefs also. He having omitted to sue for possession in that suit, is now barred from claiming relief of possession. No second suit for recovery of mesne profits is (maintainable in law). Since the plaintiff had lost his remedy for the relief of possession he cannot seek recovery of mesne profits also."

On these pleadings the learned Subordinate Judge framed 5 issues and

of these the 4th issue ran:

"Whether Order 2 Rule 2 of the Civil Procedure Code is a bar?".

Before evidence was led by the parties Issue No. 4 was argued before the learned trial Judge as a preliminary issue and the Court recorded a finding that the suit was barred by the provision named and directed the dismissal of the suit.

2. The plaintiff preferred an appeal from this decree to the Additional District Judge and the appellate court considered this plea as regards the bar under Order 2 Rule 2 of the Civil Procedure Code on two alternative basis. In the first place, the learned District Judge pointed out that the pleadings in the earlier Suit No. CS 28 of 1950 — had not been filed in the case and made part of the record, so that it was not known what the precise allegations of the plaintiff in his previous suit were. For this reason the learned District Judge held that the plea of a bar under Order 2 Rule 2 of the Civil Procedure Code should not have been entertained at all. He also considered the question as to whether, if the plea was available, it could have succeeded. On this he referred to the conflict of judicial opinion on this point and held that if the point did arise for decision he would have decided in favour of the plaintiff and treated the cause of action for a suit for mesne profits as different from the cause of action for the relief of possession of property from a tresspasser. In view, however, of his finding on the first point as to there being no material on the record to justify the plea of a bar under Order 2 Rule 2 of the Civil Procedure Code the learned District Judge did not rest his decision on his view of the law as regards the construction of Order 2 Rule 2(3). In the circumstances he set aside the dismissal of the suit and remanded it to the trial Court for being decided on the merits in accordance with the law.

3. The defendant — the appellant before us — preferred a second appeal to the High Court of Rajasthan and the learned Single Judge dismissed this appeal. It is from this judgment that the appellants have preferred this appeal after obtaining special leave.

4. As already indicated, there is a conflict of judicial opinion on the question whether a suit for possession of immoveable property and a suit for the recovery of mesne profits from the same property are both based on the same cause of action, for it is only if these two reliefs are based on "the same cause of action" that the plea of Order 2 Rule 2 of the Civil Procedure Code that was raised by the appellant could succeed. Clause (3) of Order 2 Rule 2 of the Civil Procedure Code that is relevant in this context reads:

> "(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any reliefs so omitted."

Some of the High Courts, notably Madras, have in this connection, referred to the term of Order 2 Rule 4 which runs:

> "Rule 4. No cause of action shall unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except—
>
> (*a*) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
>
> (*b*) claims for damage for breach of any contract under which the property or any part thereof is held; and
>
> (*c*) claims in which the relief sought is based on the same cause of action;
>
> Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property."

as an aid to the construction of the term 'cause of action' and the expression "relief based on the same cause of action" in Order 2 Rule 2 (3). Reading these two provisions together it has been held that the cause of action for suits for possession of immoveable property and the cause of action for a suit in respect of mesne profits from the same property are distinct and different. On the other hand, it has been held, particularly by the High Court of Allahabad that the basis of a claim for mesne profits is wrongful possession of property and so is a claim for possession and thus the cause of action for claiming either relief is the same viz. wrongful possession of property to which the plaintiff is entitled. On this reasoning it has been held that a plaintiff who brings in the first instance a suit for possession alone or for mense profits alone is afterwards debarred from suing for the other relief under Order 2 Rule 2(3). The learned trial Judge had, after referring to the conflict of authority, expressed his preference for the Allahabad view and had, therefore, upheld the defence. At the stage of the appeal the learned District Judge had, as already pointed out, expressed his preference for the other view. The learned Single Judge expressed his concurrence with the learned District Judge in preferring the Madras view as against the decisions of the Allahabad High Court.

5. Learned Counsel for the appellant sought to argue that the Allahabad view was more in accordance with principle and with the proper construction of Order 2 Rule 2(3) of the Civil Procedure Code. We do not consider it necessary to examine this conflict of judicial opinion in this case as, in our opinion, the learned District Judge was right in holding that the appellant had not placed before the Court material for the purpose of founding a plea of Order 2 Rule 2 of the Civil Procedure Code.

6. In order that a plea of a Bar under Order 2 Rule 2(3) of the Civil

Procedure Code should succeed the defendant who raises the plea must make out; (*i*) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. It is common ground that the pleadings in CS 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2 Rule 2 of the Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion, rightly that without the plaint in the previous suit being on the record, a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code was not maintainable.

Learned Counsel for the appellant, however, drew our attention to a passage in judgment of the learned Judge in the High Court which read:

> "The plaint, written statement or the judgment of the earlier court has not been filed by any of the parties to the suit. The only document filed was the judgment in appeal in the earlier suit. The two courts have, however, freely cited from the record of the earlier suit. The counsel for the parties have likewise done so. That file is also before this Court."

It was his submission that from this passage we should infer that the parties had, by agreement, consented to make the pleadings in the earlier suit part of the record in the present suit. We are unable to agree with this interpretation of these observations. The statement of the learned Judge. "The two courts have, however, freely cited from the

record of the earlier suit" is obviously inaccurate as the learned District Judge specifically pointed out that the pleadings in the earlier suit were not part of the record and on that very ground had rejected the plea of the bar under Order 2 Rule 2 of the Civil Procedure Code. Nor can we find any basis for the suggestion that the learned Judge had admitted these documents at the second appeal stage under Order 41 Rule 27 of the Civil Procedure Code by consent of parties. There is nothing on the record to suggest such an agreement or such an order, assuming that additional evidence could legitimately be admitted in a second appeal under Order 41 Rule 27 of the Civil Procedure Code. We can therefore proceed only on the basis that the pleadings in the earlier suit were not part of the record in the present suit.

7. Learned Counsel for the appellant, however, urged that in his plaint in the present suit the respondent had specifically referred to the previous suit having been for mesne profits and that as mesne profits could not be claimed except from a trespasser there should also have been an allegation in the previous suit that the defendant was a trespasser in wrongful possession of the property and that alone could have been the basis for claiming mesne profits. We are unable to accept this argument. In the first place, it is admitted that the plaint in the present suit was in Hindi and that the word 'mesne profits' is an English translation of some expression used in the original. The original of the plaint is not before us and so it is not possible to verify whether the expression 'mesne profits' is an accurate translation of the expression in the original plaint. This apart, we consider that learned Counsel's argument must be rejected for a more basic reason. Just as in the case of a plea of res judicata which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel, we consider that a plea under Order 2 Rule 2 of the Civil Procedure Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. As the plea is basically founded on the identity of the cause of action in the two suits the defence which raises the bar has necessarily to establish the cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. It is not impossible that reliefs were claimed without the necessary averments to justify their grant. From the mere use of the words 'mesne profits' therefore one need not necessarily infer that the possession of the defendant was alleged to be wrongful. It is also possible that the expression 'mesne profits' has been used in the present plaint without

a proper appreciation of its significance in law. What matters is not the characterisation of the particular sum demanded but what in substance is the allegation on which the claim to the sum was based and as regards the legal relationship on the basis of which that relief was sought. It is because of these reasons that we consider that a plea based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. We therefore consider that the order of remand passed by the learned Additional District Judge which was confirmed by the learned Judge in the High Court was right. The merits of the suit have yet to be tried and this has been directed by the order of remand which we are affirming.

8. The appeal fails and is dismissed. In the circumstances of the case there will be no order as to costs.

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* Appeal by Special Leave from the Judgment and Decree dated 12th August, 1959 of the Rajasthan High Court in Civil Misc. First Appeal No. 50 of 1956

(2020) 14 Supreme Court Cases 110 : 2019 SCC OnLine SC 1682

In the Supreme Court of India

(BEFORE DR D.Y. CHANDRACHUD AND AJAY RASTOGI, JJ.)

VURIMI PULLARAO S/O SATYANARAYANA . . Appellant;

Versus

VEMARI VYANKATA RADHARANI W/O DHANKOTESHWARRAO AND ANOTHER . . Respondents.

Civil Appeals No. 9065 of 2019 with No. 9066 of 2019, decided on November 27, 2019

A. **Civil Procedure Code, 1908 — Or. 2 Rr. 2(3) and 2(2) — Omission to sue for all the reliefs, without leave of the court — Bar on suing for such relief afterwards — Applicability — Requirements of, summarised**

— In present case, subsequent suit for specific performance of agreement to sell, held, was clearly barred as all ingredients of Or. 2 R. 2(3) were attracted as plaintiff was clearly entitled to seek the relief of specific performance in the previous suit for injunction, and had failed to do — Nor had any leave of court been obtained to omit the relief of specific performance in the previous suit — Hence, subsequent suit barred under Or. 2 R. 2(3)

— In instant case, earlier suit for injunction was instituted which contained recital of the agreement to sell, price fixed for the bargain between the parties, payment of earnest money, handing over of possession, demand for performance and the failure of defendant to perform the contract — Plaintiff further had asserted that she was going to institute a suit for specific performance of the agreement — Under the agreement, time for completion of sale was reserved — Notice of performance was issued to which defendant replied — Cause of action for the suit for specific performance had arisen when plaintiff had notice of denial by defendant to perform the contract — When suit for injunction was instituted, plaintiff was entitled to sue for specific performance — There was a complete identity of cause of action between earlier suit and cause of action for the subsequent suit — However, plaintiff omitted to sue for specific performance — This is a relief for which the plaintiff was entitled to sue when earlier suit for injunction was instituted — Having omitted the claim for relief without leave of the court, held, bar under Or. 2 R. 2(3) clearly attracted to the subsequent suit — Specific Relief Act, 1963 — Ss. 9, 14 and 16 — Suit for specific performance of agreement for sale — Maintainability — Whether barred under Or. 2 R. 2 CPC

B. **Civil Procedure Code, 1908 — Or. 2 R. 2 — Bar under — Applicability of — Strict proof of earlier suit in evidence in later suit, held, not mandatory to attract the bar under Or. 2 R. 2, so long as parties are aware of pleadings, nature of objection to the maintainability of subsequent suit on the ground of the bar under Or. 2 R. 2 — Plea that in order to attract bar under Or. 2 R. 2, it is necessary that plaint in earlier suit must be proved in evidence and same was not done in instant case — Held, liable to be rejected in present case**

— This is not a case where the plaintiff was deprived of an opportunity to explain the pleadings in earlier suit — Parties were all along aware of pleadings, nature of objection to the maintainability of subsequent suit on the ground of the bar under Or. 2 R. 2 — It was at the behest of plaintiff that a certified copy of plaint in earlier suit was allowed to be brought on the record and marked as exhibit — On facts held subsequent suit was barred under Or. 2 R. 2

C. **Civil Procedure Code, 1908 — Or. 2 R. 2 — Bar under — When attracted — Distinction between requirements of Or. 2 R. 2(2) and Or. 2 R. 2(3) — Principles summarised**

On 26-10-1995, the original defendant entered into an agreement to sell in favour of the original plaintiff in respect of the suit land for a total consideration of Rs 1,80,000. At the time of the agreement to sell, an amount of Rs 1,50,000 was paid by way of earnest to the defendant. The agreement stipulated that the sale deed would be executed against the payment of the remaining consideration in the amount of Rs 30,000. Notice was issued by the plaintiff to the defendant for performance of the contract. The plaintiff claims to have been present before the Sub-Registrar for the registration of the sale deed. However, by a reply, the defendant refused to execute the sale deed. In the meantime, it is alleged that, the defendant sought to obstruct the possession of the plaintiff over the suit land; the plaintiff claiming to have entered into possession in pursuance of the agreement to sell. A suit for injunction was instituted by the plaintiff, being Regular Civil Suit No. 216 of 1997.

The reliefs sought in the suit were a declaration that the plaintiff was in possession of the land and a permanent injunction restraining the defendant from obstructing the possession of the plaintiff. The suit for injunction was instituted without leave of the court under Order 2 Rule 2(3) CPC to institute a suit for specific performance subsequently.

The appellant-plaintiff instituted the subsequent suit i.e. Special Suit No. 61 of 1997 seeking specific performance of the agreement to sell the property. The

earlier suit for injunction was dismissed in default on 16-9-2005. The defendant contested the maintainability of the suit for specific performance raising the bar under Order 2 Rule 2 CPC. No issue was framed by the trial court with reference to the provisions of Order 2 Rule 2. Nonetheless, the trial court by its judgment dated 13-10-2005 came to the conclusion that the plaintiff had omitted to sue for specific performance of the agreement although the cause of action had accrued in favour of the plaintiff at the time when the earlier suit for injunction was instituted on 30-10-1996. Adverting to the certified copy of the plaint, which had been placed on the record,

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the trial Judge noted that the plaint in the earlier suit made specific reference to the fact that the plaintiff would file a suit on the basis of the agreement to sell for claiming specific performance. The trial Judge observed that the plaintiff had failed to seek the leave of the court, when the suit for injunction was instituted, to file a subsequent suit on the same cause of action seeking performance. Consequently, the suit for specific performance was dismissed as being barred under Order 2 Rule 2(3) CPC.

In appeal, the first appellate court by a judgment dated 6-1-2012 came to the conclusion that the bar under Order 2 Rule 2 CPC was not attracted. In coming to this conclusion, the first appellate court held that no specific issue had been framed by the trial court in this regard; the pleadings in the earlier suit had not been proved to establish that the earlier suit and the subsequent suit were based on the same cause of action; no opportunity was furnished to the plaintiff to explain his pleadings in the plaint in the earlier suit; and the trial court ought to have framed a specific issue on the bar under Order 2 Rule 2. On merits, the first appellate court adverted to the findings of the trial court and came to the conclusion that the suit for specific performance was liable to be decreed. The appeal was accordingly allowed.

A second appeal was instituted before the High Court against the decree for specific performance. By a judgment dated 2-4-2013, a Single Judge of the High Court observed that while dealing with the appeal the appellate court ought to have explored the possibility of remand, inter alia, in view of provisions of Order 41 Rule 23 CPC. The High Court set aside the judgment of the first appellate court and remanded the case by consent of parties to decide the appeal afresh.

On remand, the first appellate court framed as one of the points for consideration, whether the suit was barred by Order 2 Rule 2 CPC. The first appellate court noted that the certified copy of the plaint in the earlier suit for injunction was placed before the trial court and its production was allowed. It was held that in order to support the decree passed by the trial court it was not necessary for the respondent in the appeal to file a memorandum of cross objections challenging a particular finding rendered by the trial court. Ultimately, it

held that when the suit for injunction was instituted, it was open to the plaintiff to incorporate the relief of specific performance together with the relief of permanent injunction. The foundation for the relief of permanent injunction claimed in the earlier suit furnished a complete cause of action to sue for the relief of specific performance. All the essential ingredients on the basis of which the subsequent suit was instituted existed on the date when the earlier suit had been filed. Since the plaintiff omitted to seek the relief of specific performance which was available when the earlier suit for injunction was instituted, the court inferred that the plaintiff had relinquished the claim for specific performance. Finally, the first appellate court also held that after exploring the possibility of remand, it had come to the conclusion that it was unnecessary to do so since the parties had proceeded fully to trial knowing their rival cases and had led evidence. In the circumstances, the absence of a specific issue having been framed on the applicability of Order 2 Rule 2 CPC, did not cause any prejudice, warranting a remand. The judgment of the first appellate court was upheld by the High Court in a second appeal on 6-1-2017. The plaintiff was in appeal thereagainst before the Supreme Court.

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Dismissing the appeal, the Supreme Court

Held :

The plaintiff who is entitled to assert a claim for relief on the basis of a cause of action must include the whole of the claim. A plaintiff who omits to sue in respect of or intentionally relinquishes any portion of the claim, shall not afterwards be entitled to sue in respect of the portion omitted or relinquished. This is the mandate of Order 2 Rule 2(2). Order 2 Rule 2(3) stipulates that a person who is entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs. However, a plaintiff who omits to sue for all the reliefs, without the leave of the court, shall not afterwards sue for any relief so omitted. The leave of the court will obviate the consequence which arises under Order 2 Rule 2(3). In the absence of leave being sought and granted, a plaintiff who has omitted to sue for any of the reliefs to which they were entitled to sue in respect of the same cause of action would be barred from subsequently suing for the relief which has been omitted in the first instance. The grant of leave obviates the consequence under Order 2 Rule 2(3). But equally, it is necessary to note that Order 2 Rule 2(2) does not postulate the grant of leave. In other words, a plaintiff who has omitted to sue or has intentionally relinquished any portion of the claim within the meaning of Order 2 Rule 2(2), shall not afterwards be entitled to sue in respect of the portion so omitted or relinquished.

(Para 15)

The requirements for attracting Order 2 Rule 2 CPC can be summarised as

under:

(*i*) The correct test in cases falling under Order 2 Rule 2, is whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit. In order to attract the applicability of the bar enunciated under Order 2 Rule 2, the cause of action on which the subsequent claim is founded ought to have arisen to the plaintiff when enforcement of the first claim was sought before the court.

(*ii*) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(*iii*) If the evidence to support the two claims is different, then the causes of action are also different.

(*iv*) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(*v*) The cause of action has no relation whatever to the defence that may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour.

(Paras 16 and 17)

Mohd. Khalil Khan v. *Mahbub Ali Mian*, 1948 SCC OnLine PC 44 : (1947-48) 75 IA 121, *relied on*

In the present case, the earlier suit for injunction was instituted plaint of which contained a recital of the agreement to sell dated 26-10-1995; the price fixed for the bargain between the parties; the payment of earnest money; the handing over of possession; the demand for performance and the failure of the defendant to perform the contract. The plaintiff also asserted that she was going to institute a suit for specific performance of the agreement dated 26-10-1995. Under the agreement

dated 26-10-1995, time for completion of the sale was reserved until 25-10-1996. Notice of performance was issued on 11-10-1996 to which the defendant had replied on 13-10-1996. The cause of action for the suit for specific performance had arisen when the plaintiff had notice of the denial by the defendant to perform the contract. On 30-10-1996, when the suit for injunction was instituted, the plaintiff was entitled to sue for specific performance. There was a complete identity of the cause of action between the earlier suit and the cause of action for the subsequent suit. However, the plaintiff omitted to sue for specific performance. This is a relief for which the plaintiff was entitled to sue when the earlier suit for injunction was instituted. Having omitted the claim for relief without the leave of the court, the bar under Order 2 Rule 2(3) would stand attracted.

(Para 20)

Virgo Industries (Eng.) (P) Ltd. v. *Venturetech Solutions (P) Ltd.*, (2013) 1 SCC 625 : (2013) 1 SCC (Civ) 679; *Pramod Kumar* v. *Zalak Singh*, (2019) 6 SCC 621 : (2019) 3 SCC (Civ) 370, *relied on*

But the case of the plaintiff in appeal is that in order that the bar under Order 2 Rule 2 be attracted, it is necessary that the plaint in the earlier suit must be proved in evidence. In the present case it was submitted that this was not done.

(Para 21)

The first appellate court, in the judgment which it delivered upon remand took note of the fact that the defendant had by its application at Ext. 117 prayed for summoning the original record of the earlier suit for injunction for proving the plaint. The plaintiff opposed that plea with the assertion that a certified copy of the document could be placed on record instead of summoning the original record. The trial court in the subsequent suit for specific performance, accordingly rejected the application on the ground that since the certified copy was filed on the record, it was unnecessary to call for the original record. The defendant had moved another application in the nature of a notice to admit the certified copy of plaint in the earlier suit. This came to be allowed by the trial court. The first appellate court noted that there was no objection from the plaintiff whereupon the certified copy of the plaint was marked as Ext. 137. In this background, the first appellate court was clearly justified in coming to the conclusion that this is not a case where the plaintiff was deprived of an opportunity to explain the pleadings in the earlier suit. The finding that there was no prejudice to the plaintiff cannot be faulted. The parties were all along aware of the pleadings, the nature of the objection to the maintainability of the subsequent suit on the ground of the bar under Order 2 Rule 2 and the fact that the plaint in the earlier suit was brought on the record. Indeed, it was at the behest of the plaintiff that a certified copy of the plaint in the earlier suit was allowed to be brought on the record and marked as Ext. 137. On facts, the bar under Order 2 Rule 2 is attracted.

(Para 24)

Vurimi Jayalaxmi Pullarao v. *Vemari Vyankata Radharani*, 2017 SCC OnLine Bom 9985, *affirmed*

Gurbux Singh v. *Bhooralal*, AIR 1964 SC 1810, *distinguished on facts*

Vemuri Vyankata Radha Rani v. *Vurami Pullarao*, 2013 SCC OnLine Bom 2080, *cited*

RM-D/63417/SV

Advocates who appeared in this case:

Shashibhushan P. Adgaonkar, Advocate, for the Appellant;

Satyajit A. Desai, Ms Anagha S. Desai and Shobhit Dwivedi, Advocates, for the Respondents.

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Chronological list of cases cited ***on page(s)***

1. (2019) 6 SCC 621 : (2019) 3 SCC (Civ) 370, *Pramod Kumar* v. *Zalak Singh* 119*f-g*, 121*f*

2. 2017 SCC OnLine Bom 9985, *Vurimi Jayalaxmi Pullarao* v. *Vemari Vyankata Radharani* 115*c-d*, 118*g*, 125*b-c*

3. (2013) 1 SCC 625 : (2013) 1 SCC (Civ) 679, *Virgo Industries (Eng.) (P) Ltd.* v. *Venturetech Solutions (P) Ltd.* 119*f-g*, 121*c-d*

4. 2013 SCC OnLine Bom 2080, *Vemuri Vyankata Radha Rani* v. *Vurami Pullarao* 117*f*

5. AIR 1964 SC 1810, *Gurbux Singh* v. *Bhooralal* 119*a*, 119*f*, 122*c*, 123*a*, 123*e*, 124*a*

6. 1948 SCC OnLine PC 44 : (1947-48) 75 IA 121, *Mohd. Khalil Khan* v. *Mahbub Ali Mian* 120*g*

The Judgment of the Court was delivered by

DR D.Y. CHANDRACHUD, J.— Leave granted.

Civil Appeal No. 9065 of 2019 [arising out of SLP (C) No. 11811 of 2017]

2. This appeal arises from the judgment of a learned Single Judge dated 6-1-2017[1] at the Nagpur Bench of the High Court of Judicature at Bombay in a second appeal. The High Court came to the conclusion that the suit for specific performance instituted by the appellant was barred by Order 2 Rule 2 of the Code of Civil Procedure, 1908 ("CPC") since the appellant had instituted an earlier suit for injunction. The courts below have noticed that while instituting the earlier suit, it was in the contemplation of the appellant that a suit for specific performance of the agreement to sell would be instituted, in spite of which no leave of the court was sought under Order 2 Rule 2(3) CPC. This appeal thus

arises from the concurrent findings which have been recorded by the trial court, the first appellate court and by the High Court in second appeal holding the suit to be barred.

3. The facts on which the appeal arises are as follows (parties will be referred to by their descriptions in the suit) : the subject of the dispute is agricultural land bearing Gat. No. 111 admeasuring 3 H 05 R situated at Mauje Nayegaon, Taluka Nandura, District Buldhana. On 26-10-1995, the original defendant entered into an agreement to sell in favour of the original plaintiff in respect of the suit land for a total consideration of Rs 1,80,000. At the time of the agreement to sell, an amount of Rs 1,50,000 was paid by way of earnest to the defendant. The agreement stipulated that the sale deed would be executed by 25-10-1996 against the payment of the remaining consideration in the amount of Rs 30,000. On 11-10-1996, a notice was issued by the plaintiff to the defendant for performance of the contract. The plaintiff claims to have been present before the Sub-Registrar on 25-10-1996 for the registration of the sale deed. However, by a reply dated 13-10-1996, the defendant refused to execute the sale deed. In the meantime, it is alleged that on 16-10-1996, the defendant sought to obstruct the possession of the plaintiff over the suit land; the plaintiff claiming to have entered into possession in pursuance of the agreement to sell.

A suit for injunction was instituted by the plaintiff, being Regular Civil Suit No. 216 of 1997 before the Civil Judge, Junior Division, Malkapur.

4. Para 2 of the plaint in the earlier suit for injunction contained the following averments:

> "The property mentioned in Clause 1 of the plaint totally belongs to the defendant for which the defendant had entered into a bargain to sale with the plaintiff on 26-10-1995 at a total price of Rs 1,80,000. Against the said bargain the defendant had taken on the same day from the plaintiff a sum of Rs 1,50,000 in cash and gave in writing the bargain letter in favour of the plaintiff. Regarding the remaining amount of Rs 30,000 it was agreed by the defendant that the same would be paid at the time of execution of sale deed and thus the bargain letter was obtained in writing by the plaintiff from the defendant. On 26-10-1995 itself the defendant had handed over possession of the agricultural land to the plaintiff. Since that time the agricultural property is in possession of the plaintiff. Since the date of 26-10-1995 till today all formalities in respect of this land such as cultivation and all agricultural processes are being done by

the plaintiff. On the said farm the plaintiff had spent a lot of amount for the agricultural activities. Thereafter several times the plaintiff asked the defendant to execute the sale deed of the said land in favour of the plaintiff. The plaintiff is ready to behave as per the bargain. The plaintiff informed the defendant that by paying the remaining amount of Rs 30,000 to the defendant the plaintiff is ready to get the sale deed of the said property; but the defendant kept on prevaricating. Hence as decided earlier between the plaintiff and on 11-10-1996 the defendant the plaintiff asked by sending a notice to the defendant to execute the sale deed of the said farm on 15-10-1996. That registered notice was received by the defendant on 11-10-1996; but on 15-10-1996 the defendant did not remain present in the office of Sub-Registrar, Nandura and did not register the said sale deed in favour of the plaintiff when the plaintiff was present there with cash of Rs 30,000 to be paid to the defendant. Hence, for getting the fulfilment of the agreement that took place between the plaintiff and the defendant on 26-10-1995 the plaintiff will file a suit in the Court of Hon'ble Civil Judge Senior Division, Khamgaon."

5. The reliefs sought in the suit were a declaration that the plaintiff was in possession of the land and a permanent injunction restraining the defendant from obstructing the possession of the plaintiff. The suit for injunction was instituted on 30-10-1996. Admittedly, no leave of the Court was sought under Order 2 Rule 2(3) CPC in the earlier suit to institute a suit for specific performance subsequently.

6. On 30-4-1997, the appellant-plaintiff instituted Special Suit No. 61 of 1997 before the Civil Judge, Senior Division, Khamgaon seeking specific performance of the agreement to sell the property. The earlier suit for injunction was dismissed in default on 16-9-2005. The defendant contested the maintainability of the suit for specific performance raising the bar under Order 2 Rule 2 CPC. No issue was framed by the trial court with reference to

the provisions of Order 2 Rule 2. Nonetheless, the trial court by its judgment dated 13-10-2005 came to the conclusion that the plaintiff had omitted to sue for specific performance of the agreement although the cause of action had accrued in favour of the plaintiff at the time when the earlier suit for injunction (RCS No. 216 of 1997) was instituted on 30-10-1996. Adverting to the certified copy of the plaint, which had been placed on the record, the learned trial Judge noted that the plaint in the earlier suit made specific reference to the fact that the

plaintiff would file a suit on the basis of the agreement to sell for claiming specific performance. The trial Judge observed that the plaintiff had failed to seek the leave of the Court, when the suit for injunction was instituted, to file a subsequent suit on the same cause of action seeking performance. Consequently, the suit for specific performance was dismissed.

7. In appeal, the Ad hoc District Judge I, Khamgaon by a judgment dated 6-1-2012 came to the conclusion that the bar under Order 2 Rule 2 was not attracted. In coming to this conclusion, the first appellate court held that:

7.1. No specific issue had been framed by the trial court in this regard.

7.2. The pleadings in the earlier suit had not been proved to establish that the earlier suit and the subsequent suit were based on the same cause of action.

7.3. No opportunity was furnished to the plaintiff to explain his pleadings in the plaint in the earlier suit.

7.4. The trial court ought to have framed a specific issue on the bar under Order 2 Rule 2.

8. On merits, the first appellate court adverted to the findings of the trial court and came to the conclusion that the suit for specific performance was liable to be decreed. The appeal was accordingly allowed and a decree for specific performance was passed with a direction to the plaintiff to deposit the balance consideration of Rs 30,000 within a period of one month. The plaintiff claims to have deposited the balance consideration on 3-2-2012.

9. A second appeal was instituted before the High Court against the decree for specific performance. By a judgment dated 2-4-2013[2], a learned Single Judge of the High Court observed that while dealing with the appeal the appellate court ought to have explored the possibility of remand, inter alia, in view of provisions of Order 41 Rule 23 CPC. The High Court set aside the judgment of the first appellate court and remanded the case back to it by consent of parties to decide the appeal afresh.

10. On remand, District Judge I, Malkapur framed as one of the points for consideration, whether the suit was barred by Order 2 Rule 2 CPC. The District Judge noted that the certified copy of the plaint in the earlier suit was on record and marked as Ext. 137. The plaint contained a reference to the execution of the agreement to sell dated 26-4-2015; to the payment of earnest of Rs 1,50,000 and to the defendant having been called upon on 11-10-1996 to execute the sale deed. The District Judge did not accept the objection of the plaintiff that

the plaint in the earlier suit had not been shown when the plaintiff was in the witness box for the purpose of adducing evidence. The first appellate court in that context noted what had transpired during the course of the proceedings:

> "It is material to note that by application dated 22-2-2005 vide Ext. 117 before the trial court the defendant has prayed for calling the original record of RCS No. 216 of 1997 from the file of Nandura Court for proving the documents. The plaintiff has opposed that application with a say that certified copies of the documents can be placed on record instead of calling the original record. Accordingly, the learned Civil Judge, Sr. Dn., Khamgaon, has rejected the application on the ground that since certified copy can be filed on record, it is not necessary to call the original record. The record of the trial court further shows that on the same day i.e. on 22-2-2005, the defendant has moved another application vide Ext. 118 in the nature of notice to admit the document i.e. the certified copy of plaint in RCS No. 216 of 1997. That application came to be allowed by the learned Civil Judge, Sr. Dn., Khamgaon. It appears that in view of no objection from the plaintiff certified copy of the plaint in RCS No. 216 of 1997 came to marked Ext. 137. Therefore, now, the plaintiff cannot say that opportunity was not given to him to explain his pleadings in RCS No. 216 of 1997."

11. The first appellate court noted that certified copy of the plaint in the earlier suit for injunction (Ext. 94) was placed before the trial court and its production was allowed. It was held that in order to support the decree passed by the trial court it was not necessary for the respondent in the appeal to file a memorandum of cross-objections challenging a particular finding rendered by the trial court. Ultimately, it held that when the suit for injunction was instituted, it was open to the plaintiff to incorporate the relief of specific performance together with the relief of permanent injunction. The foundation for the relief of permanent injunction claimed in the earlier suit furnished a complete cause of action to sue for the relief of specific performance. All the essential ingredients on the basis of which the subsequent suit was instituted existed on the date when the earlier suit had been filed. Since the plaintiff omitted to seek the relief of specific performance which was available when the earlier suit for injunction was instituted, the Court inferred that the plaintiff had relinquished the claim for specific performance. Finally, the first appellate court also held that after exploring the possibility of remand, it had come to the conclusion that

it was unnecessary to do so since the parties had proceeded fully to trial knowing their rival cases and had led evidence. In the circumstances, the absence of an issue did not (it was held) cause any prejudice, warranting a remand. The judgment of the first appellate court was upheld by the High Court in a second appeal on 6-1-2017[1]. That is how the proceedings before this Court arise under Article 136 of the Constitution.

12. Mr Shashibhushan P. Adgaonkar, learned counsel appearing on behalf of the appellant submitted that in order to attract the bar under Order 2 Rule 2, an essential requirement is that there must be an identity between the cause

of action which forms the basis of the earlier suit and the cause of action on which the claim in the later suit is based. Relying on the decision of the Constitution Bench in *Gurbux Singh* v. *Bhooralal*[2], it was urged that for the bar under Order 2 Rule 2 to be established, it is necessary for the defendant to file the pleadings in the previous suit in evidence so as to prove to the Court in the subsequent suit that there is an identity of the cause of action in the two suits. In the present case, it was submitted that the defendant failed to do so. The learned counsel urged that the plaint in the earlier suit was not shown to the plaintiff in the subsequent suit at the stage when the evidence was adduced, as a result of which the plaintiff was deprived of the opportunity to establish the absence of identity between the causes of action in the two suits. Moreover, it was submitted that the trial court proceeded to hold that the suit for specific performance was barred under Order 2 Rule 2 without framing a specific issue. The learned counsel submitted that the first appellate court could have framed an issue and sought a determination thereon by the trial court after allowing evidence to be adduced or it could have alternatively made the determination itself upon production of additional evidence under Order 41 Rule 27. Neither of these courses of action was adopted and hence it has been submitted that the bar under Order 2 Rule 2 does not stand attracted.

13. On the other hand, supporting the view which weighed with the trial court, the appellate court and the High Court, it has been urged by Mr Satyajit A Desai, that the plaint in the earlier suit contains a clear reference to the agreement to sell, to the payment of consideration and to the notice of performance that was issued by the plaintiff. Not only this, para 2 of the plaint contained a specific recital of the fact that the plaintiff intended to institute a suit for specific performance before the

Court of the Civil Judge, Senior Division, Khamgaon. Despite this, it was submitted that the plaintiff omitted to seek leave of the court under Order 2 Rule 2(3). This, it was submitted, must necessarily result in the bar under the provision being attracted. The learned counsel submitted that the distinction with the situation as it arose before the Constitution Bench in *Gurbux Singh*[2] is that in the present case, the plaint in the earlier suit was duly marked as an exhibit without any objection from the plaintiff. The learned counsel in that regard has also relied upon on the decisions of this Court in *Virgo Industries (Eng.) (P) Ltd.* v. *Venturetech Solutions (P) Ltd.*[3] and *Pramod Kumar* v. *Zalak Singh*[5].

14. Order 2 Rule 2 is extracted below:

"**2. *Suit to include the whole claim*.—(1)** Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

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(2) *Relinquishment of part of claim*.—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) *Omission to sue for one of several reliefs*.—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this Rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

15. Order 2 Rule 2(1) is premised on the foundation that the whole of the claim which a plaintiff is entitled to make in respect of a cause of action must be included. However, it is open to the plaintiff to relinquish any portion of the claim in order to bring the suit within the jurisdiction of the court. Order 2 Rule 2(1) adopts the principle that the law does not countenance a multiplicity of litigation. Hence, a plaintiff who is entitled to assert a claim for relief on the basis of a cause of action must include the whole of the claim. A plaintiff who omits to sue

in respect of or intentionally relinquishes any portion of the claim, shall not afterwards be entitled to sue in respect of the portion omitted or relinquished. This is the mandate of Order 2 Rule 2(2). Order 2 Rule 2 (3) stipulates that a person who is entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs. However, a plaintiff who omits to sue for all the reliefs, without the leave of the court, shall not afterwards sue for any relief so omitted. The leave of the court will obviate the consequence which arises under Order 2 Rule 2(3). In the absence of leave being sought and granted, a plaintiff who has omitted to sue for any of the reliefs to which they were entitled to sue in respect of the same cause of action would be barred from subsequently suing for the relief which has been omitted in the first instance. The grant of leave obviates the consequence under Order 2 Rule 2(3). But equally, it is necessary to note that Order 2 Rule 2(2) does not postulate the grant of leave. In other words, a plaintiff who has omitted to sue or has intentionally relinquished any portion of the claim within the meaning of Order 2 Rule 2(2), shall not afterwards be entitled to sue in respect of the portion so omitted or relinquished.

16. The rationale underlying in Order 2 Rule 2 has been dealt with in several judgments including in the decision of the Privy Council in *Mohd. Khalil Khan* v. *Mahbub Ali Mian*[6], the Privy Council held : (SCC OnLine PC)

> "(1) The correct test in cases falling under Order 2 Rule 2, is 'whether the claim in the new suit is, in fact, founded upon a cause of action distinct from that which was the foundation for the former suit'. ...

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> (2) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. ...
>
> (3) If the evidence to support the two claims is different, then the causes of action are also different. ...
>
> (4) The causes of action in the two suits may be considered to be the same if in substance they are identical. ...
>
> (5) The cause of action has no relation whatever to the defence that may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the *media* upon which the plaintiff asks the court to arrive at a conclusion in his favour."

(emphasis in original)

17. In order to attract the applicability of the bar enunciated under Order 2 Rule 2, the cause of action on which the subsequent claim is founded ought to have arisen to the plaintiff when enforcement of the first claim was sought before the court.

18. In *Virgo Industries (Eng.) (P) Ltd.*[4], the provisions of Order 2 Rule 2 came up for consideration before a two-Judge Bench of this Court. The Court observed : (SCC p. 631, para 10)

> "*10.* The object behind the enactment of Order 2 Rules 2(2) and (3) CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons."

19. These principles have been reiterated in the more recent decision in *Pramod Kumar*[5].

20. In the present case, the earlier suit for injunction was instituted on 30-10-1996. Para 2 of the plaint in the suit for injunction contained a recital of the agreement to sell dated 26-10-1995; the price fixed for the bargain between the parties; the payment of earnest money; the handing over of possession; the demand for performance and the failure of the defendant to perform the contract. Indeed, the plaintiff also asserted that she was going to institute a suit for specific performance of the agreement dated 26-10-1995. Under the agreement dated 26-10-1995, time for completion of the sale was reserved until 25-10-1996. Notice of performance was issued on 11-10-1996

to which the defendant had replied on 13-10-1996. The cause of action for the suit for specific performance had arisen when the plaintiff had notice of the denial by the defendant to perform the contract. On 30-10 -1996 when the suit for injunction was instituted, the plaintiff was entitled to sue for specific performance. There was a complete identity of the cause of action between the earlier suit (of which para 2 of the plaint has been reproduced in the earlier part of the judgment) and the cause of action for the subsequent suit. Yet, as the record indicates, the plaintiff omitted to sue for specific performance. This is a relief for which the plaintiff was entitled to sue when the earlier suit for injunction was instituted. Having omitted the claim for relief without

the leave of the Court, the bar under Order 2 Rule 2(3) would stand attracted.

21. But the case of the plaintiff in appeal is that in order that the bar under Order 2 Rule 2 be attracted, it is necessary that the plaint in the earlier suit must be proved in evidence. In the present case, it was submitted that this was not done. The basis of above submission is the judgment of the Constitution Bench in *Gurbux Singh*[3]. Now it is necessary to analyse the facts which led to the decision of the Constitution Bench. The respondent had instituted a suit against the claimant for possession of certain property and for mesne profits. The allegation in the plaint was that the plaintiff was the absolute owner of the property of which the defendant was in wrongful possession and that despite a demand he had failed to vacate the property, thereby attracting the liability to pay mesne profits. The plaint contained a reference to a previous suit instituted by the plaintiff and his mother in which a claim had been made against the defendant for the recovery of mesne profits in regard to the same property. It was also stated that mesne profits had been decreed in the suit. In the written statement, the appellant-defendant raised a plea to the maintainability of the suit on the ground of the bar under Order 2 Rule 2. As an issue was struck it was argued as a preliminary issue. The Court recorded a finding that the suit was barred by the provisions of Order 2 Rule 2. The Court held that without the pleadings in the earlier suit being made a part of the record, the trial court decided the issue as a matter of deduction. Consequently, the District Judge held that the bar under Order 2 Rule 2 could not have been entertained without the plaint in the earlier suit being made a part of the record. However, the first appellate court also held that if the point did arise for consideration, it would have decided it in favour of the plaintiff and treated the cause of action for a suit for mesne profit as distinct from a cause of action for the relief of possession of a property from a trespasser. However, on the first point that there was no material on the record to justify the plea of a bar under Order 2 Rule 2, the District Judge did not rest his decision on his view of the law as regards the construction of Order 2 Rule 2(3). Accordingly, he set aside the dismissal of the suit and remanded it to the trial court for a decision on merits. The High Court

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dismissed the second appeal as a consequence of which proceedings came up before this Court.

22. In that context, the Constitution Bench held : (*Gurbux Singh*

case[1], AIR p. 1812, para 6)

"6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the court the identity of the cause of action in the two suits."

23. On the facts of the case, the Constitution Bench in *Gurbux Singh*[2] noted that it was common ground that the pleadings in the earlier suit had not been filed by the appellant in the subsequent suit as evidence in support of the plea under Order 2 Rule 2. This Court observed that in the absence of the pleadings, the decision of the trial Judge was merely as a matter of opinion. This Court agreed with the view which had been taken by the District Judge who had noticed the deficiency in the case of the appellant : without the plaint in the previous suit being on the record, a plea of the bar under Order 2 Rule 2 was not maintainable. As a matter of fact, the High Court also noted that neither the plaint nor the written statement in the earlier suit had been filed and the only document which was available was the judgment in appeal. It was in this background that the Court observed that in the absence of the pleadings in the earlier suit, it was not possible to enter a finding on the identity of the cause of action.

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24. The situation as it obtained in the case before the Constitution Bench in *Gurbux Singh*[3] is distinct from the events as they transpired in the present case. The first appellate court, in the judgment which it delivered upon remand took note of the fact that the defendant had by its application at Ext. 117 prayed for summoning the original record of the earlier suit for injunction for proving the plaint. The plaintiff opposed that plea with the assertion that a certified copy of the document could be placed on record instead of summoning the original record. The Civil Judge, Senior Division, accordingly rejected the application on the ground that since the certified copy was filed on the record, it was unnecessary to call for the original record. The defendant had moved another application at Ext. 118 in the nature of a notice to admit the certified copy of the plaint in the earlier suit. This came to be allowed by the trial court. The first appellate court noted that there was no objection from the plaintiff whereupon the certified copy of the plaint was marked as Ext. 137. In this background, the first appellate court was clearly justified in coming to the conclusion that this is not a case where the plaintiff was deprived of an opportunity to explain the pleadings in the earlier suit. The finding that there was no prejudice to the plaintiff cannot be faulted. The parties were all along aware of the pleadings, the nature of the objection to the maintainability of the subsequent suit on the ground of the bar under Order 2 Rule 2 and the fact that the plaint in the earlier suit was brought on the record. Indeed, it was at the behest of the plaintiff that a certified copy of the plaint in the earlier suit was allowed to be brought on the record and marked as Ext. 137. In the circumstances, we are of the view that the bar under Order 2 Rule 2 is attracted. The plaintiff was entitled to sue for specific performance when the earlier suit for injunction was instituted but omitted to do so. There was an identity of the cause of action in the earlier suit and the subsequent suit. The earlier suit was founded on the plea of the plaintiff that it was in pursuance of the agreement to sell dated 26-10-1995 that he had been placed in possession of the property. Yet, without seeking the leave of the Court, the plaintiff omitted to sue for specific performance and rested content with the prayer for permanent injunction. In these circumstances, we agree with the finding which has been arrived at by all the three courts that the subsequent suit filed is barred under Order 2 Rule 2 does not warrant any interference in this appeal. The appeal would accordingly have to stand dismissed and we order accordingly.

25. However, there is one aspect of the case which, in our view, warrants a recourse to the power of this Court under Article 142 to render a complete justice between the parties.

26. Admittedly, the plaintiff has paid over an amount of Rs 1,50,000 to the defendant at the time of execution of the agreement on 26-10-

1995. Apart from this, the plaintiff deposited the balance of the consideration of Rs 30,000 before the first appellate court on 3-2-2012 (a copy of the receipt is marked as

Annexure P-4 to the appeal). We are of the view that the amount which has been deposited by the plaintiff with the defendant must be directed to be refunded together with interest at the rate of nine per cent per annum. Apart from this, the plaintiff would be entitled to a refund of Rs 30,000 which was deposited with the trial court on 3-2-2012 together with accrued interest, if any, thereon. In the event that the defendant fails to refund the above amount within a period of two months from the date of receipt of a certified copy of this order, it would be open to the plaintiff to move this Court for appropriate directions.

27. Subject to the above directions which we have issued in exercise of our jurisdiction under Article 142, we dispose of the appeal, maintaining the judgment[1] of the High Court.

Civil Appeal No. 9066 of 2019 [arising out of SLP (C) No. 12210 of 2017]

28. The present appeal has been heard together with the accompanying civil appeal which has been decided by the above judgment. The learned counsel appearing on behalf of the contesting parties have agreed that the only point of distinction is that an amount of Rs 1,40,000 has been deposited as earnest money and an amount of Rs 30,000 was deposited before the trial court in pursuance of the order of the first appellate court decreeing the suit. We direct that the defendant shall refund to the plaintiff the amount of Rs 1,40,000 together with interest at the rate of nine per cent per annum within two months from the date of receipt of a certified copy. The plaintiff is also entitled to refund of an amount of Rs 30,000 deposited in the trial court together with accrued interest, if any, thereon. The plaintiff would be at liberty to apply before this Court for appropriate directions if the amount is not paid by the defendant within a period of two months from today.

29. The appeal is accordingly disposed of.

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[1] Arising out of SLP (C) No. 11811 of 2017. Arising from the Judgment and Order in *Vurimi Jayalaxmi Pullarao* v. *Vemari Vyankata Radharani*, 2017 SCC OnLine Bom 9985 (Bombay High Court, Nagpur Bench, Second Appeal No. 352 of 2015, dt. 6-1-2017)

[2] Arising out of SLP (C) No. 12210 of 2017. Arising from the Judgment and Order in *Vurimi*

Jayalaxmi Pullarao v. *Vemari Vyankata Radharani* (Bombay High Court, Nagpur Bench, Second Appeal No. 356 of 2015, dt. 6-1-2017)

[1] *Vurimi Jayalaxmi Pullarao* v. *Vemari Vyankata Radharani*, 2017 SCC OnLine Bom 9985

[2] *Vemuri Vyankata Radha Rani* v. *Vurami Pullarao*, 2013 SCC OnLine Bom 2080

[3] *Gurbux Singh* v. *Bhooralal*, AIR 1964 SC 1810

[4] *Virgo Industries (Eng.) (P) Ltd.* v. *Venturetech Solutions (P) Ltd.*, (2013) 1 SCC 625 : (2013) 1 SCC (Civ) 679

[5] *Pramod Kumar* v. *Zalak Singh*, (2019) 6 SCC 621 : (2019) 3 SCC (Civ) 370

[6] *Mohd. Khalil Khan* v. *Mahbub Ali Mian*, 1948 SCC OnLine PC 44 : (1947-48) 75 IA 121

(2018) 2 Supreme Court Cases 649 : (2018) 2 Supreme Court Cases (Civ) 282 : 2018 SCC OnLine SC 53

In the Supreme Court of India

(BEFORE DIPAK MISRA, C.J. AND A.M. KHANWILKAR AND DR D.Y. CHANDRACHUD, JJ.)

NEERJA REALTORS PRIVATE LIMITED . . Appellant;

Versus

JANGLU (DEAD) THROUGH LEGAL REPRESENTATIVE . . Respondent.

Civil Appeal No. 71 of 2018, decided on January 29, 2018

A. **Civil Procedure Code, 1908 — Or. 5 Rr. 20(1) & (1-A) and 17 — Service of summons — Substituted service — Mode of passing order as to — Requirements to be satisfied**

— Held, substituted service under Or. 5 R. 20 of CPC is an exception to normal mode of service — For ordering substituted service under said provision, court is required to be satisfied that : (i) there is reason to believe that defendant is keeping out of the way for purpose of avoiding service, or (ii) for any other reason, the summons cannot be served in ordinary way — Thus, while making that order, court must apply its mind to requirements under Or. 5 R. 20 of CPC and indicate in its order due consideration of provisions contained in Or. 5 R. 20

— In present case, summons issued to defendant returned unserved with report of bailiff that defendant could not be found at address mentioned in summons as he had left the house concerned and was residing elsewhere — But, in such a case, serving officer not following the procedure stipulated in Or. 5 R. 17 of CPC i.e. affixing summons on a conspicuous part of the house concerned — Thereafter, on an application moved by plaintiff, trial court ordering substituted service by way of publication in a daily newspaper — While passing that order, trial court failing to apply its mind to requirements under Or. 5 R. 20 of CPC and passing a mechanical order — That apart, trial Judge also ignoring relevant provisions as to service of summons contained in Civil Manual concerned — In such circumstances, passing ex parte judgment and decree against defendant on basis of aforesaid substituted service, held, was not proper — Hence, such judgment and decree was rightly set aside by High Court in first appeal

Dismissing the appeal, the Supreme Court

Held :

The trial court by its order dated 9-2-2011 directed issuance of summons to the original defendant, returnable on 15-3-2011. In pursuance of that order, summons

were issued. The report of the bailiff indicates that the summons were returned unserved and the bailiff was informed that the original defendant had left the premises nearly two years earlier and resided elsewhere.

(Para 12)

Page: 650

Evidently as the report of the bailiff indicates, he was unable to find the defendant at the address which was mentioned in the summons. The said report does not indicate that the summons were affixed on a conspicuous part of the house, at the address mentioned in the summons. Thus, there was a breach of the provisions of Order 5 Rule 17 of the CPC.

(Para 14)

Thereafter, when the application for substituted service was filed before the trial court under Order 5 Rule 20 of the CPC, a cryptic order was passed. Substituted service under Order 5 Rule 20 of the CPC is an exception to the normal mode of service. For such service, Order 5 Rule 20 of the CPC requires the court to be satisfied either that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason, the summons cannot be served in the ordinary way. The Court must apply its mind to the requirements of Order 5 Rule 20 and its order must indicate due consideration of the provisions contained in it. Evidently the trial court failed to apply its mind to the requirements of Order 5 Rule 20 and passed a mechanical order. Besides this, the trial Judge also ignored the provisions (as to service of summons) contained in Chapter III of the Civil Manual issued by the High Court on its appellate side for the guidance of civil courts and officers subordinate to it.

(Para 14)

The submission that under Order 5 Rule 20, it was not necessary to affix a copy of the summons at the court house and at the house where the defendant is known to have last resided, once the court had directed service by publication in the newspaper really begs the question. There was a clear breach of the procedure prescribed in Order 5 Rule 17 even antecedent thereto. Besides, the order of the Court does not indicate due application of mind to the requirement of the satisfaction prescribed in the provision. The High Court was, in these circumstances, justified in coming to the conclusion that the ex parte judgment and decree in the suit for specific performance was liable to be set aside.

(Para 15)

Janglu v. *Neeraj Realtors (P) Ltd.*, 2015 SCC OnLine Bom 6104, *affirmed*

B. **Civil Procedure Code, 1908 — Or. 9 R. 13 & S. 96 and Or. 43 R. 1(d) — Ex parte decree — Remedies available against**

— Held, a defendant against whom an ex parte decree is passed has two options i.e. (i) to file an appeal under S. 96 of CPC, or (ii) to file an application under Or. 9 R. 13 of CPC — Recourse can be taken to both the said proceedings (i.e. appeal under S. 96 and petition under Or. 9 R. 13) simultaneously — If appeal under S. 96 is dismissed, as a result of which ex parte decree merges with order of appellate court, petition under Or. 9 R. 13 would not be maintainable — But, when application under Or. 9 R. 13 is dismissed, the remedy to defendant is appeal under Or. 43 R. 1 of CPC — However, once such an appeal under Or. 43 R. 1 is dismissed, the same contention cannot be raised in first appeal under S. 96 — In present case, defendant chose remedy of first appeal under S. 96 and was able to establish before first appellate court (i.e. High Court) adequate grounds for setting aside ex parte judgment and decree passed against him

(Para 17)

Bhanu Kumar Jain v. *Archana Kumar*, (2005) 1 SCC 787; *Rabindra Singh* v. *Financial Commr., Cooperation*, (2008) 7 SCC 663, *relied on*

Mahesh Yadav v. *Rajeshwar Singh*, (2009) 2 SCC 205 : (2009) 1 SCC (Civ) 454, *affirmed*

[**Ed.** : See also remedies by way of filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud, as held by the Supreme Court in *Bhanu Kumar Jain* v. *Archana Kumar*, (2005) 1 SCC 787; *Rabindra Singh* v. *Financial Commr., Cooperation*, (2008) 7 SCC 663 and *Mahesh Yadav* v. *Rajeshwar Singh*, (2009) 2 SCC 205 : (2009) 1 SCC (Civ) 454.]

W-D/59784/CV

Advocates who appeared in this case:

Kumar Shashank, Ms Rukhmini Bobde and Vishal Prasad, Advocates, for the Appellant.

Chronological list of cases cited ***on page(s)***

1. 2015 SCC OnLine Bom 6104, *Janglu* v. *Neeraj Realtors (P) Ltd.* 651*c-d*, 652*e-f*, 655*e-f*

2. (2009) 2 SCC 205 : (2009) 1 SCC (Civ) 454, *Mahesh Yadav* v. *Rajeshwar Singh* 655*e*

3. (2008) 7 SCC 663, *Rabindra Singh* v. *Financial*

Commr., Cooperation 655*d-e*

4. (2005) 1 SCC 787, *Bhanu Kumar Jain* v. *Archana Kumar* 655*a-b*, 655*d-e*

The Judgment of the Court was delivered by

DR D.Y. CHANDRACHUD, J.— Delay condoned. The present appeal is from the judgment[1] of a Single Judge at the Nagpur Bench of the High Court of Judicature at Bombay. While allowing a first appeal, the High Court set aside the judgment and order of the Civil Judge (Senior Division) at Nagpur which had decreed a suit for specific performance instituted by the appellant, ex parte.

2. The subject-matter of the suit for specific performance is an agreement dated 15-7-2006 entered into by the appellant with the original defendant in respect of agricultural land admeasuring 1.66 hectares (4.07 acres) situated in Mauza-Sondapar, Tahsil Hingna, District Nagpur. The total consideration payable under the agreement was Rs 13,04,391 out of which an amount of Rs 3,26,000 was recorded to have been paid. The balance of Rs 9,78,391 was to be paid at the time of the execution of the sale deed.

3. On 30-6-2007, Shobha, who is the daughter of the original respondent instituted a suit (Old Regular Suit No. 726 of 2007 which was renumbered as Regular Suit No. 269 of 2008) against her father and the appellant for partition, possession and for declaratory and injunctive reliefs in relation to the land. In that suit the plaintiff claimed that her father was in dire financial need and had obtained a loan from the appellant and that as security, the appellant got certain documents executed. According to the plaintiff, the agreement was vitiated by fraud and misrepresentation and the land being ancestral property, the agreement was not binding on her. The original defendant entered appearance and disclosed his residential address in a proceeding under Order 8 Rule 11 of the Code of Civil Procedure, 1908 (CPC). The appellant also filed her written statement. The suit was dismissed on 8-7-2010 on the ground that the land belonged to the original defendant and that the plaintiff had no right, title and interest.

4. On 5-2-2011, the appellant filed a suit for specific performance

(Suit No. 184 of 2011) of the agreement to sell dated 15-7-2006. On 9-2-2011, the trial court issued notice to the original defendant for settlement of issues. It appears that summons were issued on two occasions to the original defendant but were returned unserved. On 11-4-2011, the bailiff submitted a report stating that when he went to serve the defendant, he was informed by persons residing in the village that he had left the premises two years earlier and was residing elsewhere. The summons were returned since the defendant was not residing at the address given therein.

5. The appellant filed an application for substituted service under Order 5 Rule 20(1-A) CPC on 2-9-2011. The trial court allowed the application on the same day in terms of the following order:

> "Issue S/S to defendant under Order 5 Rule 29(1-A) CPC at the expense of the plaintiff."

6. The appellant claims to have effected substituted service by publication in the Marathi daily *Lokmat*. On 29-11-2011, the trial court passed the following order:

> "Defendant served on public notice in daily newspaper *Lokmat* on 4-10-2011 but he remained absent. Suit proceeded ex parte against the defendant."

7. The suit was decreed on 13-6-2014 and the appellant was directed to deposit the balance consideration of Rs 9,78,391 within one month. The appellant claims to have deposited the amount on 17-7-2014.

8. On 12-9-2014, the original defendant filed a first appeal under Section 96 CPC before the High Court. He died on 21-8-2015. The appellant submitted an application for bringing his legal representatives on record. The application was eventually allowed on 23-9-2016.

9. The High Court by its judgment dated 7-7-2015[1] held that neither the report of the bailiff nor the order of the trial court indicate that a copy of the summons was affixed in a conspicuous place on the court house and at the house where the defendant was known to have last resided. The High Court held that there was a breach of the provisions of Order 5 Rule 20(1) CPC. The High Court observed that the order of the trial court permitting substituted service was cryptic and that the Court had not recorded its satisfaction that the defendant was keeping out of the way to avoid service or that the summons could not be served in the ordinary manner for any other reason. Moreover, the serving officer had not followed the procedure stipulated in Order 5 Rule 17 where the defendant was not found to reside at the place where he was last residing. The Court noted that besides the service to be effected through the bailiff, the summons were not sent to the defendant at the address furnished by the plaintiff by registered post, with acknowledgment due. The High Court also found that the trial

Judge had ignored the provisions of Chapter III of the Civil

Manual issued by the High Court on the appellate side for guidance of the civil courts and officers subordinate to it.

10. On behalf of the appellant, it has been submitted that the High Court has misconstrued the provisions of Order 5 Rule 20. According to the appellant, Order 5 Rule 20 allows an option to either affix the notice at the court premises coupled with affixation at the home of the defendant *or* by any other mode including publication in a newspaper. In the present case, service of summons was effected on the original defendant by publication in the newspaper on 4-10-2011. Hence, it was urged that there was no further requirement to affix the summons at the court premises and at the house of the original defendant. Moreover, it was urged that the order of the trial court was not cryptic and the report of the bailiff clearly indicated that the original defendant was not residing at the address submitted by the appellant because of which the summons were returned.

11. On the other hand, the learned counsel for the respondent urged that the findings of the High Court in the first appeal are borne out from the record and are in accordance with law. Hence no interference is warranted in the present proceedings.

12. The record before the Court would indicate that the trial court by its order dated 9-2-2011 directed the issuance of summons to the original defendant, returnable on 15-3-2011. In pursuance of the order, summons were issued on 4-3-2011. The report of the bailiff dated 11-4-2011 indicates that the summons were returned unserved and the bailiff was informed that the original defendant had left the premises nearly two years earlier and resided elsewhere.

13. Order 5 Rule 17 provides as follows:

> "**17. *Procedure when defendant refuses to accept service, or cannot be found***.—Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in

which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

14. Evidently as the report of the bailiff indicates, he was unable to find the defendant at the address which was mentioned in the summons. The report of the bailiff does not indicate that the summons were affixed on a conspicuous part of the house, at the address mentioned in the summons. There was a breach of the provisions of Order 5 Rule 17. When the application for substituted

service was filed before the trial court under Order 5 Rule 20, a cryptic order was passed on 2-9-2011. Order 5 Rule 20 requires the court to be satisfied either that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason, the summons cannot be served in the ordinary way. Substituted service is an exception to the normal mode of service. The Court must apply its mind to the requirements of Order 5 Rule 20 and its order must indicate due consideration of the provisions contained in it. Evidently the trial court failed to apply its mind to the requirements of Order 5 Rule 20 and passed a mechanical order. Besides this, as observed by the learned Single Judge of the High Court, the trial Judge ignored the provisions contained in Chapter III of the Civil Manual issued by the High Court on its appellate side for the guidance of civil courts and officers subordinate to it. Paras 33 to 36 of Chapter III are extracted below:

"33. In addition to the service to be effected through a bailiff, a summon may also be sent to the defendant, to the address given by the plaintiff, by registered post, prepaid for acknowledgment, provided there is a regular daily postal service at such place.

34. Rules as to service of summons are contained in Rules 9 to 30 of Order 5. Care should be taken to see that bailiffs follow those rules as well as the instructions given in the bailiffs' Manual.

35. It is the duty of the serving officer to follow the procedure and take all the steps laid down in Rule 17 of Order 5. He has no discretion for not taking the necessary steps, when the conditions laid down in the said Rule are fulfilled.

36. It is for the Court to determine whether the service is good or bad. In determining whether the service is good or not, the attention of courts is drawn to the necessity of strictly following the provisions of the Civil Procedure Code as to the service of processes. Ordinarily, service should not be considered sufficient unless all the requirements of the law in that behalf are fulfilled. The object of the service is to inform a party of the proceedings in due time. When from the return of a serving officer it appears that there is no likelihood that a process will come to the knowledge of the party in due time, or a probability exists that it will not so come to his knowledge, the service should not be considered to be proper. The law contemplates that the primary method of service should be tendering or delivering a copy of the process to the party personally, in case in which it may be practicable to do so. It is the duty of the serving officer to make all proper efforts to find the party, with a view to effect personal service. If it be not possible after reasonable endeavour to find the party, then only the service may be made on an adult male member of the family residing with him."

15. The submission that under Order 5 Rule 20, it was not necessary to affix a copy of the summons at the court house and at the house where the defendant is known to have last resided, once the court had directed service by publication in the newspaper really begs the question. There was a clear breach of the procedure prescribed in Order 5 Rule 17 even antecedent thereto. Besides, the order of the Court does not indicate due application of mind to

the requirement of the satisfaction prescribed in the provision. The High Court was, in these circumstances, justified in coming to the conclusion that the ex parte judgment and order in the suit for specific performance was liable to be set aside.

16. In *Bhanu Kumar Jain* v. *Archana Kumar*, a Bench of three Judges of this Court has held that : (SCC p. 797, para 24)

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

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

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

17. A defendant against whom an ex parte decree is passed has two options : the first is to file an appeal. The second is to file an

application under Order 9 Rule 13. The defendant can take recourse to both the proceedings simultaneously. The right of appeal is not taken away by filing an application under Order 9 Rule 13. But if the appeal is dismissed as a result of which the ex parte decree merges with the order of the appellate court, a petition under Order 9 Rule 13 would not be maintainable. When an application under Order 9 Rule 13 is dismissed, the remedy of the defendant is under Order 43 Rule 1. However, once such an appeal is dismissed, the same contention cannot be raised in a first appeal under Section 96. The three-Judge Bench decision in *Bhanu Kumar Jain*[2] has been followed by another Bench of three Judges in *Rabindra Singh* v. *Financial Commr., Cooperation*[3], and by a two-Judge Bench in *Mahesh Yadav* v. *Rajeshwar Singh*[4]. In the present case, the original defendant chose a remedy of first appeal under Section 96 and was able to establish before the High Court, adequate grounds for setting aside the judgment and decree.

18. For the above reasons, we find no reason to interfere with the judgment[1] and order of the High Court. The appeal accordingly stands dismissed. There shall be no order as to costs.

———

[1] Arising out of SLP (C) No. 5847 of 2017. Arising from the Judgment in *Janglu* v. *Neeraj Realtors (P) Ltd.*, 2015 SCC OnLine Bom 6104 (Bombay High Court, Nagpur Bench, FA No. 928 of 2014, dt. 7-7-2015)

[2] *Janglu* v. *Neeraj Realtors (P) Ltd.*, 2015 SCC OnLine Bom 6104

[3] *Bhanu Kumar Jain* v. *Archana Kumar*, (2005) 1 SCC 787

[3] *Rabindra Singh* v. *Financial Commr., Cooperation*, (2008) 7 SCC 663

[4] *Mahesh Yadav* v. *Rajeshwar Singh*, (2009) 2 SCC 205 : (2009) 1 SCC (Civ) 454

2022 SCC OnLine SC 1128

In the Supreme Court of India

(BEFORE ANIRUDDHA BOSE AND J.B. PARDIWALA, JJ.)

Life Insurance Corporation of India … Appellant;

Versus

Sanjeev Builders Private Limited and Another … Respondents.

Civil Appeal No. 5909 of 2022 (Arising out of SLP(C) No. 22443 of 2019)

Decided on September 1, 2022

The Judgment of the Court was delivered by

J.B. PARDIWALA, J.:— Leave granted.

2. This appeal is at the instance of a defendant in a suit filed by the respondents herein (original plaintiffs) for the specific performance of contract based on an agreement dated 08.06.1979 and is directed against the judgment and order passed by the High Court of Judicature at Bombay dated 13.12.2018 in the Appeal [L] No. 499 of 2018, arising from the order passed by a learned Single Judge on its ordinary original civil jurisdiction side in the Chamber Summons No. 854 of 2017 in the Suit No. 894 of 1986 dated 11.09.2018. The Chamber Summons was allowed by the High Court at the instance of the plaintiffs, permitting the plaintiffs to amend the plaint. The order passed by the High Court in the Chamber Summons came to be affirmed by a Division Bench in the Appeal [L] No. 499 of 2018. The High Court permitted the plaintiffs to amend the plaint, seeking to enhance the amount towards the alternative claim for damages.

FACTUAL MATRIX

3. It appears from the materials on record that the respondents herein are the original plaintiffs and the appellant herein is the original defendant in the Suit No. 894 of 1986, pending as on date in the High Court of Judicature at Bombay on its original side. The said suit has been instituted seeking specific performance of the agreement dated 08.06.1979. In the alternative, the plaintiffs have also prayed for damages. The plaintiffs moved the Chamber Summons No. 854 of 2017, *inter alia*, seeking enhancement of the amount towards damages on the grounds, more particularly, set out in the affidavit filed in support of the said chamber summons.

4. The learned Single Judge of the High Court allowed the chamber summons referred to above, *vide* the order dated 11.09.2018, keeping the issue of limitation open and also permitting the defendant, appellant herein, to file additional written statement.

5. The appellant herein preferred an appeal against the said order which came to be dismissed *vide* the impugned order dated 13.12.2018.

6. Being aggrieved and dissatisfied with the impugned order passed by the High Court referred to above, the appellant (original defendant) is here before this Court with the present appeal.

SUBMISSIONS ON BEHALF OF THE APPELLANT

7. The learned senior counsel appearing for the appellant, vehemently, submitted that the High Court committed a serious error in passing the impugned order. He would submit that the High Court overlooked the order passed by this Court in the *Life Insurance Corporation of India* v. *Sanjeev Builders Pvt. Ltd.*, (2018) 11 SCC 722 between the same parties, arising from the same suit proceedings.

8. The learned counsel would submit that the High Court should not have permitted

the plaintiffs to amend the plaint after a period of thirty-one years, more particularly, when the earlier amendment seeking to implead the assignee as the plaintiff No. 3 in the suit was declined by this Court *vide* the judgment and order dated 24.10.2017 passed in the *Life Insurance Corporation of India* (supra).

9. The learned counsel would submit that the High Court failed to consider that the amendment was hit by the provisions of Order II Rule 2 of the Civil Procedure Code, 1908 (for short, the 'CPC'). He would submit that the amendment could be said to be even hit by the principle of constructive *res judicata*.

10. The learned counsel pointed out that at the time when the suit came to be instituted, the damages to the tune of Rs. 1,01,00,000/- [Rs. One Crore & One Lakh only] in the alternative was prayed for. By way of amendment the damages now prayed for is to the tune of Rs. 4,00,01,00,000/- [Rs. Four Hundred Crore & One Lakh only].

11. In such circumstances referred to above, the learned counsel appearing for the appellant (original defendant) prayed that there being merit in his appeal, the same may be allowed and the impugned order passed by the High Court may be set aside and the original amendment application filed by the plaintiffs be rejected.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

12. The learned senior counsel appearing for the respondents herein (original plaintiffs) on the other hand, submitted that no error, not to speak of any error of law, could be said to have been committed by the High Court in passing the impugned order. It is submitted that the question of limitation has been kept open by the High Court that may be agitated by the defendant in the trial and the defendant has also been permitted to file its additional written statement.

13. The learned counsel would submit that the suit is yet to be adjudicated; and in such circumstances, the delay in amending the plaint for the purpose of enhancing the amount towards damages would not cause any serious prejudice to the defendant.

14. The learned counsel further submitted that the provisions of Order II Rule 2 of the CPC cannot be made applicable to an application seeking amendment of plaint.

15. The learned counsel in the last submitted that the decision of this Court rendered in the case of *Life Insurance Corporation of India* (supra) between the same parties was altogether in a different context. In the said appeal before this Court, the issue was whether the assignee could have been impleaded as one of the plaintiffs in the suit after a period of twenty-seven years from the date of institution of the suit?

16. In such circumstances referred to above, the learned counsel appearing for the plaintiffs prays that there being no merit in this appeal, the same may be dismissed with costs.

ANALYSIS

17. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions of law fall for the consideration of this Court:

1. Whether the High Court committed any material irregularity or jurisdictional error going to the root of the matter in passing the impugned order?
2. Whether the provisions of Order II Rule 2 CPC can be made applicable to an amendment application?
3. Whether the amendment of plaint for the purpose of enhancing the amount towards damages could be said to be hit by the doctrine of constructive *res judicata*?
4. Whether the judgment and order passed by a coordinate Bench of this Court in the case of *Life Insurance Corporation of India* (supra) between the same parties has any bearing on the present appeal?

5. Whether the present appeal is covered by the proviso to Section 21(5) and Section 22(2) resply of the Specific Relief Act, 1963 (47 of 1963) (for short, 'the Act 1963')?

18. Before adverting to the rival contentions canvassed on either side and before we deal with the orders passed by the High Court permitting the plaintiffs to amend the plaint with respect to the prayer clause, let us consider, the laws on the question of allowing or rejecting a prayer for amendment of the pleadings, more particularly, when the plea of limitation was taken by one of the parties.

19. It is well settled that the court must be extremely liberal in granting the prayer for amendment, if the court is of the view that if such amendment is not allowed, a party, who has prayed for such an amendment, shall suffer irreparable loss and injury. It is also equally well settled that there is no absolute rule that in every case where a relief is barred because of limitation, amendment should not be allowed. It is always open to the court to allow an amendment if it is of the view that allowing of an amendment shall really sub-serve the ultimate cause of justice and avoid further litigation. In *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.*, AIR 1957 SC 357, this Court at paragraph 16 of the said decision observed as follows:

> *"**16.** It is no doubt true that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interest of justice….."*

20. Again in *T.N. Alloy Foundry Co. Ltd.* v. *T.N. Electricity Board*, (2004) 3 SCC 392, this Court observed as follows:

> *"**2.** …..The law as regards permitting amendment to the plaint, is well settled. In* L.J. Leach and Co. Ltd. *v.* Jardine Skinner and Co. *[AIR 1957 SC 357 : 1957 SCR 438] it was held that the Court would as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it.*
>
> ***3.** It is not disputed that the appellate court has a coextensive power of the trial court. We find that the discretion exercised by the High Court in rejecting the plaint was in conformity with law."*

21. So far as the answer to the specific plea that the claim of damages is barred by limitation and cannot be permitted at this stage is concerned, it becomes necessary to examine the various judicial pronouncements of this Court. The principles governing an amendment which may be permitted even after the expiry of the statutory period of limitation were laid down by the Privy Council in its judgment in *Charan Das* v. *Amir Khan*, AIR 1921 PC 50. In this case, the Privy Council laid down the principles thus:

> *"…..That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases : see for example* Mohummud Zahoor Ali *v.* Rutta Koer, *where such considerations are outweighed by the special circumstances of the case, and their Lordships are not prepared to differ from the Judicial Commissioner in thinking that the present case is one."*

22. It would be useful to also notice the observations of this Court in, *Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil*, 1957 SCR 595 : AIR 1957 SC 363, wherein this Court considered an objection to the amendment on the ground that the same amounted to a new case and a new cause of action. In this case, this Court laid down the principles which would govern the exercise of discretion as to whether the

court ought to permit an amendment of the pleadings or not. This Court approved the observations of Batchelor, J., in the case of *Kisandas Rupchand* v. *Rachappa Vithoba Shilwant* reported in ILR (1909) 33 Bom 644, when he laid down the principles thus:

> *"**10.** …..“All amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties … but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused; to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same : can the amendment be allowed without injustice to the other side, or can it not?”…..”*

23. This Court has repeatedly held that the power to allow an amendment is undoubtedly wide and may be appropriately exercised at any stage in the interests of justice, notwithstanding the law of limitation. In this behalf, in *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393, this Court held thus:

> *"**22.** …..The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court…..”*

24. Again in *Ganesh Trading Co.* v. *Moji Ram*, (1978) 2 SCC 91, this Court laid down the principles thus:

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

25. The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defense which, however, is subject to an exception that by the proposed amendment other side should not be subjected to injustice and that any admission made in favor of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defense taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. The proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed

which amounts to or relates in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the application for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement. (See *South Konkan Distilleries* v. *Prabhakar Gajanan Naik*, (2008) 14 SCC 632)

26. But undoubtedly, every case and every application for amendment has to be tested in the applicable facts and circumstances of the case. As the proposed amendment of the pleadings amounts to only a different or an additional approach to the same facts, this Court has repeatedly laid down the principle that such an amendment would be allowed even after the expiry of statutory period of limitation.

27. In this behalf, in *A.K. Gupta & Sons Ltd.* v. *Damodar Valley Corporation*, AIR 1967 SC 96 : (1966) 1 SCR 796, this Court held thus:

> *"**7.** .....a new case or a new cause of action particularly when a suit on the new case or cause of action is barred:* Weldon *v.* Neale *[[L.R.] 19 Q.B. 394]. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation:....."*

28. In entitled, *G. Nagamma* v. *Siromanamma*, (1996) 2 SCC 25, this Court considered the proposed amendment of the plaint and noticing that neither the cause of action would change nor the relief would be materially affected, allowed the same. This Court in this case noticed that in the plaintiff's suit for specific performance, the plaintiff was entitled to plead even inconsistent pleas and that in the present case, the plaintiffs were seeking only the alternative reliefs. It appears that the plaintiffs had filed a suit for specific performance of an agreement of re-conveyance. By the application under Order VI Rule 17 of the CPC for amendment of the plaint, the appellants were pleading that the transactions of execution of the sale deed and obtaining a document for re-conveyance were single transactions viz. mortgage by conditional sale. They also wanted to incorporate an alternative relief to redeem the mortgage. At the end of the prayer, the plaintiff sought alternatively to grant of a decree for redemption of the mortgage. This amendment was permitted by this Court.

29. In *Pankaja* v. *Yellappa (dead) by lrs.*, (2004) 6 SCC 415, this Court held that it was in the discretion of the court to allow an application under Order VI Rule 17 of the CPC seeking amendment of the plaint even where the relief sought to be added by amendment was allegedly barred by limitation. The Court noticed that there was no absolute rule that the amendment in such a case should not be allowed. It was pointed out that the court's discretion in this regard depends on the facts and circumstances of the case and has to be exercised on a judicial evaluation thereof. It would be apposite to notice the observations of this Court in this pronouncement in extenso. The principles were laid down by this Court thus:

> ***"12.** So far as the court's jurisdiction to allow an amendment of pleadings is concerned, there can be no two opinions that the same is wide enough to permit amendments even in cases where there has been substantial delay in filing such amendment applications. This Court in numerous cases has held that the dominant purpose of allowing the amendment is to minimise the litigation, therefore, if the facts of the case so permit, it is always open to the court to allow applications in spite of the delay and laches in moving such amendment application.*
>
> ***13.** But the question for our consideration is whether in cases where the delay has extinguished the right of the party by virtue of expiry of the period of limitation prescribed in law, can the court in the exercise of its discretion take away the right accrued to another party by allowing such belated amendments.*

14. *The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.*

xxx *xxx* *xxx*

16. *This view of this Court has, since, been followed by a three-Judge Bench of this Court in the case of* T.N. Alloy Foundry Co. Ltd. *v.* T.N. Electricity Board *[(2004) 3 SCC 392]. Therefore, an application for amendment of the pleading should not be disallowed merely because it is opposed on the ground that the same is barred by limitation, on the contrary, application will have to be considered bearing in mind the discretion that is vested with the court in allowing or disallowing such amendment in the interest of justice.*

xxx *xxx* *xxx*

18. *We think that the course adopted by this Court in* Ragu Thilak D. John case *[(2001) 2 SCC 472] applies appropriately to the facts of this case. The courts below have proceeded on an assumption that the amendment sought for by the appellants is ipso facto barred by the law of limitation and amounts to introduction of different relief than what the plaintiff had asked for in the original plaint. We do not agree with the courts below that the amendment sought for by the plaintiff introduces a different relief so as to bar the grant of prayer for amendment, necessary factual basis has already been laid down in the plaint in regard to the title which, of course, was denied by the respondent in his written statement which will be an issue to be decided in a trial. Therefore, in the facts of this case, it will be incorrect to come to the conclusion that by the amendment the plaintiff will be introducing a different relief."*

30. From the above, therefore, one of the cardinal principles of law in allowing or rejecting an application for amendment of the pleading is that the courts generally, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of filing of the application. But that would be a factor to be taken into account in the exercise of the discretion as to whether the amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interest of justice.

31. In *Ragu Thilak D. John* v. *S. Rayappan*, (2001) 2 SCC 472, this Court also observed that where the amendment was barred by time or not, was a disputed question of fact and, therefore, that prayer for amendment could not be rejected and in that circumstances the issue of limitation can be made an issue in the suit itself like the one made by the High Court in the case on hand.

32. In a decision in *Vishwambhar* v. *Laxminarayan (Dead) through Lrs.*, (2001) 6 SCC 163, this Court held that the amendment though properly made cannot relate back to the date of filing of the suit, but to the date of filing of the application.

33. Again, in *Vineet Kumar* v. *Mangal Sain Wadhera*, (1984) 3 SCC 352 : AIR 1985 SC 817, this Court held that if a prayer for amendment merely adds to the facts already on record, the amendment would be allowed even after the statutory period of limitation.

IMPUGNED ORDERS

34. We now proceed to look into the two orders passed by the High Court i.e. one

by the learned Single Judge and the other in the appeal by the Division Bench.

35. The learned Single Judge in *Sanjeev Builders Pvt. Ltd.* v. *Life Insurance Corporation of India*, 2018 SCC OnLine Bom 15283, while allowing the Chamber Summons and permitting the plaintiffs to amend the plaint, observed thus:

*"**5.** It is the case of the applicant as submitted by Ms. Panda that while filing the suit, plaintiffs quantified the estimated damages likely to be caused to them by reason of non performance at Rs. 1,01,00,000/- The value of the suit property increased during the pendency of the suit. According to plaintiffs' estimate, the value of the property today can be estimated to be Rs. 400,01,00,000/- and if the court is not inclined to grant specific performance, then the damages which plaintiffs would suffer on account of non performance by the defendants under the agreement should be Rs. 400,01,00,000/-. Therefore, there is already claim for damages but what plaintiffs are seeking today is only enhancing the claim, of course subject to provisions of Section 73 of the Contract Act.*

***6.** Ms. Paranjape submitted that after 30 years, this application is filed for enhancement and therefore, exfacie the increased amount is barred by limitation. Ms. Paranjape submitted that though the settled position in law is that courts are generally liberal with pre-trial amendment, when ex-facie claim appears to be barred by limitation, the court should not permit the amendment.*

***7.** What one should keep in mind is this figure of Rs. 400,01,00,000/- can tomorrow go up or go down. Plaintiffs are only estimating it to be the amount which according to plaintiffs, is the loss which they would suffer. Whether that is the right estimate can be decided only at the time of trial. Even in para 12 of the plaint plaintiff has stated ".....suffered loss and damages which they estimate at....." In prayer clause-(b)(v) plaintiff pray "..... or such other sum as this Honourable Court may deem just and proper....." Further, if this figure of Rs. 1,01,00,000/- is not amended as prayed in this Notice of Motion, defendant will object the attempt of plaintiff to claim more as damages saying plaintiff cannot go beyond what is averred in the plaint. Due to situation beyond the control of plaintiff, this suit has remained pending for almost 32 years. Chances of suffering greater prejudice is more if the amendment is not allowed. It is clarified that plaintiff will still have to prove every penny it is claiming as damages.*

xxx xxx xxx

***10.** Admittedly, the trial is yet to begun though issues have been framed long ago.*

***11.** In the circumstances, keeping open rights and contentions of defendants to raise the issue of limitation which the court will decide at the time of trial, Chamber summons allowed in terms of prayer clause-(a) and accordingly disposed."*

36. While affirming the aforesaid order, the High Court in Appeal (L) No. 499 of 2018 held as under:

*"**4.** Undisputedly, trial is yet to commence. The amendment has been allowed by the learned Single Judge by giving cogent and sound reasons. Merely because the Plaintiffs are permitted to amend the plaint does not mean that the claim which has been made by the Plaintiffs by way of amendment would be granted by the Court. Defendants can always file an additional Written Statement to contest the claim of the Plaintiffs. In such additional Written statement, Appellants can also raise a ground with regard to limitation which will have to be gone into by the learned Single Judge. In any case, in the present case, Appellants have also filed additional Written Statement so as to meet the grounds brought on record by way of amendment.*

***5.** In that view of the matter, we do not find that this is a fit case to interfere with the discretion exercised by the learned Single Judge. Appeal is therefore*

rejected."

LIFE INSURANCE CORPORATION OF INDIA (SUPRA)

37. We now proceed to give a fair idea, as regards the judgment rendered by a coordinate Bench of this Court in the case of *Life Insurance Corporation of India* (supra) dated 24.10.2017.

38. The said appeal before this Court arose out of the judgment of the High Court of Bombay dated 22.08.2014 in and by which the Division Bench dismissed the appeal filed by the appellant herein Life Insurance Corporation of India (for short, 'LIC') thereby affirming the order of the Single Judge in the Chamber Summons No. 187 of 2014 by which the respondent No. 3 therein was impleaded as the plaintiff No. 3 in the Suit No. 894 of 1986.

39. It appears from the pleadings, more particularly, the facts recorded in the judgment rendered by the coordinate Bench that in the year 2014, the respondent No. 3 therein, namely, the Kedia Construction Company Ltd. filed the Chamber Summons No. 187 of 2014 stating that subsequent to the filing of the suit for the specific performance of contract, with the consent of the respondent No. 2, plaintiff No. 1/respondent No. 1 had assigned its interest to the respondent No. 3 for a consideration of Rs. 23,31,000/- by an agreement for sale dated 24.08.1987. The chamber summons was filed to implead the respondent No. 3 therein as the plaintiff No. 3 with a prayer to amend the plaint pursuant to the agreement of sale in its favour. The appellant herein (LIC) had opposed the chamber summons on the ground that the respondent No. 3 therein was not a *bona fide* assignee or a necessary party and that the issues in the suit were framed on 31.01.2014 and there had been an inordinate delay on 27 years in filing the application which had not been properly explained.

40. In the aforesaid set of facts, this Court while allowing the appeal filed by the appellant herein (LIC) held as under:

*"**11.** The stand of Respondent 3 is that it claims as an assignee of the rights of Respondents 1 and 2 and that it has the right to continue the suit under Order 22 Rule 10 CPC and the provisions of limitation, do not apply to such an application. To appreciate merits of this contention, we may usefully refer to Order 22 Rule 10 CPC, which reads as under:*

Order 22 — Death, Marriage and Insolvency of Parties

*"**10. Procedure in case of assignment before final order in suit**.—(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.*

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."

Under Order 22 Rule 10 CPC, when there has been an assignment or devolution of interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against person to or upon whom such interest has been assigned or devolved and this entitles the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the court for leave to continue the suit. When the plaintiff assigns/transfers the suit during the pendency of the suit, the assignee is entitled to be brought on record and continue the suit. Order 22 Rule 10 CPC enables only continuance of the suit by the leave of the court. It is the duty of the court to decide whether leave was to be granted or not to the person or to the assignee to continue the suit. The discretion to implead or not to implead parties who apply to continue the suit must be exercised

judiciously and not arbitrarily.

12. *The High Court was not right in holding that mere alleged transfer/assignment of the agreement would be sufficient to grant leave to Respondent 3 to continue the suit. From the filing of the suit in 1986, over the years, valuable right of defence accrued to the appellant; such valuable right of defence cannot be defeated by granting leave to the third respondent to continue the suit in the application filed under Order 22 Rule 10 CPC after 27 years of filing of the suit. The learned Single Judge was not right in saying that impleading Respondent 3 as Plaintiff 3 would cause no prejudice to the appellant and that the issues can be raised at the time of trial.*

13. *In a suit for specific performance, application for impleadment must be filed within a reasonable time. Considering the question of impleadment of party in a suit for specific performance after referring to various judgments, in* Vidur Impex and Traders (P) Ltd. *v.* Tosh Apartments (P) Ltd. [Vidur Impex and Traders (P) Ltd. *v.* Tosh Apartments (P) Ltd., *(2012) 8 SCC 384 : (2012) 4 SCC (Civ) 1] the Court summarised the principles as under : (SCC p. 413, para 41)*

> *"41. Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:*
>
> *41.1. The court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit.*
>
> *41.2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court.*
>
> *41.3. A proper party is a person whose presence would enable the court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.*
>
> *41.4. If a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.*
>
> *41.5. In a suit for specific performance, the court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.*
>
> *41.6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the court or the application is unduly delayed then the court will be fully justified in declining the prayer for impleadment."*

In light of the above principles, considering the case in hand, in our view, the application filed for impleading Respondent 3 as Plaintiff 3 was not filed within reasonable time. No explanation is offered for such an inordinate delay of 27 years, which was not kept in view by the High Court.

14. *Be it noted that an application under Order 22 Rule 10 CPC seeking leave of the court to continue the suit by the assignee/third respondent was not actually filed. Chamber Summons No. 187 of 2014 was straightaway filed praying to amend the suit which would have been the consequential amendment, had the leave to continue the suit been granted by the court.*

15. *As pointed out earlier, the application was filed after 27 years of filing of the suit. Of course, the power to allow the amendment of suit is wide and the court should not adopt hypertechnical approach. In considering amendment applications, court should adopt liberal approach and amendments are to be allowed to avoid multiplicity of litigations. We are conscious that mere delay is not a ground for rejecting the amendment. But in the case in hand, the parties are not rustic litigants; all the respondents are companies and the dispute between the parties is a commercial litigation. In such facts and circumstances, the amendment prayed in the chamber summons filed under Order 22 Rule 10 CPC ought not to have been allowed, as the same would cause serious prejudice to the appellant. In our view, the impugned order, allowing Chamber Summons No. 187 of 2014 filed after 27 years of the suit would take away the substantial rights of defence accrued to the appellant and the same cannot be sustained.*

16. *In the result, the impugned judgment* [LIC *v.* Sanjeev Builders (P) Ltd., *2014 SCC OnLine Bom 4811] is set aside and the appeal is allowed. Chamber Summons No. 187 of 2014 in Suit No. 894 of 1986 stands dismissed. No order as to costs."*

41. Thus, from the aforesaid, it is evident that a coordinate Bench of this Court took the view that impleading the respondent No. 3 therein as the plaintiff No. 3 would cause a serious prejudice to the appellant. This Court took the view that no explanation was offered for an inordinate delay of twenty-seven years, which was overlooked by the High Court. Even while allowing the appeal filed by the appellant herein, the coordinate Bench of this Court observed that mere delay would not be a ground for rejecting the amendment. However, in the facts of the case, since the parties not being rustic litigants and all the respondents therein being companies and the dispute being a commercial litigation, the amendment could not have been permitted after twenty-seven years of the suit, as it would take away the substantial rights of defence accrued in favour of the appellant (LIC).

42. We are of the view that the judgment and order passed by the coordinate Bench of this Court in the *Life Insurance Corporation of India* (supra) has no application so far as the present appeal is concerned. The appellant herein cannot succeed in the present appeal merely on the strength of the judgment and order passed by this Court in the *Life Insurance Corporation of India* (supra).

ORDER II RULE 2 OF THE CPC

43. In the present appeal, the principal argument of the learned counsel appearing for the appellant is that the amendment application should have been rejected by the courts below applying the principle of Order II Rule 2 of the CPC.

44. The said provision is set out below:

"Order II Rule 2 of the Code of Civil Procedure:

2. Suit to include the whole claim.*-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*

(2) ***Relinquishment of part of claim.****-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*

(3) ***Omission to sue for one of several reliefs.****-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.*

Explanation.-For the purposes of this rule an obligation and a collateral

security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration

A lets a house to B at a yearly rent of Rs. 1200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907."

45. The expressions "omits to sue" and "intentionally relinquish any portion of his claim" give an indication as to the intention of the legislature in framing the said rule. The term 'sue' can mean both the filing of the suit and prosecuting the suit to its culmination, depending on the context of the provision. In the present case, the legislature thought it fit to debar a plaintiff from suing afterwards for any relief which he/she has omitted without the leave of the court or from suing in respect of any portion of his claim which he intentionally relinquishes. Order II Rule 2(1) provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action.

46. The provision of Order II Rule 2 of the CPC has been well discussed by the Privy Council in the case of *Mohd. Khalil Khan* v. *Mahbub Ali Mian*, AIR 1949 PC 78, held as under:

"The principles laid down in the cases thus far discussed may be thus summarized:

(1.) the correct test in cases falling under Or. 2, r. 2, is "whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation for the former suit." (Moonshee Buzloor Ruheem *v.* Shumsoonnissa Begum.) *(2.) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment.* (Read *v.* Brown.) *(3.) If the evidence to support the two claims is different, then the causes of action are also different.* (Brunsden *v.* Humphrey.) *(4.) The causes of action in the two suits may be considered to be the same if in substance they are identical.* (Brunsden *v.* Humphrey.) *(5.) The cause of action has no relation whatever to the defence that may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers "to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour*." (Muss. Chand Kour *v.* Partab Singh.) *This observation was made by Lord Watson in a case under s. 43 of the Act of 1882 (corresponding to Or. 2, r. 2), where plaintiff made various claims in the same suit."*

47. In *Upendra Narain Roy* v. *Rai Janoki Nath Roy*, AIR 1919 Cal 904, a Division Bench of the Calcutta High Court had an occasion to consider this question. Woodroffe, J. has observed:

".....As regards the other point it has more ingenuity than substance. It proceeds on the erroneous assumption that the amendment was prohibited by Or. II, r. 2. This Rule does not touch the matter before us. It refers to a case where there has been a suit in which there has been an omission, to sue in respect of portion of a claim, and a decree has been made in that suit. In that case a second suit in respect of the portion so omitted is barred. That is not the case here. In the present case the suit has not been heard but a claim has been omitted by, it is said, inadvertence. To hold that in such case an amendment should not be allowed would be to hold something which the Rule does not say and which would be absurd. The Rule says "he shall not afterwards sue," that is, it assumes that there has been a suit carried to a decision, and a sub-sequent suit. It does not apply to amendment where there has been only one suit. As the Plaintiff had in law a right to apply for an amendment before the conclusion of his suit, it cannot be said that any rights of

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the Respondent in the Pabna suit are affected. Such a contention is based on the erroneous assumption that nothing could be done by way of amendment of the Calcutta suit to remove the objection that the claims on the previous mortgage or charge were not sustainable. A case would fall within Or. II, r. 2, only if a Plaintiff fails to apply for amendment before decree, and then brings another suit. The Plaintiffs are not doing that but asking for amendment in the one and only suit they have brought. This is, therefore, not a case in which the amendment either affects rights to the other party, or otherwise prejudices him."

(emphasis supplied)

48. A Constitution Bench of this Court, considering the scope and applicability of Order II Rule 2 of the CPC, in the case of *Gurbux Singh* v. *Bhooralal*, AIR 1964 SC 1810, held as under:

*"**6.** In order that a plea of a Bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out; (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. It is common ground that the pleadings in CS 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2 Rule 2 of the Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion, rightly that without the plaint in the previous suit being on the record, a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code was not maintainable."*

49. So far as, *Gurbux Singh* (supra) is concerned, we may clarify that the entire consideration in the said case by this Court was to the fact that there was a relinquishment of a claim by the plaintiff therein, but the relevant point which was considered by this Court was that the relief had become time barred. The ratio of the said judgment is that the relief being barred by limitation, the Order II Rule 2 of the CPC only came in as an adjunct. However, *Gurbux Singh* (supra) makes it clear that the bar of Order II Rule 2 of the CPC applies only to the subsequent suits.

50. In the light of the principles discussed and the law laid down by the Constitution Bench as also the other decisions discussed above, we are of the view that if the two suits and the relief claimed therein are based on the same cause of action then the subsequent suit will become barred under Order II Rule 2 of the CPC. However, we do not find any merit in the contention raised on behalf of the appellant herein that the amendment application is liable to be rejected by applying the bar

under Order II Rule 2 of the CPC. Order II Rule 2 of the CPC cannot apply to an amendment which is sought on an existing suit.

51. In the aforesaid context, we may refer to with approval a decision rendered by the High Court of Delhi in the case of *Vaish Cooperative Adarsh Bank Ltd.* v. *Geetanjali Despande*, (2003) 102 DLT 570. Paras 17 and 18 resply indicate that the bar under Order II Rule 2 of the CPC is only for a subsequent suit. These paras read as under:

> *"**17.** Reverting to the preliminary objections raised by the appellant against the maintainability of the application for amendment, one would come across with a peculiar plea of proposed amendment being barred under Order II Rule 2 CPC. General rule enacted under Order II Rule 2.(1) CPC is that every suit must include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Order II Rule 2.(2) precludes a subsequent suit on any part of claim, which had been omitted or intentionally relinquished by the plaintiff in an earlier suit based on the same cause of action. Similarly, where the plaintiff is entitled to more than one relief in respect of the same cause of action but omits, except with the leave of the court, to sue for all such reliefs, he is debarred in view of the Order II Rule 2(3) CPC from suing afterwards for any relief so omitted.*
>
> ***18.** A plea of bar under Order II Rule 2 CPC is maintainable only if the defendant makes out (i) that the cause of action of the second suit is the same on which the previous suit was based, (ii) that in respect of that cause of action, the plaintiff was entitled to more than one relief and (iii) that the plaintiff without leave obtained from the Court omitted to sue earlier for the relief for which the second suit is filed. (see* "Gurbux Singh *v.* Bhooralal", *AIR 1964 SC 1810). Clearly, Order II Rule 2 CPC enacts a rule barring a second suit in the situation indicated above. Identity of cause of action in the former and subsequent suits is essential before the bar contemplated under Order II Rule 2 CPC is set to operate. Thus, where the claim or reliefs in the second suit are based on a distinct cause of action, Order II Rule 2 CPC would have no application. Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived."*
>
> *(emphasis supplied)*

52. We are also not impressed by the contention raised on behalf of the appellant herein that the amendment application is hit by the principle of constructive *res judicata*. The principle of constructive *res judicata* has no application in the instant case, since there was no formal adjudication between the parties after full hearing. The litigation before this Court has come up at the stage when the courts below allowed the amendment of plaint for the purpose of enhancing the amount towards damages in the alternative to the main relief of specific performance of the contract.

SPECIFIC RELIEF ACT, 1963

53. The above takes us now to consider the proviso to Section 21(5) and Section 22 (2) of the Act 1963.

54. The Act 1963 contemplates that in addition to or in substitution of a claim for performance, a plaintiff is entitled to claim compensation. Section 21 of the Act 1963 provides as follows:

> *"**21. Power to award compensation in certain cases. -**(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach [in addition to] such performance.*
>
> *(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach,*

it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation.-The circumstances that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section."

55. Under sub-section (2) of Section 21, the court is empowered to award compensation for breach where it holds that there is a contract between the parties which was broken by the defendant but in the event, it decides that specific performance ought not to be granted. Sub-section (3) of Section 21 empowers the court to grant compensation for breach in addition to a decree for specific performance where it is of the view that specific performance alone would not satisfy the justice of the case. Sub-section (5), however, stipulates that compensation cannot be awarded under the section unless the Plaintiff has claimed such compensation in the plaint. This provision is mandatory.

56. The proviso to sub-section (5) of Section 21 dilutes the rigours of the main provision by allowing the plaintiff who has not claimed such compensation in the plaint to amend the plaint at any stage of the proceedings and the court, it has been provided, shall at any stage of the proceedings allow an amendment for including a claim for such compensation on such terms as may be just. In *Shamsu Suhara Beevi* v. *G. Alex*, (2004) 8 SCC 569, for instance, this Court held that the High Court erred in granting compensation under Section 21, in addition to the relief of specific performance in the absence of a prayer made to that effect either in the plaint as originally filed or as amended at any stage of the proceedings.

57. Section 22 of the Act 1963 contains the following provisions:

*"**22. Power to grant relief for possession, partition, refund of earnest money, etc.-**(1) Notwithstanding anything to the contrary contained in the Civil Procedure Code, 1908, (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for-*

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or (made by) him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the Court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21."

58. Section 22 has a non-obstante provision which overrides the CPC. A plaintiff who claims specific performance of a contract for the transfer of immovable property, may in an appropriate case ask for possession, partition and separate possession of the property, in addition to specific performance. The plaintiff may also claim any other relief including the refund of earnest money or deposit paid, in case the claim for specific performance is refused. Corresponding to the provisions of sub-section (5) of Section 21, sub-section (2) of Section 22 stipulates that such relief cannot be granted by the court unless it has been specifically claimed. However, the proviso requires that the court shall at any stage of the proceedings allow the plaintiff to amend the plaint to claim such relief where it has not been originally claimed on such terms which may appear just.

THE SPECIFIC RELIEF (AMENDMENT) ACT, 2018

59. The Act 1963 was amended in the year 2018 and in Section 21 of the Principal Act, in sub-section (1) the words "either in addition to, or in substitution of" were deleted and the words "in addition to" were substituted in their place. As a result, damages are now available only in addition to specific performance and not in lieu thereof. This is a consequence of other amendments to the Act 1963 whereby the amending act has eliminated the discretion of courts by substituting Sections 10 and 20 resply of the Principal Act.

60. The aforesaid provisions of the Act 1963 were duly considered by the Bombay High Court in the case of *Kahini Developers Pvt. Ltd.* v. *Mukesh Morarjipanchamatia*, reported in (2013) 3 Mah LJ 440, Dr. Justice D.Y. Chandrachud, (as His Lordship then was), speaking for the Bench, very lucidly and in the most erudite manner explained as under:

*"**9.** The object of the legislature in introducing the proviso to sub-section (5) of section 21 and to sub-section (2) of section 22 was to obviate a multiplicity of the proceedings. In* Babu Lal *v.* Hazari Lal, *(1982) 1 SCC 525 : AIR 1982 SC 818 the Supreme Court noted that the legislature "has given ample power to the Court to allow amendment of the plaint at any stage." (At para 20 page 825). This, the Supreme Court held, would include even the stage of execution. The Supreme Court also held that a mere contract for sale or for that matter, a decree for specific performance does not confer title on the buyer and that title would pass only upon execution of the decree. While discussing the issue of limitation, the Supreme Court held as follows:*

"If once we accept the legal position that neither a contract for sale nor a decree passed on that basis for specific performance of the contract gives any right or title to the decree-holder and the right and the title passes to him only on the execution of the deed of sale either by the judgment-debtor himself or by the Court itself in case he fails to execute the sale deed, it is idle to contend that a valuable right had accrued to the Petitioner merely because a decree has been passed for the specific performance of the contract. The limitation would start against the decree-holders only after they had obtained a sale in respect of the disputed property. It is, therefore, difficult to accept that a valuable right had accrued to the judgment-debtor by lapse of time. Section 22 has been enacted only for the purpose of avoiding multiplicity of proceedings which the law Courts always abhor." (At para 21 page 825)

***10.** The same view was taken by the Supreme Court in a later judgment in* Jagdish Singh *v.* Natthu Singh, *(1992) 1 SCC 647 : AIR 1992 SC 1604:*

"So far as the proviso to sub-section (5) is concerned, two positions must be kept clearly distinguished. If the amendment relates to the relief of

compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the Court will allow the amendment at any stage of the proceeding. That is a claim for compensation falling under section 21 of the Specific Relief Act, 1963 and the amendment is one under the proviso to sub-section (5). But different and less liberal standards apply if what is sought by the amendment is the conversion of a suit for specific performance into one for damages for breach of contract in which case section 73 of the Contract Act is invoked. This amendment is under the discipline of R.17, 0.6, C.P.C. The fact that sub-section (4) in turn, invokes section 73 of the Contract Act for the principles of quantification and assessment of compensation does not obliterate this distinction." (At para 10 page 1608)

In the decision in Shamsu Suhara Beevi *(supra), while holding that the High Court had erred in granting compensation under section 21, in addition to the relief of the specific performance in the absence of a prayer to that effect, the Supreme Court held that a prayer could have been made to that effect either in the plaint or by amending the plaint at any later stage of the proceeding to include the relief of compensation in addition to the relief of a specific performance. The plaint, however, in that case, was never amended and the order of the High Court was, therefore, held to be in error. These principles have also been noticed in a judgment of a learned Single Judge of this Court in* Manohar Dhundiraj Joshi *v.* Jhunnulal Hariram Yadao, *1983 Mah LJ 369.*

11. *Since the Court is informed that an appeal has been filed against the judgment of the learned Single Judge in* Harinarayan G. Bajaj *(supra), we are not expressing any opinion on the correctness of that decision. We are, however, of the view that since the legislature has contemplated that an amendment within the meaning of the provisos to section 21(5) and section 22(2) of the Specific Relief Act, 1963 can be made at any stage of the proceeding, such an amendment would not be barred by limitation. Even as a matter of first principle, an application for amendment must be distinguished from the cause of action which is sought to be set up by the amendment. As a matter of general principle, though an application for amendment is allowed, the question as to whether the cause of action is within limitation would have to be determined and adjudicated upon. While allowing an amendment, it is always open to a Civil Court to direct that the amendment shall not relate back to the institution of the proceeding. The Court would therefore have to determine at trial whether the cause of action is within limitation or is barred. Where the legislature has contemplated that the plaint can be amended at any stage of the proceeding as stipulated in the provisos to section 21(5) and section 21(2). Such an amendment of the nature contemplated by those provisions can indeed be brought about at any stage of the proceedings."*

(emphasis supplied)

61. In the case of *B.K. Narayana Pillai* v. *Parameswaran Pillai*, (2000) 1 SCC 712 relying upon the cases of *A.K. Gupta* (supra) and *Ganesh Trading Co.* (supra), this Court held that the court should adopt a liberal approach in the matter of amendment and only when the other side had acquired any legal right due to lapse of time, the amendment should be declined. It has been held as follows:

".....All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such

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

62. In *Jagdish Singh* v. *Natthu Singh*, reported in (1992) 1 SCC 647 : AIR 1992 SC 1604, this Court had the occasion to deal with the provisions of Section 21 of the Act 1963. While analysing the aforesaid provisions, this Court laid down that if the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the court should allow the amendment at any stage of the proceedings since that is a claim for compensation falling under Section 21 of the Act 1963 and the amendment is one under the proviso to sub-section (5) of Section 21. This Court, however, issued a note of caution by laying down that different and less liberal standards would apply if what is sought by the amendment is conversion of a suit for specific performance into one for damages for breach of contract, in which case Section 73 of the Indian Contract Act, 1872 would get invoked, and then the said amendment would be under the discipline of Order VI Rule 17 of the CPC. This Court further held that when the plaintiff by his option had made specific performance impossible then Section 21 does not entitle him to seek damages. It is also held that in Indian Law when the contract, for no fault of the plaintiff, becomes impossible of performance Section 21 enables award of compensation in lieu and substitution of specific performance.

63. The legal position, therefore, in respect of scope and ambit of Section 21 of the Act 1963 is clear and made so more by the ratio of the aforesaid decision of this Court.

64. The plaintiffs in the original plaint claimed for compensation in addition to a decree for specific performance of the agreement to sell. Therefore, strictly speaking the provisions of Section 21 of the Act 1963 are not attracted to the facts of the present case. The intention of the plaintiffs in seeking for amendment of the plaint appears to be to get an enhanced amount of compensation than what was originally claimed in the original plaint which was restricted only to Rs. 1,01,00,000/-. The aforesaid intention becomes apparent when the averments made in the application praying for amendment are looked into inasmuch as, the plaintiffs have stated that in view of the fact that in last 30 years there had been a tremendous escalation of the value of the suit property which has an adverse effect on the quantum of damages, compensation, relief sought for the breach of contract by the appellant/defendant. According to the plaintiffs the raising of the amount of compensation to Rs. 400,01,00,000/- from Rs. 1,01,00,000/- as claimed in the original plaint has been necessitated in view of undue delay in the prosecution of the suit which was not earlier foreseen, which in turn has caused more damage to the plaintiffs through the years and therefore, they have sought to raise the amount of compensation to the present value as stated above from Rs. 1,01,00,000/-.

65. However, the argument of the learned counsel appearing for the appellant in regard to the two provisos referred to above, is quite curious. The argument is that the power of the court to permit the plaintiff to amend the plaint in a suit filed for the specific performance of contract flows from Sections 21 and 22 resply of the Act, 1963 & the proviso to the sub-section (5) of Section 21 of the Act 1963 may entitle the plaintiff to amend the plaint, provided the plaintiff has inadvertently or otherwise omitted to pray for compensation. The argument proceeds on the footing that in the present case, as the plaintiff specifically prayed for compensation in the plaint, later if he seeks to amend that part of the relief, the sub-section (5) of Section 21 of the Act 1963 would be an embargo for the court to do so. We do not find any merit in this argument of the learned counsel appearing for the appellant.

66. The two provisos referred to above, deal with the question of permitting the plaintiff to amend his plaint. It is not, as if, in the absence of these two provisos, it is not permissible in law for the plaintiff to carry out an amendment in his pleading by introducing a relief for enhanced compensation. Rule 17 of Order VI of the CPC does confer power on a Court to allow a party to alter or amend his pleading in such manner and on such terms as may be just. This rule does not stop at that, but it further says that all such amendments should be made as may be necessary for the purpose of determining the real question in controversy between the parties. It is pertinent to note that this provision which empowers the court in its discretion to permit a party to amend his pleadings, was already on the statute book, when the Specific Relief Act, 1963 was enacted. It can, therefore, be presumed that when the latter legislation was on the anvil, the Parliament was aware of this power of the court to permit amendment of pleadings. Therefore, it cannot be successfully urged that a suit for specific performance falling under the provisions of the Act, 1963 would not be governed by the provisions of the CPC. It is, therefore, clear that to such a suit the provisions contained in Order VI Rule 17 of the CPC would apply and a plaintiff who has earlier failed to incorporate the reliefs for compensation or who has incorporated the reliefs for compensation but seeks amendment in the same, could seek the permission of the court to introduce these reliefs by way of amendment.

67. It is important to note that sub-section (5) of Section 21 of the Act 1963 was originally introduced to resolve the confusion over whether the court had the power to grant compensation in a claim for specific performance in absence of any pleading to that effect under the provisions of the Act 1963. Prior to the enactment of the Act 1963 the Law Commission in its 9th Law Commission Report while referring to the diverse opinions expressed by the High Courts recommended that in no case should compensation be decreed unless it is claimed by a proper pleading.

68. In *The Arya Pradeshak Pritinidhi Sabha, Sindh, Punjab & Bilochistan* v. *Lahori Mal*, (1924) 6 Lah LJ 286 : AIR 1924 Lah 713, the Lahore High Court had held that the court has the power to award damages in substitution of or in addition to specific performance even though the plaintiff has not specifically claimed the same in its plaint and written submissions. As against, the Madras High Court in *Somasundaram Chettiar* v. *Chidambaram Chettiar*, AIR 1951 Mad 282 held that the court could not award damages in absence of a specific claim for damages.

69. In *Somasundaram Chettiar* (supra), the Madras High Court held that the rationale for not allowing a claim for damages in a suit for specific performance without a specific pleading is based on the principle that the plaintiff must establish its claim for damages and the defendant must be put on notice and correspondingly have an opportunity to adduce evidence that the damages claimed are excessive or that the plaintiff has not suffered any damages.

70. Our final conclusions may be summed up thus:

(i) Order II Rule 2 CPC operates as a bar against a subsequent suit if the requisite conditions for application thereof are satisfied and the field of amendment of pleadings falls far beyond its purview. The plea of amendment being barred under Order II Rule 2 CPC is, thus, misconceived and hence negatived.

(ii) All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word “shall”, in the latter part of Order VI Rule 17 of the CPC.

(iii) The prayer for amendment is to be allowed

(i) if the amendment is required for effective and proper adjudication of the controversy between the parties, and

(ii) to avoid multiplicity of proceedings, provided

(a) the amendment does not result in injustice to the other side,

(b) by the amendment, the parties seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side and

(c) the amendment does not raise a time barred claim, resulting in divesting of the other side of a valuable accrued right (in certain situations).

(iv) A prayer for amendment is generally required to be allowed unless

(i) by the amendment, a time barred claim is sought to be introduced, in which case the fact that the claim would be time barred becomes a relevant factor for consideration,

(ii) the amendment changes the nature of the suit,

(iii) the prayer for amendment is *malafide*, or

(iv) by the amendment, the other side loses a valid defence.

(v) In dealing with a prayer for amendment of pleadings, the court should avoid a hypertechnical approach, and is ordinarily required to be liberal especially where the opposite party can be compensated by costs.

(vi) Where the amendment would enable the court to pin-pointedly consider the dispute and would aid in rendering a more satisfactory decision, the prayer for amendment should be allowed.

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(viii) Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint.

(ix) Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.

(x) Where the amendment changes the nature of the suit or the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint, the amendment must be disallowed. Where, however, the amendment sought is only with respect to the relief in the plaint, and is predicated on facts which are already pleaded in the plaint, ordinarily the amendment is required to be allowed.

(xi) Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See *Vijay Gupta* v. *Gagninder Kr. Gandhi*, 2022 SCC OnLine Del 1897)

71. In the overall view of the matter, we are convinced that we should not disturb the impugned order passed by the Division Bench of the High Court, affirming the order passed by the learned Single Judge allowing the amendment application filed at the instance of the plaintiffs.

72. In the result, this appeal fails and is hereby dismissed with no order as to costs.

73. Pending application, if any, stands disposed of.

(2009) 2 Supreme Court Cases 409 : (2009) 1 Supreme Court Cases (Civ) 563 : 2008 SCC OnLine SC 1865

(BEFORE S.B. SINHA AND CYRIAC JOSEPH, JJ.)

VIDYABAI AND OTHERS . . Appellants;

Versus

PADMALATHA AND ANOTHER . . Respondents.

Civil Appeal No. 7251 of 2008, decided on December 12, 2008

Civil Procedure Code, 1908 — Or. 6 R. 17 proviso and Or. 8 R. 1-A — Amendment of written statement after commencement of trial — Jurisdictional fact/mandatory nature of statutory precondition not considered and production of documents allowed — Effect — In appellant-plaintiff's suit for specific performance of contract, issues framed, affidavits regarding evidence filed and dates fixed for cross-examination — Thereafter, respondent-defendants sought to amend the WS and produce additional documents — Both not allowed by trial court — High Court without application of mind to the facts of the case allowed documents to be filed while upholding the rejection of amendment of WS — Precondition that court should be satisfied that in spite of due diligence, party could not introduce amendment before commencement of trial — In the absence of such jurisdictional fact, courts, held, have no jurisdiction to allow amendment of pleadings — R. 17 is couched in mandatory form, facts regarding not considered by High Court — High Court did not deal with the jurisdictional fact/issue — Hence, matter remanded to decide whether

documents could be allowed to be produced after commencement of trial when the amendment of WS was not allowed

In a suit for specific performance of contract filed by the appellant-plaintiff, issues were framed on the basis of pleadings of the parties, affidavits were filed regarding evidence and dates were fixed for cross-examination. Thereafter, the respondent-defendants filed two IAs, one seeking to amend the WS under Or. 6 R. 17 CPC and the other seeking to produce additional documents under Or. 8 R. 1-A CPC. The Civil Judge dismissed both the applications. The High Court by its impugned order partly allowed a writ filed thereagainst by the respondent-defendants by allowing the application seeking to produce additional documents.

Allowing the appeal of the appellant-plaintiff, the Supreme Court

Held :

Or. 6 R. 17 CPC is couched in a mandatory form. Unless the jurisdictional fact, as envisaged in the proviso to Order 6 Rule 17 CPC is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. From the order passed by the trial Judge, it is evident that the respondents had not been able to fulfil the said precondition.

(Paras 10, 19 and 11)

Ajendraprasadji N. Pandey v. *Swami Keshavprakeshdasji N.*, (2006) 12 SCC 1; *Salem Advocate Bar Assn.* v. *Union of India*, (2005) 6 SCC 344, *relied on*

Baldev Singh v. *Manohar Singh*, (2006) 6 SCC 498, *distinguished*

The judgment of the High Court does not satisfy the test of judicial review. It has not been found that the trial Judge exceeded its jurisdiction in passing the order impugned before it. It has also not been found that any error of law has been committed by it. The High Court did not deal with the

contentions raised before it. It has not applied its mind on the jurisdictional issue. The impugned judgment, therefore, cannot be sustained, which is set aside accordingly.

(Para 20)

The question as to whether the documents should have been called for or not by the court without there being the amended written statement before it may be considered afresh. The trial had commenced. The date on which the issues are framed is the date of first hearing. Various steps under CPC are taken at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness would amount to "commencement of proceeding".

(Paras 11 and 12)

Union of India v. *Major-General Madan Lal Yadav*, (1996) 4 SCC 127 : 1996 SCC (Cri) 592; *Ameer Trading Corpn. Ltd.* v. *Shapoorji Data Processing Ltd.*, (2004) 1 SCC 702; *Kailash* v. *Nanhku*, (2005) 4 SCC 480, *referred to*

Pradeep Singhvi v. *Heero Dhankani*, (2004) 13 SCC 432; *Rajesh Kumar Aggarwal* v. *K.K. Modi*, (2006) 4 SCC 385, *explained*

SS-M/39963/C

Advocates who appeared in this case :

S.K. Kulkarni, M. Gireesh Kumar and Vijay Kumar, Advocates, for the Appellants;

Kiran Suri, S.J. Amith and Ms Aparna Bhat, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

The Judgment of the Court was delivered by

S.B. SINHA, J.— Leave granted.

2. Whether pleadings can be directed to be amended after the hearing of a case begins is the question involved in this appeal which arises out of a judgment and order dated 24-10-2007 passed by the High Court of Karnataka at Bangalore in Writ Petition No. 14013 of 2007.

3. On or about 16-12-2003, the appellant-plaintiffs filed a suit for specific performance of an agreement of sale. According to the plaintiffs, one Prashant Sooji (since deceased) executed an agreement of sale on 15-1-2001 in respect of the suit property for a sum of Rs 21 lakhs. The respondent-defendants are the predecessors-in -interest of the said Prashant Sooji.

4. A written statement was filed on 17-4-2004. An application for amendment of the written statement was filed on 8-11-2006. In between the period 17-4-2004 and 8 -11-2006, however, indisputably issues were framed and parties filed their respective affidavits by way of evidence. Dates had been fixed for cross-examination of the said witnesses.

5. On or about 8-11-2006, an application had been filed under Order 6 Rule 17 of the Code of Civil Procedure (for short "the Code"), which was marked as IA No. 9 of 2006, seeking amendment to the written statement. On the same day, another application, which was marked as IA No. 10 of 2006, had also been filed purported to be under Order 8 Rule 1-A of the Code for production of additional documents.

6. By reason of an order dated 18-7-2007, the learned Principal Civil Judge (Senior Division), Hubli dismissed the said applications holding that an entirely new case is sought to be made out. The contention that they had no knowledge of the facts stated therein and the respondents could not gather the materials and information necessary for drafting a proper written statement earlier was rejected, stating:

> "... However, this contention cannot be accepted. Because according to proposed amendment sought by the defendants at Para 3(*a*) will is dated 18-3-1994. Therefore, naturally same would have been in the knowledge of the defendants right from the date and moreover when they say that the mother-in-law of Defendant 1 is also a necessary party and

she has also got right and interest in the suit property and that she is alive, then through her defendants would have known about will right from beginning and hence it cannot be said that Defendant 1 required time to gather information regarding will and further as details of will would have been within the knowledge of the defendants and/or could have been given by the mother-in-law of Defendant 1 i.e. Subhadrabai, then it was not necessary for Defendant 1 to have any social activities or have knowledge of business to know about the will and hence proposed amendment regarding the will cannot said to be not within the knowledge of the defendants at the time of filing of written statement. Further, regarding husband of Defendant 1 being addicted to bad vices like womanising, drinking, etc. again this would have been within the personal knowledge of Defendant 1 as she is the wife of deceased Prashant against whom those allegations are made and this would have been in her knowledge right from the beginning and to have the said knowledge again she need not have any knowledge of business or social activities and thus she also did not require any time to gather that the information which are well within her own knowledge...."

7. A writ petition was filed thereagainst. By reason of the impugned judgment, the

High Court noticed the defence of the appellants in the following terms:

> "There is no retracting of statement made in the written statement already filed by the defendants."

It, however, took into consideration the fact that the said IAs were filed after the affidavit of evidence had been filed by the appellant-plaintiffs. Despite noticing the proviso appended to Order 6 Rule 17 of the Code, it was held:

> "... According to Order 6 Rule 17, an amendment application can be filed at any stage of the proceeding. Filing of affidavit by way of evidence itself is not a good ground to reject the application filed seeking amendment of written statement. It is not out of place to mention that the parties must be allowed to plea. Such a valuable right cannot be curtailed in the absence of good ground."

IA No. 10 was also directed to be allowed.

8. Mr S.K. Kulkarni, learned counsel appearing on behalf of the appellants, would submit that in view of the proviso appended to Order 6 Rule 17 of the Code, the High Court committed a serious illegality in passing the impugned judgment.

9. Ms Kiran Suri, learned counsel appearing on behalf of the respondents, on the other hand, would contend that the proviso appended to Order 6 Rule 17 of the Code is not attracted in the instant case as by reason of the amendment to the written statement, no new case has been made out. It was submitted that "leave" to amend the written statement was filed for the purpose of elaborating the defence which had already been taken by the defendants and in that view of the matter, this Court should not exercise its jurisdiction under Article 136 of the Constitution of India particularly when it

is well known that an application for amendment of written statement should be dealt with liberally.

10. By reason of the Civil Procedure Code (Amendment) Act, 2002 (Act 22 of 2002), Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as under:

> "Provided that no application for amendment shall be 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 trial."

It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

11. From the order passed by the learned trial Judge, it is evident that the respondents had not been able to fulfil the said precondition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to "commencement of proceeding".

12. Although in a different context, a three-Judge Bench of this Court in *Union of India* v. *Major-General Madan Lal Yadav*[1] took note of the dictionary meaning of the terms "trial" and "commence" to opine: (SCC p. 136, para 19)

> "*19*. It would, therefore, be clear that trial means act of proving or judicial examination or determination of the issues including *its own* jurisdiction or

authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial."

(emphasis in original)

The High Court, as noticed hereinbefore, opined that filing of an affidavit itself would not mean that the trial has commenced.

13. Order 18 Rule 4(1) of the Code reads as under:

"4. *Recording of evidence*.—(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court."

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This aspect of the matter has been considered by this Court in *Ameer Trading Corpn. Ltd.* v. *Shapoorji Data Processing Ltd.*[2] in the following terms: (SCC p. 707, paras 15-16)

"*15.* The examination of a witness would include evidence-in-chief, cross-examination or re-examination. Rule 4 of Order 18 speaks of examination-in-chief. The unamended rule provided for the manner in which 'evidence' is to be taken. Such examination-in-chief of a witness in every case shall be on affidavit.

16. The aforementioned provision has been made to curtail the time taken by the court in examining a witness-in-chief. Sub-rule (2) of Rule 4 of Order 18 of the Code of Civil Procedure provides for cross-examination and re-examination of a witness which shall be taken by the court or the Commissioner appointed by it."

14. In *Kailash* v. *Nanhku*[3] this Court held: (SCC pp. 490-91, para 13)

"*13.* At this point the question arises: when does the trial of an election petition commence or what is the meaning to be assigned to the word 'trial' in the context of an election petition? In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial. As held by this Court in several decided cases, this general rule is not applicable to the trial of election petitions as in the case of election petitions, all the proceedings commencing with the presentation of the election petition and up to the date of decision therein are included within the meaning of the word 'trial'."

15. We may notice that in *Ajendraprasadji N. Pandey* v. *Swami Keshavprakeshdasji N.*[4] this Court noticed the decision of this Court in *Kailash*[3] to hold: (*Ajendraprasadji case*[4], SCC p. 13, paras 35-36)

"*35.* By Act 46 of 1999, there was a sweeping amendment by which Rules 17 and 18 were wholly omitted so that an amendment itself was not permissible, although sometimes effort was made to rely on Section 148 for extension of time for any purpose.

36. Ultimately, to strike a balance the legislature applied its mind and reintroduced Rule 17 by Act 22 of 2002 w.e.f. 1-7-2002. It had a provision permitting amendment in the first part which said that the court may at any stage permit amendment as described therein. But it also had a total bar introduced by a

proviso which prevented any application for amendment to be allowed after the trial had commenced unless the court came to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial. It is this proviso which falls for consideration."

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This Court also noticed *Salem Advocate Bar Assn.* v. *Union of India*[5] to hold: (*Ajendraprasadji case*[4], SCC pp. 14-15, paras 41-43)

"*41.* We have carefully considered the submissions made by the respective Senior Counsel appearing for the respective parties. We have also carefully perused the pleadings, annexures, various orders passed by the courts below, the High Court and of this Court. In the counter-affidavit filed by Respondent 1, various dates of hearing with reference to the proceedings taken before the Court has been elaborately spelt out which in our opinion, would show that the appellant is precluded by the proviso to rule in question from seeking relief by asking for amendment of his pleadings.

42. It is to be noted that the provisions of Order 6 Rule 17 CPC have been substantially amended by the CPC (Amendment) Act, 2002.

43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (*sic* Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief."

The ratio in *Kailash*[2] was reiterated stating that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

16. Reliance, however, has been placed by Ms Suri on *Baldev Singh* v. *Manohar Singh*[6] wherein it was opined: (SCC pp. 504-05, para 17)

"*17.* Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet

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their documentary evidence in the suit. From the record, it also appears that the as not on the verge of conclusion as found by the High Court and the trial court. part, commencement of trial as used in proviso to Order 6 Rule 17 in the Code il Procedure must be understood in the limited sense as meaning the final g of the suit, examination of witnesses, filing of documents and addressing of ents. As noted hereinbefore, parties are yet to file their documents, we do not ny reason to reject the application for amendment of the written statement in of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered ion on the court to allow an amendment of the written statement at any stage proceedings."

ot an authority for the proposition that the trial would not be deemed to have enced on the date of first hearing. In that case, as noticed hereinbefore, the ents were yet to be filed and, therefore, it was held that the trial did not ence.

Reliance has also been placed by Ms Suri on *Pradeep Singhvi* v. *Heero ani*[2]. Therein, the suit was filed in the year 1995 and, therefore, the proviso ded to Order 6 Rule 17 of the Code of Civil Procedure had no application.

Reliance has also been placed by Ms Suri on *Rajesh Kumar Aggarwal* v. *K.K.* No doubt, as has been held by this Court therein that the court should allow lments that would be necessary to determine the real question of the versy between the parties but the same indisputably would be subject to the on that no prejudice is caused to the other side.

It is the primal duty of the court to decide as to whether such an amendment is ary to decide the real dispute between the parties. Only if such a condition is d, the amendment is to be allowed. However, proviso appended to Order 6 Rule the Code restricts the power of the court. It puts an embargo on exercise of its ction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the ctional fact, as envisaged therein, is found to be existing, the court will have no ction at all to allow the amendment of the plaint.

In *Salem Advocate Bar Assn.*[1] this Court has upheld the validity of the said o. In any event, the constitutionality of the said provision is not in question us nor we in this appeal are required to go into the said question. Furthermore, dgment of the High Court does not satisfy the test of judicial review. It has not ound that the learned trial Judge exceeded its jurisdiction in passing the order ned before it. It has also not been found that any error of law has been tted by it. The High Court did not deal with the contentions raised before it. It ot applied its mind on the jurisdictional issue. The impugned judgment, ore, cannot be sustained, which is set aside accordingly.

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However, we may observe that the question as to whether the documents have been called for or not by the court without there being the amended statement before it may be considered afresh.

The appeal is allowed. However, in the facts and circumstances of the case, shall be no order as to costs.

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out of SLP (C) No. 4740 of 2008. From the Judgment and Final Order dated 24-10-2007 of the High

Court of Karnataka at Bangalore in Writ Appeal No. 14103 of 2007 (GM-CPC)

[1] (1996) 4 SCC 127 : 1996 SCC (Cri) 592

[2] (2004) 1 SCC 702

[3] (2005) 4 SCC 480

[4] (2006) 12 SCC 1

[5] (2005) 6 SCC 344

[6] (2006) 6 SCC 498

[7] (2004) 13 SCC 432

[8] (2006) 4 SCC 385

(2020) 12 Supreme Court Cases 667 : 2020 SCC OnLine SC 621

In the Supreme Court of India

(BEFORE R.F. NARIMAN, NAVIN SINHA AND INDIRA BANERJEE, JJ.)

EXL CAREERS AND ANOTHER . . Appellants;

Versus

FRANKFINN AVIATION SERVICES PRIVATE LIMITED . . Respondent.

Civil Appeal No. 2904 of 2020[1], decided on August 5, 2020

A. **Civil Procedure Code, 1908 — Or. 7 Rr. 10 and 10-A — Return of plaint by court lacking jurisdiction, for presentation before court of competent jurisdiction — Held, after such presentation, suit has to proceed de novo before competent court, even if evidence of parties already stood concluded and matter fixed for final arguments before court which returned the plaint — Or. 7 R. 10 r/w R. 10-A cannot be interpreted as providing any discretion to court to which plaint was returned, to proceed from the stage at which plaint was returned**

B. **Contract and Specific Relief — Contract Act, 1872 — Ss. 28 and 23 — Of the multiple courts that might have jurisdiction, the parties can by agreement specify court of a particular place alone to the exclusion of others, to have exclusive jurisdiction to adjudicate disputes between them — Thus, in present case suit in question could have been filed only in the court which had been conferred with exclusive jurisdiction by such clause — Plaint was correctly returned by the court which was not covered by the exclusive jurisdiction clause, to the court covered by the exclusive jurisdiction clause**

— Civil Procedure Code, 1908 — Or. 7 Rr. 10 and 10-A — Contractual Obligations and Rights — Exemption/Exclusion/Restriction Clauses/Negative Covenants — Exclusion/Restriction of jurisdiction — Return of plaint for presentation before court covered by the exclusive jurisdiction clause

A franchise agreement was executed between the parties at New Delhi. Clause 16-B of the agreement stipulated that only courts in Delhi shall have exclusive jurisdiction to settle all disputes and differences arising out of the agreement. The respondent filed a suit arising out of the franchise agreement before the Civil Judge at Gurgaon against the appellant for recovery of certain amount. The appellant filed an application under Order 7 Rule 10 CPC contending that the Gurgaon court had no territorial jurisdiction as it did not carry on any business within its jurisdiction and neither was it a resident, as such, the plaint should be returned to the respondent. No objection was raised under Clause 16-B of the agreement. The Civil Judge, Gurgaon rejected the objection opining that it could not be decided summarily and was required to be framed as a preliminary issue. The appellant then filed its written statement and the respondent its replication. Issues in the suit were framed. The appellant offered no explanation why the objection under Clause 16-B of the agreement was not raised in its application

under Order 7 Rule 10. The Civil Judge, Gurgaon rejected the argument with regard to exclusive jurisdiction at Delhi under Clause 16-B of the agreement. The High Court in revision set aside the order of the Civil Judge holding that in view of Clause 16-B of the franchise agreement, the Gurgaon court lacked territorial jurisdiction directing return of the file. The submission of the respondent with regard to the advanced stage of the suit at Gurgaon was rejected. Prior thereto, the suit had made substantive progress as in the meantime evidence of the parties had been closed and the matter had been fixed for final argument. Thereafter, the respondent moved an application before the Civil Judge at Gurgaon that in the peculiar facts of the case, the advanced stage at which the proceedings were at Gurgaon, it would be in the interest of justice that the entire judicial file be transferred to the court having jurisdiction at Delhi, which was allowed by the Civil Judge, Gurgaon noticing that the High Court in revision had directed for transfer of the file. In the fresh revision preferred by the respondent against the order, the High Court declined to interfere and rejected the contention of the appellant for a de novo trial at Delhi.

Before the present Bench of the Supreme Court, appeal was placed on a reference by a two-Judge Bench opining a perceived conflict between two Division Bench decisions in *Joginder Tuli*, (1997) 1 SCC

502 and *Modern Construction & Co.*, (2014) 1 SCC 648. The question of law that this Bench was required to answer was : that if a plaint is returned under Order 7 Rules 10 and 10-A CPC for presentation in the court in which it should have been instituted, whether the suit shall proceed de novo or will it continue from the stage where it was pending before the court at the time of returning of the plaint.

Held :

In a dispute between parties where two or more courts may have jurisdiction, it is always open for them by agreement to confer exclusive jurisdiction by consent on one of the two courts. Clause 16-B of the agreement clearly states that the parties clearly indicated that it was only the court at Delhi which shall have exclusive jurisdiction with regard to any dispute concerning the franchise agreement and no other court would have jurisdiction over the same. In that view of the matter, the presentation of the plaint at Gurgaon was certainly not before a court having jurisdiction in the matter.

(Para 12)

Swastik Gases (P) Ltd. v. *Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157; *State of W.B.* v. *Associated Contractors*, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1, *relied on*

In *Modern Construction case* the Court held that if the court where the suit is instituted, is of the view that it has no jurisdiction, the plaint is to be returned under Order 7 Rule 10 CPC and after its 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. In *Joginder Tuli case* the original court lost jurisdiction by reason of the amendment of the plaint. The trial court directed it to be returned for presentation before the District Court. The Court observed as follows:"Normally, when the plaint is directed to be returned for presentation to the proper court perhaps it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the matter was tried accordingly. The High Court had directed to proceed from that stage at which the suit stood transferred. We

find no illegality in the order passed by the High Court warranting interference". However, *Joginder Tuli case* does not take into consideration any earlier judgments including *Amar Chand Inani*, (1973) 1 SCC 115 by a Bench of three Hon'ble Judges. There is no discussion of the law either and therefore it has no precedential value as laying down any law. *Modern Construction*, (2014) 1 SCC 648, lays down the correct law. The reference is answered accordingly.

(Paras 14 to 16)

Ramdutt Ramkissen Dass v. *E.D. Sassoon & Co.*, 1929 SCC OnLine PC 3 : (1928-29) 56 IA 128 : AIR 1929 PC 103; *Amar Chand Inani* v. *Union of India*, (1973) 1 SCC 115, *relied on*

ONGC v. *Modern Construction & Co.*, (2014) 1 SCC 648 : (2014) 1 SCC (Civ) 617; *Harshad Chimanlal Modi (2)* v. *DLF Universal Ltd.*, (2006) 1 SCC 364; *Hanamanthappa* v. *Chandrashekharappa*, (1997) 9 SCC 688, *affirmed*

Joginder Tuli v. *S.L. Bhatia*, (1997) 1 SCC 502, *held per incuriam and to have no precedential value*

EXL Careers v. *Frankfinn Aviation Services (P) Ltd.*, 2019 SCC OnLine SC 1294, *reference answered*

Hasham Abbas Sayyad v. *Usman Abbas Sayyad*, (2007) 2 SCC 355, *cited*

It is not possible to concur with *Oriental Insurance Co. Ltd.*, (2019) 9 SCC 435 that in pursuance of the amendment dated 1-2-1977 by reason of insertion of Rule 10-A to Order 7, it cannot be said that under all circumstances the return of a plaint for presentation before the appropriate court shall be considered as a fresh filing, distinguishing it from *Amar Chand Inani case*. The attention of the Court does not appear to have been invited to *Modern Construction case* and the plethora of precedents post the amendment. The language of Order 7 Rule 10-A is in marked contrast to the language of Section 24(2) and Section 25(3). The statutory scheme now becomes clear. In cases dealing with transfer of proceedings from a court having jurisdiction to another court, the discretion vested in the court by Sections 24(2) and 25(3) either to retry the proceedings or proceed from the point at which such proceeding was transferred or withdrawn, is in marked contrast to the scheme under Order 7 Rule 10 r/w Rule 10-A where no such discretion is given and the proceeding has to commence de novo. For all these reasons, it must be held that *Oriental Insurance Co. Ltd. case* does not lay down the correct law and deserves to be overruled. *R.K. Roja*, (2016) 14 SCC 275 has no direct relevance to the controversy at hand.

(Paras 17, 19 and 20)

Amar Chand Inani v. *Union of India*, (1973) 1 SCC 115, *relied on*

ONGC v. *Modern Construction & Co.*, (2014) 1 SCC 648 : (2014) 1 SCC (Civ) 617, *affirmed*

R.K. Roja v. *U.S. Rayudu*, (2016) 14 SCC 275 : (2017) 3 SCC (Civ) 270, *distinguished*

Oriental Insurance Co. Ltd. v. *Tejparas Associates & Exports (P) Ltd.*, (2019) 9 SCC 435 : (2019) 4 SCC (Civ) 534, *overruled*

The further question is with regard to the nature of the order to be passed in the facts and circumstances of the present case. The jurisdiction of the Supreme Court under Article 136 of the Constitution is unfettered and is not confined within definite bounds. In *Balraj Taneja*, (1999) 8 SCC 396 the Supreme Court observed that notwithstanding that a judgment may not be wholly correct or in accordance with law, the Court is not bound to interfere in exercise of its discretionary jurisdiction.

(Paras 22 and 23)

Penu Balakrishna Iyer v. *Ariya M. Ramaswami Iyer*, AIR 1965 SC 195, *relied on*

Balraj Taneja v. *Sunil Madan*, (1999) 8 SCC 396; *ONGC* v. *Sendhabhai Vastram Patel*, (2005) 6 SCC 454; *Shin-Etsu Chemical Co. Ltd. (2)* v. *Vindhya Telelinks Ltd.*,

(2009) 14 SCC 16 : (2009) 5 SCC (Civ) 280; *Karam Kapahi* v. *Lal Chand Public Charitable Trust*, (2010) 4 SCC 753 : (2010) 2 SCC (Civ) 262, *affirmed*

Kunhayammed v. *State of Kerala*, (2000) 6 SCC 359; *Pritam Singh* v. *State*, 1950 SCC 189 : AIR 1950 SC 169 : (1950) 51 Cri LJ 1270, *cited*

In the present case, the appellant did not raise the objection under Clause 16-B of the agreement at the very first opportunity, the first order of rejection attained finality, the objection under Clause 16-B was raised more as an afterthought, the second application under Order 7 Rule 10 had to be preferred by the respondent, pleadings of the parties have been completed, evidence led, and that the matter was fixed for final argument. In the peculiar facts and circumstances of the case, it has to be held that despite having concluded that the impugned order is not sustainable in view of the law laid down in *Modern Construction case*, in exercise of the Court's discretionary jurisdiction under Article 136 of the Constitution and in order to do complete and substantial justice between the parties under Article 142 of the Constitution nonetheless the impugned order of the High Court need not be set aside.

(Para 26)

EXL Careers v. *Frankfinn Aviation Services (P) Ltd.*, 2017 SCC OnLine P&H 2888, *explained and clarified*

EXL Careers v. *Frankfinn Aviation Services (P) Ltd.*, 2018 SCC OnLine P&H 6064, *reversed in law*

EXL Careers v. *Frankfinn Aviation Services (P) Ltd.*, 2018 SCC OnLine SC 3603, *cited*

R-D/65141/SV

Advocates who appeared in this case :

Manoj Swarup and P.S. Patwalia, Senior Advocates, (Ankit Swarup, Naveen Kumar, Jawad Tariq, Neelmani Pant, Ms Vidisha Swarup, Kulvinder Singh Kohli, Ms Meenakshi Midha, Kapil Midha, Ms Abhivandana Chowdhury, Ms Pritika Janeja, Amandeep Singh Bhullar and Chander Shekhar Asgri, Advocates), for the appearing parties.

Chronological list of cases cited ***on page(s)***

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2. 2019 SCC OnLine SC 1294, *EXL Careers* v. *Frankfinn Aviation Services (P) Ltd.* 671c, 671d-e, 671

3. 2018 SCC OnLine P&H 6064, *EXL Careers* v. *Frankfinn Aviation Services (P) Ltd.* **(reversed in law)** 671*f*, 673*a-b*, 673*c*, 674*e* 679*b*, 67

4. 2018 SCC OnLine SC 3603, *EXL Careers* v. *Frankfinn Aviation Services (P) Ltd.* 671

5. 2017 SCC OnLine P&H 2888, *EXL Careers* v. *Frankfinn Aviation Services (P) Ltd.* 672*c*, 673*a*, 673*b*, 674*b*, 674*c*-674

6. (2016) 14 SCC 275 : (2017) 3 SCC (Civ) 270, *R.K. Roja* v. *U.S. Rayudu* 673*d-e*, 677*c*

7. (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1, *State of W.B.* v. *Associated Contractors* 675*c*

8. (2014) 1 SCC 648 : (2014) 1 SCC (Civ) 617, *ONGC* v. *Modern Construction & Co.* 671*c-d*, 671*g*, 676*a*, 676*b*, 676*e*, 676*e*, 676*f-g*, 67

9. (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157, *Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.* 67

10. (2010) 4 SCC 753 : (2010) 2 SCC (Civ) 262, *Karam Kapahi* v. *Lal Chand Public Charitable Trust* 678

11. (2009) 14 SCC 16 : (2009) 5 SCC (Civ) 280, *Shin-Etsu Chemical Co. Ltd. (2)* v. *Vindhya Telelinks Ltd.* 678

12. (2007) 2 SCC 355, *Hasham Abbas Sayyad* v. *Usman Abbas Sayyad* 672

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13. (2006) 1 SCC 364, *Harshad Chimanlal Modi (2)* v. *DLF Universal Ltd.* 672*e-f*, 676*b*, 676*c*

14. (2005) 6 SCC 454, *ONGC* v. *Sendhabhai Vastram Patel* 678*c*

15. (2000) 6 SCC 359, *Kunhayammed* v. *State of Kerala* 678

16. (1999) 8 SCC 396, *Balraj Taneja* v. *Sunil Madan* 67

17. (1997) 9 SCC 688, *Hanamanthappa* v. *Chandrashekharappa* 676a

18. (1997) 1 SCC 502, *Joginder Tuli* v. *S.L. Bhatia* **(held per incuriam)** 671c-d, 671g, 672a, 673d-675e, 676b, 676d-e, 67

19. (1973) 1 SCC 115, *Amar Chand Inani* v. *Union of India* 672e, 676a, 676a-b, 67

20. AIR 1965 SC 195, *Penu Balakrishna Iyer* v. *Ariya M. Ramaswami Iyer* 67

21. 1950 SCC 189 : AIR 1950 SC 169 : (1950) 51 Cri LJ 1270, *Pritam Singh* v. *State* 67

22. 1929 SCC OnLine PC 3 : (1928-29) 56 IA 128 : AIR 1929 PC 103, *Ramdutt Ramkissen Dass* v. *E.D. Sassoon & Co.* 672e, 676a

The Judgment of the Court was delivered by

NAVIN SINHA, J.— Leave granted. The present appeal has been placed before us on a reference[1] by a two-Judge Bench opining a perceived conflict between two Division Bench decisions in *Joginder Tuli* v. *S.L. Bhatia*[2] and *ONGC* v. *Modern Construction & Co.*[3] The question of law we are required to answer is that if a plaint is returned under Order 7 Rules 10 and 10-A of the Code of Civil Procedure, 1908 (hereinafter called as "the Code") for presentation in the court in which it should have been instituted, whether the suit shall proceed de novo or will it continue from the stage where it was pending before the court at the time of returning of the plaint. The order[1] of reference also leaves it open for consideration if the conduct of the appellant disentitles it to any relief notwithstanding the decision on the issue of law.

2. The respondent filed a suit for recovery against the appellant arising out of a franchise agreement dated 24-3-2004, before the Civil Judge (Senior Division) at Gurgaon. In view of the exclusion clause in the agreement, the plaint was returned holding that the court at Gurgaon lacked territorial jurisdiction and that the court at Delhi alone had jurisdiction in the matter. The High Court by the impugned order dated 13-3-2018[4] has held that the suit at Delhi shall proceed from the stage at which it was pending at Gurgaon before return of the plaint and not de novo. Aggrieved, the appellant preferred the present appeal. Further proceedings were stayed on 13-7-2018[5] culminating in the order[1] of reference.

3. Shri Manoj Swarup, learned Senior Counsel appearing on behalf of the appellant, submitted that there is no conflict between the decisions in *Joginder Tuli*[2] and *Modern Construction*[3] requiring consideration by a larger Bench. The latter lays down the correct law that the suit will have to proceed de novo at

Delhi and cannot be continued from the earlier stage at Gurgaon. *Joginder Tuli*[2] cannot have any precedential value not being based on consideration of the law, but having been passed more in the facts of that case.

4. Shri Swarup submitted that the High Court erred in not appreciating that it was not exercising transfer jurisdiction under Section 24 of the Code. The plaint could be returned at any stage of the suit under Order 7 Rules 10 and 10-A. The fact that the pleadings and evidence may have concluded before the Gurgaon court was inconsequential. The suit was filed on 6-1-2011. The appellant had preferred the objection under Order 7 Rule 10 promptly on 26-8-2011. Order 18 Rule 15 also could not be invoked in view of the nature of jurisdiction conferred under Rule 10 for return of the plaint. Rule 10-A is only a sequitur with regard to the procedure to be followed for the same. It cannot be interpreted as providing for continuation of the suit. The High Court in the first revisional order dated 5-9-2017[6] had rejected the objection with regard to the advanced stage at which the suit was at Gurgaon. The mere use of the words "return the file" are irrelevant and cannot be construed as enlarging the scope of jurisdiction under Order 7 Rule 10. The order attained finality as no appeal was preferred against the same. Significantly under Order 7 Rule 10-A fresh summons had to issue upon presentation of the plaint before the court of competent jurisdiction. Shri Swarup in this context referred to Order 4 Rule 1 with regard to the institution of the suit by presentation of a plaint and issuance of summons under Order 5 Rule 1 to contend that under Rule 10-A when summons are issued by the new court where the plaint is presented the proceedings go back to the inception of the suit by institution.

5. In support of his submission that the suit has necessarily to proceed de novo on return of the plaint, he relied upon *Ramdutt Ramkissen Dass* v. *E.D. Sassoon & Co.*[7]; *Amar Chand Inani* v. *Union of India*[8]; *Harshad Chimanlal Modi (2)* v. *DLF Universal Ltd.*[9] and *Hasham Abbas Sayyad* v. *Usman Abbas Sayyad*[10], to submit that the institution of the suit at Gurgaon being coram non judice the suit had necessarily to commence de novo at Delhi.

6. Shri P.S. Patwalia, learned Senior Counsel appearing for the respondent, submitted that the special leave petition suffers from suppression of material facts. Had the materials placed in the counter-affidavit been brought to the attention of the court perhaps the special leave petition may not have been entertained. The appellant in his first objection did not raise the ground under the exclusion Clause 16-B of the agreement but limited it to the grounds that no business was carried on at Gurgaon and also that Defendant 2 did not reside there. The first order of rejection dated 12-3-2015 has not been annexed to the appeal. Thereafter, jurisdiction was framed as a preliminary issue which was again decided in favour of the respondent on 6-9-2016. The revision by the

appellant having been allowed by the High Court on 5-9-2017[6], it did not take any step for having the plaint returned to the respondent. It was left for the respondent to file a fresh application under Order 7 Rule 10 praying for transfer of the entire judicial file from Gurgaon to Delhi considering the advanced stage of the suit which was allowed by the Civil Judge and affirmed in the impugned order[4] by the High Court.

7. Shri Patwalia next submitted that the High Court on 5-9-2017[6] had consciously directed for return of the file. Nothing precluded the High Court from directing the return of the plaint. The trial court has justifiably reasoned that the order of the High Court for return of the file was based on the premise of the advanced stage of the suit for continuation of the same at Delhi, as otherwise it would be a travesty of justice if the suit was to proceed de novo at Delhi. The High Court correctly affirmed the same by the impugned order[4]. The present was not a case where the Gurgaon court lacked complete jurisdiction. The respondent has been non-suited at Gurgaon only in view of the exclusionary clause at 16-B of the franchise agreement. It shall be a question on the facts of each case, if the trial should proceed afresh or continue from the earlier stage and the

matter could not be put in a straitjacket. The present being a case of overlapping jurisdictions it would be a travesty of justice and will cause great injustice and prejudice to the respondent if the suit is directed to proceed de novo at Delhi. Shri Patwalia relied upon *R.K. Roja* v. *U.S. Rayudu*[11] and *Oriental Insurance Co. Ltd.* v. *Tejparas Associates & Exports (P) Ltd.*[12], to submit that the latter also follows *Joginder Tuli*[2].

8. We have considered the submission on behalf of the parties and considered the materials on record. The franchise agreement was executed between the parties at New Delhi on 24-3-2004 for running courses in aviation, hospitality and travel management at Meerut in accordance with the prescriptions and standards of the respondent. Clause 16-B of the agreement stipulated as follows:

> "B. Jurisdiction
>
> Only courts in Delhi shall have exclusive jurisdiction to settle all disputes and differences arising out of the agreement, whether during its term or after expiry/earlier termination thereof."

9. The respondent on 6-1-2011 instituted a suit before the Civil Judge (Senior Division) at Gurgaon against the appellant for recovery of Rs 23,11,190. The appellant filed an application under Order 7 Rule 10 CPC on 26-8-2011 contending that the Gurgaon court had no territorial jurisdiction as it did not carry on any business within its jurisdiction and neither was it a resident, requiring the plaint to be returned to the respondent. No objection was raised under Clause 16-B of the agreement. The Civil Judge, Gurgaon on 12-3-2015

rejected the objection opining that it could not be decided summarily and was required to be framed as a preliminary issue. The appellant then filed its written statement and the respondent its replication. Issues in the suit were framed on 1-10-2015 inadvertently ignoring the earlier order leading to framing of the preliminary issue on 1-10-2015 with regard to jurisdiction. The appellant offers no explanation why the objection under Clause 16-B of the agreement was not raised in its application dated 26-8-2011 under Order 7 Rule 10 CPC.

10. The Civil Judge, Gurgaon by his order dated 6-9-2016 rejected the argument with regard to exclusive jurisdiction at Delhi under Clause 16-B of the agreement. The High Court in revision on 5-9-2017[4] set aside the order of the Civil Judge dated 6-9-2016 holding that in view of Clause 16-B of the franchise agreement, the Gurgaon court lacked territorial jurisdiction directing return of the file. The submission of the respondent with regard to the advanced stage of the suit at Gurgaon was rejected. Prior thereto, the suit had made substantive progress as in the meantime evidence of the parties had been closed and the matter has been fixed for final argument on 1-6-2017. We are of the considered opinion that the mere use of the words "return the file" in the order dated 5-9-2017[5] cannot enlarge the scope of jurisdiction under Order 7 Rule 10 to mean that the High Court has directed so with the intention for continuance of the suit. Firstly, that objection was expressly rejected. Secondly the order itself states that the file be returned under Order 7 Rules 10 and 10-A of the Code. Clearly what the High Court intended was the return of the plaint.

11. Thereafter, it was left for the respondent who moved an application on 11-10-2017 before the Civil Judge at Gurgaon that in the peculiar facts of the case, the advanced stage at which the proceedings were at Gurgaon, it would be in the interest of justice that the entire judicial file be transferred to the court having jurisdiction at Delhi, which was allowed by the Civil Judge, Gurgaon on 14-2-2018 noticing that the High Court in revision had directed[6] for transfer of the file. In the fresh revision preferred by the respondent against the order, the High Court by the impugned order dated 13-3-2018[1] declined to interfere and rejected the contention of the appellant for a de novo trial at Delhi. We have

referred to the facts of the case with brevity to notice the conduct of the parties and all other relevant aspects to be kept in mind while passing final orders.

12. It is no more res integra that in a dispute between parties where two or more courts may have jurisdiction, it is always open for them by agreement to confer exclusive jurisdiction by consent on one of the two courts. Clause 16-B of the agreement extracted above leaves us in no doubt that the parties clearly indicated that it was only the court at Delhi which shall have exclusive jurisdiction with regard to any dispute concerning the franchise agreement and no other court would have jurisdiction over the same. In that view of the matter, the presentation of the plaint at Gurgaon was certainly not before a court having jurisdiction in the matter. This Court considering a similar

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clause restricting jurisdiction by consent in *Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.*[12], observed as follows: (SCC pp. 47-48, para 32)

> "*32.* ... It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by having Clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner."

13. This was reiterated in *State of W.B.* v. *Associated Contractors*[14], holding that presentation of the plaint in a court contrary to the exclusion clause could not be said to be proper presentation before the court having jurisdiction in the matter.

14. That brings us to the order of the reference to be answered by us. In *Joginder Tuli*[2] the original court lost jurisdiction by reason of the amendment of the plaint. The trial court directed it to be returned for presentation before the District Court. This Court observed as follows: (SCC pp. 503-04, para 5)

> "*5.* ... Normally, when the plaint is directed to be returned for presentation to the proper court perhaps it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the matter was tried accordingly. The High Court had directed to proceed from that stage at which the suit stood transferred. We find no illegality in the order passed by the High Court warranting interference."

To our mind, the observations are very clear that the suit has to proceed afresh before the proper court. The directions came to be made more in the peculiar facts of the case in exercise of the discretionary jurisdiction under Article 136 of the Constitution. We may also notice that it does not take into consideration

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any earlier judgments including *Amar Chand Inani* v. *Union of India*[8] by a Bench of three

Hon'ble Judges. There is no discussion of the law either and therefore it has no precedential value as laying down any law.

15. *Modern Construction*[1], referred to the consistent position in law by reference to *Ramdutt Ramkissen Dass* v. *E.D. Sassoon & Co.*[7], *Amar Chand Inani* v. *Union of India*[8], *Hanamanthappa* v. *Chandrashekharappa*[15], *Harshad Chimanlal Modi (2)*[9] and after also noticing *Joginder Tuli*[2], arrived at the conclusion as follows: (*Modern Construction case*[1], SCC p. 654, para 17)

> "*17.* Thus, in view of the above, the law on the issue can be summarised to the effect that if the court where the suit is instituted, is of the view that it has no jurisdiction, the plaint is to be returned in view of the provisions of Order 7 Rule 10 CPC and the plaintiff can present it before the court having competent jurisdiction. In such a factual matrix, the plaintiff is entitled to exclude the period during which he prosecuted the case before the court having no jurisdiction in view of the provisions of Section 14 of the Limitation Act, and may also seek adjustment of court fee paid in that court. However, 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."

Joginder Tuli[2] was also noticed in *Harshad Chimanlal Modi (2)*[9] but distinguished on its own facts.

16. We find no contradiction in the law as laid down in *Modern Construction*[1] pronounced after consideration of the law and precedents requiring reconsideration in view of any conflict with *Joginder Tuli*[2]. *Modern Construction*[1] lays down the correct law. We answer the reference accordingly.

17. We regret our inability to concur with *Oriental Insurance Co. Ltd.*[12], relied upon by Mr Patwalia, that in pursuance of the amendment dated 1-2-1977 by reason of insertion of Rule 10-A to Order 7, it cannot be said that under all circumstances the return of a plaint for presentation before the appropriate court shall be considered as a fresh filing, distinguishing it from *Amar Chand Inani*[8]. The attention of the Court does not appear to have been invited to *Modern Construction*[1] and the plethora of precedents post the amendment.

18. Order 7 Rule 10-A, as the notes on clauses indicates, was inserted by the Code of Civil Procedure (Amendment) Act, 1976 (with effect from 1-2-1977) for the reason:

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> "New Rule 10-A is being inserted to obviate the necessity of serving summonses on the defendants where the return of plaint is made after the appearance of the defendant in the suit."

Also, under sub-rule (3) all that the Court returning the plaint can do, notwithstanding that it has no jurisdiction to try the suit is:

> "**10-A.** ***Power of court to fix a date of appearance in the court where plaint is to be filed after its return.***—(1)-(2) * * *
>
> (3) Where an application is made by the plaintiff under sub-rule (2), the court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit,—
>
> (*a*) fix a date for the appearance of the parties in the court in which the plaint is proposed to be presented, and
>
> (*b*) give to the plaintiff and to the defendant notice of such date for appearance."

19. The language of Order 7 Rule 10-A is in marked contrast to the language of Section 24(2) and Section 25(3) of the Code of Civil Procedure which read as under:

24. *General power of transfer and withdrawal*.—(1) * * *

2) Where any suit or proceeding has been transferred or withdrawn under sub-ion (1), the court which is thereafter to try or dispose of such suit or proceeding , subject to any special directions in the case of an order of transfer, either retry it roceed from the point at which it was transferred or withdrawn. ...

5. *Power of Supreme Court to transfer suits, etc.*—(1)-(2) * * *

3) The court to which such suit, appeal or other proceeding is transferred shall, ect to any special directions in the order of transfer, either retry it or proceed from stage at which it was transferred to it."

The statutory scheme now becomes clear. In cases dealing with transfer of dings from a court having jurisdiction to another court, the discretion vested in the by Sections 24(2) and 25(3) either to retry the proceedings or proceed from the t which such proceeding was transferred or withdrawn, is in marked contrast to the e under Order 7 Rule 10 read with Rule 10-A where no such discretion is given and ceeding has to commence de novo.

For all these reasons, we hold that *Oriental Insurance Co. Ltd.*[12] does not lay down rrect law and overrule the same. *R.K. Roja*[11] has no direct relevance to the versy at hand.

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That brings us to a question with regard to the nature of the order to be passed in cts and circumstances of the present case. In *Penu Balakrishna Iyer* v. *Ariya M. wami Iyer*[16], this Court observed as follows: (AIR p. 198, para 7)

7. ... The question as to whether the jurisdiction of this Court under Article 136 uld be exercised or not, and if yes, on what terms and conditions, is a matter which Court has to decide on the facts of each case."

In *Balraj Taneja* v. *Sunil Madan*[17] it was observed as follows: (SCC p. 415, para 47)

47. ... It is true that the jurisdiction under Article 136 of the Constitution is a retionary jurisdiction and notwithstanding that a judgment may not be wholly ect or in accordance with law, this Court is not bound to interfere in exercise of its retionary jurisdiction."

In *ONGC* v. *Sendhabhai Vastram Patel*[18], it was observed: (SCC p. 461, para 23)

23. It is now well settled that the High Courts and the Supreme Court while rcising their equity jurisdiction under Articles 226 and 32 of the Constitution as also cle 136 thereof may not exercise the same in appropriate cases. While exercising jurisdiction, the superior courts in India may not strike down even a wrong order because it would be lawful to do so. A discretionary relief may be refused to be nded to the appellant in a given case although the Court may find the same to be ified in law."

The nature of jurisdiction under Article 136 of the Constitution was again ered in *Shin-Etsu Chemical Co. Ltd. (2)* v. *Vindhya Telelinks Ltd.*[19] In *Karam Kapahi Chand Public Charitable Trust*[20], it was observed as follows: (*Karam Kapahi case*[20], . 770-71, para 65)

65. The jurisdiction of this Court under Article 136 of the Constitution is basically of conscience. The jurisdiction is plenary and residuary in nature. It is unfettered not confined within definite bounds. Discretion to be exercised here is subject to one limitation and that is the wisdom and sense of justice of the Judges (see *hayammed* v. *State of Kerala*[21], SCC at p. 371, para 13). This jurisdiction has to be rcised only in suitable cases and very sparingly as opined by the Constitution Bench

of this Court in *Pritam Singh* v. *State*[22], AIR at p. 171, para 9."

26. In the peculiar facts and circumstances of the case, because the appellant did not raise the objection under Clause 16-B of the agreement at the very first opportunity, the first order of rejection attained finality, the objection under Clause 16-B was raised more as an afterthought, the second application under Order 7 Rule 10 had to be preferred by the respondent, that pleadings of the parties have been completed, evidence led, and that the matter was fixed for final argument on 3-7-2017, we are of the considered opinion that despite having concluded that the impugned order[4] is not sustainable in view of the law laid down in *Modern Construction*[3], in exercise of our discretionary jurisdiction under Article 136 of the Constitution and in order to do complete and substantial justice between the parties under Article 142 of the Constitution in the peculiar facts and circumstances of the case nonetheless, we decline to set aside the impugned order of the High Court dated 13-3-2018[4].

27. The appeal stands disposed of.

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* Arising out of SLP (C) No. 16893 of 2018. Arising from the Judgment and Order in *EXL Careers* v. *Frankfinn Aviation Services (P) Ltd.*, 2018 SCC OnLine P&H 6064 (Punjab and Haryana High Court, CR No. 1602 of 2018, dt. 13-3-2018)

[1] *EXL Careers* v. *Frankfinn Aviation Services (P) Ltd.*, 2019 SCC OnLine SC 1294

[2] *Joginder Tuli* v. *S.L. Bhatia*, (1997) 1 SCC 502

[3] *ONGC* v. *Modern Construction & Co.*, (2014) 1 SCC 648 : (2014) 1 SCC (Civ) 617

[4] *EXL Careers* v. *Frankfinn Aviation Services (P) Ltd.*, 2018 SCC OnLine P&H 6064

[5] *EXL Careers* v. *Frankfinn Aviation Services (P) Ltd.*, 2018 SCC OnLine SC 3603

[6] *EXL Careers* v. *Frankfinn Aviation Services (P) Ltd.*, 2017 SCC OnLine P&H 2888

[7] *Ramdutt Ramkissen Dass* v. *E.D. Sassoon & Co.*, 1929 SCC OnLine PC 3 : (1928-29) 56 IA 128 : AIR 1929 PC 103

[8] *Amar Chand Inani* v. *Union of India*, (1973) 1 SCC 115

[9] *Harshad Chimanlal Modi (2)* v. *DLF Universal Ltd.*, (2006) 1 SCC 364

[10] *Hasham Abbas Sayyad* v. *Usman Abbas Sayyad*, (2007) 2 SCC 355

[11] *R.K. Roja* v. *U.S. Rayudu*, (2016) 14 SCC 275 : (2017) 3 SCC (Civ) 270

[12] *Oriental Insurance Co. Ltd.* v. *Tejparas Associates & Exports (P) Ltd.*, (2019) 9 SCC 435 : (2019) 4 SCC (Civ) 534

[13] *Swastik Gases (P) Ltd.* v. *Indian Oil Corpn. Ltd.*, (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157

[14] *State of W.B.* v. *Associated Contractors*, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1

[15] *Hanamanthappa* v. *Chandrashekharappa*, (1997) 9 SCC 688

[16] *Penu Balakrishna Iyer* v. *Ariya M. Ramaswami Iyer*, AIR 1965 SC 195

[17] *Balraj Taneja* v. *Sunil Madan*, (1999) 8 SCC 396

[18] *ONGC* v. *Sendhabhai Vastram Patel*, (2005) 6 SCC 454

[19] *Shin-Etsu Chemical Co. Ltd. (2)* v. *Vindhya Telelinks Ltd.*, (2009) 14 SCC 16 : (2009) 5 SCC (Civ) 280

[20] *Karam Kapahi* v. *Lal Chand Public Charitable Trust*, (2010) 4 SCC 753 : (2010) 2 SCC (Civ) 262

[21] *Kunhayammed* v. *State of Kerala*, (2000) 6 SCC 359

[22] *Pritam Singh* v. *State*, 1950 SCC 189 : AIR 1950 SC 169 : (1950) 51 Cri LJ 1270

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In the Supreme Court of India

(BEFORE L. NAGESWARA RAO AND INDU MALHOTRA, JJ.)

DAHIBEN . . Appellant;

Versus

ARVINDBHAI KALYANJI BHANUSALI (GAJRA) DEAD THROUGH LEGAL REPRESENTATIVES AND OTHERS . . Respondents.

Civil Appeal No. 9519 of 2019, decided on July 9, 2020

A. **Civil Procedure Code, 1908 — Or. 7 R. 11(a) — Object — Exercise of power under — Nature of enquiry to be made by court — Court has to determine whether plaint prima facie discloses cause of action**

— To ascertain this, court has to read averments in conjunction with documents relied upon in plaint as a whole, without addition or subtraction of any words — It is substance and not form which has to be seen — So read, if cause of action prima facie disclosed, court not required to further enquire about truthfulness of allegations on fact — Pleas taken by defendant in written statement also not relevant at this stage — If however, court finds suit to be manifestly vexatious, not disclosing any right to sue, it would be justified in exercising power under R. 11(a)

B. **Civil Procedure Code, 1908 — Or. 7 R. 11 — Mandatory in nature — If any of the grounds specified in cls. (a) to (e) are made out, court bound to reject the plaint — Conduct of plaintiff relevant consideration — Evidence Act, 1872, S. 8**

C. **Civil Procedure Code, 1908 — Or. 7 R. 11(a) — Cause of action — Meaning — Court has to find whether plaint discloses real cause of action or illusory cause of action created by clever drafting — Court must be vigilant against camouflage or suppression and if suit found to be vexatious and an abuse of process of court, it should exercise its drastic power under R. 11 to reject the plaint — Words and Phrases — "Cause of action"**

D. **Civil Procedure Code, 1908 — Or. 7 R. 11 — Power under, can be exercised by court at any stage of suit**

E. **Civil Procedure Code, 1908 — Or. 7 R. 11(d) — Limitation — Plaint shall be rejected when from averments in plaint suit appears to be barred by any law**

F. **Limitation Act, 1963 — Arts. 58 and 59 — Suit to obtain declaration or to set aside instrument or decree, or, for rescission of contract — "Right to sue" when accrues — Court must determine when right to sue first accrued**

— Right to sue accrues only when cause of action arises — Suit must be instituted when right asserted in suit is infringed or there is clear and unequivocal threat of infringement by dependant — Specific Relief Act, 1963 — Ss. 34, 35, 27 and 31 — Words and Phrases — "Right to sue"

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G. **Transfer of Property Act, 1882 — S. 54 — Sale — Expression "price paid or promised or part paid and part promised" — Meaning — Actual payment of entire sale price at time of execution of sale deed not essential condition for completion of sale — Sale deed can be registered even upon part-payment of sale price whereupon title would pass to transferee — Non-payment of remaining part of sale price would not invalidate sale — Vendor would have other remedies for recovery of balance consideration, but not cancellation of sale for non-payment of balance consideration**

— Even if the averments of appellant-plaintiffs are taken to be true in present case, that the entire sale consideration had not in fact been paid, held, the same could not be a ground for cancellation of the sale deed — Appellant-plaintiffs may have other remedies in law for recovery of the balance consideration, but could not be granted the relief of cancellation of the registered sale deed — Specific Relief Act, 1963 — Ss. 31, 27, 34 and 35 — Property Law — Cancellation/Challenge to/Validity of Transfer — Contract and Specific Relief — Remedies/Relief — Remedies for Breach of Contract — Specific Remedies — Action for Contractual Price/Debt

H. **Practice and Procedure — Costs — Having regard to conduct of appellant-plaintiffs in bringing a vexatious suit which amounted to abuse of process of court, costs of Rs 1 lakh imposed on them by Supreme Court, while dismissing their appeal — Constitution of India — Art. 136 — Supreme Court Rules, 2013, Pt. V Or. XLIX**

The agricultural land in question which was in the ownership of the plaintiffs, was under restrictive tenure as per Section 73-AA of the Land Revenue Code. The plaintiffs filed an application in 2008 before the Collector to obtain permission for selling the suit land to Respondent 1-Defendant 1 which was non-irrigated and stated that they had no objection to the sale of the suit property. The Collector after carrying out verification of the title of the plaintiffs, passed an order in 2009 permitting sale of the property as per the jantri issued by the State Government @ Rs 2000 per square metre, which would work out to Rs 1,74,02,000. The Collector granted permission for the sale subject to the terms and conditions contained in Section 73-AA of the Land Revenue Code. It was stipulated that the purchaser shall make the payment by cheque, and reference of the payment shall be made in the sale deed. The plaintiffs thereafter sold the suit property to Respondent 1 herein

vide registered sale deed dated 2-7-2009. Respondent 1—purchaser issued 36 cheques for Rs 1,74,02,000 towards payment of the sale consideration in favour of the plaintiffs, the details of which were set out in the registered sale deed. In the sale deed the plaintiffs expressly and unequivocally acknowledged that the entire sale consideration was "paid" by Defendant 1-Respondent 1 to the plaintiffs through cheques which were issued prior to the execution of the sale deed, during the period 7-7-2008 to 2-7-2009 and further stated that the vendors would not raise any dispute in future denying receipt of the sale price or alleging receipt of only a part amount and that if the vendors do so "then, the same shall be void by this deed". Respondent 1 subsequently sold the suit property to Respondents 2 and 3 herein vide registered sale deed dated 1-4-2013, for a sale consideration of Rs 2,01,00,000.

On 15-12-2014 the plaintiffs filed a special suit against the original purchaser i.e. Respondent 1, and also impleaded the subsequent purchasers i.e. Respondents 2 and 3 as defendants. It was inter alia prayed that the sale deed dated 2-7-2009 be cancelled and declared as being illegal, void, ineffective and not binding on them, on the ground that the sale consideration fixed by the Collector, had not been paid in entirety by Respondent 1. The case made out in the plaint is that even though they had executed the registered sale deed dated 2-7-2009 for a sale consideration of Rs 1,74,02,000, an amount of only Rs 40,000 was paid to them. The remaining 31 cheques mentioned in the sale deed, which covered the balance amount of Rs 1,73,62,000 were alleged to be "bogus" or "false", and allegedly remained unpaid. The plaintiffs further averred in the plaint that the period of limitation commenced on 21-11-2014, when they obtained a copy of the index of the sale deed dated 2-7-2009, and discovered the alleged fraud committed by Defendant 1.

Respondents 2 and 3 filed an application for rejection of the plaint under Order 7 Rules 11(*a*) and (*d*) CPC, contending that the suit filed by the plaintiffs was barred by limitation, and that no cause of action had been disclosed in the plaint. The only dispute now sought to be raised was that they had not received a part of the sale consideration. This plea was denied as being incorrect. It was further submitted that if the sale deed dated 2-7-2009 was being challenged, then the suit ought to have been filed within three years i.e. on or before 2-7-2012 the suit property had been transferred to Respondent 1 vide Hakk Patrak Entry. Before certifying the said entry, notice under Section 135-D of the Land Revenue Code had been duly served on the plaintiffs, and ever since, Respondent 1 had been paying the land revenue on the suit property, and taking the produce therefrom. Respondents 2 and 3 further submitted that they had purchased the suit property from Respondent 1 after verifying the title, and inspecting the revenue records. and that the plaintiffs, with a

view to mislead the court, had deliberately filed copies of the 7/12 extracts dated 20-7-2009, which was prior to the mutation being effected in the name of Respondent 1. It was submitted that the suit was devoid of any merit, and clearly time-barred, and liable to be rejected.

The trial court held that the period of limitation for filing the suit was 3 years from the date of execution of the sale deed dated 2-7-2009. The suit was filed on 15-12-2014. The cause of action as per the averments in the plaint had arisen when Defendant 1-Respondent 1 had issued "false" or "bogus" cheques to the plaintiffs in 2009. The suit for cancellation of the sale deed dated 2-7-2009 could have been filed by 2012, as per Articles 58 and 59 of the Limitation Act, 1963. The suit was, however, filed on 15-12-2014, which was barred by limitation. The suit property was subsequently sold by Respondent 1 to Respondents 2 and 3 by a registered sale deed dated 1-4-2013. Before purchasing the suit property, Respondents 2 and 3 had issued a public notice on 14-8-2012. The plaintiffs did not raise any objection to the same. Accordingly, it was held that the suit of the plaintiffs was barred by limitation, and allowed the application under Order 7 Rule 11 (*d*) CPC. The High Court in first appeal affirmed the findings of the trial court, and held that the suit was barred by limitation and therefore, the trial court rightly allowed the application under Order 7 Rule 11(*d*) CPC.

Dismissing the appeal preferred by the plaintiffs with costs, the Supreme Court

Held :

The remedy under Order 7 Rule 11 CPC is an independent and special remedy, wherein the court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision. The underlying object of Order 7 Rule 11(*a*) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11(*d*), the court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. In such a case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.

(Paras 23.2 and 23.3)

Azhar Hussain v. *Rajiv Gandhi*, 1986 Supp SCC 315, *relied on*

Manvendrasinhji Ranjitsinhji Jadeja v. *Vijaykunverba*, 1998 SCC OnLine Guj 281 : (1998) 2 GLH 823, *approved*

The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order 7 Rule 11 are required to be strictly adhered to. Under Order 7 Rule 11, a duty is cast on the court to determine

whether the plaint discloses a cause of action by scrutinising the averments in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by any law. Having regard to Order 7 Rule 14 CPC, the documents filed along with the plaint, are required to be taken into consideration for deciding the application under Order 7 Rule 11(*a*). When a document referred to in the plaint, forms the basis of the plaint, it should be treated as a part of the plaint. In exercise of power under this provision, the court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding whether a case for rejecting the plaint at the threshold is made out. At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted to, or taken into consideration. The test for exercising the power under Order 7 Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. It is not permissible to cull out a sentence or a passage, and to read it in isolation. It is the substance, and not merely the form, which has to be looked into. The plaint has to be construed as it stands, without addition or subtraction of words. If the allegations in the plaint prima facie show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact. If, however, on a meaningful reading of the plaint, it is found that the suit does not disclose right to sue, cause of action or suit is barred by any law and the court has no option but to reject the plaint and without any merit, Order 7 Rule 11 CPC. The provision of Order 7 Rule 11 is mandatory in nature. It states that the plaint "shall" be rejected if any of the grounds specified in clauses (*a*) to (*e*) are made out. If the court finds that the plaint does not disclose a cause of action, or that the suit is barred by any law, the court has no option, but to reject the plaint.

(Paras 23.5, 23.6, 23.8 to 23.13 and 23.15)

Liverpool & London S.P. & I Assn. Ltd. v. *M.V. Sea Success I*, (2004) 9 SCC 512; *Sopan Sukhdeo Sable* v. *Charity Commr.*, (2004) 3 SCC 137; *Hardesh Ores (P) Ltd.* v. *Hede & Co.*, (2007) 5 SCC 614; *D. Ramachandran* v. *R.V. Janakiraman*, (1999) 3 SCC 267; *Vijay Pratap Singh* v. *Dukh Haran Nath Singh*, AIR 1962 SC 941, *relied on*

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The power under Order 7 Rule 11 CPC may be exercised by the court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial. The plea that once issues are framed, the matter must necessarily go to trial cannot be accepted.

(Para 23.14)

Saleem Bhai v. *State of Maharashtra*, (2003) 1 SCC 557; *Azhar Hussain* v. *Rajiv Gandhi*, 1986 Supp SCC 315, *relied on*

"Cause of action" means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. It consists of a bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit. While considering an application under Order 7 Rule 11 CPC what is required to be decided is whether the plaint discloses a real cause of action, or something purely illusory. What is required is that a clear right must be made out in the plaint. If, however, by clever drafting of the plaint, it has created the illusion of a cause of action, it should be nipped in the bud, so that bogus litigation will end at the earliest stage. The Court must be vigilant against any camouflage or suppression, and determine whether the litigation is utterly vexatious, and an abuse of the process of the court.

(Paras 24 and 24.2 to 24.4)

Swamy Atmananda v. *Sri Ramakrishna Tapovanam*, (2005) 10 SCC 51; *T. Arivandandam* v. *T.V. Satyapal*, (1977) 4 SCC 467; *ITC Ltd.* v. *Debts Recovery Appellate Tribunal*, (1998) 2 SCC 70; *Madanuri Sri Rama Chandra Murthy* v. *Syed Jalal*, (2017) 13 SCC 174 : (2017) 5 SCC (Civ) 602, *relied on*

The period of limitation prescribed under Articles 58 and 59 of the 1963 Act is three years, which commences from the date when the right to sue first accrues. The use of the word "first" between the words "sue" and "accrued", requires the court to examine the plaint and determine when the right to sue first accrued to the plaintiff, and whether on the assumed facts, the plaint is within time. The words "right to sue" mean the right to seek relief by means of legal proceedings. The right to sue accrues only when the cause of action arises. The suit must be instituted when the right asserted in the suit is infringed, or when there is a clear and unequivocal threat to infringe such right by the defendant against whom the suit is instituted. Order 7 Rule 11(*d*) provides that where a suit appears from the averments in the plaint to be barred by any law, the plaint shall be rejected.

(Paras 26 to 28)

Khatri Hotels (P) Ltd. v. *Union of India*, (2011) 9 SCC 126 : (2011) 4 SCC (Civ) 484; *State of Punjab* v. *Gurdev Singh*, (1991) 4 SCC 1 : 1991 SCC (L&S) 1082, *relied on*

On a reading of the plaint and the documents relied upon, it is clear that the plaintiffs have admitted the execution of the registered sale deed dated 2-7-2009 in favour of Defendant 1-Respondent 1 herein. The averments in the plaint are completely contrary to the recitals in the sale deed dated 2-7-2009, which was admittedly executed by the plaintiffs in favour of Respondent 1. In the sale deed, the plaintiffs have accepted and acknowledged the payment of the full sale consideration from Respondent 1. The sale deed records that the 36 cheques covering the entire sale consideration of Rs 1,74,02,000 were "paid" to the plaintiffs, during the period between 7-7-2008 to 2-7-2009.

(Paras 29.1, 29.2, 14 and 29.4)

If the case made out in the plaint is to be believed, it would mean that almost 99% of the sale consideration i.e. Rs 1,73,62,000 allegedly remained unpaid throughout. It is, however, inconceivable that if the payments had remained unpaid, the plaintiffs would have remained completely silent for a period of over five-and-half years, without even issuing a legal notice for payment of the unpaid sale

consideration, or instituting any proceeding for recovery of the amount, till the filing of the present suit in December 2014.

(Para 29.5)

Even if the averments of the plaintiffs are taken to be true, that the entire sale consideration had not in fact been paid, could not be a ground for cancellation of the sale deed. The plaintiffs may have other remedies in law for recovery of the balance consideration, but could not be granted the relief of cancellation of the registered sale deed. It was held by the Supreme Court in *Vidhyadhar*, (1999) 3 SCC 573 that the expression "price paid or promised or part paid or part promised" in the definition of "sale" under Section 54 of the Transfer of Property Act indicates that actual payment of the whole of the price at the time of the execution of the sale deed is not a sine qua non for completion of the sale. Even if the whole of the price is not paid, but the document is executed, and thereafter registered, the sale would be complete, and the title would pass on to the transferee under the transaction. The non-payment of a part of the sale price would not affect the validity of the sale. Once the title in the property has already passed, even if the balance sale consideration is not paid, the sale could not be invalidated on this ground. In order to constitute a "sale", the parties must intend to transfer the ownership of the property, on the agreement to pay the price either in praesenti, or in future. The intention is to be gathered from the recitals of the sale deed, the conduct of the parties, and the evidence on record.

(Paras 29.9 and 29.8)

Vidhyadhar v. *Manikrao*, (1999) 3 SCC 573, *applied*

The plaintiffs averred in the plaint that the period of limitation commenced on 21-11-2014, when they obtained a copy of the index of the sale deed dated 2-7-2009, and discovered the alleged fraud committed by Defendant 1. The plea taken in the plaint that they learnt of the alleged fraud in 2014, on receipt of the index of the sale deed, is wholly misconceived, since the receipt of the index would not constitute the cause of action for filing the suit. On a reading of the plaint, it is clear that the cause of action arose on the non-payment of the bulk of the sale consideration, which event occurred in the year 2009. The plea taken by the plaintiffs is to create an illusory cause of action, so as to overcome the period of limitation. The plea raised is rejected as being meritless and devoid of any truth. The

conduct of the plaintiffs in not taking recourse to legal action for over a period of five-and-half years from the execution of the sale deed in 2009, for payment of the balance sale consideration, also reflects that the institution of the present suit is an afterthought. The plaintiffs apparently filed the suit after the property was further sold by Respondent 1 to Respondents 2 and 3, to cast a doubt on the title of Respondent 1 to the suit property. The plaintiffs did not make any complaint whatsoever to the Collector at any point of time. The conduct of the plaintiffs is reflective of lack of bona fide.

(Paras 29.10 to 29.13 and 29.15)

Suhrid Singh v. *Randhir Singh*, (2010) 12 SCC 112 : (2010) 4 SCC (Civ) 585, *cited*

The present case is a classic case, where the plaintiffs by clever drafting of the plaint, attempted to make out an illusory cause of action, and bring the suit within the period of limitation. The plaintiffs deliberately did not mention the date of the registered sale deed dated 2-7-2009 executed by them in favour of Respondent 1, since it would be evident that the suit was barred by limitation. The prayer however mentions the date of the subsequent sale deed i.e. 1-4-2013 when the suit property was further sold by Respondent 1 to Respondents 2 and 3. The omission of the date of execution of the sale deed on 2-7-2009 in the prayer clause, was done deliberately and knowingly, so as to mislead the court on the issue of limitation.

(Paras 29.16 and 29.17)

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In *Raghwendra Sharan Singh*, (2020) 16 SCC 601, the Supreme Court held that the suit would be barred by limitation under Article 59 of the Limitation Act, if it was filed beyond three years of the execution of the registered deed. The delay of over 5 and ½ years after the alleged cause of action arose in 2009, shows that the suit was clearly barred by limitation as per Article 59 of the Limitation Act, 1963. The suit was instituted on 15-12-2014, even though the alleged cause of action arose in 2009, when the last cheque was delivered to the plaintiffs. The plaintiffs have failed to discharge the onus of proof that the suit was filed within the period of limitation. The plaint is therefore, liable to be rejected under Order 7 Rule 11(*d*) CPC.

(Paras 29.19 and 29.18)

Raghwendra Sharan Singh v. *Ram Prasanna Singh*, (2020) 16 SCC 601 : 2019 SCC OnLine SC 372, *relied on*

The plaintiffs have also prayed for cancellation of the subsequent sale deed dated 1-4-2013 executed by Respondent 1 in favour of Respondents 2 and 3;

since the suit in respect of the first sale deed dated 2-7-2009 is rejected both under clauses (*a*) and (*d*) of Order 7 Rule 11, the prayer with respect to the second sale deed dated 1-4-2003 cannot be entertained.

(Para 29.20)

The present suit filed by the plaintiffs is clearly an abuse of the process of the court, and bereft of any merit. The trial court has rightly exercised the power under Order 7 Rule 11 CPC, by allowing the application filed by Respondents 2 and 3, which was affirmed by the High Court.

(Para 30)

In view of the aforesaid discussion, the present civil appeal is dismissed with costs of Rs 1,00,000 payable by the appellant to Respondents 2 and 3, within a period of twelve weeks from the date of this judgment.

(Para 31)

Dahiben v. *Arvindbhai Kalyanji Bhanusali*, 2016 SCC OnLine Guj 10017, *affirmed*

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Chronological list of cases cited ***on page(s)***

1. (2020) 16 SCC 601 : 2019 SCC OnLine SC 372, *Raghwendra Sharan Singh* v. *Ram Prasanna Singh* 385*c-d*

2. (2017) 13 SCC 174 : (2017) 5 SCC (Civ) 602, *Madanuri Sri Rama Chandra Murthy* v. *Syed Jalal* 380*b*

3. 2016 SCC OnLine Guj 10017, *Dahiben* v. *Arvindbhai Kalyanji Bhanusali* 373*a-b*, 376*e*, 385*e-f*

4. (2011) 9 SCC 126 : (2011) 4 SCC (Civ) 484, *Khatri Hotels (P) Ltd.* v. *Union of India* 380*f-g*

5. (2010) 12 SCC 112 : (2010) 4 SCC (Civ) 585, *Suhrid Singh* v. *Randhir Singh* 383*g*

6. (2007) 5 SCC 614, *Hardesh Ores (P) Ltd.* v. *Hede & Co.* 378*g*

7. (2005) 10 SCC 51, *Swamy Atmananda* v. *Sri Ramakrishna Tapovanam* 379*d*

8. (2004) 9 SCC 512, *Liverpool & London S.P. & I Assn. Ltd.* v. *M.V. Sea Success I* — 377*g*, 378*e-f*

9. (2004) 3 SCC 137, *Sopan Sukhdeo Sable* v. *Charity Commr.* — 378*e*

10. (2003) 1 SCC 557, *Saleem Bhai* v. *State of Maharashtra* — 379*b*

11. (1999) 3 SCC 573, *Vidhyadhar* v. *Manikrao* — 382*f*

12. (1999) 3 SCC 267, *D. Ramachandran* v. *R.V. Janakiraman* — 379*a*

13. (1998) 2 SCC 70, *ITC Ltd.* v. *Debts Recovery Appellate Tribunal* — 380*a*

14. 1998 SCC OnLine Guj 281 : (1998) 2 GLH 823, *Manvendrasinhji Ranjitsinhji Jadeja* v. *Vijaykunverba* — 377*d-e*, 379*b-c*

15. (1991) 4 SCC 1 : 1991 SCC (L&S) 1082, *State of Punjab* v. *Gurdev Singh* — 381*a*

16. 1986 Supp SCC 315, *Azhar Hussain* v. *Rajiv Gandhi* — 377*d-e*, 379*b-c*

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17. (1977) 4 SCC 467, *T. Arivandandam* v. *T.V. Satyapal* — 379*f*

18. AIR 1962 SC 941, *Vijay Pratap Singh* v. *Dukh Haran Nath Singh* — 379*a*

The Judgment of the Court was delivered by

INDU MALHOTRA, J.— The present civil appeal has been filed to challenge the impugned judgment and order dated 19-10-2016[1] passed by a Division Bench of the Gujarat High Court, which affirmed the order of the trial court, allowing the application filed by Defendants 2 and 3, Respondents 2 and 3 herein under Order 7 Rule 11(*d*) CPC holding that the suit filed by the appellant and Respondents 9 to 13 herein (hereinafter referred to as "the plaintiffs") was barred by limitation.

2. The subject-matter of the present proceedings pertains to a plot of agricultural land of old tenure, admeasuring approximately 8701 sq m in Revenue Survey No. 610, Block No. 573 situated in Village Mota Varachha, Sub-District Surat (hereinafter referred to as "the suit property") which was in the ownership of the plaintiffs.

3. The land was under restrictive tenure as per Section 73-AA of the Land Revenue Code. The plaintiffs filed an application dated 13-5-2008 before the Collector, Surat to obtain permission for selling the suit property to Respondent 1-Defendant 1, which was non-irrigated, and stated that they had no objection to the sale of the suit property.

4. The Collector vide order dated 19-6-2009, after carrying out verification of the title of the plaintiffs, permitted sale of the suit property, and fixed the sale price of the suit property as per the jantri issued by the State Government @ Rs 2000 per square metre, which would work out to Rs 1,74,02,000. The Collector granted permission for the sale subject to the terms and conditions contained in Section 73-AA of the Land Revenue Code. It was stipulated that the purchaser shall make the payment by cheque, and reference of the payment shall be made in the sale deed.

5. After obtaining permission from the Collector, the plaintiffs sold the suit property to Respondent 1 herein vide registered sale deed dated 2-7-2009. Respondent 1 purchaser issued 36 cheques for Rs 1,74,02,000 towards payment of the sale consideration in favour of the plaintiffs, the details of which were set out in the registered sale deed dated 2-7-2009.

6. Respondent 1 subsequently sold the suit property to Respondents 2 and 3 herein vide registered sale deed dated 1-4-2013, for a sale consideration of Rs 2,01,00,000.

7. On 15-12-2014, the plaintiffs filed Special Civil Suit No. 718 of 2014 before the Principal Civil Judge, Surat against the original purchaser i.e. Respondent 1, and also impleaded the subsequent purchasers i.e. Respondents 2 and 3 as defendants. It was inter alia prayed that the sale deed dated 2-7-2009 be cancelled and declared as

being illegal, void, ineffective and not binding on them, on the ground that the sale consideration fixed by the Collector, had not been paid in entirety by Respondent 1.

8. The plaintiffs contended that they were totally illiterate, and were not able to read and write, and were only able to put their thumb impression on the sale deed dated 2-7-2009. The sale deed was obtained without payment of full consideration. Respondent 1 had paid only Rs 40,000 through 6 cheques, and remaining 30 cheques for Rs 1,73,62,000 were "bogus" cheques. The plaintiffs prayed for cancellation of the sale deed dated 2-7-2009, and also prayed that the subsequent sale deed dated 1-4-2013 be declared as illegal, void and ineffective; and, the physical possession of the suit property be restored to the plaintiffs.

9. Respondents 2 and 3 filed an application for rejection of the plaint under Order 7 Rules 11(*a*) and (*d*) CPC, contending that the suit filed by the plaintiffs was barred by limitation, and that no cause of action had been disclosed in the plaint. It was inter alia submitted that the plaintiffs had admitted the execution of the sale deed dated 2-7-2009 in favour of Respondent 1 before the Sub-Registrar, Surat. The only dispute now sought to be raised was that they had not received a part of the sale consideration. This plea was denied as being incorrect.

10. It was further submitted that if the sale deed dated 2-7-2009 was being challenged, then the suit ought to have been filed within three years i.e. on or before 2-7-2012.

11. It was further submitted that pursuant to the execution of the registered sale deed dated 2-7-2009, the plaintiffs had participated in the proceedings before the Revenue Officer for transfer of the suit property in the revenue records in favour of Respondent 1. On that basis, the suit property had been transferred to Respondent 1 vide Hakk Patrak Entry No. 6517 dated 24-7-2009. Before certifying the said entry, notice under Section 135-D of the Land Revenue Code had been duly served on the plaintiffs, and ever since, Respondent 1 had been paying the land revenue on the suit property, and taking the produce therefrom.

12. Respondents 2 and 3 further submitted that they had purchased the suit property from Respondent 1 after verifying the title, and inspecting the revenue records. Respondent 1 had sold the suit property vide a registered sale deed dated 1-4-2013, on payment of

valuable consideration of Rs 2,01,00,000. Pursuant thereto, the suit property was transferred in the name of Respondents 2 and 3 in the revenue records. It was further submitted that the plaintiffs, with a view to mislead the Court, had deliberately filed copies of the 7/12 extracts dated 20-7-2009, which was prior to the mutation being effected in the name of Respondent 1. It was submitted that the suit was devoid of any merit, and clearly time-barred, and liable to be rejected.

13. The trial court carried out a detailed analysis of the averments in the plaint along with the documents filed with the plaint, including the registered sale deed dated 2-7-2009, executed by the plaintiffs. The undisputed facts which emerged from the averments in the plaint was that the suit property was of restrictive tenure under Section 73-AA of the Land Revenue Code. Since the plaintiffs were in dire need of money, and wanted to sell the suit property to Respondent 1, they had filed an application before the Collector, Surat on 13-5-2008 to obtain permission for sale of the suit property. The Collector vide order dated 19-6-2009 granted permission to the plaintiffs and fixed the

sale price at Rs 1,74,02,000 which was to be paid through cheques. It was contended in the plaint that Respondent 1 had in fact paid only Rs 40,000, and false cheques of Rs 1,73,62,000 were issued, which remained unpaid.

14. On a perusal of the registered sale deed dated 2-7-2009, [marked as Ext. 3/9] it was noted that the plaintiffs had in fact accepted and acknowledged the payment of the full sale consideration from Respondent 1, through cheques which were issued prior to the execution of the sale deed, during the period 7-7-2008 to 2-7-2009. As per the plaintiffs, the sale deed was executed on 2-7-2009 in favour of Respondent 1, which was registered before the Office of the Sub-Registrar, for which the plaintiffs would have remained personally present. The transaction having been executed through a registered document, was in the public domain, and in the knowledge of the plaintiffs right from the beginning.

15. The trial court noted that there was no averment in the plaint that the cheques had not been received by them. Once the cheques were received by them, in the normal course, they would have presented the cheques for encashment within 6 months. The Court held that had the plaintiffs not been able to encash 30 cheques, a complaint ought to have been filed, or proceedings initiated for recovery of the

unpaid sale consideration. There was, however, nothing on record to show that the plaintiffs had made any complaint in this regard for a period of over 5 years. The plaintiffs also failed to produce the returned cheques, their passbooks, bank statements, or any other document to support their averments in the plaint. A notice for transfer of the suit property in the revenue records under Section 135-D was served on the plaintiffs, to which no objection was raised. The name of Respondent 1 was entered into the revenue records, which was certified by the Revenue Officer.

16. The trial court held that the period of limitation for filing the suit was 3 years from the date of execution of the sale deed dated 2-7-2009. The suit was filed on 15-12-2014. The cause of action as per the averments in the plaint had arisen when Defendant 1-Respondent 1 had issued "false" or "bogus" cheques to the plaintiffs in 2009. The suit for cancellation of the sale deed dated 2-7-2009 could have been filed by 2012, as per Articles 58 and 59 of the Limitation Act, 1963. The suit was, however, filed on 15-12-2014, which was barred by limitation.

17. The suit property was subsequently sold by Respondent 1 to Respondents 2 and 3 by a registered sale deed dated 1-4-2013. Before purchasing the suit property, Respondents 2 and 3 had issued a public notice on 14-8-2012. The plaintiffs did not raise any objection to the same.

18. The trial court, on the basis of the settled position in law, held that the suit of the plaintiffs was barred by limitation, and allowed the application under Order 7 Rule 11(*d*) CPC.

19. Aggrieved by the judgment dated 12-8-2016 passed by the Senior Civil Judge, Surat, the plaintiffs filed First Appeal No. 2324 of 2016 before the High Court of Gujarat at Ahmedabad.

20. The Division Bench of the High Court took note of the fact that the plaintiffs did not deny having executed the registered sale deed dated 2-7-2009 in favour of Respondent 1. In the said sale deed, it was specifically admitted

and acknowledged by the plaintiffs that they had received the full sale consideration. The sale deed contained the complete particulars with respect to the payment of sale consideration by Respondent 1 through 36 cheques, the particulars of which were recorded therein. Since the execution of the sale deed was not disputed, and the conveyance was duly registered in the presence of the plaintiffs before the Sub-Registrar, the sale deed could not be declared to be void, illegal, or ineffective. The suit property was subsequently sold by Respondent 1 in

favour of Respondents 2 and 3 vide registered sale deed dated 1-4-2013 for a sale consideration of Rs 2,01,00,000. Respondents 2 and 3 were bona fide purchasers for valuable consideration.

21. The present suit for cancellation of the sale deed was filed by the plaintiffs after a period of over 5 years after the execution of the sale deed dated 2-7-2009, and 1 year after the execution of the sale deed dated 1-4-2013 by Respondent 1. It was noted that prior to the institution of the suit on 15-12-2014, at no point of time did the plaintiffs raise any grievance whatsoever, of not having received the full sale consideration mentioned in the sale deed dated 2-7-2009. It was for the first time that such an allegation was made after over 5 years from the date of execution of the sale deed dated 2-7-2009. Since the suit in respect of the sale deed dated 2-7-2009 was held to be barred by law of limitation, the High Court was of the view that the suit could not be permitted to be continued even with respect to the subsequent sale deed dated 1-4-2013. The plaintiffs had not raised any allegation against Respondents 2 and 3, and there was no privity of contract between the plaintiffs and Respondents 2 and 3. The High Court rightly affirmed[1] the findings of the trial court, and held that the suit was barred by limitation, since it was filed beyond the period of limitation of three years.

22. Aggrieved by the impugned judgment and order dated 19-10-2016[1] passed by the High Court, the original Plaintiff 1 has filed the present civil appeal.

23. We have heard the learned counsel for the parties, perused the plaint and documents filed therewith, as also the written submissions filed on behalf of the parties.

23.1. We will first briefly touch upon the law applicable for deciding an application under Order 7 Rule 11 CPC, which reads as under:

> "**11. *Rejection of plaint*.**—The plaint *shall* be rejected in the following cases—
>
> (*a*) *where it does not disclose a cause of action*;
>
> (*b*) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;
>
> (*c*) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the court, fails to do so;

(*d*) *where the suit appears from the statement in the plaint to be barred by any law*;

(*e*) where it is not filed in duplicate;

(*f*) where the plaintiff fails to comply with the provisions of Rule 9:

Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp -papers, as the case may be, within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff."

(emphasis supplied)

23.2. The remedy under Order 7 Rule 11 is an independent and special remedy, wherein the court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision.

23.3. The underlying object of Order 7 Rule 11(*a*) is that if in a suit, no cause of action is disclosed, or the suit is barred by limitation under Rule 11(*d*), the court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. In such a case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.

23.4. In *Azhar Hussain* v. *Rajiv Gandhi*[2] this Court held that the whole purpose of conferment of powers under this provision is to ensure that a litigation which is meaningless, and bound to prove abortive, should not be permitted to waste judicial time of the court, in the following words : (SCC p. 324, para 12)

"*12*. ... The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless, and bound to prove abortive should not be permitted to occupy the time of the court, and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation, the court readily exercises the power to reject a plaint, if it does not disclose any cause of action."

23.5. The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order 7 Rule

11 are required to be strictly adhered to.

23.6. Under Order 7 Rule 11, a duty is cast on the court to determine whether the plaint discloses a cause of action by scrutinising the averments in the plaint[3], read in conjunction with the documents relied upon, or whether the suit is barred by any law.

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23.7. Order 7 Rule 14(1) provides for production of documents, on which the plaintiff places reliance in his suit, which reads as under:

> "**14. *Production of document on which plaintiff sues or relies***.—(1) *Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.*
>
> (2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.
>
> (3) A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit.
>
> (4) Nothing in this Rule shall apply to document produced for the cross-examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."
>
> (emphasis supplied)

23.8. Having regard to Order 7 Rule 14 CPC, the documents filed along with the plaint, are required to be taken into consideration for deciding the application under Order 7 Rule 11(*a*). When a document referred to in the plaint, forms the basis of the plaint, it should be treated as a part of the plaint.

23.9. In exercise of power under this provision, the court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding whether a case for rejecting the plaint at the threshold is made out.

23.10. At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted to, or taken into

consideration.[1]

23.11. The test for exercising the power under Order 7 Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in *Liverpool & London S.P. & I Assn. Ltd.* v. *M.V. Sea Success I*[2] which reads as : (SCC p. 562, para 139)

> "*139*. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed."

23.12. In *Hardesh Ores (P) Ltd.* v. *Hede & Co.*[5] the Court further held that it is not permissible to cull out a sentence or a passage, and to read it in isolation. It is the substance, and not merely the form, which has to be looked into. The plaint has to be construed as it stands, without addition or subtraction

of words. If the allegations in the plaint prima facie show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact. *D. Ramachandran* v. *R.V. Janakiraman*[6].

23.13. If on a meaningful reading of the plaint, it is found that the suit is manifestly vexatious and without any merit, and does not disclose a right to sue, the court would be justified in exercising the power under Order 7 Rule 11 CPC.

23.14. The power under Order 7 Rule 11 CPC may be exercised by the court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial, as held by this Court in the judgment of *Saleem Bhai* v. *State of Maharashtra*[7]. The plea that once issues are framed, the matter must necessarily go to trial was repelled by this Court in *Azhar Hussain case*[3].

23.15. The provision of Order 7 Rule 11 is mandatory in nature. It states that the plaint "shall" be rejected if any of the grounds specified in clauses (*a*) to (*e*) are made out. If the court finds that the plaint does not disclose a cause of action, or that the suit is barred by any law, the court has no option, but to reject the plaint.

24. "Cause of action" means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. It consists of a bundle of material facts, which are necessary

for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit.

24.1. In *Swamy Atmananda* v. *Sri Ramakrishna Tapovanam*[9] this Court held : (SCC p. 60, para 24)

> "*24. A cause of action, thus, means every fact, which, if traversed, it would be necessary for the plaintiff to prove* in order to support his right to a judgment of the court. In other words, *it is a bundle of facts, which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act, no cause of action can possibly accrue*. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded."

(emphasis supplied)

24.2. In *T. Arivandandam* v. *T.V. Satyapal*[2] this Court held that while considering an application under Order 7 Rule 11 CPC what is required to be decided is whether the plaint discloses a real cause of action, or something purely illusory, in the following words : (SCC p. 470, para 5)

> "*5.* ... The learned Munsif must remember that *if on a meaningful—not formal—reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7 Rule 11 CPC* taking care to see that the ground mentioned

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therein is fulfilled. And, *if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing*...."

(emphasis supplied)

24.3. Subsequently, in *ITC Ltd.* v. *Debts Recovery Appellate Tribunal*[10] this Court held that law cannot permit clever drafting which creates illusions of a cause of action. What is required is that a clear right must be made out in the plaint.

24.4. If, however, by clever drafting of the plaint, it has created the illusion of a cause of action, this Court in *Madanuri Sri Rama Chandra Murthy* v. *Syed Jalal*[11] held that it should be nipped in the bud, so that bogus litigation will end at the earliest stage. The Court must be vigilant against any camouflage or suppression, and determine whether the litigation is utterly vexatious, and an abuse of the process of the court.

25. The Limitation Act, 1963 prescribes a time-limit for the institution of all suits, appeals, and applications. Section 2(*j*) defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suits, appeals or applications. Section 3 lays down that every suit instituted after the prescribed period, shall be dismissed even though limitation may not have been set up as a defence. If a suit is not covered by any specific article, then it would fall within the residuary article.

26. Articles 58 and 59 of the Schedule to the 1963 Act, prescribe the period of limitation for filing a suit where a declaration is sought, or cancellation of an instrument, or rescission of a contract, which reads as under:

"*Description of suit*	*Period of limitation*	*Time from which period begins to run*
58. To obtain any other declaration.	Three years	When the right to sue first accrues.
59. To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him."

The period of limitation prescribed under Articles 58 and 59 of the 1963 Act is three years, which commences from the date when the right to sue first accrues.

27. In *Khatri Hotels (P) Ltd.* v. *Union of India*[12] this Court held that the use of the word "first" between the words "sue" and "accrued", would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. That is, if there are successive violations of the right, it would not give rise to a fresh cause of action, and the suit will be liable to be dismissed, if it is beyond the period of limitation counted from the date when the right to sue first accrued.

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28. A three-Judge Bench of this Court in *State of Punjab* v. *Gurdev Singh*[13] held that the Court must examine the plaint and determine when the right to sue first accrued to the plaintiff, and whether on the

assumed facts, the plaint is within time. The words "right to sue" mean the right to seek relief by means of legal proceedings. The right to sue accrues only when the cause of action arises. The suit must be instituted when the right asserted in the suit is infringed, or when there is a clear and unequivocal threat to infringe such right by the defendant against whom the suit is instituted. Order 7 Rule 11(*d*) provides that where a suit appears from the averments in the plaint to be barred by any law, the plaint shall be rejected.

Analysis and Findings

29. We have carefully perused the averments in the plaint read with the documents relied upon.

29.1. On a reading of the plaint and the documents relied upon, it is clear that the plaintiffs have admitted the execution of the registered sale deed dated 2-7-2009 in favour of Defendant 1-Respondent 1 herein. Para (5) of the plaint reads as:

> "(5) ... Thus, subject of the aforesaid terms *the plaintiffs had executed sale deed selling the suit property to Opponent 1 vide sale deed dated 2-7-2009 bearing Sl. No. 5158...*"
>
> (emphasis supplied)

29.2. The case made out in the plaint is that even though they had executed the registered sale deed dated 2-7-2009 for a sale consideration of Rs 1,74,02,000, an amount of only Rs 40,000 was paid to them. The remaining 31 cheques mentioned in the sale deed, which covered the balance amount of Rs 1,73,62,000 were alleged to be "bogus" or "false", and allegedly remained unpaid. We find the averments in the plaint completely contrary to the recitals in the sale deed dated 2-7-2009, which was admittedly executed by the plaintiffs in favour of Respondent 1. In the sale deed, the plaintiffs have expressly and unequivocally acknowledged that the entire sale consideration was "paid" by Defendant 1-Respondent 1 herein to the plaintiffs.

29.3. Clauses (3) and (4) of the sale deed are extracted hereinbelow for ready reference:

> *"Since the full amount of consideration of the sale as decided above, has since been paid by you, the vendees to we, the vendors of this sale deed, for which we the vendors of this sale deed acknowledge the same so, we or our descendants, guardian or legal heirs is to take any dispute or objection in future that such amount is not received, or is received less, and if we do so then, the same shall be void by this deed and, if any loss or damage occurs due to the same then, we the vendors of this sale deed and descendants, guardians, legal heirs of we, the vendors are liable to pay the same to you the vendees or your descendants, guardian, legal heirs and*

you can recover the same by court proceedings.

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(4) We the party of second part i.e. vendors of the sale deed since received full consideration on the above facts, the physical possession, occupancy of the land or the property mentioned in this sale deed has been handed over to you the vendee of this sale deed, and that has been occupied and taken in possession of the land or property mentioned in this sale deed by you the vendee of this sale deed by coming at the site and therefore, we the vendors of this sale deed have not to raise any dispute in the future that the possession of the land or the property has not been handed over to you. ..."

(emphasis supplied)

29.4. The sale deed records that the 36 cheques covering the entire sale consideration of Rs 1,74,02,000 were "paid" to the plaintiffs, during the period between 7-7-2008 to 2-7-2009.

29.5. If the case made out in the plaint is to be believed, it would mean that almost 99% of the sale consideration i.e. Rs 1,73,62,000 allegedly remained unpaid throughout. It is, however, inconceivable that if the payments had remained unpaid, the plaintiffs would have remained completely silent for a period of over five-and-half years, without even issuing a legal notice for payment of the unpaid sale consideration, or instituting any proceeding for recovery of the amount, till the filing of the present suit in December 2014.

29.6. The plaintiffs have made out a case of alleged non-payment of a part of the sale consideration in the Plaint, and prayed for the relief of cancellation of the sale deed on this ground.

29.7. Section 54 of the Transfer of Property Act, 1882 provides as under:

"**54. *"Sale" defined***.—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

The definition of "sale" indicates that there must be a transfer of ownership from one person to another i.e. transfer of all rights and interest in the property, which was possessed by the transferor to the transferee. The transferor cannot retain any part of the interest or right in the property, or else it would not be a sale. The definition further indicates that the transfer of ownership has to be made for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale.

29.8. In *Vidhyadhar* v. *Manikrao*[14] this Court held that the words "price paid or promised or part-paid and part-promised" indicates that actual payment of the whole of the price at the time of the execution of the sale deed is not a sine qua non for completion of the sale. Even if the whole of the price is not paid, but the document is executed, and thereafter registered, the sale would be complete, and the title would pass on to the transferee under the transaction. The non-payment of a part of the sale price would not affect the validity of the sale. Once the title in the property has already passed, even if the balance sale consideration is not paid, the sale could not be invalidated on this ground. In order to constitute a "sale", the parties must intend to transfer the ownership of the property, on the agreement to pay the price either in praesenti, or in future.

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The intention is to be gathered from the recitals of the sale deed, the conduct of the parties, and the evidence on record.

29.9. In view of the law laid down by this Court, even if the averments of the plaintiffs are taken to be true, that the entire sale consideration had not in fact been paid, it could not be a ground for cancellation of the sale deed. The plaintiffs may have other remedies in law for recovery of the balance consideration, but could not be granted the relief of cancellation of the registered sale deed. We find that the suit filed by the plaintiffs is vexatious, meritless, and does not disclose a right to sue. The plaint is liable to be rejected under Order 7 Rule 11 (*a*).

29.10. The plaintiffs have averred in the plaint that the period of limitation commenced on 21-11-2014, when they obtained a copy of the index of the sale deed dated 2-7-2009, and discovered the alleged fraud committed by Defendant 1. The relevant extract from the plaint in this regard is set out hereinbelow:

> "(7) ... Not only that but also, *on obtaining the copy of the index of the sale deed of the acts committed by Opponents 1, 4, 5 and on obtaining the certified copy of the sale deed, we the plaintiffs could come to know on 21-11-2014 that, Opponent 1 had in collusion with Opponents 4, 5 mentioned the false cheques stated below in the so-called sale deed with intention to commit fraud and no any consents of we, the plaintiffs have also been obtained in that regard*. The said cheques have not been received to we the plaintiffs or no any amounts of the said cheques have been credited in accounts of we the plaintiffs. *Thus, the cheques which have been mentioned in the*

agreement caused to have been executed by Opponent 1, the false cheques have been mentioned of the said amounts. Not only that but also, the agricultural land under the suit had been sold by Opponent 1 to Opponent 2 Dillipbhai Gordhanbhai Sonani and Opponent 3, Laljibhai Gordhanbhai Sonani on 1-4-2013 for Rs 2,01,00,000 as if the said sale deed was having clear title deeds. On taking out the copy of the said sale deed with seal and signature on 21-11-2014, it could come to the knowledge of we, the plaintiffs. We, the plaintiffs have not done any signature or witness on the said agreement. The said agreement is not binding to we, the plaintiffs. Since the said agreement is since null, void and invalid as well as illegal, therefore, no court fee stamp duty is required to be paid by we, the plaintiffs on the said agreement and for that we, the plaintiffs rely upon the judgment of the Supreme Court in *Suhrid Singh* v. *Randhir Singh*[15]. ..."

(emphasis supplied)

29.11. The plea taken in the plaint that they learnt of the alleged fraud in 2014, on receipt of the index of the sale deed, is wholly misconceived, since the receipt of the index would not constitute the cause of action for filing the suit.

29.12. On a reading of the plaint, it is clear that the cause of action arose on the non-payment of the bulk of the sale consideration, which event occurred in the year 2009. The plea taken by the plaintiffs is to create an illusory cause of action, so as to overcome the period of limitation. The plea raised is rejected as being meritless and devoid of any truth.

29.13. The conduct of the plaintiffs in not taking recourse to legal action for over a period of 5 and ½ years from the execution of the sale deed in 2009, for payment of the balance sale consideration, also reflects that the institution of the present suit is an afterthought. The plaintiffs apparently filed the suit after the property was further sold by Respondent 1 to Respondents 2 and 3, to cast a doubt on the title of Respondent 1 to the suit property.

29.14. The plaintiffs have placed reliance on the order of the Collector dated 19-6-2009 with the plaint. The order reveals that the permission was granted subject to the fulfilment of certain conditions. Clause 4 of the permission states that:

"(4) The purchaser of the land/property, shall have to make the

payment of the price of the land by cheque and its reference shall require to be made in the sale deed."

29.15. If the plaintiffs had a genuine grievance of non-payment of the balance sale consideration, the plaintiffs could have moved for revocation of the permission granted by the Collector on 19-6-2009. Clause (6) of the order provided that:

"(6) On making violation of any of the aforesaid terms, the permission shall automatically be treated as cancelled and, separate proceeding shall be taken up for the violation of the terms and conditions."

The plaintiffs did not make any complaint whatsoever to the Collector at any point of time. The conduct of the plaintiffs is reflective of lack of bona fide.

29.16. The present case is a classic case, where the plaintiffs by clever drafting of the plaint, attempted to make out an illusory cause of action, and bring the suit within the period of limitation. Prayer (1) of the plaint reads as:

"(1) The suit property being agricultural land of old tenure of Revenue Survey No. 610 whose Block No. is 573 situated at Village Mota Varachha, Sub-District : Surat City, District Surat has been registered by Opponent 1 of this case in Office of the Sub-Registrar (Katar Gam) at Surat vide Sl. No. 5158 in Book No. 1. Since, the same is illegal, void, ineffective and since the amount of consideration is received by the plaintiffs, and by holding that it is not binding to the plaintiffs and to cancel the same, and since the sale deed as aforesaid suit property has been executed by Opponent 1 to Opponents 2, 3, it is registered in the Office of Sub-Registrar, Surat (Rander) on 1-4-2013 vide Sl. No. 443 which is not binding to we, the plaintiffs. Since, it is illegal, void, ineffective and therefore, this Hon'ble Court may be pleased to cancel the same and this Hon'ble Court may be pleased to send the Yadi in that regard to the Sub-Registrar, Surat (Karat

Gam) and the Sub-Registrar (Rander) in regard to the cancellation of both the aforesaid documents."

29.17. The plaintiffs deliberately did not mention the date of the registered sale deed dated 2-7-2009 executed by them in favour of Respondent 1, since it would be evident that the suit was barred by limitation. The prayer however mentions the date of the subsequent sale deed i.e. 1-4-2013 when the suit property was further sold by

Respondent 1 to Respondents 2 and 3. The omission of the date of execution of the sale deed on 2-7-2009 in the prayer clause, was done deliberately and knowingly, so as to mislead the court on the issue of limitation.

29.18. The delay of over 5 and ½ years after the alleged cause of action arose in 2009, shows that the suit was clearly barred by limitation as per Article 59 of the Limitation Act, 1963. The suit was instituted on 15-12-2014, even though the alleged cause of action arose in 2009, when the last cheque was delivered to the plaintiffs. The plaintiffs have failed to discharge the onus of proof that the suit was filed within the period of limitation. The plaint is therefore, liable to be rejected under Order 7 Rule 11(*d*) CPC.

29.19. Reliance is placed on the recent judgment of this Court rendered in *Raghwendra Sharan Singh* v. *Ram Prasanna Singh*[16] wherein this Court held that the suit would be barred by limitation under Article 59 of the Limitation Act, if it was filed beyond three years of the execution of the registered deed.

29.20. The plaintiffs have also prayed for cancellation of the subsequent sale deed dated 1-4-2013 executed by Respondent 1 in favour of Respondents 2 and 3; since the suit in respect of the first sale deed dated 2-7-2009 is rejected both under Clauses (*a*) and (*d*) of Order 7 Rule 11, the prayer with respect to the second sale deed dated 1-4-2003 cannot be entertained.

30. The present suit filed by the plaintiffs is clearly an abuse of the process of the court, and bereft of any merit. The trial court has rightly exercised the power under Order 7 Rule 11 CPC, by allowing the application filed by Respondents 2 and 3, which was affirmed[1] by the High Court.

31. In view of the aforesaid discussion, the present civil appeal is dismissed with costs of Rs 1,00,000 payable by the appellant to Respondents 2 and 3, within a period of twelve weeks from the date of this judgment. Pending applications, if any, are accordingly disposed of.

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Arising out of SLP (C) No. 11618 of 2017. Arising from the Judgment and Order in *Dahiben* v. *Arvindbhai Kalyanji Bhanusali*, 2016 SCC OnLine Guj 10017 (Gujarat High Court, First Appeal No. 2324 of 2016, dt. 19-10-2016)

[1] *Dahiben* v. *Arvindbhai Kalyanji Bhanusali*, 2016 SCC OnLine Guj 10017

[2] *Azhar Hussain* v. *Rajiv Gandhi*, 1986 Supp SCC 315. Followed in *Manvendrasinhji Ranjitsinhji Jadeja* v. *Vijaykunverba*, 1998 SCC OnLine Guj 281 : (1998) 2 GLH 823

[3] *Liverpool & London S.P. & I Assn. Ltd.* v. *M.V. Sea Success I*, (2004) 9 SCC 512

[4] *Sopan Sukhdeo Sable* v. *Charity Commr.*, (2004) 3 SCC 137

[5] *Hardesh Ores (P) Ltd.* v. *Hede & Co.*, (2007) 5 SCC 614

[6] *D. Ramachandran* v. *R.V. Janakiraman*, (1999) 3 SCC 267; See also *Vijay Pratap Singh* v. *Dukh Haran Nath Singh*, AIR 1962 SC 941

[7] *Saleem Bhai* v. *State of Maharashtra*, (2003) 1 SCC 557

[8] *Swamy Atmananda* v. *Sri Ramakrishna Tapovanam*, (2005) 10 SCC 51

[9] *T. Arivandandam* v. *T.V. Satyapal*, (1977) 4 SCC 467

[10] *ITC Ltd.* v. *Debts Recovery Appellate Tribunal*, (1998) 2 SCC 70

[11] *Madanuri Sri Rama Chandra Murthy* v. *Syed Jalal*, (2017) 13 SCC 174 : (2017) 5 SCC (Civ) 602

[12] *Khatri Hotels (P) Ltd.* v. *Union of India*, (2011) 9 SCC 126 : (2011) 4 SCC (Civ) 484

[13] *State of Punjab* v. *Gurdev Singh*, (1991) 4 SCC 1 : 1991 SCC (L&S) 1082

[14] *Vidhyadhar* v. *Manikrao*, (1999) 3 SCC 573

[15] *Suhrid Singh* v. *Randhir Singh*, (2010) 12 SCC 112 : (2010) 4 SCC (Civ) 585

[16] *Raghwendra Sharan Singh* v. *Ram Prasanna Singh*, (2020) 16 SCC 601 : 2019 SCC OnLine SC 372

(2003) 1 Supreme Court Cases 557 : 2002 SCC OnLine SC 1232

(BEFORE S.S.M. QUADRI AND DR ARIJIT PASAYAT, JJ.)

SALEEM BHAI AND OTHERS . . Appellants;

Versus

STATE OF MAHARASHTRA AND OTHERS . . Respondents.

Civil Appeals No. 8518 of 2002[1] with No. 8519 of 2002[2], decided on December 17, 2002

A. **Civil Procedure Code, 1908 — Or. 7 R. 11 and Or. 8 R. 10 — Defendant's application under Or. 7 R. 11(a) & (d) — Germane facts for deciding such an application, held, are the averments in the plaint and not the pleas taken in the written statement — Hence, trial court's direction to the defendant to file the written statement, without deciding his application under Or. 7 R. 11, held, bad**

B. **Civil Procedure Code, 1908 — Or. 7 R. 11 — Court's power under — Held, can be exercised at any stage of the suit before the conclusion of the trial**

One of the respondents herein filed suits against the appellant herein. The appellant-defendant filed an application under Order 7 Rule 11(*a*) and (*d*) CPC for dismissing the suits on the ground stated therein. The respondents also filed an application under Order 8 Rule 10 CPC to pronounce the judgment in the suits as the appellant had not filed his written statement. The trial court dismissed the application under Order 8 Rule 10. On the application under Order 7 Rule 11, the trial court directed the appellant to file his written statement. Aggrieved thereby, the appellant unsuccessfully approached the High Court and thereafter filed the instant appeals by special leave.

Allowing the appeals, the Supreme Court

Held :

The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under Rule 11(*a*) & (*d*) of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage. Therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial

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court. The trial court's order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity.

(Para 9)

The cases are therefore, remitted to the trial court for deciding the application under Order 7 Rule 11 CPC on the basis of the averments in the plaint, after affording an opportunity of being heard to the parties in accordance with law.

(Para 10)

H-M/27214/C

Advocates who appeared in this case:

T.R. Andhyarujina, R.F. Nariman, Kailash Vasdev and K.K. Venugopal, Senior Advocates (S.V. Deshpande, G.D. Sule, Ms Anuradha Rastogi, Murari Lal Pathak, Manish Pitale, Chander Shekhar Ashri, Rashid Haque, Chandra Shekhar Ashri, Arun Agarwal, Shakil Nawaz, Kuldip Singh, Pavan Kumar, K.S. Rana, S.S. Shinde, V.N. Raghupathy, W.A. Nomani, B.S. Banthia and S.K. Agnihotri, Advocates, with them) for the appearing parties.

ORDER

1. Leave is granted.

2. These appeals arise from the common order of the High Court of Madhya Pradesh (Indore Bench) in Civil Revision Petitions Nos. 256 and 257 of 2002 dated 7-5-2002.

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

"(2) That it be declared that the judgment and decree passed by the IIIrd Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No. 147 of 1967, judgment and decree passed by the IVth Additional District Judge, Nagpur in Regular Civil Appeal No. 16 of 1987, and approving the same in the judgment and decree passed by the Hon'ble Bombay High Court, Bench at Nagpur in Second Appeal No. 132 of 1992, and while maintaining this judgment and decree, judgment and order passed by the Hon'ble Supreme Court in Special Leave Petition (Civil) No. 25004 of 1996 and in Review Petition No. 1075 of 1997 and order passed in various Revenue Case No. 8 of 1996-97, are illegal, not in existence, null and void and are not within the jurisdiction and therefore are not binding on the

plaintiff."

4. The appellant filed an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (for short "CPC") in the suits praying the court to dismiss the suits on the ground stated therein. Before us, it is stated that the plaint is liable to be rejected under clauses (*a*) and (*d*) of Rule 11 of Order 7 CPC. While so, the said respondents also filed an application under Order 8 Rule 10 CPC to pronounce the judgment in the suits as the appellant did not file his written statement. There was also an application by the appellant

under Section 151 CPC praying the court to decide first the application under Order 7 Rule 11 CPC. By an order dated 8-12-2001, the learned trial Judge dismissed the application under Order 8 Rule 10 as well as the application filed under Section 151 CPC. Insofar as the application under Order 7 Rule 11 CPC is concerned, the learned Judge directed the appellant to file his written statement. Aggrieved thereby, the appellant filed the aforementioned revision petitions before the High Court of Madhya Pradesh (Indore Bench). On 7-5-2002, the High Court, while confirming the order of the learned trial Judge, reiterated the direction given by the learned trial Judge that the appellant should file his written statement and observed that the trial court shall frame issues of law and facts arising out of pleadings and that the trial court should record its finding on the preliminary issues in accordance with law before proceeding to try the suit on facts. It is against this order of the High Court that the present appeals have been preferred.

5. Mr T.R. Andhyarujina, learned Senior Counsel appearing for the appellant in the appeal arising out of SLP (C) No. 13234 of 2002 and Mr R.F. Nariman, learned Senior Counsel appearing for the appellant in the appeal arising out of SLP (C) No. 14577 of 2002 have contended that having regard to the very nature of the relief claimed by the plaintiffs, the plaints are liable to be rejected under Order 7 Rule 11 CPC and that the Court ought to have considered the said application on merits instead of giving direction to file written statement which would amount to not exercising the jurisdiction vested in the Court. It is further contended that the High Court also did not appreciate that the plaints do not show any cause of action and that the plaint ought to have been rejected as the suit is barred by the principles of res judicata and lis pendens.

6. Mr K.K. Venugopal, learned Senior Counsel appearing for the respondents, on the other hand, drew our attention to various orders

passed in earlier proceedings to show that the subject-matter of the property, Items 51 and 52 of the relinquishment deed were not the suit properties in the earlier judgments, including the order passed by this Court and, therefore, neither the principle of res judicata nor the principle of lis pendens is attracted.

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

8. Order 7 Rule 11 CPC reads as under:

"11. *Rejection of plaint*.—The plaint shall be rejected in the following cases—

(*a*) where it does not disclose a cause of action;

(*b*) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;

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(*c*) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the court, fails to do so;

(*d*) where the suit appears from the statement in the plaint to be barred by any law;

(*e*) where it is not filed in duplicate;

(*f*) where the plaintiff fails to comply with the provisions of Rule 9:

Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be, within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff."

9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before

registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (*a*) and (*d*) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court, however, did not advert to these aspects.

10. We are, therefore, of the view that for the aforementioned reasons, the common order under challenge is liable to be set aside and we, accordingly, do so. We remit the cases to the trial court for deciding the application under Order 7 Rule 11 CPC on the basis of the averments in the plaint, after affording an opportunity of being heard to the parties in accordance with law.

11. The civil appeals are, accordingly, allowed. There shall be no order as to costs.

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[1] Arising out of SLP (C) No. 13234 of 2002. From the Judgment and Order dated 7-5-2002 of the Madhya Pradesh High Court in CR No. 256 of 2002

[2] Arising out of SLP (C) No. 14577 of 2002

(2005) 4 Supreme Court Cases 480 : 2005 SCC OnLine SC 691

(BEFORE R.C. LAHOTI, C.J. AND D.M. DHARMADHIKARI AND P.K. BALASUBRAMANYAN, JJ.)

KAILASH . . Appellant;

Versus

NANHKU AND OTHERS . . Respondents.

Civil Appeal No. 7000 of 2004, decided on April 6, 2005

A. **Election — Election Trial — Procedure — Written statement — Power of court to permit extension of time for filing of [beyond the time fixed therefor under Or. 8 R. 1 CPC and the proviso thereto, as amended by Act 22 of 2002 (w.e.f. 1-7-2002)] — Held, S. 86(6) of RPA, 1951 empowers High Court to grant a reasonable time for filing of written statement, though for reasons to be recorded — So also Rr. 5 and 12 of the (Allahabad) High Court Rules vest the same discretion in the High Court — In fact, under said R. 5, this power would include the power to fix an extended date not merely once but again and again depending on the discretion of the High Court — Further held, this discretion, under the Act or the High Court Rules, is not controlled by Or. 8 R. 1 CPC and the proviso thereto, as amended — On facts, High Court felt satisfied that reason assigned by defendant-appellant for delay in filing written statement was good and valid — However High Court denied prayer for extension of time as it felt it had not the power to do so (considering itself bound by mandate of Or. 8 R. 1 CPC and the proviso thereto, as amended) — In light of ruling above, written statement already having been filed in High Court, direction issued for its being taken on board, subject to payment of Rs 5000 as costs to election petitioner — High Courts — Allahabad High Court Rules of Court, 1952 — Rr. 5 and 12 — Representation of the People Act, 1951 — Ss. 86, 87 and Part VI (Ss. 79 to 122)**

[Paras 13, 17, 22, 46(i) and 47]

[**Ed.**: The Supreme Court has held herein, as noted in Shortnote A, that the power of the court to extend time for filing of the written statement in an election petition is not circumscribed by Order 8 Rule 1 CPC and the proviso thereto, as amended. But it has also held that provisions of CPC are to serve as guidelines for the election court, as noted in Shortnotes B and C. Therefore, given that Order 8 Rule 1 CPC and the proviso thereto, as amended, have also been held to be directory in this judgment, as noted in Shortnote E, it seems that the directions given for exercise of discretion in extending time for filing of the written statement under Order 8 Rule 1 CPC and the proviso thereto, as amended, and noted in Shortnotes F and G, would also be applicable to the exercise of discretion by an election court in considering whether to grant (further) time for filing of the written statement in an election trial. This conclusion is supported by the Supreme Court's observations regarding the caution to be exercised against defendants in election petitions in para 41 herein. Shortnote A should therefore be read along with Shortnotes F and G.]

B. **Election — Election Trial — Procedure — Applicability of CPC — Held, the procedure provided for trial of civil suits under CPC is not applicable in its entirety to trial of election petitions — Applicability of CPC is circumscribed by two riders: (i) CPC procedure is applicable only "as nearly as may be", as provided for under S. 87(1), RPA, 1951; and (ii) CPC**

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procedure would give way to any provisions of RPA, 1951 or any rules made thereunder, or any rules made by the High Court concerned under Art. 225 or S. 129 CPC — Therefore, CPC procedure applies to election trials under RPA, 1951 with flexibility and only as guidelines — Position contrasted with the applicability of the Evidence Act, 1872 to election trials as provided for under S. 87(2) of RPA, 1951, which is "deemed to apply in all respects" to an election trial — Representation of the People Act, 1951 — S. 87 and Part VI (Ss. 79 to 122) — High Courts — Allahabad High Court Rules of Court, 1952 — Ch. XV-A

[Paras 7, 6, 19, 9, 10 and 46(ii)]

C. **Election — Election Trial — Procedure — Inter se primacy of provisions of RPA, 1951, rules framed thereunder, Rules framed by High Court concerned for conduct of election trials under Art. 225, and CPC — Held, provisions of the Act and said High Court Rules are to be harmoniously construed avoiding any conflict; but if the same be irreconcilable, the Act would have primacy — Further, the Act, rules framed thereunder and said High Court Rules on the one hand, would have primacy over rules of procedure contained in CPC on the other hand — Representation of the People Act, 1951 — S. 87 and Part VI (Ss. 79 to 122) — High Courts — Allahabad High Court Rules of Court, 1952 — Ch. XV-A**

[Paras 12, 10 and 46(iii)]

D. **Election — Election Trial — Generally — Scope of election trial — Distinguished from trial in a civil suit, that election trial encompasses all proceedings commencing with receipt of election petition up to date of decision**

(Para 13)

Mohan Raj v. *Surendra Kumar Taparia*, (1969) 1 SCR 630 : AIR 1969 SC 677; *Iridium India Telecom Ltd.* v. *Motorola Inc.*, (2005) 2 SCC 145; *Tarlok Singh* v. *Municipal Corpn. of Amritsar*, (1986) 4 SCC 27; *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*, (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348, *relied on*

Duryodhan v. *Sitaram*, AIR 1970 All 1 : 1969 All LJ 87 (FB); *Hari Vishnu Kamath* v. *Election Tribunal, Jabalpur*, AIR 1958 MP 168 : 1958 MPLJ 426, *approved*

E. **Civil Procedure Code, 1908 — Or. 8 R. 1 and proviso thereto [as amended by Act 22 of 2002 (w.e.f. 1-7-2002)] — Nature and effect of — Held, are directory in character and not mandatory — Further held, though they cast an obligation on defendant to file a written statement within the time prescribed therein, the provisions do not deal with nor specifically take away the power of the court to take a written statement on record, though filed beyond the time as provided for therein — However stressed, fact that Or. 8 R. 1 and proviso thereto, as amended, have been held to be directory may not be understood as nullifying the entire force and impact, the entire life and vigour, of the provision in its amended form — Clarified categorically that ordinarily the time schedule contained in the provisions is to be followed as a rule and departure therefrom would be by way of exception only — Guidelines for exercise of discretion by court in this regard elucidated in detail**

F. **Civil Procedure Code, 1908 — Or. 8 R. 1 and proviso thereto [as amended by Act 22 of 2002 (w.e.f. 1-7-2002)] and Or. 17 R. 1 — Discretion of court under, to take written statement on record though filed beyond time prescribed therein — Guidelines for exercise of, stated — Held, the extension of time sought for by defendant from court, whether within 30 or 90 days, should not be granted as a matter of routine and merely for the**

asking, and especially when period of 90 days has expired — Delaying tactics of defendants, especially in election petitions deprecated — In light of such delaying tactics, court must handle prayers for adjournment with firmness — Extension of time beyond the limits laid down in Or. 8 R. 1 and proviso thereto, as amended, could only be by way of exception and for reasons assigned by defendant and also recorded in writing by court to its satisfaction, howsoever brief they might be — Court concerned had to spell out that departure from time schedule prescribed in Or. 8 R. 1 and proviso thereto, as amended, was being allowed because circumstances were exceptional, occasioned by reasons beyond control of defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if time were not extended — Emphasised, that in no case was defendant to be permitted to seek extension of time when the court was satisfied that it was a case of laxity or gross negligence on the part of defendant or his counsel — Further, prayer seeking time beyond 90 days for filing written statement had to be made in writing, and court could put defendants on terms, including imposition of costs and could insist on documentary evidence being annexed to application seeking extension of time so as to convince court that the prayer was founded on grounds that existed

G. **Civil Procedure Code, 1908 — S. 35 and Or. 8 R. 1 and proviso thereto [as amended**

by Act 22 of 2002 (w.e.f. 1-7-2002)] — Imposition of costs as condition precedent for permitting departure from time schedule laid down under Or. 8 R. 1 and proviso thereto, as amended — Held, said costs could be imposed for (i) deterring defendants, and (ii) for compensating plaintiffs for delay and inconvenience caused to them

H. **Civil Procedure Code, 1908 — Or. 8 R. 1 and proviso thereto [as amended by Act 22 of 2002 (w.e.f. 1-7-2002)] — Object of insertion of, in present form**

I. **Civil Procedure Code, 1908 — Or. 8 Rr. 9 and 1 and proviso to R. 1 [as amended by Act 22 of 2002 (w.e.f. 1-7-2002)] — Written statement "required" by court — Filing of, beyond time period fixed in Or. 8 R. 1 and proviso thereto, as amended — Permissibility under Or. 8 R. 9 — Held, under Or. 8 R. 9, in spite of said time-limit having expired, court is not powerless to permit written statement being filed if court requires such written statement**

J. **Civil Procedure Code, 1908 — Or. 8 Rr. 10 and 9 & 1 and proviso to R. 1 [as amended by Act 22 of 2002 (w.e.f. 1-7-2002)] — Written statement not filed within time period prescribed by Or. 8 R. 1 and proviso thereto, as amended, or as fixed in Or. 8 R. 9 — Options before court — Held, in such case court need not necessarily pronounce judgment, but may make such other order in relation to suit as it thinks fit**

K. **Interpretation of Statutes — Particular statutes or provisions — Procedural law/procedure — Held, unless compelled by express and specific language of the statute, provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless in meeting extraordinary situations for ends of justice — Civil Procedure Code, 1908 — Interpretation of**

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L. **Interpretation of Statutes — Particular statutes or provisions — Procedural law/procedure — Provision relating to participation of a party in any proceedings, in an adversarial system, held, should be so construed that ordinarily no party is denied the opportunity of participating in the process of justice dispensation — Civil Procedure Code, 1908 — Ors. 1, 7, 8, 9, 17, 18, 22, 23, 35 and 41 — Natural justice**

M. **Interpretation of Statutes — Subsidiary rules — Mandatory or directory — Provision couched in negative language implying a mandatory character, held, does not necessarily imply that it must be held to be mandatory — Court can, keeping in view the entire context in which provision came to be enacted, hold the same to be directory**

All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

(Para 28)

Sushil Kumar Sen v. *State of Bihar*, (1975) 1 SCC 774; *State of Punjab* v. *Shamlal Murari*, (1976) 1 SCC 719 : 1976 SCC (L&S) 118; *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46; *Sangram Singh* v. *Election Tribunal, Kotah*, (1955) 2 SCR 1 : AIR 1955 SC 425, *relied on*

Merely because a provision of law is couched in a negative language implying a mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

(Para 30)

Justice G.P. Singh: *Principles of Statutory Interpretation* (9th Edn., 2004), *relied on*

The object behind substituting Order 8 Rule 1 CPC in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious

inconvenience of the court, faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried. The provision spells out a disability on the defendant: a careful reading of the language in which Order 8 Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Though the language of the proviso to Rule 1 Order 8 CPC is couched in the negative form, it does not specify any penal consequences flowing from the non-compliance; however, the consequences of non-compliance may be read in by necessary implication. The provision being in the domain of the procedural law and considering the object and purpose behind enacting Rule 1 of Order 8 in the present form and the context in which the provision is placed, it has to be held to

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be directory and not mandatory. Moreover, under Order 8 Rule 9, in spite of the time-limit appointed by Order 8 Rule 1 having expired, the court is not powerless to permit a written statement being filed if the court may require such written statement. Under Order 8 Rule 10, the court need not necessarily pronounce judgment against the defendant who failed to file written statement as required by Order 8 Rule 1 or Rule 9. The court may still make such other order in relation to the suit as it thinks fit.

[Paras 27, 25, 46(*iv*), 41, 30, 33 and 32]

However, the fact that Order 8 Rule 1 CPC has been held to be directory may not be misunderstood as nullifying the entire force and impact — the entire life and vigour — of the provision. Though Order 8 Rule 1 is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. The defendant should be vigilant. No sooner is the writ of summons served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. The delaying tactics adopted by defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidates may succeed in enjoying the substantial part, if not in its entirety, of the term for which he was elected even though he may lose the battle at the end. Therefore, the judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the court to its satisfaction, howsoever brief they may be. It must be spelled out by the court concerned that a departure from the time schedule prescribed by Order 8 Rule 1 CPC was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended. In no case, shall the defendant be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel.

[Paras 41, 42, 44 and 46(*v*)]

A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled parameters, the court may indeed put the defendants on terms including imposition of compensatory costs and may also insist on an affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the court that the prayer was founded on grounds which do exist. The court may impose costs for dual purpose: (*i*) to deter the defendant from seeking any extension of time just for the asking, and (*ii*)

to compensate the plaintiff for the delay and inconvenience caused to him.

[Paras 43, 44 and 46(*v*)]

However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order 8 Rule 1 CPC shall be the rule and departure therefrom an exception, made for satisfactory reasons only.

(Para 45)

Topline Shoes Ltd. v. *Corpn. Bank*, (2002) 6 SCC 33, *relied on*

J.J. Merchant (Dr.) v. *Shrinath Chaturvedi*, (2002) 6 SCC 635, *held, ruling on Order 8 Rule 1 rendered obiter, hence not binding*

N. **Election — Representation of the People Act, 1951 — Ss. 169, 87(1) and preamble — Rules to govern procedure of election trials — Power of framing whether conferred on Central Government under — Held, Central Government is empowered thereunder to make such rules**

O. **Election — Election Trial — Procedure — Power of High Court to frame rules in respect of — Source of — Though 1951 Act contained no such provision, held, High Court can frame such rules under Art. 225 of Constitution or S. 129 CPC — Civil Procedure Code, 1908 — S. 129**

S. 169 — Rule-making power under Act

Section 169 of the Act confers power on the Central Government to make rules for carrying out the purposes of the Act. The Central Government is empowered to make rules which may govern the procedure of trial of election petitions. Although this subject is not specifically mentioned as one of the matters in Section 169(2), which specifies the topics on which the Central Government may frame rules, however, Section 169(2)(*i*) is a residuary clause which empowers the Central Government to frame rules regarding "any other matter required to be prescribed by this Act". Section 87(1) of the Act also gives an indication that the statute contemplates the framing of rules under the Act to govern the procedure of trials before the High Court, which, read with the preamble to the Act, is the source of power for making the rules laying down the procedure for the trial of election petitions.

(Para 10)

Rule-making power of High Court

There is no provision in the Act which empowers the High Court to frame the rules governing the procedure of trials before the High Court. However, the High Court is not entirely powerless in the matter of framing the rules of procedure. The High Court can frame rules of procedure regarding the trial of election petitions under Article 225 of the Constitution. This source of power emanates from the Constitution and is, therefore, very potent. Section 129 CPC is another source of power of the High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. This will include election petitions also as they are tried in the original civil jurisdiction of the High Court.

(Para 10)

P. **Practice and Procedure — Issues of general public importance — Appointment of amicus curiae may be warranted in spite of parties being represented by learned counsel — Constitution of India — Art. 136**

(Para 50)

D-M/TZ/31694/C

Advocates who appeared in this case:

Rakesh Dwivedi (Amicus Curiae) and Vijay Hansaria, Senior Advocates (Gaurav Bhatia, Abhishek Chaudhary, Ms Niranjana Singh, Ms Vimla Sinha, Gaurav Librehan, Adarsh Upadhyay, Avnish Tiwari, Dr. I.P. Singh, R.K. Singh, Sanjay Kr. Singh and C.D. Singh, Advocates, with them) for the Appellant;

Vijay Kumar, Ms Mayuri Vats, Sunil Verma, Sanjeev Chaudhary, Rajanish Kumar and Aniruddha P. Mayee, Advocates, for the Respondents.

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Chronological list of cases cited ***on page(s)***

1. (2005) 2 SCC 145, *Iridium India Telecom Ltd.* v. *Motorola Inc.* 492*f*
2. (2003) 7 SCC 66, *Dipak Chandra Ruhidas* v. *Chandan Kumar Sarkar* 491*e-f*
3. (2002) 6 SCC 635, *J.J. Merchant (Dr.)* v. *Shrinath Chaturvedi* 498*a-b*
4. (2002) 6 SCC 33, *Topline Shoes Ltd.* v. *Corpn. Bank* 497*e*, 498*a*, 498*b-c*
5. (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348, *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra* 493*c-d*
6. (1986) 4 SCC 27, *Tarlok Singh* v. *Municipal Corpn. of Amritsar* 493*b-c*
7. (1984) 3 SCC 46, *Ghanshyam Dass* v. *Dominion of India* 495*e-f*
8. (1976) 1 SCC 719 : 1976 SCC (L&S) 118, *State of Punjab* v. *Shamlal Murari* 495*d-e*
9. (1975) 1 SCC 774, *Sushil Kumar Sen* v. *State of Bihar* 495*b-c*
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14. 1957 SCR 370 : AIR 1957 SC 444, *Harish Chandra Bajpai* v. *Triloki Singh* 491a

15. (1955) 2 SCR 1 : AIR 1955 SC 425, *Sangram Singh* v. *Election Tribunal, Kotah* 496a

The Judgment of the Court was delivered by

R.C. LAHOTI, C.J.—

Facts in brief

1. Elections of the Uttar Pradesh Legislative Council were held pursuant to the Presidential Notification dated 7-11-2003. The appellant was declared elected. Respondent 1 filed an election petition under Section 80 of the Representation of the People Act, 1951 (hereinafter "the Act" for short) laying challenge to the election of the appellant.

2. The appellant was served with the summons, accompanied by a copy of the election petition, requiring his appearance before the Court on 6-4-2004. On the appointed day, the appellant appeared through his counsel and sought for one month's time for filing the written statement. The Court allowed time till 13-5-2004 for filing the written statement. On 13-5-2004, the appellant again filed an application seeking further time for filing the written statement on the ground that copies of several documents were required to be obtained. The Court adjourned the hearing to 3 -7-2004 as, in between, from 13-5-2004 to 2-7-2004, the High Court was closed for summer vacation. On 22-6-2004, the appellant's advocate's nephew expired. However, the written statement was drafted and kept ready for filing. The registered clerk of the advocate was deputed for filing the same in the Court on the appointed day. The clerk reached Allahabad, the seat of the High Court, from Ghazipur where the appellant and his advocate resided. On 1-7-2004, that is, two days prior to the day of hearing, the affidavit of the appellant annexed with the written statement, was sworn in at Allahabad.

However, (as is stated later on), on account of lack of understanding on the part of the registered clerk, the written statement could not be filed on 3-7-2004 but the same was filed on 8-7-2004 accompanied by an application for condonation of delay in filing the written statement briefly stating the reasons set out hereinbefore. On 23-8-2004, the High Court rejected the application filed by the appellant and refused to take the written statement on record for the reason that the same was filed beyond a period of 90 days from the date of service of summons, the period of limitation as provided by the proviso to Rule 1 of Order 8 of the Code of Civil Procedure, 1908 (hereinafter "CPC" for short), as introduced by Act 22 of 2002 with effect from 1-7-2002. Feeling aggrieved by the said order, the winning candidate i.e. the defendant-respondent before the High Court, has filed this appeal by special leave.

3. We have heard Shri Vijay Hansaria, the learned Senior Counsel for the appellant, Shri Vijay Kumar, the learned counsel for the respondent (election petitioner), and also Mr Rakesh Dwivedi, the learned Senior Counsel, who has on request appeared *amicus curiae*.

Questions for decision

4. The learned counsel for the appellant submitted that the provisions of CPC do not *ipso facto* and in their entirety apply to the trial of election petition under Chapter II of the Act. Alternatively, he submitted that rules have been framed by the Allahabad High Court making special provisions relating to the trial of election petitions which would override the provisions of CPC. In the next alternative, the learned Senior Counsel submitted that the provisions of Order 8 Rule 1 CPC being in the realm of procedural law, the time-limit contained therein should be construed as directory and not mandatory assuming the provision is applicable to the trial of election petitions. The learned counsel for Respondent 1 has disputed the correctness of the submissions so made and argued in support of the impugned order of the High Court.

5. Three questions arise for decision:

(*1*) Whether Order 8 Rule 1 CPC is applicable to the trial of an election petition under Chapter II of the Act?

(*2*) Whether the rules framed by the High Court governing the trial of election petitions would override the provisions of CPC and permit a written statement being filed beyond the period prescribed by Order 8 Rule 1 CPC?

(*3*) Whether the time-limit of 90 days as prescribed by the proviso appended to Rule 1 of Order 8 CPC is mandatory or directory in nature?

Relevant provisions

6. The Representation of the People Act, 1951 (43 of 1951) has been enacted, as its preamble indicates, to provide for the conduct of elections and other proceedings relating to such elections, as also for the decision of doubts and disputes arising out of or in connection with such elections. Part VI of

the Act deals with "Disputes regarding elections". The provisions contained therein are elaborate and detailed. This part is divided into five chapters. Chapter I incorporates Section 79 which is an interpretation clause giving definitions of certain words and expressions which are relevant for the purpose of Parts VI and VII of the Act. Chapter II deals with presentation of election petitions to High Courts. The jurisdiction to try election petitions is conferred on the High Courts. Provisions are made as to by whom and in what manner an election petition shall be presented; who will be parties to the petition; what an election petition must contain and the reliefs which an election petitioner may claim. Chapter III makes provision for trial of election petitions; procedure before the High Court and several rules of evidence applicable to trial of an election petition. What directions — principal and incidental — can be made and issued by the High Court in its judgment disposing of an election petition and the grounds on which such directions can be founded are provided for. Chapter IV lays down the rules governing the discretion of the court in the matter of permitting withdrawal of election petitions and the procedure relating thereto. Provision is made as to when and subject to what procedure an election petition would abate or substitution would be permitted in case of death of a party to the election petition. Chapter V deals with costs and security for costs. Right of appeal and procedure relating thereto are contained in Chapter IV-A.

7. Two points of significance deserve to be noted and highlighted. On all the subjects, suggested by the titles given to the different chapters, provisions are already available in CPC which is a pre-existing law. An election petition is a civil trial and if Parliament had so wished, all the aspects of trial included in Part VI could have been left to be taken care of by the pre-existing law, that is, CPC. However, Parliament has

chosen to enact separate and independent provisions applicable to the trial of election petitions and placed them in the body of the Act.

8. Section 87 of the Act provides as under:

"87. *Procedure before the High Court.*—(1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, *as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits*:

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872 (1 of 1872), *shall*, subject to the provisions of this Act, *be deemed to apply in all respects* to the trial of an election petition."

(emphasis supplied)

"86. *Trial of election petitions.*—(1)-(5) * * *

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(6) The *trial* of an election petition shall, *so far as is practicable* consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds *the adjournment of the trial beyond the following day to be necessary for reasons to be recorded*.

(7) Every election petition shall be *tried as expeditiously as possible* and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial."

(emphasis supplied)

9. Sub-section (6) of Section 86 of the Act requires trial of an election petition to be continued from day to day until its conclusion, so far as is practicable consistently with the interests of justice in respect of the trial, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded. Sub-section (7) requires every election petition to be tried as expeditiously as possible with an endeavour to conclude the trial within six months from the date of presentation of the election petition. Thus, the procedure provided for the trial of civil suits by CPC is not applicable in its entirety to the trial of election petitions. The applicability of the procedure is circumscribed by two riders; firstly, CPC procedure is applicable "as nearly as may be"; and secondly, CPC procedure would give way to any provisions of the Act and of any rules made thereunder.

10. Section 169 of the Act confers power on the Central Government to make rules for carrying out the purposes of the Act. The Central Government is empowered to make rules which may govern the procedure of trial of election petitions. Although this subject is not specifically mentioned as one of the matters in sub-section (2), which specifies the topics on which the Central Government may frame rules, however, clause (*i*) of sub-section (2) is a residuary clause which empowers the Central Government to frame rules regarding "any other matter required to be prescribed by this Act". Sub-section (1) of Section 87 of the Act also gives an indication that the statute contemplates the framing of rules under the Act to govern the procedure of trials before the High Court, which, read with the preamble to the Act, is the source of

power for making the rules laying down the procedure for the trial of election petitions. There is no provision in the Act which empowers the High Court to frame the rules governing the procedure of trials before the High Court. However, the High Court is not entirely powerless in the matter of framing the rules of procedure. Article 225 of the Constitution confers powers on the High Court, *inter alia*, to make rules of court for the purpose of hearing, trying and deciding any matter lying within the jurisdiction of the High Court. The High Court can thus frame rules of procedure regarding the trial of election petitions under Article 225 of the Constitution. This source of power emanates from the Constitution and is, therefore, very potent. Section 129 CPC is another source of power of the High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction.

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This will include election petitions also as they are tried in the original civil jurisdiction of the High Court.

11. The Allahabad High Court has framed several rules in exercise of the powers conferred by Article 225 of the Constitution. Chapter XV-A, consisting of 13 rules and entitled "Special provisions relating to the trial of election petitions", was added in the body of the Rules vide notification dated 7-3-1967. The following Rules are relevant for our purpose and hence are extracted and reproduced hereunder:

> "1. *Scope.*—The provisions of this Chapter shall govern the trial of election petitions under the Representation of the People Act, 1951.
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> * * *
>
> 5. *Issue of notice to respondent.*—The election petition shall be laid before the Bench so constituted without delay, and unless it is dismissed under sub-section (1) of Section 86 of the Act or for being otherwise defective, the Bench may direct issue of notice to the respondent to appear and answer the claim on a date to be specified therein. Such notice shall also direct that if he wishes to put up a defence he shall file his written statement together with a list of all documents, whether in his possession or power or not, upon which he intends to rely as evidence in support of his defence on or before the date fixed; and further, that in default of appearance being entered on or before the date fixed in the notice the election petition may be heard and determined in his absence. The notice shall be in Form 34-A.
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> * * *
>
> 12. *Court's power to give directions in matters of practice and procedure.*—The Bench may, consistently with the provisions of Section 87 of the Act, give such directions in matters of practice and procedure (including the recording of evidence) as it shall consider just and expedient."

12. A perusal of the several provisions made by the High Court Rules goes to show that the Rules touch many a subject on which provisions are found in the Act itself. Suffice it to observe that in case of conflict, the provisions of the Act and the provisions of the High Court Rules shall, as far as may be, be harmoniously construed avoiding the conflict, if any, and if the conflict be irreconcilable the provisions contained in the Act being primary legislation shall prevail over the provisions contained in the High Court Rules framed in exercise of delegated power to legislate. No such conflict is noticeable, so far as the present case is concerned.

"Trial" of election petition, when it commences?

13. At this point the question arises: when does the trial of an election petition

commence or what is the meaning to be assigned to the word "trial" in the context of an election petition? In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial. As held by this Court in several decided cases, this general rule is not applicable to the trial of election petitions as in the case of election petitions, all the proceedings commencing

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with the presentation of the election petition and up to the date of decision therein are included within the meaning of the word "trial".

14. In *Harish Chandra Bajpai* v. *Triloki Singh*[1] the narrow and wider sense in which the word "trial" is used came up for consideration of the Court. In its narrow or limited sense, "trial" means the final hearing of the petition consisting of examination of witnesses, filing of documents and addressing arguments. In its wider sense, the word "trial" indicates the entire proceeding from the time when the petition comes before the court until the pronouncement of decision. In the context of an election petition, it was held that the word "trial" must necessarily include the matters preliminary to the hearing, such as settlement of issues, issuance of directions and the like. With the receipt of the petition in the High Court, various steps have to be taken before the stage can be set for hearing it. The respondent has to file his written statement and issues have to be settled. The stages of discovery and inspection, enforcing attendance of witnesses and compelling the production of documents do not form part of the hearing in a trial governed by CPC but precede it. For the purpose of an election petition, the word "trial" includes the entire proceedings commencing from the time of receipt of the petition until the pronouncement of the judgment. It was held that hearing of an application under Order 6 Rule 17 CPC for amending the pleadings would be a stage in the trial of an election petition.

15. In *Om Prabha Jain* v. *Gian Chand*[2] also this Court refused to assign a restrictive meaning to the word "trial" in regard to election petitions while interpreting Section 90 (3) of the Act as it existed prior to the 1966 amendment. It was held that an order dismissing an election petition at the very threshold under Section 90(3) for non-compliance with Section 117 would be deemed to be an order at a stage of trial. This view was reiterated by this Court recently in *Dipak Chandra Ruhidas* v. *Chandan Kumar Sarkar*[3] wherein it was held that to be an order passed during the trial of an election petition it is not necessary that at the time of passing of that order there must have been a full-dressed trial after taking evidence of the parties; even an order dismissing an election petition summarily for non-compliance with the provisions of Section 81 or 82 or 117 is an order passed during the trial of an election petition.

16. Two decisions by the High Courts deserve to be noticed. They are *Duryodhan* v. *Sitaram*[4] and *Hari Vishnu Kamath* v. *Election Tribunal, Jabalpur*[5]. Both the High Courts have taken the view that the word "trial" undoubtedly has two meanings. It may mean the trial of a controversy that arises from an issue. It may equally mean the trial of an election petition covering the entire process of the litigation from its first seisin by the

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Tribunal (or the Court) to its disposal and would include all the matters even prior to

the hearing of the election petition. The matters relating to service of summons, calling for and finalising the pleadings and settling the issues are all constituent stages of the trial. We find ourselves in agreement with the meaning so assigned to the word "trial" in the context of election petition.

Receiving written statement being part of "trial", time can be extended

17. Once we are clear about the meaning of the word "trial" in the context of election petition, certain consequences follow. Sub-section (6) of Section 86 of the Act would empower the High Court trying an election petition to adjourn the trial beyond the following day if necessary and for reasons to be recorded. The filing of a written statement being a stage in the trial of an election petition, this provision would empower the High Court to grant a reasonable time for filing of a written statement though for reasons to be recorded. The availability of this power finds support from Rules 5 and 12 of the High Court Rules. Under Rule 5, the High Court has power to fix a date for filing the written statement which power would include the power to fix such date not merely once but again and again depending on the discretion of the High Court. Power to extend time for filing the written statement being a matter of practice and procedure, the High Court would be within its power to give such directions in that regard as it shall consider just and expedient within the meaning of Rule 12. This discretion vested in the Court by rules made under Article 225 for purposes of any special Act would not be controlled by the proviso to Rule 1 of Order 8 CPC.

18. This position of law does not admit of any doubt as, as was held in *Mohan Raj* v. *Surendra Kumar Taparia*[6], CPC applies only subject to the provisions of the Act and the rules made thereunder. The question arose in the context of Sections 82 and 86 of the Act whereunder a candidate against whom the allegations of corrupt practices were made in the petition and so should have been necessarily joined as respondent under Section 82 but was not joined and Section 86 provides for mandatory dismissal of such a petition. It was held that the defect could not be cured by invoking Order 1 Rule 10 or Order 6 Rule 17 CPC to avoid the penalty of dismissal of the petition. In *Iridium India Telecom Ltd.* v. *Motorola Inc.*[7] this Court affirmed the view taken by a Division Bench of the Bombay High Court that the amended provision of Order 8 Rule 1 CPC would not apply to the suits on the original side of the High Court and such suits would continue to be governed by the High Court (Original Side) Rules; the High Court Rules were framed in exercise of the power conferred by Section 129 CPC and the Letters Patent and, therefore, were saved by Section 4(1) CPC.

19. Section 87 of the Act is a guarded provision as its language indicates. A few things are noteworthy for determining the nature and character of the provision contained in Section 87. Its title reads "*Procedure before the High Court*". The applicability of the provision is — "subject to the provisions of

this Act and of any rules made thereunder". The procedure prescribed by the Code for the trial of suits is not just adopted, and as if incorporated into the Act, so as to govern the trial of election petition. The procedure applicable under the Code to the trial of suits has been made applicable to the trial of every election petition "as nearly as may be". The language of sub-section (1) of Section 87 has to be read in *juxtaposition* with the language of sub-section (2), whereby the provisions of the Evidence Act, 1872 have been made applicable in respect to the trial of an election petition by providing that they shall "be deemed to apply in all respects to the trial of an election petition".

20. In *Tarlok Singh* v. *Municipal Corpn. of Amritsar*[8] Section 384 of the Punjab Municipal Corporation Act, 1976 came up for the consideration of the Court. It provided for the procedure in the Code, in regard to suits, being followed, "as far as it can be made applicable", in the disposal of certain matters under the Act. The Court held that the relevant provisions of the Code were made applicable for the purposes of guidance of procedure and it is not expected that the procedure of a suit was to be followed technically and strictly in accordance with the provisions contained in the Code.

21. In *Direct Recruit Class II Engg. Officers' Assn.* v. *State of Maharashtra*[9] the expression "as far as applicable" came up for the consideration of the Court. It was held that such expression had the effect of making the rules or provisions contained elsewhere applicable with realism and flexibility, true to life rather than with abstract absolutism.

22. We are, therefore, of the opinion that, in view of Rules 5 and 12 framed under Article 225 for purposes of the special Act, the High Court is not powerless to extend the time for filing the written statement simply because the time-limit for filing the written statement within the allowance permitted by the proviso to Order 8 Rule 1 CPC has come to an end.

Alternatively, Order 8 Rule 1 CPC, mandatory or directory?

23. This leads us to examine the alternative contention of the learned Senior Counsel for the appellant that, in any event, Order 8 Rule 1 CPC is not mandatory but directory in nature, a submission on which both the learned counsel for the parties have forcefully argued and the learned *amicus curiae* has also made detailed submissions.

24. CPC which consolidated and amended the laws relating to the procedure of the Courts of Civil Judicature in the year 1908, has in the recent times undergone several amendments based on the recommendations of the Law Commission displaying the anxiety of Parliament to secure an early and expeditious disposal of civil suits and proceedings but without sacrificing the fairness of trial and the principles of natural justice inbuilt in any sustainable procedure. The Statement of Objects and Reasons for enacting the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) records the following

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basic considerations which persuaded Parliament in enacting the amendments:

> "5. (*i*) that a litigant should get a fair trial in accordance with the accepted principles of natural justice;
>
> (*ii*) that every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;
>
> (*iii*) that the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community who do not have the means to engage a pleader to defend their cases."

25. By the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) the text of Order 8 Rule 1 was sought to be substituted in a manner that the power of court to extend the time for filing the written statement was so circumscribed as would not permit the time being extended beyond 30 days from the date of service of summons on the defendant. As is well known, there was stiff resistance from the members of the Bar against enforcing such and similar other provisions sought to be introduced by way of amendment and hence the Amendment Act could not be promptly notified for

enforcement. The text of the provision in the present form has been introduced by the Code of Civil Procedure (Amendment) Act, 2002 (22 of 2002) with effect from 1-7-2002. The purpose of such like amendments stated in the Statement of Objects and Reasons is "to reduce delay in the disposal of civil cases".

26. The text of Order 8 Rule 1, as it stands now, reads as under:

"1. *Written statement.*—The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."

27. Three things are clear. Firstly, a careful reading of the language in which Order 8 Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order 8 Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the

same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.

28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in *Sushil Kumar Sen* v. *State of Bihar*[10] are pertinent: (SCC p. 777, paras 5-6)

"The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. ... Justice is the goal of jurisprudence — processual, as much as substantive."

29. In *State of Punjab* v. *Shamlal Murari*[11] the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that: (SCC p. 720)

"Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

In *Ghanshyam Dass* v. *Dominion of India*[12] the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle.

30. It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order 8 is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

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31. In *Sangram Singh* v. *Election Tribunal, Kotah*[13] this Court highlighted three principles while interpreting any portion of CPC. They are:

(*i*) A code of procedure must be regarded as such. It is "procedure", something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to "both" sides) lest the very means designed for the furtherance of justice be used to frustrate it. (SCR pp. 8-9)

(*ii*) There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. (SCR p. 9)

(*iii*) No forms or procedure should ever be permitted to exclude the presentation of the litigant's defence unless there be an express provision to the contrary. (SCR p. 9)

32. Our attention has also been invited to a few other provisions such as Rules 9 and 10 of Order 8. In spite of the time-limit appointed by Rule 1 having expired, the court is not powerless to permit a written statement being filed if the court may require such written statement. Under Rule 10, the court need not necessarily pronounce judgment against the defendant who failed to file written statement as required by Rule 1 or Rule 9. The court may still make such other order in relation to the suit as it thinks fit.

33. As stated earlier, Order 8 Rule 1 is a provision contained in CPC and hence belongs to the domain of procedural law. Another feature noticeable in the language of Order 8 Rule 1 is that although it appoints a time within which the written statement has to be presented and also restricts the power of the court by employing language

couched in a negative way that the extension of time appointed for filing the written statement was not to be later than 90 days from the date of service of summons yet it does not in itself provide for penal consequences to follow if the time schedule, as laid down, is not observed. From these two features certain consequences follow.

34. Justice G.P. Singh notes in his celebrated work *Principles of Statutory Interpretation* (9th Edn., 2004) while dealing with mandatory and directory provisions:

> "The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context,

subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " (p. 338)

> " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider *inter alia*, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory." (pp. 339-40)

35. Two decisions, having a direct bearing on the issue arising for decision before us, have been brought to our notice, one each by the learned counsel for either party. The learned Senior Counsel for the appellant submitted that in *Topline Shoes Ltd.* v. *Corpn. Bank*[14] a *pari materia* provision contained in Section 13 of the Consumer Protection Act, 1986 came up for the consideration of the Court. The provision requires the opposite party to a complaint to give his version of the case within a period of 30 days or such extended period not exceeding 15 days as may be granted by the District Forum. The Court took into consideration the Statement of Objects and Reasons and the legislative intent behind providing a time-frame to file reply and held: (*i*) that the provision as framed was not mandatory in nature as no penal consequences are prescribed if the extended time exceeds 15 days, and; (*ii*) that the provision was directory in nature and could not be interpreted to mean that in no event whatsoever the reply of the respondent could be taken on record beyond the period of 45 days.

36. The Court further held that the provision is more by way of procedure to achieve the object of speedy disposal of such disputes. The strong terms in which the provision is couched are an expression of "desirability" but do not create any kind of substantive right in favour of the complainant by reason of delay so as to debar the respondent from placing his version in defence in any circumstances whatsoever.

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37. In our opinion, the view of the law so taken by this Court squarely applies to the issue before us and we find ourselves in agreement with the law stated by the two -Judge Bench of this Court in the case of *Topline Shoes Ltd.*[14]

38. The learned counsel for the respondent, on the other hand, invited our attention to a three-Judge Bench decision of this Court in *J.J. Merchant (Dr.)* v. *Shrinath Chaturvedi*[15] wherein we find a reference made to Order 8 Rule 1 CPC vide paras 14 and 15 thereof and the Court having said that the mandate of the law is required to be strictly adhered to. A careful reading of the judgment shows that the provisions of Order 8 Rule 1 CPC did not directly arise for consideration before the Court and to that extent the observations made by the Court are *obiter*. Also, the attention of the Court was not invited to the earlier decision of this Court in *Topline Shoes Ltd. case*[14].

39. It was submitted by the learned Senior Counsel for the appellant that there may be cases and cases which cannot be foretold or thought of precisely when grave injustice may result if the time-limit of days prescribed by Order 8 Rule 1 was rigidly followed as an insurmountable barrier. The defendant may have fallen sick, unable to move; maybe he is lying unconscious. Also, the person entrusted with the job of presenting a written statement, complete in all respects and on his way to the court, may meet with an accident. The illustrations can be multiplied. If the schedule of time as prescribed was to be followed as a rule of thumb, failure of justice may be occasioned, though for the delay, the defendant and his counsel may not be to blame at all. However, the learned counsel for Respondent 1 submitted that if the court was to take a liberal view of the provision and introduce elasticity into the apparent rigidity of the language, the whole purpose behind enacting Order 8 Rule 1 in the present form may be lost. It will be undoing the amendment and restoring the pre-amendment position, submitted the learned counsel.

40. We find some merit in the submissions made by the learned counsel for both the parties. In our opinion, the solution — and the correct position of law — lie somewhere midway and that is what we propose to do placing a reasonable construction on the language of Order 8 Rule 1.

41. Considering the object and purpose behind enacting Rule 1 of Order 8 in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the entire force and impact — the entire life and vigour — of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidate may succeed in enjoying the substantial part, if not in its entirety,

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the term for which he was elected even though he may lose the battle at the end. Therefore, the judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence.

42. Ordinarily, the time schedule prescribed by Order 8 Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order 8 Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.

43. A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled parameters, the court may indeed put the defendants on terms including imposition of compensatory costs and may also insist on an affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the court that the prayer was founded on grounds which do exist.

44. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, shall the defendant be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose: (*i*) to deter the defendant from seeking any extension of time just for the asking, and (*ii*) to compensate the plaintiff for the delay and inconvenience caused to him.

45. However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order 8 Rule 1 shall be the rule and departure therefrom an exception, made for satisfactory reasons only. We hold that Order 8 Rule 1, though couched in mandatory form, is directory being a provision in the domain of processual law.

46. We sum up and briefly state our conclusions as under:

(*i*) The trial of an election petition commences from the date of the receipt of the election petition by the court and continues till the date of

its decision. The filing of pleadings is one stage in the trial of an election petition. The power vesting in the High Court to adjourn the trial from time to time (as far as practicable and without sacrificing the expediency and interests of justice) includes power to adjourn the hearing in an election petition, affording opportunity to the defendant to file a written statement. The availability of such power in the High Court is spelled out by the provisions of the Representation of the People Act, 1951 itself and rules made for purposes of that Act and a resort to the provisions of CPC is not called for.

(*ii*) On the language of Section 87(1) of the Act, it is clear that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure contained in

CPC apply to the trial of election petitions under the Act with flexibility and only as guidelines.

(*iii*) In case of conflict between the provisions of the Representation of the People Act, 1951 and the rules framed thereunder or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the Constitution on the one hand, and the rules of procedure contained in CPC on the other hand, the former shall prevail over the latter.

(*iv*) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.

(*v*) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the

defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.

47. In the case at hand, the High Court felt satisfied that the reason assigned by the defendant-appellant in support of the prayer for extension of time was good and valid. However, the prayer was denied because the High Court felt it had no power to do so. The written statement has already been filed in the High Court. We direct that the written statement shall now be taken on record but subject to payment of Rs 5000 by way of costs payable by the appellant herein to Respondent 1 i.e. the election petitioner in the High Court, within a period of 4 weeks from today.

48. The appeal stands allowed in the above terms.

49. No order as to the costs in this appeal.

50. Before parting we would like to state that the issue raised in this appeal arises frequently before the courts and is of some significance affecting a large number of cases, and so, in spite of the parties being represented by learned counsel, we thought it fit to request Mr Rakesh Dwivedi, Senior Advocate and former Additional Solicitor General of India to assist the Court as *amicus curiae*. He responded to the call of the Court and presented the case from very many angles bringing to the notice of the

Court a volume of case-law some of which we have referred to hereinabove. We place on record our appreciation of the valuable assistance rendered by Mr Rakesh Dwivedi, Senior Advocate.

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[1] From the Judgment and Order dated 23-8-2004 of the Allahabad High Court in EP No. 1 of 2004

[1] 1957 SCR 370 : AIR 1957 SC 444

[2] 1959 Supp (2) SCR 516 : AIR 1959 SC 837

[3] (2003) 7 SCC 66

[4] AIR 1970 All 1 : 1969 All LJ 87 (FB)

[5] AIR 1958 MP 168 : 1958 MPLJ 426

[6] (1969) 1 SCR 630 : AIR 1969 SC 677

[7] (2005) 2 SCC 145 : JT (2005) 1 SC 50

[8] (1986) 4 SCC 27

[9] (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348

[10] (1975) 1 SCC 774

[11] (1976) 1 SCC 719 : 1976 SCC (L&S) 118

[12] (1984) 3 SCC 46

[13] (1955) 2 SCR 1 : AIR 1955 SC 425

[14] (2002) 6 SCC 33

[15] (2002) 6 SCC 635

(2020) 2 Supreme Court Cases 394 : (2020) 1 Supreme Court Cases (Civ) 545 : 2019 SCC OnLine SC 1493

In the Supreme Court of India

(BEFORE N.V. RAMANA, M.M. SHANTANAGOUDAR AND AJAY RASTOGI, JJ.)

ASHOK KUMAR KALRA . . Petitioner;

Versus

WING CDR. SURENDRA AGNIHOTRI AND OTHERS . . Respondents.

SLP (C) No. 23599 of 2018[1], decided on November 19, 2019

A. **Civil Procedure Code, 1908 — Or. 8 R. 6-A — Counterclaim — Scheme of Or. 8, explained — Legislative intention is to impose restrictions on belated filing of written statement, set-off and counterclaim under Or. 8 — Counterclaim is designed to avoid multiplicity of proceedings — Time -limit for filing counterclaim is not explicitly provided for — Only limitation as to accrual of cause of action is provided for**

— Filing of counterclaim after submission of written statement — Permissibility of — Held (*per curiam*), court has discretionary power to consider such belated counterclaim — Filing of counterclaim with substantial delay even though period under Limitation Act therefor had not elapsed — Whether permissible — Balanced approach of court in exercise of discretionary power where counterclaim is filed after submission of written statement, stressed — Factors to be considered for exercise of discretionary power, illustrated — Once issues have been framed, further held (*per curiam*), court cannot entertain belated counterclaim filed after submission of written statement

— *Per Shantanagoudar, J.* (*partly dissenting*), though the normal rule is that subsequent to filing of written statement, counterclaim cannot be filed after issues have been framed, under exceptional circumstances, counterclaim may be permitted to be filed after issues have been framed, but prior to commencement of recording of plaintiff's evidence

In suit for specific performance filed by Respondent 1-plaintiff, the appellant-Defendant 2 filed written statement. He then filed counterclaim in the same suit after framing of issues. The trial court rejected objections raised by Respondent 1-plaintiff and treated counterclaim as part of proceedings. However, the High Court quashed counterclaim of the appellant-Defendant 2. Hence, this appeal. During proceedings, clarification was sought from larger Bench whether a counterclaim could be filed after submission of the written statement.

Answering the reference in the terms below, the larger Bench

Held :

Per curiam

When the whole scheme of Order 8 CPC is looked at, it unequivocally points out at the legislative intent to advance the cause of justice by placing embargo on the belated filing of written statement, set-off and counterclaim.

(Para 12)

The time limitation for filing of the counterclaim, is not explicitly provided by the legislature, rather only limitation as to the accrual of the cause of action is provided. The right to file a counterclaim in a suit is explicitly limited by the embargo provided for the accrual of the cause of action under Order 8 Rule 6-A. Having said so, this does not mean that counterclaim can be filed at any time after filing of the written statement. As counterclaim is treated to be plaint, generally it needs to first of all be compliant with the limitation provided under the Limitation Act, 1963 as time-barred suits cannot be entertained under the guise of the counterclaim just because of the fact that the cause of action arose as per the parameters of Order 8 Rule 6-A.

(Para 17)

Jag Mohan Chawla v. *Dera Radha Swami Satsang*, (1996) 4 SCC 699; *Shanti Rani Das Dewanjee* v. *Dinesh Chandra Day*, (1997) 8 SCC 174; *Vijay Prakash Jarath* v. *Tej Prakash Jarath*, (2016) 11 SCC 800 : (2016) 4 SCC (Civ) 505; *Bollepanda P. Poonacha* v. *K.M. Madapa*, (2008) 13 SCC 179; *Ramesh Chand Ardawatiya* v. *Anil Panjwani*, (2003) 7 SCC 350, *summarised*

The whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6-A in Order 8 CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filing of the counterclaim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counterclaim has to be filed along with the written statement and beyond that, the court has no power. The courts, taking into consideration the reasons stated in support of the counterclaim, should adopt a balanced approach keeping in mind the object behind the amendment and to subserve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counterclaim has to be filed, by curtailing the discretion conferred on the courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counterclaim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. But however, the defendant cannot be permitted to file counterclaim after the issues are framed and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to CPC.

(Para 18)

Even if a counterclaim is filed within the limitation period, the trial court has to exercise its discretion to balance between the right to speedy trial and right to file counterclaim, so that the substantive justice is not defeated. The discretion vested with the trial court to ascertain the maintainability of the counterclaim is limited by various considerations based on facts and circumstances of each case. It has to be pointed out that there cannot be a straitjacket formula, rather there are numerous factors which need to be taken into consideration before admitting a counterclaim.

(Para 19)

Mahendra Kumar v. *State of M.P.*, (1987) 3 SCC 265, *limited*

Any contrary interpretation would lead to unnecessary curtailment of the right of a defendant to file counterclaim. The practical difficulties faced by the litigants across the country has to be recognised. Attaining the laudable goal of speedy justice itself cannot be the only end, rather effective justice wherein adequate opportunity is provided to all the parties, needs to be recognised as well.

(Para 20)

Salem Advocate Bar Assn. (2) v. *Union of India*, (2005) 6 SCC 344, *relied on*

Thus, Order 8 Rule 6-A CPC does not put an embargo on filing the counterclaim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counterclaim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the counterclaim, which is pegged till the issues are framed. The court in such cases has the discretion to entertain filing of the counterclaim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

(*i*) Period of delay.

(*ii*) Prescribed limitation period for the cause of action pleaded.

(*iii*) Reason for the delay.

(*iv*) Defendant's assertion of his right.

(*v*) Similarity of cause of action between the main suit and the counterclaim.

(*vi*) Cost of fresh litigation.

(*vii*) Injustice and abuse of process.

(*viii*) Prejudice to the opposite party.

(*ix*) And facts and circumstances of each case.

(*x*) In any case, not after framing of the issues.

(para 21)

Per Shantanagoudar, J. (partly supplementing and partly dissenting)

To ensure that the objective of introducing the statutory amendments with respect to counterclaims was not defeated, it was rightly held that a belated counterclaim raised by way of an amendment to the written statement (under Order 6 Rule 17 CPC) or as a subsequent pleading (under Order 8 Rule 9 CPC) should not be allowed after the framing of issues and commencement of trial.

(Para 51)

Bollepanda P. Poonacha v. *K.M. Madapa*, (2008) 13 SCC 179; *Ramesh Chand Ardawatiya* v. *Anil Panjwani*, (2003) 7 SCC 350, *considered*

It is crucial to note that even though the Court held that a counterclaim can be filed after the filing of a written statement, it must necessarily be filed before the issues are framed and the evidence is closed.

(Paras 52 to 54 and 58)

Gayathri Women's Welfare Assn. v. *Gowramma*, (2011) 2 SCC 330 : (2011) 1 SCC (Civ) 429; *Vijay Prakash Jarath* v. *Tej Prakash Jarath*, (2016) 11 SCC 800 : (2016) 4 SCC (Civ) 505, *explained* and *affirmed*

Rohit Singh v. *State of Bihar*, (2006) 12 SCC 734, *clarified*

Gowramma v. *Gayathri Women's Welfare Assn.*, 2008 SCC OnLine Kar 786, *held, reversed*

Rohit Singh v. *State of Bihar*, 2006 SCC OnLine SC 29, *referred to*

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Even though Rule 6-A CPC permits the filing of a counterclaim after the written statement, the court has the discretion to refuse such filing if it is done at a highly belated stage. However, to ensure speedy disposal of suits, propriety requires that such discretion should only be exercised till the framing of issues for trial. Allowing counterclaims beyond this stage would not only prolong the trial, but also prejudice the rights that may get vested with the plaintiff over the course of time.

(Para 56)

At the same time, in exceptional circumstances, to prevent multiplicity of proceedings and a situation of effective re-trial, the court may entertain a counterclaim even after the framing of issues, so long as the court has not started recording the evidence. This is because there is no significant development in the legal proceedings during the intervening period between framing of issues and commencement of recording of evidence. If a counterclaim is brought during such period, a new issue can still be framed by the court, if needed, and evidence can be recorded accordingly, without seriously prejudicing the rights of either party to the suit.

(Para 57)

There are several considerations that must be borne in mind while allowing the filing of a belated counterclaim. *First*, the court must consider that no injustice or irreparable loss is being caused to the defendant due to a refusal to entertain the counterclaim, or to the plaintiff by allowing the same. Of course, as the defendant would have the option to pursue his cause of action in a separate suit, the question of prejudice to the defendant would ordinarily not arise. *Second*, the interest of justice must be given utmost importance and procedure should not outweigh substantive justice. *Third*, the specific objectives of reducing multiplicity of litigation and ensuring speedy trials underlying the provisions for counterclaims, must be accorded due consideration.

(Para 59)

It is not mandatory for a counterclaim to be filed along with the written statement. The court, in its discretion, may allow a counterclaim to be filed after the filing of the written statement, in view of the considerations mentioned in the preceding paragraph. However, propriety requires that such discretion should ordinarily be exercised to allow the filing of a counterclaim till the framing of issues for trial. However, in exceptional circumstances, a counterclaim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff.

(Para 60)

Ashok Kumar Kalra v. *Surendra Agnihotri*, 2018 SCC OnLine SC 3497; *Surendra Agnihotri* v. *Moti Ram Jain*, 2018 SCC OnLine All 991; *Jai Jai Ram Manohar Lal* v. *National Building Material Supply*, (1969) 1 SCC 869, *cited*

B. **Civil Procedure Code, 1908 — Or. 8 R. 6-A, Or. 8 R. 9, Or. 8 R. 10 and Or. 6 R. 17 — Counterclaim — What is, object of permitting the same, and when may be filed — Reckoning of limitation for filing of counterclaim — Principles summarised — Power of courts to entertain belated counterclaim in light of Or. 8 R. 9, Or. 8 R. 10 and Or. 6 R. 17 examined — Outer limit for filing of belated counterclaim is until issues have been framed, but not after that (*per curiam*)**

— Held, *per Shantanagoudar, J.* (*supplementing*), R. 6-A(1) places categorical limitation on accrual of cause of action for counterclaim — Cause of action pertaining to counterclaim must arise either before or after filing of suit but before defendant has delivered his defence, that is, before filing of

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written statement, or before expiry of time period for delivering such defence — Under R. 6-A(2) counterclaim is akin to plaint in cross-suit so as to enable court to pronounce final judgment on original claim as well as counterclaim in the same suit itself — Or. 8 R. 6-A is carefully designed to meet purpose of avoiding multiplicity of proceedings

— R. 6-A(1) places limitation on time within which cause of action for counterclaim must arise — Besides this limitation, there is no explicit guidance under R. 6-A(1) as to time within which counterclaim itself must be filed — As per R. 6-A(4), counterclaim is governed by rules applicable to plaints — As plaint has to be presented within period prescribed under Limitation Act, 1963, period of limitation for counterclaim can be inferred from S. 3(2)(b)(ii) of Limitation Act — It means that limitation for filing of counterclaim, akin to plaint, depends upon nature of claim and is accordingly governed by period of limitation provided under Limitation Act, 1963

— Counterclaim can be filed if two conditions are met : (i) cause of action arises complying with Or. 8 R. 6-A(1); and (ii) it is filed within period of limitation as per Limitation Act — Or. 8 R. 6-A does not, by itself, specially require that counterclaim has to be filed along with written statement

— Under Or. 8 R. 9, court has discretion to allow any subsequent pleading as per terms it thinks fit — Such subsequent pleading or additional written statement may include counterclaim — Or. 8 R. 9 does not create bar on nature of claims that can be raised as subsequent pleadings — As long as court considers that it would be proper to allow counterclaim by way subsequent pleading, it is possible to file counterclaim after filing of written statement

— Under Or. 6 R. 17 belated counterclaim can be introduced by way of amendment — Like Or. 8 R. 9, under Or. 6 R. 17 filing of belated counterclaim through amendment is subject to leave of court — It is not granted to defendant as matter of right

— Under Or. 8 R. 10 court has discretion to pass any order that it deems fit if written statement is not filed within prescribed statutory limit — Applying same principle, court has power to condone delay in filing belated counterclaim

— Conjoint and harmonious reading of Or. 8 R. 6-A, Or. 8 R. 9, Or. 8 R. 10 and Or. 6 R. 17 reveals that court is vested with discretion to allow filing of counterclaim even after filing of written statement as long as same is filed within period of limitation prescribed under Limitation Act, 1963 — However, rules under Limitation Act which may allow filing of belated counterclaim up to long period of time, should not be used to defeat ends of justice — But see Shortnote *A* — the outer limit for filing of belated counterclaim is until issues have been framed, but not after that — Limitation Act, 1963 — S. 3 — Reckoning of limitation for filing of counterclaim

(Paras 28 to 50)

Salem Advocate Bar Assn. (2) v. *Union of India*, (2005) 6 SCC 344, *relied on*

Ramesh Chand Ardawatiya v. *Anil Panjwani*, (2003) 7 SCC 350; *Mahendra Kumar* v. *State of M.P.*, (1987) 3 SCC 265; *Shanti Rani Das Dewanjee* v. *Dinesh Chandra Day*, (1997) 8 SCC 174, *affirmed*

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C. **Civil Procedure Code, 1908 — Or. 8 Rr. 6-A and 6-B — Accrual of cause of action for filing of counterclaim — Need not necessarily be before filing of written statement — Applicability of Or. 8 R. 6-B, clarified — Conjoint and harmonious reading of provisions of Or. 8 — Necessity of, emphasised — Outer limit for filing of belated counterclaim is until issues have been framed, but not after that (*per curiam*)**

— Held, *per Shantanagoudar, J.* (*supplementing*), for filing of counterclaim, it is not necessary for accrual of cause of action therefor prior to filing of written statement — Reasons being : (i) it is possible that at the time of filing of written statement, defendant is unaware of facts giving rise to cause of action for his counterclaim; and (ii) perusal of Or. 8 R. 6-B suggests that it is only limited to cases where counterclaim is made along with written statement — Similarly, limited access to justice, especially in rural areas, shaped by socio-economic context of parties, may compel filing of belated counterclaims

— Where belated counterclaim is raised by way of amendment to written statement or as subsequent pleading, R. 6-B has no application — If technical interpretation of R. 6-B is relied on, then it would disallow filing of belated counterclaim — That would lead to multiplicity of proceedings — This would be contrary to objectives of introduction of Rr. 6-A to 6-G

— Provisions of Or. 8 must be read in conjoint and harmonious manner — R. 6-B cannot be read as limitation on court's discretion to permit filing of belated counterclaim — But *see* Shortnote *A* — the outer limit for filing of belated counterclaim is until issues have been framed, but not after that — Limitation Act, 1963 — S. 3 — Reckoning of limitation for filing of counterclaim

(Paras 42 to 46)

Shanti Rani Das Dewanjee v. *Dinesh Chandra Day*, (1997) 8 SCC 174, *affirmed*

Mahendra Kumar v. *State of M.P.*, (1987) 3 SCC 265, *affirmed on this point*

D. **Civil Procedure Code, 1908 — Or. 8 R. 6 and Or. 8 R. 6-A — Set-off and Counterclaim — Determination of period of limitation for filing of counterclaim — Applying period of limitation meant for set-off to counterclaims — Untenability of, as both are different in nature — Essential distinction between set-off and counterclaim, clarified — [As to principles for reckoning of limitation for filing of counterclaim, *see* Shortnotes *B* and *C*]**

— Held, *per Shantanagoudar, J.* (*supplementing*), nature of set-off and counterclaim is different — Set-off arises out of same transaction — For counterclaim transaction may be different — Further, there is no provision similar to R. 6-A(4) which provides for treating set-off as separate plaint — Limitation Act, 1963 — S. 3 — Reckoning of limitation for claiming set-off, and for filing of counterclaim — Distinguished

(Paras 45 and 46)

Gowramma v. *Gayathri Women's Welfare Assn.*, 2008 SCC OnLine Kar 786, *cited*

E. **Civil Procedure Code, 1908 — Or. 8 R. 6-A — Counterclaim — Legislative history, traced — Held (*per curiam*), R. 6-A was introduced by way of Code of Civil Procedure (Amendment) Act, 1976 — Before amendment, counterclaim or set-off could not be pleaded in suits other than money suits — To avoid multiplicity of proceedings, R. 6-A was inserted as per recommendation of Law Commission of India**

— Held, *per Shantanagoudar, J.* (*supplementing*), originally enacted CPC of 1908 did not provide statutory right to file counterclaim — Or. 8 pertained only to written statements and set-offs — Law Commission in its 27th Report and 54th Report, recommended for express provisions on counterclaims to avoid multiplicity of proceedings — Also to dispel ambiguity on whether counterclaims could be entertained at all — By Code of Civil Procedure (Amendment) Act, 1976, these recommendations of Law Commission were enacted — Through introduction of Rr. 6-A to 6-G under Or. 8, explicit right of filing counterclaim was accorded to defendant — Rules governing counterclaim were laid down

(Paras 13, 27 and 28)

F. **Jurisprudence — Procedural Law — Subservient nature of procedural justice to substantive justice, emphasised**

— There is a need to blend substantive justice and procedural justice to have effective, accurate and participatory judicial system — Procedural law is not tyrant but a servant of substantive justice — When courts set out to do justice, they should not lose sight of end goal amidst technicalities — Equity and justice should be foremost considerations while construing procedural rules, without nullifying object of the legislature in totality

(Paras 7, 14 and 50)

Salem Advocate Bar Assn. (2) v. *Union of India*, (2005) 6 SCC 344, *relied on*

G-D/63369/CV

Advocates who appeared in this case :

K.K. Tyagi, Sarvam Ritam Khare, Advocates, for the Petitioner;

Dinesh Dwivedi, Senior Advocate (Syed Hasan Isfahani, Krishnan Mishra, Yasharth Kant, Nishant Singh and Rohit Kr. Singh, Advocates) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. 2018 SCC OnLine SC 3497, *Ashok Kumar Kalra* v. *Surendra Agnihotri* — 401*c-d*, 401*d*, 401*d-e*, 402, 40
2. 2018 SCC OnLine All 991, *Surendra Agnihotri* v. *Moti Ram Jain* — 40
3. (2016) 11 SCC 800 : (2016) 4 SCC (Civ) 505, *Vijay Prakash Jarath* v. *Tej Prakash Jarath* — 406*a*, 41
4. (2011) 2 SCC 330 : (2011) 1 SCC (Civ) 429, *Gayathri Women's Welfare Assn.* v. *Gowramma* — 417*b-c*, 417*c*
5. 2008 SCC OnLine Kar 786, *Gowramma* v. *Gayathri Women's Welfare Assn.* **(held, reversed)** — 41
6. (2008) 13 SCC 179, *Bollepanda P. Poonacha* v. *K.M. Madapa* — 406*a-b*, 406*b-c*, 417*a*, 41
7. (2006) 12 SCC 734, *Rohit Singh* v. *State of Bihar* — 416*e-f*, 417*d-e*, 417*e*, 418*b*
8. 2006 SCC OnLine SC 29, *Rohit Singh* v. *State of Bihar* — 41
9. (2005) 6 SCC 344, *Salem Advocate Bar Assn. (2)* v. *Union of India* — 402*c*, 405*d*, 407*e*, 41
10. (2003) 7 SCC 350, *Ramesh Chand Ardawatiya* v. *Anil Panjwani* — 406*b*, 411*d-e*, 416*a*, 417*a*-417*c-d*, 41

11. (1997) 8 SCC 174, *Shanti Rani Das Dewanjee* v. *Dinesh Chandra Day* 406a, 41

12. (1996) 4 SCC 699, *Jag Mohan Chawla* v. *Dera Radha Swami Satsang* 40

13. (1987) 3 SCC 265, *Mahendra Kumar* v. *State of M.P.* 405e, 407b-c, 413a, 41

14. (1969) 1 SCC 869, *Jai Jai Ram Manohar Lal* v. *National Building Material Supply* 40

The Judgments of the Court were delivered by

N.V. RAMANA, J. (*for himself, Shantanagoudar and Rastogi, JJ.; Shantanagoudar partly supplementing and partly dissenting as well*)— Questions about procedural justice are remarkably persistent and usual in the life of Common Law Courts. However, achieving a perfect procedural system may be feasible or affordable, rather more manageable standards of meaningful participation needs to be aspired while balancing cost, time and accuracy at the same time.

2. The present reference placed before us arises out of the order dated 10-9-2018 passed by a two-Judge Bench of this Court, wherein clarification has been sought as to the interpretation of Order 8 Rule 6-A of the Civil Procedure Code (hereinafter referred to as "CPC"), regarding the filing of counterclaim by a defendant in a suit. The reference order dated 10-9-2018 is extracted below: (*Ashok Kumar Kalra*, SCC OnLine SC para 3)

> "3. The papers to be placed before the Hon'ble Chief Justice of India for constitution of a three-Judge Bench *to look into the effect of our previous judgments as well as whether the language of Order 8 Rule 6-A of the Civil Procedure Code is mandatory in nature.*"
>
> (emphasis supplied)

3. Before we proceed further, we need to allude to the brief factual background necessary for the disposal of this reference. A dispute arose between the petitioner (Defendant 2) and Respondent 1 (plaintiff) concerning performance of agreement to sell dated 20-11-1987 and 4-10-1989. Respondent 1 (plaintiff) filed the suit for specific performance against the petitioner (Defendant 2) on 2-5-2008. Petitioner (Defendant 2) herein filed a written statement on 2-12-2008 and counterclaim on 15-3-2009, in the same suit. By order dated 15-5-2009, the trial court rejected the objections, concerning filing of the counterclaim after filing of the written statement and framing of issues. Order dated 15-5-2009 was challenged before the High Court, in Civil Revision No. 253 of 2009 the High Court allowed the same and quashed the counterclaim. Aggrieved by the aforesaid order of the High

Court, the petitioner (Defendant 2) herein approached the Division Bench of this Court, which has referred the matter to a three-Judge Bench.

4. The learned counsel appearing on behalf of the petitioner submitted that the intent behind Order 8 Rule 6-A CPC is to provide an enabling provision for the filing of counterclaim so as to avoid multiplicity of proceedings, thereby saving the time of the courts and avoiding inconvenience to the parties. Therefore, no specific statutory bar or

embargo has been imposed upon the court's jurisdiction to entertain a counterclaim except the limitation under the said provision which provides that the cause of action in the counterclaim must arise either before or after the filing of the suit but before the defendant has delivered his defence. The learned counsel also submitted that if permitting the counterclaim would lead to protracting the trial and cause delay in deciding the suit, the court would be justified in exercising its discretion by not permitting the filing of the counterclaim. Relying on the judgments of this Court in *Salem Advocate Bar Assn. (2)* v. *Union of India*[1], and *Jai Jai Ram Manohar Lal* v. *National Building Material Supply*[1], the learned counsel lastly submitted that rules of procedure must not be interpreted in a manner that ultimately results in failure of justice.

5. On the other hand, the learned Senior Counsel for the respondent submitted that the language of the statute, and the scheme of the Order, indicates that the counterclaim has to be a part of the written statement. The learned Senior Counsel strengthened the above submission by relying on the statutory requirement that the cause of action relating to a counterclaim must arise before the filing of the written statement, and submitted that the counterclaim must therefore form a part of the written statement. The learned Senior Counsel also relied on the language of Order 8 Rule 6 CPC, which requires a defendant's claim to set-off to be a part of the written statement, to suggest that the same rules should also apply to the filing of a counterclaim, keeping in mind the placement of the provision relating to counterclaim in Order 8 Rule 6-A CPC.

6. We have heard the learned counsel on either side at length and perused the material available on record. In the light of the reference and the arguments advanced on behalf of the parties, the following issues arise for consideration before this Court:

6.1.(*i*) Whether Order 8 Rule 6-A CPC mandates an embargo on filing the counterclaim after filing the written statement?

6.2.(*ii*) If the answer to the aforesaid question is in the negative, then what are the restrictions on filing the counterclaim after filing of the written statement?

7. At the outset, there is no gainsaying that the procedural justice is imbibed to provide further impetus to the substantive justice. It is this extended procedural fairness provided by the national courts, which adds to the

legitimacy and commends support of the general public. On the other hand, we must be mindful of the legislative intention to provide for certainty and clarity. In the name of substantive justice, providing unlimited and unrestricted rights in itself will be detrimental to certainty and would lead to the state of lawlessness. In this regard, this Court needs to recognise and harmoniously stitch the two types of justice, so as to have an effective, accurate and participatory judicial system.

8. Having observed on nuances of procedural justice, we need to turn our attention to the Order 8 of the CPC, which deals with written statement, set-off and counterclaim. Rules 1 to 5 of Order 8 CPC deal with the written statement. This Order dealing with the written statement was amended extensively by the Code of Civil Procedure (Amendment) Act, 2002 (22 of 2002) (hereinafter referred to as "Act 22 of 2002"), whereby the defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence. In case he fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

9. Order 8 Rule 6 CPC specifies the particulars of set-off to be given in written statement and the same reads as under:

Order 8 Rule 6:

"**6. *Particulars of set-off to be given in written statement***.—(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the court, present a written statement containing the particulars of the debt sought to be set off.

(2) ***Effect of set-off***.—The written statement shall have the same effect as a plaint in a cross-suit so as to enable the court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off."

10. Order 8 Rule 6-A, which pertains to the counterclaim, reads as under:

Order 8 Rule 6-A:

"**6-A. *Counterclaim by defendant***.—(1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counterclaim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence

or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not:

Provided that such counterclaim shall not exceed the pecuniary limits of the jurisdiction of the court.

(2) Such counterclaim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counterclaim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counterclaim of the defendant within such period as may be fixed by the court.

(4) The counterclaim shall be treated as a plaint and governed by the rules applicable to plaints."

11. Thus, as per Order 8 Rule 6 CPC, the defendant can claim set-off of any ascertained sum of money legally recoverable by him from the plaintiff, against the plaintiff's demand, in a suit for recovery of money. Whereas, Rule 6-A deals with counterclaim by the defendant, according to which a defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counterclaim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after filing of the suit but before the defendant has delivered his defence or before the time prescribed for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not.

12. The counterclaim shall be treated as a plaint and governed by the rules applicable to plaints. Order 8 Rule 6-G says that the rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counterclaim. As per Rule 8, any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off or counterclaim may be raised by the defendant or plaintiff, as the case may be, in his written statement. Rule 9 of Order 8 prohibits presentation of pleadings subsequent to the written statement of a defendant other than by way of defence to set-off or counterclaim, except by the leave of the court.

and upon such terms as the court thinks fit; and the provision further stipulates that the court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same. This amendment with respect to subsequent pleadings was made to CPC by way of Act 22 of 2002. At the cost of repetition, we may note the conditions for filing a counterclaim under Order 8 Rule 6-A:

(*i*) Counterclaim can be for claim of damages or otherwise.

(*ii*) Counterclaim should relate to the cause of action, which may accrue before or even after filing the suit.

(*iii*) If the cause of action in the counterclaim relates to one accrued after filing of suit, it should be one accruing before filing of the written statement or the time given for the same.

When we look at the whole scheme of Order 8 CPC, it unequivocally points out at the legislative intent to advance the cause of justice by placing embargo on the belated filing of written statement, set-off and counterclaim.

13. We have to take note of the fact that Rule 6-A was introduced in CPC by the Code of Civil Procedure (Amendment) Act of 1976 (104 of 1976), and before the amendment, except in money suits, counterclaim or set-off could not be pleaded in other suits. As per the recommendation of the Law Commission of India, to avoid multiplicity of proceedings, the counterclaim by way of Rule 6-A was inserted in the Civil Procedure Code. The Statement of Objects and Reasons for enacting the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), were—

(1) A litigant should get a fair trial in accordance with the accepted principles of natural justice.

(2) Every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;

(3) The procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community who do not have the means to engage a pleader to defend their cases.

14. Before we proceed further, we deem it appropriate to note that any provision under the procedural law should not be construed in such a way that it would leave the court helpless (refer to *Salem Advocate Bar Assn. case*[3]). In fact, a wide discretion has been given to the civil court regarding the procedural elements of a suit. As held by this Court, procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice.

15. Now we need to observe certain earlier judgments of this Court which have dealt with Order 8 Rule 6-A. In *Mahendra Kumar* v. *State of M.P.*[4], (hereinafter referred to as *Mahendra Kumar case*), where the appeals were preferred against concurrent findings of the courts below in dismissing the counterclaim as barred under Section 14 of the Treasure Trove Act, 1878, this Court, while considering the scope of Rule 6-A(1) of Order 8 CPC, has held that on the face of it, Rule 6-A(1) does not bar the filing of a counterclaim by the defendant after he had filed the written statement. As the cause of action for the counterclaim had arisen before the filing of the written statement, the counterclaim was held to be maintainable. This Court further observed that under Article 113 of the Limitation Act, 1963, the period of limitation is three years from the date of the right to sue accrues, when the period of limitation is not provided elsewhere in the Schedule. As the counterclaim was filed within three years from the date of accrual of the right to sue, this Court held that the learned District Judge and the High Court were wrong in dismissing the counterclaim. The issue concerning applicability of limitation period for

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unterclaim was also discussed in *Jag Mohan Chawla* v. *Dera Radha Swami Satsang*[6] *anti Rani Das Dewanjee* v. *Dinesh Chandra Day*[7].

In *Vijay Prakash Jarath* v. *Tej Prakash Jarath*[8], this Court directed the court below to ain the counterclaim which was filed 2½ years after framing of issues, as the ce was still pending and this Court felt that no prejudice would be caused to the f. However, in *Bollepanda P. Poonacha* v. *K.M. Madapa*[9] (hereinafter referred as *anda Poonacha case*"), this Court while referring to *Ramesh Chand Ardawatiya* v. *anjwani*[10], discouraged the belated filing of counterclaims. Further, the Court ted on the serious harm caused by allowing such delayed filing. In any case, in *nda P. Poonacha*[9], the Court could not expound any further as the counterclaim was d on the basis that the cause of action had arisen after the filing of the written ent.

The time limitation for filing of the counterclaim, is not explicitly provided by the ure, rather only limitation as to the accrual of the cause of action is provided. As in the above precedents, further complications stem from the fact that there is a lity of amending the written statement. However, we can state that the right to file terclaim in a suit is explicitly limited by the embargo provided for the accrual of the of action under Order 8 Rule 6-A. Having said so, this does not mean that rclaim can be filed at any time after filing of the written statement. As counterclaim ted to be plaint, generally it needs to first of all be compliant with the limitation ed under the Limitation Act, 1963 as the time-barred suits cannot be entertained the guise of the counterclaim just because of the fact that the cause of action arose the parameters of Order 8 Rule 6-A.

As discussed by us in the preceding paragraphs, the whole purpose of the ural law is to ensure that the legal process is made more effective in the process of ing substantial justice. Particularly, the purpose of introducing Rule 6-A in Order 8 to avoid multiplicity of proceedings by driving the parties to file separate suit and at the dispute between the parties is decided finally. If the provision is interpreted a way, to allow delayed filing of the counterclaim, the provision itself becomes lant and the purpose for which the amendment is made will be defeated and ely it leads to flagrant miscarriage of justice. At the same time, there cannot be a nd hyper-technical approach that the provision stipulates that the counterclaim has iled along with the written statement and beyond that, the court has no power. The taking into consideration the reasons stated in support of the counterclaim, should a balanced approach keeping in mind the object behind the amendment and to ve the ends of justice. There cannot be any hard and fast rule to say that in a lar time the counterclaim has

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filed, by curtailing the discretion conferred on the courts. The trial court has to e the discretion judiciously and come to a definite conclusion that by allowing the rclaim, no prejudice is caused to the opposite party, process is not unduly delayed e same is in the best interest of justice and as per the objects sought to be ed through the amendment. But however, we are of the considered opinion that the ant cannot be permitted to file counterclaim after the issues are framed and after it has proceeded substantially. It would defeat the cause of justice and be ental to the principle of speedy justice as enshrined in the objects and reasons for

rticular amendment to CPC.

In this regard having clarified the law, we may note that *Mahendra Kumar case*[5] to be understood and restricted to the facts of that case. We may note that even if a rclaim is filed within the limitation period, the trial court has to exercise its ion to balance between the right to speedy trial and right to file counterclaim, so e substantive justice is not defeated. The discretion vested with the trial court to ain the maintainability of the counterclaim is limited by various considerations based ts and circumstances of each case. We may point out that there cannot be a cket formula, rather there are numerous factors which needs to be taken into eration before admitting a counterclaim.

We may note that any contrary interpretation would lead to unnecessary ment of the right of a defendant to file counterclaim. This Court needs to recognise actical difficulties faced by the litigants across the country. Attaining the laudable f speedy justice itself cannot be the only end, rather effective justice wherein ate opportunity is provided to all the parties, need to be recognised as well (refer to *Advocate Bar Assn. case*[3]).

We sum up our findings, that Order 8 Rule 6-A CPC does not put an embargo on he counterclaim after filing the written statement, rather the restriction is only with t to the accrual of the cause of action. Having said so, this does not give absolute o the defendant to file the counterclaim with substantive delay, even if the on period prescribed has not elapsed. The court has to take into consideration the imit for filing the counterclaim, which is pegged till the issues are framed. The court cases have the discretion to entertain filing of the counterclaim, after taking into eration and evaluating inclusive factors provided below which are only illustrative, not exhaustive:

i) Period of delay.

ii) Prescribed limitation period for the cause of action pleaded.

iii) Reason for the delay.

iv) Defendant's assertion of his right.

v) Similarity of cause of action between the main suit and the counterclaim.

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vi) Cost of fresh litigation.

vii) Injustice and abuse of process.

viii) Prejudice to the opposite party.

ix) And facts and circumstances of each case.

x) In any case, not after framing of the issues.

We answer the reference accordingly. The instant special leave petition may be before an appropriate Bench after obtaining orders from the Hon'ble Chief Justice of for considering the case on merits.

. Shantanagoudar, J. (*partly supplementing and partly dissenting*)— I have read inion given in this reference by my learned Brothers. I agree with their conclusion court may exercise its discretion and permit the filing of a counterclaim after the statement, till the stage of framing of the issues of the trial. However, in addition , I find that in exceptional circumstances, the subsequent filing of a counterclaim e permitted till the stage of commencement of recording of the evidence on behalf plaintiff. I deem it fit to state the reasons for arriving at this conclusion through this .

24. This reference arises out of the order of this Court dated 10-9-2018 in *Ashok Kumar Kalra* v. *Surendra Agnihotri*[1], which states as follows: (SCC OnLine SC para 3)

"*3.* The papers to be placed before the Hon'ble Chief Justice of India for constitution of a three-Judge Bench to look into the effect of our previous judgments as well as whether the language of Order 8 Rule 6-A of the Code of Civil Procedure is mandatory in nature."

25. Essentially, in light of the previous judgments of this Court, the question referred to this Court is whether it is mandatory for a counterclaim of the defendant to be filed along with the written statement.

26. The counsel for both parties argued about the scope of Order 8 Rule 6-A of the Code of Civil Procedure, 1908 (hereinafter "CPC") and whether a counterclaim must necessarily be filed along with the written statement. Since the arguments have been elaborated upon by my learned Brother Judge, they are not reproduced herein for the sake of brevity.

27. To fully understand the expanse of the legal questions in this case, it is essential to appreciate the context in which the rules relating to counterclaims were introduced in the CPC. The originally enacted CPC of 1908 did not provide a statutory right to file a counterclaim. At that time, Order 8 only pertained to written statements and set-offs. Taking note of this omission, the Law Commission of India, in its 27th and 54th Reports, had recommended that express provisions on counterclaims should be included in CPC to avoid multiple proceedings and to dispel ambiguity on whether counterclaims could be entertained at all. These recommendations were implemented through the Code of Civil Procedure (Amendment) Act, 1976, which introduced the following rules to Order 8 CPC:

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"**6-A.** ***Counterclaim by defendant.***—(1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counterclaim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not:

Provided that such counterclaim shall not exceed the pecuniary limits of the jurisdiction of the court.

(2) Such counterclaim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counterclaim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counterclaim of the defendant within such period as may be fixed by the court.

(4) The counterclaim shall be treated as a plaint and governed by the rules applicable to plaints.

6-B. ***Counterclaim to be stated.***—Where any defendant seeks to rely upon any ground as supporting a right of counterclaim, he shall, in his written statement, state specifically that he does so by way of counterclaim.

6-C. ***Exclusion of counterclaim.***—Where a defendant sets up a counterclaim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counterclaim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counterclaim, apply to the court for an order that such counterclaim may be excluded, and the court may, on the hearing of such application make such order as it thinks fit.

6-D. ***Effect of discontinuance of suit.***—If in any case in which the defendant sets

up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.

6-E. *Default of plaintiff to reply to counterclaim*.—If the plaintiff makes default in putting in a reply to the counterclaim made by the defendant, the court may pronounce judgment against the plaintiff in relation to the counterclaim made against him, or make such order in relation to the counterclaim as it thinks fit.

6-F. *Relief to defendant where counterclaim succeeds*.—Where in any suit a set -off or counterclaim is established as a defence against the plaintiff's claim, and any balance is found due to the plaintiff or the defendant, as the case may be, the court may give judgment to the party entitled to such balance.

6-G. *Rules relating to written statement to apply*.—The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counterclaim."

28. For the first time, through the introduction of Rules 6-A to 6-G of Order 8, an explicit right of filing a counterclaim was accorded to the defendant, and rules governing the same were laid down. In this scheme, Rule 6-A(1) is the cornerstone provision. It specifically grants the right of filing a counterclaim.

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In addition to this, it also places a categorical limitation on the accrual of the cause of action for a counterclaim. This is in the form of the requirement that the cause of action pertaining to the counterclaim must arise either before or after the filing of the suit, but before the defendant has delivered his defence (i.e. before the filing of the written statement), or before the expiry of the time period for delivering such defence.

29. Further, under Rule 6-A(2), a counterclaim is stated to have the same effect as the plaint in a cross-suit, so as to enable the court to pronounce a final judgment on the original claim as well as the counterclaim in the same suit itself. Thus, it is evident that Rule 6-A has been carefully designed to meet the purpose of avoiding multiplicity of proceedings.

30. It is clear that Rule 6-A(1) only places a limitation on the time within which the cause of action for a counterclaim must arise. Besides this limitation, there is no explicit guidance in Rule 6-A(1) as to the time within which the counterclaim itself must be filed. In this respect, Rule 6-A(4) provides that a counterclaim is governed by the rules applicable to plaints. It is well established that a plaint must be presented within the period prescribed under the Limitation Act, 1963 (hereinafter "the Limitation Act"). For counterclaims as well, the period within which they must be filed can be inferred from Section 3(2)(*b*)(*ii*) of the Limitation Act, 1963, which states thus:

"**3. (2)** For the purposes of this Act—

(*b*) *any claim by way of a set-off or a counterclaim, shall be treated as a separate suit* and shall be deemed to have been instituted—

(*ii*) in the case of a counterclaim, on the date on which the counterclaim is made in court;"

(emphasis supplied)

This provision mandates that in order to determine the limitation period applicable to a counterclaim, it must be treated as a separate suit, which is deemed to have been instituted on the date on which it is made in the court. Thus, evidently, in consonance with the provisions of Order 8 Rule 6-A(4), the Limitation Act also treats a counterclaim like a plaint. This means that much like a plaint, the limitation for filing a counterclaim also depends on the nature of the claim and is accordingly governed by the period of limitation stipulated in the Limitation Act.

31. From the foregoing discussion, it is clear that a counterclaim can be filed if two

conditions are met: *first*, its cause of action complies with Order 8 Rule 6-A(1); and *second*, it is filed within the period specified under the Limitation Act. Clearly, by itself, Rule 6-A does not specifically require that a counterclaim has to be filed along with the written statement. In the absence of a particular mandate under this Rule, it is necessary to look to other provisions of CPC to determine whether a counterclaim can be filed after a written statement.

32. It would be appropriate to begin with a reference to Order 8 Rule 9, which states thus:

> "**9. *Subsequent pleadings***.—No pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counterclaim shall be presented except by the leave of the court and upon such

terms as the court thinks fit; but the court may at any time require a written statement *or additional written statement from any of the parties* and fix a time of not more than thirty days for presenting the same."

(emphasis supplied)

According to this Rule, after the filing of the written statement, it is open to plead a defence to a set-off or counterclaim without the leave of the court. However, any other pleading sought to be filed after the written statement requires the leave of the court. The Rule also vests the court with a discretion to allow filing of a written statement or additional written statement within a period not exceeding thirty days.

33. A plain reading of Order 8 Rule 9 makes it clear that the court has the discretion to allow any subsequent pleading upon such terms as it thinks fit. It is important to appreciate here that such subsequent pleading or additional written statement may include a counterclaim. This is because Rule 9 does not create a bar on the nature of claims that can be raised as subsequent pleadings. As long as the court considers that it would be proper to allow a counterclaim by way of a subsequent pleading, it is possible to file a counterclaim after filing the written statement.

34. In addition to this, it is also possible to introduce a belated counterclaim by way of an amendment to the original written statement under Order 6 Rule 17 CPC. However, as is the case with Order 8 Rule 9, the filing of such a counterclaim through an amended written statement is subject to the leave of the court, and not accorded to the defendant *as a matter of right*.

35. In this regard, it would be relevant to note the observations of this Court in *Ramesh Chand Ardawatiya* v. *Anil Panjwani*[10]: (SCC p. 367, para 28)

> "*28*. Looking to the scheme of Order 8 as amended by Act 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counterclaim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counterclaim which in the light of Rule 1 read with Rule 6-A would be a counterclaim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. *Secondly, a counterclaim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counterclaim may be filed by way of a subsequent pleading under Rule 9*. In the latter two cases the counterclaim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the court, either under Order 6 Rule 17 CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the court under Order 8 Rule 9 CPC if sought to be placed on record by way of subsequent pleading."

(emphasis supplied)

I fully agree with this proposition, and affirm on the basis of the foregoing discussion that

the court has the discretion to allow a counterclaim to be filed after the written statement in exercise of its power under Order 8 Rule 9 and Order 6 Rule 17 CPC.

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36. It can also be gleaned from Order 8 Rule 10 that it is permissible to file a belated counterclaim under the scheme of Order 8 CPC:

> "**10. *Procedure when party fails to present written statement called for by court***.—Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the court, as the case may be, the court shall pronounce judgment against him, *or make such order in relation to the suit as it thinks fit* and on the pronouncement of such judgment a decree shall be drawn up."
>
> (emphasis supplied)

Under this Rule, the court is afforded with the discretion to pass any order that it deems fit in the event that a written statement is not filed within the prescribed statutory limit. To determine whether this discretion extends to allowing the filing of a belated counterclaim as well, it would be useful to appreciate the scope of the discretion accorded under this provision.

37. In *Salem Advocate Bar Assn. (2)* v. *Union of India*[1], this Court, while construing the nature of Order 8 Rule 1, relied on the broad discretionary power under Order 8 Rule 10, and observed as follows: (SCC p. 364, para 21)

> "*21.* In construing this provision, support can also be had from Order 8 Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the court, the court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. ... In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. *The effect would be that under Rule 10 Order 8, the court in its discretion would have the power to allow the defendant to file written statement even after expiry of the period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to 'make such order in relation to the suit as it thinks fit'*. Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory."
>
> (emphasis supplied)

Thus, under Order 8 Rule 10, the court has the power to condone the delay in filing of a written statement, if it deems it fit in the facts and circumstances of the case. If it is so, there is no reason as to why the delay in filing a counterclaim cannot be condoned by the court as well.

38. A conjoint and harmonious reading of Rules 6-A, 9 and 10 of Order 8 as well as Order 6 Rule 17 CPC thus reveals that the court is vested with the discretion to allow the filing of a counterclaim even after the filing of the written statement, as long as the same is within the limitation prescribed under the Limitation Act, 1963. In this regard, I agree with the propositions laid down in the decisions discussed below.

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39. In *Mahendra Kumar* v. *State of M.P.*[5], it was held that: (SCC pp. 272-73, para 15)

"*15*. The next point that remains to be considered is whether Rule 6-A(1) of Order 8 of the Code of Civil Procedure bars the filing of a counterclaim after the filing of a written statement. This point need not detain us long, *for Rule 6-A(1) does not, on the face of it, bar the filing of a counterclaim by the defendant after he had filed the written statement*. What is laid down under Rule 6-A(1) is that a counterclaim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6-A(1) in holding that as the appellants had filed the counterclaim after the filing of the written statement, the counterclaim was not maintainable. ... Under Article 113 of the Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues, has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counterclaim, which is treated as a suit under Section 3(2)(*b*) of the Limitation Act has been filed by the appellants within three years from the date of accrual to them of the right to sue."

(emphasis supplied)

40. In *Shanti Rani Das Dewanjee* v. *Dinesh Chandra Day*[2], it was held that the right to file a counterclaim is referable to the date of accrual of the cause of action: (SCC p. 175, para 2)

"*2*. In our view, the impugned decision does not warrant interference. Such question was specifically raised before this Court in *Mahendra Kumar* v. *State of M.P.*[5] It has been held by this Court that right to file a counterclaim under Order 8 Rule 6-A of the Code of Civil Procedure is referable to the date of accrual of the cause of action. If the cause of action had arisen before or after the filing of the suit, and such cause of action continued up to the date of filing written statement or extended date of filing written statement, *such counterclaim can be filed even after filing the written statement*. The said Civil Case No. 248 of 1982, in which the application under Order 8 Rule 6-A has been filed by the defendant-respondents was instituted on 15-7-1982 and the application under Order 8 Rule 6-A was presented on 22-6-1985. It cannot be held that the cause of action for the suit or counterclaim was ex facie barred by limitation under the Limitation Act."

(emphasis supplied)

41. I am unable to persuade myself to arrive at a different conclusion than the one found in the aforementioned judgments.

42. It was argued by the counsel for the respondent that Order 8 Rule 6-A(1) requires that the cause of action for a counterclaim should arise before the filing of the written statement, and hence it is logical that the counterclaim,

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or the grounds upon which it is based, should also find a mention in the written statement. To support this, he relied on Order 8 Rule 6-B, which states that a defendant seeking to rely upon any ground in support of his right of counterclaim, shall specifically state in his written statement that he does so by way of a counterclaim.

43. I do not agree with this view for two reasons:

43.1. *First*, it is possible that at the time of filing the written statement, the defendant is unaware of the facts giving rise to the cause of action for his counterclaim. For instance, in a suit for declaration of title brought by the plaintiff against his sister, the defendant may be unaware that the plaintiff has wrongfully detained her belongings kept at the said property, at the time of filing her written statement. In such a situation, even though the

cause of action for her counterclaim of wrongful detention of belongings may have arisen *before* the filing of the written statement, it may not have been possible for her to raise the said counterclaim. Similarly, limited access to justice, especially in rural areas, shaped by the socio-economic context of parties, may compel the filing of belated counterclaims.

43.2. *Second*, a perusal of Order 8 Rule 6-B suggests that it is only limited to cases where the counterclaim is made along with the written statement. In instances where a belated counterclaim is raised by way of an amendment to the written statement, or as a subsequent pleading, Rule 6-B cannot be said to be applicable. This is because in any such case, if the court relies on a technical interpretation of Rule 6-B to disallow the filing of a belated counterclaim, the defendant would still be free to file a fresh suit for such a claim. He may, in such matters, after filing the separate suit, request the court to club the suits or to hear them simultaneously. This may further delay the process of adjudication and would certainly not help the plaintiff in the first suit, who may have opposed the filing of the belated counterclaim. Such multiplicity of proceedings goes against the object with which Rules 6-A to 6-G were introduced to CPC. Thus, the provisions under Order 8 should not be read in isolation, but in a conjoint and harmonious manner, and Rule 6-B cannot be read as a limitation on the court's discretion to permit the filing of a belated counterclaim.

44. Therefore, I do not find force in the argument raised by the counsel for the respondent.

45. Further, the contention that the limitation on filing of set-offs under Order 8 Rule 6 should be read into Rule 6-A(1) is untenable. The nature of a set-off and a counterclaim is different. For instance, a set-off must necessarily be of the same nature as the claim of the plaintiff and arise out of the same transaction. These requirements do not hold for counterclaims, which may be related to "*any right or claim in respect of a cause of action accruing to the defendant against the plaintiff*" as stated in Order 8 Rule 6-A(1). Further, in case of set-offs, there is no provision akin to Order 8 Rule 6-A(4), which provides that a set-off must be treated as a plaint. Thus, it appears that the legislature has consciously considered it fit to omit a specific time-limit for filing of counterclaims in Rule 6-A. In such a scenario, a limitation cannot be read into this Rule.

46. Lastly, as regards the respondent's reliance on Order 8 Rule 1-A, which requires the documents in support of a counterclaim to be presented along with the written statement itself, I am of the view that this requirement should not be read as being mandatory. Rule 1-A(2) itself provides instances where such documents are not in the possession of the defendant, by requiring him to specify the person in whose possession the documents rest. Accordingly, Rule 1-A(3) (as amended in 2002) also provides that these documents may be produced later, with the leave of the court. The discretion accorded in these provisions goes on to support the conclusion that it is possible to file a counterclaim even after the written statement, with the leave of the court.

47. Finally, then, the scope of discretion vested with the court under Order 6 Rule 17 and Order 8 Rule 9 to allow for belated counterclaims remains to be examined. It must be determined when it may be proper for the court to refuse a belated counterclaim, in spite of it being permissible within the scheme of Order 8 Rule 6-A and the Limitation Act, 1963.

48. In several cases, it is possible that the period of limitation for filing of counterclaims may extend up to a long period of time and prolong the trial. For instance, in a suit for declaration of title, the defendant may bring a counterclaim for possession of the immovable property based on previous possession. In terms of Order 8 Rule 6-A, such a claim would be admissible as long as the dispossession had occurred before the filing of

the written statement, or before the expiry of the time provided for filing of the written statement. However, as per the Limitation Act, such a claim would be valid even if it were brought within twelve years from the date of the defendant's dispossession.

49. In such a situation, it is possible that by the time the counterclaim is brought, the issues in the original suit have already been framed, the evidence led, arguments made, and the judgment reserved. Allowing a counterclaim to be filed at this stage would effectively result in a re-trial of the suit, since the court would have to frame new issues, both parties would have to lead evidence, and only then would the judgment be pronounced. If this is permitted, the very purpose of allowing counterclaims i.e. avoiding multiplicity of litigation, would be frustrated.

50. It is well settled that procedural rules should not be interpreted so as to defeat justice, rather than furthering it. This is because procedural law is not meant to serve as a tyrant against justice, but to act as a lubricant in its administration. Thus, when courts set out to do justice, they should not lose sight of the end goal amidst technicalities. In some cases, this means that rules that have traditionally been treated as mandatory, may be moulded so that their object and substantive justice is not obstructed. It would be apposite to remember that equity and justice should be the foremost considerations while construing procedural rules, without nullifying the object of the legislature in totality. Thus, rules under the Limitation Act which may allow for filing of a belated counterclaim up to a long period of time, should not be used to defeat the ends of justice.

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51. Keeping this in mind, in *Ramesh Chand Ardawatiya*[10], this Court considered the scope of discretion in allowing for belated counterclaims. It is useful to refer to the observations made by the Court in the context of Order 8 Rule 6-A (as it was in 1976): (SCC pp. 367-68, para 28)

> "*28.* ... The purpose of the provision enabling filing of a counterclaim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counterclaims, that is, all disputes between the same parties being decided in the course of the same proceedings. *If the consequence of permitting a counterclaim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in exercising its discretion not in favour of permitting a belated counterclaim.* The framers of the law never intended the pleading by way of counterclaim being utilised as an instrument for forcing upon a reopening of the trial or pushing back the progress of proceeding. *Generally speaking, a counterclaim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced.* ... A refusal on the part of the court to entertain a belated counterclaim may not prejudice the defendant because in spite of the counterclaim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counterclaim."
>
> (emphasis supplied)

To ensure that the objective of introducing the statutory amendments with respect to counterclaims was not defeated, it was rightly held that a belated counterclaim raised by way of an amendment to the written statement (under Order 6 Rule 17) or as a subsequent pleading (under Order 8 Rule 9) should not be allowed after the framing of issues and commencement of trial.

52. Later, in *Rohit Singh* v. *State of Bihar*[11], this Court read in a similar limitation on the filing of belated counterclaims: (SCC p. 743, para 18)

> "*18.* ... A counterclaim, no doubt, could be filed even after the written statement is filed, *but that does not mean that a counterclaim can be raised after issues are framed and the evidence is closed*. Therefore, the entertaining of the so-called counterclaim of Defendants 3 to 17 by the trial court, after the framing of issues for trial, was clearly illegal and without jurisdiction. On that short ground, the so-called counterclaim, filed by Defendants 3 to 17 has to be held to be not maintainable."
>
> (emphasis supplied)

It is crucial to note that even though the Court held that a counterclaim can be filed after the filing of a written statement, it must *necessarily* be filed before the issues are framed and the evidence is closed. In fact, since the counterclaim

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in the said matter was filed at the stage where the judgment was reserved[12], the Court went as far as saying that entertaining such a claim was illegal and without jurisdiction.

53. The decision of this Court in *Bollepanda P. Poonacha* v. *K.M. Madapa*[9], is also significant in this regard. Referring to *Ramesh Chand Ardawatiya*[10], it acknowledged that belated counterclaims were to be discouraged, and called upon the Court to consider questions of serious injustice and irreparable loss while permitting any such claim. However, in *Bollepanda*[9], the Court did not have an occasion to expound further on this proposition, as the counterclaim had been rejected on the basis that its cause of action had arisen after the filing of the written statement.

54. It was in *Gayathri Women's Welfare Assn.* v. *Gowramma*[13], that this Court once again had the occasion to look into the filing of a belated counterclaim. In this case, filing of the initial counterclaim was not in challenge. Instead, the Court was considering the effect of an amendment to an existing counterclaim. While the trial court had refused to allow such an amendment, the High Court had granted[14] the same. Reiterating the concerns noted in *Ramesh Chand Ardawatiya*[10], this Court held as follows: (*Gowramma case*[13], SCC p. 343, para 44)

> "*44.* The matter herein symbolises the concern highlighted by this Court in *Ramesh Chand*[10]. Permitting a counterclaim at this stage would be to reopen a decree which has been granted in favour of the appellants by the trial court. The respondents have failed to establish any factual or legal basis for modification/nullifying the decree of the trial court."

The Court also relied on *Rohit Singh*[11] and observed that a counterclaim cannot be filed after the framing of issues.

55. In *Vijay Prakash Jarath* v. *Tej Prakash Jarath*[8], this Court further refined the limitation in *Rohit Singh*[11] that counterclaims cannot be raised after the issues are framed and the evidence is closed. In the said case, even though the issues had been framed, and the case was in the early stages of recording of the plaintiff's evidence, a counterclaim filed at that point was allowed, as no prejudice was caused to the plaintiff.

56. The above discussion lends support to the conclusion that even though Rule 6-A permits the filing of a counterclaim after the written statement, the court has the discretion to refuse such filing if it is done at a highly belated stage. However, in my considered opinion, to ensure speedy disposal of suits, propriety requires that such discretion should only be exercised till the framing of issues for trial. Allowing counterclaims beyond this stage would not only

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prolong the trial, but also prejudice the rights that may get vested with the plaintiff over the course of time.

57. At the same time, in exceptional circumstances, to prevent multiplicity of proceedings and a situation of effective re-trial, the court may entertain a counterclaim even after the framing of issues, so long as the court has not started recording the evidence. This is because there is no significant development in the legal proceedings during the intervening period between framing of issues and commencement of recording of evidence. If a counterclaim is brought during such period, a new issue can still be framed by the court, if needed, and evidence can be recorded accordingly, without seriously prejudicing the rights of either party to the suit.

58. At this juncture, I would like to address the observation in *Rohit Singh*[11] that a counterclaim, if filed after the framing of the issues and closing of the evidence, would be illegal and without jurisdiction. In my opinion, this is not a correct statement of law, as the filing of counterclaims after the commencement of recording of evidence is not illegal *per se*. However, I hasten to add that permitting such a counterclaim would be improper, as the court's discretion has to be exercised wisely and pragmatically.

59. There are several considerations that must be borne in mind while allowing the filing of a belated counterclaim:

59.1. *First*, the court must consider that no injustice or irreparable loss is being caused to the defendant due to a refusal to entertain the counterclaim, or to the plaintiff by allowing the same. Of course, as the defendant would have the option to pursue his cause of action in a separate suit, the question of prejudice to the defendant would ordinarily not arise.

59.2. *Second*, the interest of justice must be given utmost importance and procedure should not outweigh substantive justice.

59.3. *Third*, the specific objectives of reducing multiplicity of litigation and ensuring speedy trials underlying the provisions for counterclaims, must be accorded due consideration.

60. Having considered the previous judgments of this Court on counterclaims, the language employed in the rules related thereto, as well as the intention of the legislature, I conclude that it is not mandatory for a counterclaim to be filed along with the written statement. The court, in its discretion, may allow a counterclaim to be filed after the filing of the written statement, in view of the considerations mentioned in the preceding paragraph. However, propriety requires that such discretion should ordinarily be exercised to allow the filing of a counterclaim till the framing of issues for trial. To this extent, I concur with the conclusion reached by my learned Brothers. However, for the reasons stated above, I am of the view that in exceptional circumstances, a counterclaim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence on behalf of the plaintiff.

61. The reference is answered accordingly.

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* Arising from the Judgment and Order in *Surendra Agnihotri* v. *Moti Ram Jain*, 2018 SCC OnLine All 991 (Allahabad High Court, Civil Revision No. 253 of 2009, dt. 1-5-2018)

' **Ed.**: The Judgment of the Court was delivered by Ramana, J., for himself, Shantanagoudar and Rastogi, JJ. Shantanagoudar, J. delivered a partly supplementing and partly dissenting opinion as well.

[1] *Ashok Kumar Kalra* v. *Surendra Agnihotri*, 2018 SCC OnLine SC 3497

[2] *Surendra Agnihotri* v. *Moti Ram Jain*, 2018 SCC OnLine All 991

[3] *Salem Advocate Bar Assn. (2)* v. *Union of India*, (2005) 6 SCC 344 : AIR 2005 SC 3353

[4] *Jai Jai Ram Manohar Lal* v. *National Building Material Supply*, (1969) 1 SCC 869

[5] *Mahendra Kumar* v. *State of M.P.*, (1987) 3 SCC 265

[6] *Jag Mohan Chawla* v. *Dera Radha Swami Satsang*, (1996) 4 SCC 699

[7] *Shanti Rani Das Dewanjee* v. *Dinesh Chandra Day*, (1997) 8 SCC 174

[8] *Vijay Prakash Jarath* v. *Tej Prakash Jarath*, (2016) 11 SCC 800 : (2016) 4 SCC (Civ) 505

[9] *Bollepanda P. Poonacha* v. *K.M. Madapa*, (2008) 13 SCC 179

[10] *Ramesh Chand Ardawatiya* v. *Anil Panjwani*, (2003) 7 SCC 350

[11] *Rohit Singh* v. *State of Bihar*, (2006) 12 SCC 734

[12] *Rohit Singh* v. *State of Bihar*, 2006 SCC OnLine SC 29

[13] *Gayathri Women's Welfare Assn.* v. *Gowramma*, (2011) 2 SCC 330 : (2011) 1 SCC (Civ) 429

[14] *Gowramma* v. *Gayathri Women's Welfare Assn.*, 2008 SCC OnLine Kar 786

(1955) 2 SCR 1 : AIR 1955 SC 425 : 10 ELR 293

In the Supreme Court of India

(BEFORE VIVIAN BOSE, B. JAGANNADHADAS AND B.P. SINHA, JJ.)

SANGRAM SINGH ... Appellant;

Versus

1. ELECTION TRIBUNAL, KOTAH
2. BHUREY LAL BAYA ... Respondents.

Civil Appeal No. 214 of 1954*, decided on March 22, 1955

Advocates who appeared in this case:

R.K. Rastogi and Ganpat Rai, Advocates, for the Appellant;

R.C. Prasad, Advocate for S.L. Chhibber Advocate, for Respondent 2.

The Judgment of the Court was delivered by

VIVIAN BOSE, J.— The second respondent Bhurey Lal filed an election petition under Section 100 of the Representation of the People Act against the appellant Sangram Singh and two others for setting aside Sangram Singh's election.

2. The proceedings commenced at Kotah and after some hearings the Tribunal made an order on 11-12-1952 that the further sittings would be at Udaipur from 16th to 21st March, 1953. It was discovered later that the 16th was a public holiday, so on 5-1-1953 the dates were changed to "from the 17th March onwards" and the parties were duly notified.

3. On the 17th the appellant did not appear nor did any of the three counsel whom he had engaged, so the Tribunal proceeded ex parte after waiting till 1.15 p.m.

4. The Tribunal examined Bhurey Lal and two witnesses on the 17th, five more witnesses on the 18th and on the 19th the case was adjourned till the 20th.

5. On the 20th one of the appellant's three counsel, Mr, Bharat Raj, appeared but was not allowed to take any part in the proceedings because the Tribunal said that it was proceeding ex parte at that stage. Three more witnesses were then examined.

6. On the following day, the 21st, the appellant made an application asking that the ex parte proceedings be set aside and asking that he be allowed to cross-examine those of Bhurey Lal's witnesses whose evidence had already been recorded.

7. The Tribunal heard arguments and passed an order the same day rejecting the application on the ground that the appellant had

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

and it added—

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

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

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

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

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

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

10. The only question before the High Court was whether the Tribunal was right in refusing to allow the appellant's counsel to appear and take part in the proceedings on and after the 20th of March, 1953, and the first question that we have to decide is whether that is sufficient ground to give the High Court jurisdiction to entertain a writ petition under Article 226 of the Constitution. That, in our opinion, is no longer res integra. The question was settled by a Bench of seven Judges of this Court in *Hari Vishnu* v. *Ahmad Ishaque*[1] in these terms:

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

That is exactly the position here.

11. It was urged that that cannot be so in election matters because of Section 105 of the Representation of the People Act of 1951 (Act 43 of 1951), a section which was not considered in the earlier case. It runs thus:

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

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

12. But this, also, is no longer open to question. The point has been decided by three Constitution Benches of this Court. In *Hari Vishnu* v. *Ahmad Ishaque*[1] the effect of Section 105 of the Representation of the People Act was not considered, but the Court laid down in general terms that the jurisdiction under Article 226 having been conferred by the Constitution, limitations cannot be placed on it except by the Constitution itself : see pages 238 and 242. Section 105 was, however, considered in *Durga Shankar Mehta* v. *Raghuraj Singh*[2] and it was held that that section cannot cut down or affect the overriding powers of this Court under Article 136. The same rule was applied to Article 226 in *Raj Krushna Bose* v. *Binod Kanungo*[3] and it was decided that Section 105 cannot take away or whittle down the powers of the High Court under Article 226. Following those decisions we hold that the jurisdiction of the High Court under Article 226 is not taken away or curtailed by Section 105.

13. The jurisdiction which Articles 226 and 136 confer entitles the High Courts and this Court to examine the decisions of all tribunals to see whether they have acted illegally. That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusion is something that exists outside and apart from the decision of an inferior tribunal. It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. The High Courts and the Supreme Court alone can determine what the law of the land is vis-a-vis all other courts and tribunals and they alone can pronounce with authority and finality on what is legal and what is not. All that an inferior tribunal can do is to reach a tentative conclusion which is subject to review under Articles 226 and 136. Therefore, the jurisdiction of the High Courts under

Article 226 with that of the Supreme Court above them remains to its fullest extent despite Section 105.

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

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

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

We must therefore direct our attention to that portion of the Civil Procedure Code that deals with the trial of suits.

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

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

possible, in the light of that principle.

18. The existence of such a principle has been doubted, and in any event was condemned as unworkable and impractical by O'sullivan, J. in *Hariram* v. *Pribhdas*[4]. He regarded it as an indeterminate term "liable to cause misconception" and his views were shared by Wanchoo, C.J. and Bapna, J. in Rajasthan : *Sewa Ram* v. *Misrimal*[5]. But that a law of natural justice exists in the sense that a party must be heard in a court of law, or at any rate be afforded an opportunity to appear and defend himself, unless there is express provision to the contrary, is, we think, beyond dispute. See the observations of the Privy Council in *Balakrishna Udayar* v. *Vasudeva Ayyar*[6] and especially in *T.M. Barret* v. *African Products Ltd.*[7] where Lord Buckmaster said—

> "no forms or procedure should ever be permitted to exclude the presentation of a litigant's defence".

Also *Hari Vishnu case*[1] which we have just quoted.

In our opinion, Wallace, J. was right in *Venkatasubbiah* v. *Lakshminarasimham*[8] in holding that—

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

and that—

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

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

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

Section 30 gives the court power to

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

Then come the penalties for default. They are set out in Section 32 but they are confined to cases in which a summons has been issued under *Section 30*. There is no penalty for a refusal or an omission to appear in response to a summons under Section 27. It is true certain consequences will follow if a defendant does not appear and, popularly speaking, those consequences may be regarded as the penalty for non-appearance, but they are not penalties in the true sense of the term. They are not punishments which the court is authorised to administer for disregard of its orders. The antithesis that Section 32 draws between Section 27 and Section 30 is that an omission to appear in response to a summons under Section 27 carries no penalty in the

strict sense, while disregard of a summons under Section 30 may entail punishment. The spirit of this distinction must be carried over to the First Schedule. We deprecate the tendency of some Judges to think in terms of punishments and penalties properly so called when they should instead be thinking of compensation and the avoidance of injustice to both sides.

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

First, there is Order 5 Rule 1:

> "…a summons may be issued to the defendant to appear and answer the claim *on a day to be therein specified*."

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

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

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

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

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

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

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

23. Rule 1 of Order 9 starts by saying—

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

and the rest of the Rules in that Order are consequential on that. This is emphasised by the use of the word "postponement" in Rule 6(1)(*c*), of

"adjournment" in Rule 7 and of "adjournment" in Rule 1. Therefore, we reach the position that Order 9 Rule 6(1)(*a*), which is the Rule relied on, is confined to the first hearing of the suit and does not per se apply to subsequent hearings : see *Sahibzada Zeinulabdin Khan* v. *Sahibzada Ahmed Raza Khan*[9].

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

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

The whole question is, what do these words mean? Judicial opinion is sharply divided about this. On the one side is the view propounded by Wallace, J. in *Venkatasubbiah* v. *Lakshminarasimham*[8] that ex parte merely means in the absence of the other party, and on the other side is the view of O'sullivan, J., in *Hariram* v. *Pribhdas*[4] that it means that the court is at liberty to proceed without the defendant till the termination of the proceedings unless the defendant shows good cause for his non-appearance. The remaining decisions, and there are many of them, take one or the other of those two views.

25. In our opinion, Wallace, J. and the other Judges who adopt the same line of thought, are right. As we have already observed, our laws of procedure are based on the principle that, as far as possible, no proceeding in a court of law should be conducted to the detriment of a person in his absence. There are of course exceptions, and this is one of them. When the defendant has been served and has been afforded an opportunity of appearing, then, if he does not appear, the court may proceed in his absence. But, be it noted, the court is not directed to make an ex parte order. Of course the fact that it is proceeding ex parte will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an ex parte decree or other ex parte order which the court is authorised to make. All that Rule 6(1)(*a*) does is to remove a bar and no more. It merely authorises the court to do that which it could not have done without this authority, namely, to proceed in the absence of one of the parties. The contrast in language between Rules 7 and 13 emphasises this.

26. Now, as we have seen, the first hearing is either for the settlement of issues or for final hearing. If it is only for the settlement of issues, then the court cannot pass an ex parte decree on that date because of the proviso to Order 15 Rule 3(1) which provides that that can only be done when

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

On the other hand, if it is for final hearing, an ex parte decree can be passed, and if it is passed, then Order 9 Rule 13 comes into play and before the decree is set aside the court is required to *make an order to set it aside*. Contrast this with Rule 7 which does not require the setting aside of what is commonly, though erroneously, known as "the ex parte order". No order is contemplated by the Code and therefore no order to set aside the order is contemplated either. But a decree is a command or order of the court and so can only be set aside by another order made and recorded with due formality.

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

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

This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared.

28. We turn next to the adjourned hearing. That is dealt with in Order 17 Rule 1(1) empowers the court to adjourn the hearing and whenever it does so it must fix a day "for the further hearing of the suit", except that once the hearing of the evidence has begun it must go on from day to day till all the witnesses in attendance have been examined unless the court considers, for reasons to be recorded in writing, that a further adjournment is necessary. Then follows Rule 2—

> "Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit."

29. Now Rule 2 only applies when one or both of the parties do not appear *on the day fixed for the adjourned hearing*. In that event, the court is thrown back to Order 9 with the additional power to make "such order as it thinks fit". When it goes back to Order 9 it finds that it is again empowered to proceed ex parte on the adjourned hearing in the same way as it did, or could have done, if one or other of the parties had not appeared at the first hearing, that is to say, the right to proceed ex parte is a right which accrues from day to day because at each adjourned hearing the court is thrown back to Order 9 Rule 6. It is not a mortgaging of the future but only applies to the particular hearing at which a party was afforded the chance to appear and did not avail himself of it. Therefore, if a party does appear on "the day to which the hearing of the suit is adjourned", he cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing.

30. But though he has the right to appear at an adjourned hearing,

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

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

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

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

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

33. Now when we speak of the ends of justice, we mean justice not only to the defendant and to the other side but also to witnesses and others who may be inconvenienced. It is an unfortunate fact that the convenience of the witness is ordinarily lost sight of in this class of case and yet he is the one that deserves the greatest consideration. As a rule, he is not particularly interested in the dispute but he is vitally interested in his own affairs which he is compelled to abandon because a court orders him to come to the assistance of one or other of the parties to a dispute. His own business has to suffer. He may have to leave his family and his affairs for days on end. He is usually out of pocket. Often he is a poor man living in an out of the way village and may have to trudge many weary miles on his feet. And when he gets

there, there are no arrangements for him. He is not given accommodation; and when he reaches the court, in most places there is no room in which he can wait. He has to loiter about in the verandah or under the trees, shivering in the cold of winter and exposed to the heat of summer, wet and miserable in the rains : and then, after wasting hours and sometimes days for his turn, he is brusquely told that he must go back and come again another day. Justice strongly demands that this unfortunate section of the general public compelled to discharge public duties, usually at loss and inconvenience to themselves, should not be ignored in the overall picture of what will best serve the ends of justice and it may well be a sound exercise of discretion in a given case to refuse an adjournment and permit the plaintiff to examine the witnesses present and not allow the defendant to cross-examine them, still less to adduce his own evidence. It all depends on the particular case. But broadly speaking, after all the various factors have been taken into consideration and carefully weighed, the endeavour should be to avoid snap decisions and to afford litigants a real opportunity of fighting out their cases fairly and squarely. Costs will be adequate compensation in many cases and in others the court has almost unlimited discretion about the terms it can impose provided always the discretion is judicially exercised and is not arbitrary.

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

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

The Privy Council held in *Zeinulabdin Khan* v. *Ahmed Raza Khan*[9] that this only applied to a defendant who had not appeared at all at any stage, therefore, if once an appearance was entered, the right of appeal was not taken away. One of the grounds of their decision was that—

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

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

the first instance without getting the ex parte order set aside under Order 9 Rule 7.

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

36. If the defendant does not appear at the adjourned hearing (irrespective of whether or not he appeared at the first hearing) Order 17 Rule 2 applies and the court is given the widest possible discretion either

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

The point is this : The court has a discretion which it must exercise. Its hands are not tied by the so called ex parte order; and if it thinks they are tied by Order 9 Rule 7 then it is not exercising the discretion which the law says it should and, in a given case, interference may be called for.

37. The learned Judges who constituted a Full Bench of the Lucknow Chief Court (*Tulsha Devi* v. *Sri Krishna*[10]) thought that if the original ex parte order did not enure throughout all future hearings it would be necessary to make a fresh ex parte order at each succeeding hearing. But this proceeds on the mistaken assumption that an ex parte order is required. The order sheet, or minutes of the proceedings, has to show which of the parties were present and if a party is absent the court records that fact and then records whether it will proceed ex parte against him, that is to say, proceed in his absence, or whether it will adjourn the hearing; and it must necessarily record this fact at every subsequent bearing because it has to record the presence and absence of the parties at each hearing. With all due deference to the learned Judges who hold this view, we do not think this is a grave or a sound objection.

38. A much weightier consideration is that the plaintiff may be gravely prejudiced in a given case because, as the learned Rajasthan Judges point out, and as O'Sullivan, J. thought, when a case proceeds

ex parte, the plaintiff does not adduce as much evidence as he would have if it had been contested. He contents himself with leading just enough to establish a prima facie case. Therefore, if he is suddenly confronted with a contest after he has closed his case and the defendant then comes forward with an army of witnesses he would be taken by surprise and gravely prejudiced. That objection is, however, easily met by the wide discretion that is vested in the court. If it has reason to believe that the defendant has by his conduct misled the plaintiff into doing what these learned Judges apprehend, then it might be a sound exercise of discretion to shut out cross-examination and the adduction of evidence on the defendant's part and to allow him only to argue at the stage when arguments are heard. On the other hand, cases may occur when the plaintiff is not, and ought not to be, misled. If these considerations are to weigh, then surely the sounder rule is to leave the court with an unfettered discretion so that it can take every circumstance into consideration and do what seems best suited to meet the ends of justice in the case before it.

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

Now the Tribunal said on 23-3-1953—

> "The exact stage at which the case had reached before us on the 21st of March, 1953 was that under the clear impression that Respondent 1 had failed to appear from the very first date of the final hearing when the ex parte order was passed, the petitioner must have closed his case after offering as little evidence as he thought was just necessary to get his petition disposed of ex parte. Therefore, to allow Respondent 1 to step in now would certainly handicap the petitioner and would amount to a bit of injustice which

we can neither contemplate nor condone."

But this *assumes* that the petitioner was misled and closed his case "after offering as little evidence as he thought was just necessary to get his petition disposed of ex parte". It does not decide that that was in fact the case. If the defendant's conduct really gave rise to that impression and the plaintiff would have adduced more evidence than he did, the order would be unexceptional but until that is found to be the fact a mere assumption would not be a sound basis for the kind of discretion which the Court must exercise in this class of case after carefully weighing *all* the relevant circumstances. We, therefore, disagreeing with the High Court which has upheld the Tribunal's order, quash the order of the Tribunal and direct it to exercise the discretion vested in it by law along the lines we have indicated. In doing so the Tribunal will consider whether the plaintiff was in fact misled or could have been misled if he had acted with due diligence and caution. It will take into consideration the fact that the defendant did enter an appearance and did file a written statement and that issues were framed in his presence; also that the case was fixed for the "petitioner's" evidence only and not for that of the appellant; and that the petitioner examined all the witnesses he had present on the 17th and the 18th and did not give up any of them; that he was given an adjournment on 19-3-1953 for the examination witnesses who did not come on that date and that examined three more on 20-3-1953 after the defendant had entered an appearance through counsel and claimed the right to plead; also whether, when the appellant's only protest was against the hearings at Udaipur on dates fixed for the petitioner's evidence alone, it would be legitimate for a party acting with due caution and diligence to assume that the other side had abandoned his right to adduce his own evidence should the hearing for that be fixed at some other place or at some other date in the same place.

40. The Tribunal will also consider and determine whether it will be proper in the circumstances of this case to allow the appellant to adduce his own evidence.

41. The Tribunal will now reconsider its orders of the 20th, the 21st and the 23rd of March, 1953 in the light of our observations and will proceed accordingly.

42. The records will be sent to the Election Commission with directions to that authority to reconstitute the Tribunal, if necessary, and to direct it to proceed with this matter along the lines indicated above.

43. There will be no order about costs.

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* Appeal from the Judgment and Order dated 17th July, 1953 of the Rajasthan High Court

(Jaipur) in Civil Writ Application No. 128 of 1953.

[1] AIR 1955 SC 233, 249

[2] AIR 1954 SC 520, 522

[3] (1954) SCR 913, 918

[4] AIR 1945 Sind 98, 102

[5] AIR 1952 Raj 12, 14

[6] ILR 40 Mad 793, 800

[7] AIR 1928 P.C. 261, 262

[8] AIR 1925 Mad 1274

[9] 5 IA 233, 236

[10] AIR 1949 Oudh 59

(2006) 5 Supreme Court Cases 638 : 2006 SCC OnLine SC 690

(BEFORE ASHOK BHAN AND G.P. MATHUR, JJ.)

RAMESH B. DESAI AND OTHERS . . Appellants;

Versus

BIPIN VADILAL MEHTA AND OTHERS . . Respondents.

Civil Appeal No. 4766 of 2001[1], decided on July 11, 2006

A. Limitation — Determination of question of, as preliminary issue — Permissibility — As starting point of limitation has to be ascertained on facts in every case, held, plea of limitation cannot be decided as a abstract principle of law divorced from facts — Hence unless it becomes apparent from reading of the plaint/petition (company petition in this case), on the principle of demurrer that the same is barred by limitation, plaint/petition cannot be rejected under Or. 7 R. 11(d) — In present case, Company Judge, as affirmed by Division Bench, determining question of limitation of company petition filed under S. 155, Companies Act, 1956 for violation of S. 77, Companies Act, as a preliminary issue, and dismissing the same as being barred by limitation — Sustainability — Held, on principle of demurrer the company petition does not disclose that it is barred by limitation — Facts disclosed in petition, discussed in this regard — Company Judge could not have referred to affidavit-in-reply to determine the question of limitation at preliminary stage — Therefore, if facts in company petition were disputed, question of limitation could not have been determined at preliminary stage without a decision on facts after parties had been given opportunity to adduce evidence — Civil Procedure Code, 1908 — Or. 14 R. 2 and Or. 7 R. 11 — Corporate Laws — Company Law — Company petition — Limitation

B. Limitation — Nature of question of — Held, is a mixed question of fact and law

C. Civil Procedure Code, 1908 — Or. 14 R. 2 — Questions that may be determined as preliminary questions — Mixed questions of fact and law — Held, CPC confers no jurisdiction on court to decide a mixed question of fact and law, unless the facts are clear from the plaint itself and the mixed question of fact and law can be determined on the principle of demurrer — Where a decision on an issue of law depends upon a decision of fact, it cannot be tried as a preliminary issue

D. Civil Procedure Code, 1908 — Or. 14 R. 2 and Or. 7 R. 11 — Demurrer — Principle of — Explained in detail — Corporate Laws — Company Law — Company petition — Words and phrases

E. Corporate Laws — Practice and Procedure — Applicability of CPC to proceedings under Companies Act, 1956 — Companies Act, 1956 — S. 10-FZA — Companies (Court) Rules, 1959, R. 6

F. Evidence Act, 1872 — S. 114 — Natural course of events — Affairs of a public limited company — Knowledge of, on part of small shareholders — Prima facie view expressed that it was quite probable that small shareholders would not be aware of the same in detail — The fact that one

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of such shareholders was partially involved in a many-step transaction to buy a company's shares with its own funds in violation of S. 77, Companies Act, 1956, does not lead to the only inference that he had knowledge of the entire transaction — Corporate Laws

Allowing the appeal with costs throughout, the Supreme Court

Held :

In view of Rule 6 of the Companies (Court) Rules, the provisions of the Code of Civil Procedure will be applicable in the proceedings under the Companies Act, 1956.

(Para 12)

A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained, which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. Therefore unless it becomes apparent from the reading of the company petition that the same is barred by limitation the petition cannot be rejected under Order 7 Rule 11(*d*) CPC.

(Para 19)

Balasaria Construction (P) Ltd. v. *Hanuman Seva Trust*, (2006) 5 SCC 658, *followed*

Sangramsinh P. Gaekwad v. *Shantadevi P. Gaekwad*, (2005) 11 SCC 314, *relied on*

CPC confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

(Para 13)

Major S.S. Khanna v. *Brig. F.J. Dillon*, (1964) 4 SCR 409 : AIR 1964 SC 497, *relied on*

Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further.

(Para 14)

The plea raised by the contesting respondents is in fact a plea of demurrer. The assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on the point of demurrer. The principle underlying Order 7 Rule 11(*d*) is no different.

(Paras 14 and 15)

The principle is well settled that in order to examine whether the plaint is barred by any law, as contemplated by Order 7 Rule 11(*d*) CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the said principle, the plea raised by the contesting respondents that the company petition was barred by limitation has to be examined by looking into the averments made in the company petition alone and any affidavit filed in reply to the company petition or the contents of the affidavit filed in support of Company Application No. 113 of 1995 filed by the respondents seeking dismissal of the company petition cannot at all be looked into.

(Para 16)

O.N. Bhatnagar v. *Rukibai Narsindas*, (1982) 2 SCC 244; *Roop Lal Sathi* v. *Nachhattar Singh Gill*, (1982) 3 SCC 487; *Abdulla Bin Ali* v. *Galappa*, (1985) 2 SCC 54; *Exphar SA* v. *Eupharma Laboratories Ltd.*, (2004) 3 SCC 688; *Indian Mineral & Chemicals Co.* v. *Deutsche Bank*, (2004) 12 SCC 376; *Popat and Kotecha Property* v. *State Bank of India Staff Assn.*, (2005) 7 SCC 510, *followed*

The case set up by the petitioners in the company petition is that they had absolutely no knowledge of the alleged utilisation of the funds of the Company

for purchase of shares by one B and they came to know about it by or about in the month of May 1987 when a criminal complaint was filed by some office-bearers of the union of the Company and thereafter Petitioner 1 gave notice dated 14-6-1987. Though it should not be understood as recording any finding on this point, but in the natural course of events or at least it looks quite probable that the petitioners in the company petition, who are small shareholders of the Company, may not have come to know about the abovesaid transactions.

(Para 18)

In the natural course of events it looks quite probable that a third party may not come to know that the Company had advanced money to M/s Santosh Starch Products on 13-11-1982 and M/s Santosh Starch Products gave Rs 20 lakhs to B and his family members on the same day and the

said money was utilised for purchasing the shares. It is noteworthy that M/s Santosh Starch Products is a supplier of the Company M/s Sayaji Industries Ltd. and in such circumstances the payment of money by the Company to M/s Santosh Starch Products could not have raised any suspicion. At any rate accepting the version given in the company petition as correct and without taking into consideration any plea raised in the affidavits filed in reply thereto or any other material or evidence, it is absolutely clear that having regard to the provisions of Section 17(1) of the Limitation Act, the limitation for filing the company petition had not begun to run until May 1987 when the petitioners claim to have got knowledge of the alleged fraud committed by the respondents in utilising the funds of the Company for purchase of its shares, which is a clear violation of Section 77 of the Companies Act. Thus the company petition cannot be thrown out at the preliminary stage as being barred by limitation and the view to the contrary taken by the learned Company Judge and also by the Division Bench is clearly erroneous in law.

(Para 20)

The Company Judge has referred to the affidavit-in-reply filed by one R.T. Doshi opposing the admission of the company petition based on which certain questions have been considered, which questions are all questions of fact, findings on which could be recorded only after the parties had been given opportunity to adduce evidence. The mere fact that one cheque for Rs 5 lakhs was signed by Petitioner 1 himself does not lead to the only inference that he got knowledge of the entire transaction relating to payment of Rs 20 lakhs by the Company to M/s Santosh Starch Products and the payment of the said amount on the same day by M/s Santosh Starch Products to B and his family members. It is important to point out that apart from Petitioner 1 there are 8 other shareholders who had filed the company petition. There is not even the slightest inkling in the impugned judgments of the High Court that the other 8 petitioners had acquired knowledge of the transaction much earlier. The approach adopted by the High Court is clearly illegal as no finding on the point of knowledge could have been recorded until the parties had been given opportunity to lead evidence and in such circumstances dismissal of the company petition at a preliminary stage on the finding that it was barred by limitation is clearly erroneous in law.

(Para 23)

The appeal accordingly succeeds and is hereby allowed with costs throughout.

(Para 32)

G. Limitation Act, 1963 — S. 17 — Applicability — Petitioners claiming that respondents had acted in violation of S. 77, Companies Act, 1956 in causing shares of Company to be bought fraudulently by utilising funds of Company and consequently that register of Company needed to be verified in accordance with S. 155, Companies Act — Held, as petitioners were not

claiming any right or title over shares of Company, it was S. 17(1)(a) that was applicable and not S. 17(1)(b) — Position obtaining under S. 18, Limitation Act, 1908 compared — Corporate Laws — Companies Act, 1956 — Ss. 77 and 155 — Limitation Act, 1908 — S. 18

(Paras 27 and 30)

Syed Shah Ghulam Ghouse Mohiuddin v. *Syed Shah Ahmed Mohiuddin Kamisul Quadri*, (1971) 1 SCC 597; *Kasturi Lakshmibayamma* v. *Sabnivis Venkoba Rao*, AIR 1970 AP 440 : (1970) 2 An LT 176; *Marappa Goundar, In re*, AIR 1959 Mad 26 : (1958) 1 MLJ 260, *distinguished*

H. Civil Procedure Code, 1908 — Or. 6 R. 4 — Fraud — Particulars that need to be pleaded in respect of — Detail necessary — Discussed in detail — Instance given — Held, particulars of alleged fraud will depend upon facts of each particular case and no abstract principle can be laid down — Fraud — Pleading and particulars necessary in respect of

Undoubtedly, Order 6 Rule 4 CPC requires that complete particulars of fraud shall be stated in the pleadings. The particulars of alleged fraud, which are required to be stated in the plaint, will depend upon the facts of each particular case and no abstract principle can be laid down in this regard. Where some transaction of money takes place to which 'A', 'B' and 'C' are parties and payment is made by cheques, in normal circumstances a third party 'X' may not get knowledge of the said transaction unless he is informed about it by someone who has knowledge of the transaction or he gets an

opportunity to see the accounts of the parties concerned in the bank. In such a case an assertion by 'X' that he got no knowledge of the transaction when it took place and that he came to know about it subsequently through some proceedings in court cannot be said to be insufficient pleading for the purpose of Order 6 Rule 4 CPC. In such a case 'X' can only plead that he got no knowledge of the transaction and nothing more. Having regard to the circumstances of the case the High Court was in error in holding that there was no proper pleading of fraud.

(Para 22)

Bishundeo Narain v. *Seogeni Rai*, 1951 SCC 447 : 1951 SCR 548 : AIR 1951 SC 280; *Bijendra Nath Srivastava* v. *Mayank Srivastava*, (1994) 6 SCC 117; *Sangramsinh P. Gaekwad* v. *Shantadevi P. Gaekwad*, (2005) 11 SCC 314, *referred to*

I. Corporate Laws — Companies Act, 1956 — Ss. 77 to 81 and 100 — Purchase of its own shares by company — Permissibility — Held, a limited company cannot purchase its own shares except in the manner laid down in the statute

A limited company cannot purchase its own shares except by way of reduction of capital with the sanction of the court and in the manner laid down in the statute. Any valuable consideration paid out of the Company's assets will make a transaction amounting to a purchase and, therefore, invalid.

(Para 11)

Trevor v. *Whitworth*, (1887) 12 AC 409 : (1886-90) All ER Rep 46 (HL); *British and American Trustee and Finance Corpn.* v. *Couper*, 1894 AC 399 : (1891-94) All ER Rep 667 (HL), *followed*

Buckley on the Companies Act, 14th Edn., p. 1499; *Palmer's Company Law*, 23rd Edn., p. 440; A. Ramaiya : *Guide to the Companies Act*, (16th Edn., p. 951), *relied on*

J. Corporate Laws — Companies Act, 1956 — Ss. 155 and 111 — Entry of name of person in register of company wrongfully obtained — Nature of wrong — Whether continuing wrong, so as to attract S. 22, Limitation Act, 1963 — Question left open — Limitation Act, 1963 — S. 22

(Para 31)

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Advocates who appeared in this case:

Soli J. Sorabjee, Senior Advocate (Pritesh Kapoor, Ms Hemantika Wahi and S. Sanjanwala, Advocates, with him) for the Appellants;

Iqbal Chagla, V.A. Bobde, Sudhir Nanavati, Mihir Joshi, Uday U. Lalit and Sunil Gupta, Senior Advocates (Huzefa Ahmadi, Devang S. Nanavati, Saurin Mehta, Anshuman Mohapatra, Nakul Diwan, Riaz Chagla, Ms V.D. Khanna for I.M. Nanavati Associates, Rutwik Panda, Jatin Zaveri, Prantap Kalra, Naresh K. Sharma, Ms Bina Gupta, Ms Inklee Barooah, Ms Indrani Mukherjee and Ms Sumita Hazarika, Advocates, with them) for the Respondents.

Chronological list of cases cited ***on page(s)***

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2. (2005) 11 SCC 314, *Sangramsinh P. Gaekwad* v. *Shantadevi P. Gaekwad* 649g-h, 655g

3. (2005) 7 SCC 510, *Popat and Kotecha Property* v. *State Bank of India Staff Assn.* 651*d-e*

4. (2004) 12 SCC 376, *Indian Mineral & Chemicals Co.* v. *Deutsche Bank* 651*c-d*

5. (2004) 3 SCC 688, *Exphar SA* v. *Eupharma Laboratories Ltd.* 651*a-b*

6. (1994) 6 SCC 117, *Bijendra Nath Srivastava* v. *Mayank Srivastava* 655*g*

7. (1985) 2 SCC 54, *Abdulla Bin Ali* v. *Galappa* 651*a*

8. (1982) 3 SCC 487, *Roop Lal Sathi* v. *Nachhattar Singh Gill* 650*g*

9. (1982) 2 SCC 244, *O.N. Bhatnagar* v. *Rukibai Narsindas* 650*f-g*

10. (1971) 1 SCC 597, *Syed Shah Ghulam Ghouse Mohiuddin* v. *Syed Shah Ahmed Mohiuddin Kamisul Quadri* 656*b-c*

11. AIR 1970 AP 440 : (1970) 2 An LT 176, *Kasturi Lakshmibayamma* v. *Sabnivis Venkoba Rao* 656*b-c*

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15. 1894 AC 399 : (1891-94) All ER Rep 667 (HL), *British and American Trustee and Finance Corpn.* v. *Couper* 649*e-f*

16. (1887) 12 AC 409 : (1886-90) All ER Rep 46 (HL), *Trevor* v. *Whitworth* 649*c-d*, 649*e-f*

The Judgment of the Court was delivered by

G.P. MATHUR, J.— This appeal, by special leave, has been preferred against the judgment and order dated 10-3-2000 of a Division Bench of the High Court of Gujarat by which the appeal preferred against the order dated 12-3-1996 of the learned Company Judge was dismissed and the order of the learned Company Judge

dismissing Company Petition No. 35 of 1988 was affirmed.

2. The appellants had filed Company Petition No. 35 of 1988 for rectification of the register of the Company M/s Sayaji Industries Ltd. (hereinafter referred to as "the Company") as provided by Section 155 of the Companies Act. Respondents 1 and 2 viz. Bipin Vadilal Mehta and Priyam Bipinbhai Mehta moved Company Application No. 113 of 1995 before the learned Company Judge to dismiss Company Petition No. 35 of 1988, without going into the merits of the petition, on the ground that the same was barred by limitation. This application was allowed by the learned Company Judge by the judgment and order dated 12-3-1996 and the said order was affirmed in appeal by a Division Bench of the High Court by the judgment

and order dated 10-3-2000, which is the subject-matter of challenge in the present appeal.

3. Company Petition No. 35 of 1988 was filed by Ramesh B. Desai and 8 others who are shareholders of the Company, which is a public limited company. The allegations made in the company petition are as follows. Vadilal Lallubhai Mehta was the Chairman and Managing Director of the Company. He had two sons viz. Bipin Vadilal Mehta and Suhas Vadilal Mehta (for short "Bipinbhai and Suhasbhai") and four daughters, who are all married. The family owned several properties. Besides shares in the Company, there was HUF Trust and other private limited companies under the control of the said family. A memorandum of understanding (MOU) was executed by the family members on 30-1-1982 and the main object thereof was to entrust the management of some of the companies to Bipinbhai and some to Suhasbhai. It was decided that the management of M/s Sayaji Industries Ltd. and M/s C.V. Mehta Private Ltd. was to be entrusted to Bipinbhai while other companies such as M/s Industrial Machinery Manufacturers Pvt. Ltd., M/s C. Doctor and Company Pvt. Ltd., M/s Mehta Machinery Manufacturers Pvt. Ltd. and M/s Oriental Corporation Pvt. Ltd., were to remain with Suhasbhai. Clause 10 of MOU provided that Bipinbhai should deposit Rs 40 lakhs and odd with M/s C.V. Mehta Pvt. Ltd. in order that the latter could pay back the debts which it owed to Suhasbhai and his family members and family concerns. This amount of Rs 40 lakhs and odd was the consideration for getting the controlling interest and management of M/s Sayaji Industries Ltd. and M/s C.V. Mehta Pvt. Ltd. Though under the terms of MOU the said amount of Rs 40 lakhs and odd was to be paid by Bipinbhai immediately, but he could not do so as he could not arrange the necessary funds. The result of non-payment by Bipinbhai was that he could not get the control and management of M/s Sayaji Industries Ltd. and M/s C.V. Mehta Pvt. Ltd. in January 1982 as was contemplated by MOU dated 30-1-1982. A modified MOU was accordingly executed on 13-11-1982 whereunder it was provided that Bipinbhai would pay the entire amount in two instalments, one in the sum of Rs 20 lakhs pursuant to which the control and management of M/s Sayaji Industries Ltd. were to be transferred to him by making the transfer of 13,000 shares of the Company in his name and in the names of his family members. The balance amount of Rs 19 lakhs and odd was to be deposited by Bipinbhai with M/s C.V. Mehta Pvt. Ltd. within a period of 24 months from the date of the agreement. This was necessary as M/s C.V. Mehta Pvt. Ltd. held 9000 equity shares of M/s Sayaji Industries Ltd. Acquisition and control of M/s C.V. Mehta Pvt. Ltd. and thereby 9000 equity shares of M/s Sayaji Industries Ltd. would have been possible only after payment of the said amount. It is further averred in the company petition that Bipinbhai was not in a position to pay or deposit Rs 20 lakhs without which he could not have got the controlling interest in M/s

Sayaji Industries Ltd. He, therefore, devised a scheme whereunder the Company viz. M/s Sayaji Industries Ltd. paid an amount of Rs 20 lakhs by way of advance to M/s Santosh Starch Products by means of two cheques of Rs 10 lakhs and Rs 5 lakhs (both dated 13-11-1982) and a third cheque of Rs 5

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lakhs dated 25-11-1982, all drawn on Punjab National Bank, Maskati Market Branch, Ahmedabad. The said M/s Santosh Starch Products paid an amount of Rs 20 lakhs to Bipinbhai and his family by means of three cheques of Rs 7 lakhs, 6 lakhs and 7 lakhs all dated 13-11-1982 and drawn on the same branch of Punjab National Bank. The aforesaid amount paid through cheques was deposited in the personal account of Bipinbhai and his family members on the same day. This whole amount of Rs 20 lakhs was transferred to M/s C.V. Mehta Pvt. Ltd. in order to get control of the Company M/s Sayaji Industries Ltd. as per MOU. The specific case of the petitioners in the company petition is that the funds of the Company amounting to Rs 20 lakhs were utilised by Bipinbhai in paying the said amount to M/s C.V. Mehta Pvt. Ltd. for the purpose of acquiring the shares of M/s Sayaji Industries Ltd. and thereby he became the Director of the said Company. This camouflage was adopted only to ensure that the violation of Section 77 of the Companies Act, which provision imposes a restriction on a company to buy its own shares unless the consequent reduction of capital is effected and sanctioned in pursuance of Sections 100 to 104 or Section 402 of the Companies Act, would not be known. The aforesaid devise of payment of advance by the Company to M/s Santosh Starch Products also violated Article 20 of the Articles of Association. Bipinbhai had thus devised a scheme whereunder funds of the Company were directly used for the purpose of acquiring shares of the Company and also that of M/s C.V. Mehta Pvt. Ltd., which in turn was holding substantial shares of M/s Sayaji Industries Ltd. The Company had no knowledge of the devise adopted by Bipinbhai nor had the Company authorised these transactions by passing any resolution of the Board and the Company never rectified the action of Bipinbhai. Bipinbhai was inducted in the management of the Company on 18-11-1982 and payment of cheque by the Company to M/s Santosh Starch Products on 25-11-1982 represented the act of the Company itself and clearly showed that the funds of the Company were being utilised in order to benefit Bipinbhai and his family members. The transactions whereunder shares of M/s C.V. Mehta Pvt. Ltd. were acquired related to the period when Bipinbhai had been inducted in the management of the Company. The manner of acquiring the control of M/s C.V. Mehta Pvt. Ltd. was violative of Section 77(2) of the Companies Act as it was only a devise for the ultimate control of shares of M/s Sayaji Industries Ltd. It was also averred in the petition that Article 20 of the Articles of Association of the Company stipulates that "none of the funds of the Company shall be employed in the purchase of shares of the Company". The transaction devised by Bipinbhai in order to purchase the shares and get control of the Company is also contrary to Article 20 of the Articles of Association of the Company and, therefore, it is void. It was further pleaded in the company petition that the petitioners could not detect the fraud earlier. They came to know about the same in detail in the month of May 1987 when a criminal complaint was filed by some office-bearers of the union of the Company before a criminal court at Narol. After making enquiries and collecting information Petitioner 1 gave a notice dated 14-6-1987 to the respondents to make rectification in the register of the Company. It was

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accordingly prayed in the company petition that directions may be issued to the respondents to rectify the register of the Company in accordance with Section 155 of the Companies Act and the names of Bipinbhai Vadilal Mehta, Smt Nirmaiben Bipinbhai Mehta and Priyambhai Bipinbhai Mehta may be deleted from the register of the Company.

4. Though the company petition was filed on 10-11-1987 but after nearly 8 years on 20-3-1995 an application being Application No. 113 of 1995 was filed by Bipinbhai and Priyambhai Mehta (Respondents 2 and 3 in the company petition) praying that the company petition be dismissed as barred by limitation, without going into the merits of the petition. The application was moved on the ground that the company petition had been filed on 10-11-1987 seeking rectification of the register and for deletion of names of Respondents 2 to 11 in accordance with Section 155 of the Companies Act. The rectification had been sought in respect of shares registered in the names of the respondents on 17-11-1982 and as the limitation for moving such a petition was three years from the date of transfer of shares, the period of limitation expired on 17-11-1985 and consequently the company petition was barred by limitation. It was submitted that the petition under Section 155 of the Companies Act, which confers power on the court to decide the title, is in fact a suit and it was only a summary proceeding in place of a suit and, therefore, the period of limitation applicable for a suit would also apply to such a petition. No application for condoning the delay would be maintainable and the claim is extinguished on the expiry of the period of limitation. Assuming that the company petition is to be construed as an application, even then the petition was barred in view of Article 137 of the Limitation Act. The knowledge of the proceedings was not relevant for the purpose of Article 137 because for the purpose of such article, limitation would start running from the date the right accrues and the date of acquiring knowledge cannot extend the period of limitation. It was also submitted that the petitioners had asserted in the company petition that they came to know about the transfer of shares and other details in the month of May 1987 when a criminal complaint was filed but the said complaint had in fact been filed on 18-6-1987 whereas the petitioners had given notice on 17-6-1987. It was further submitted that the petitioners in the company petition had filed a separate application for condoning the delay and since no order had been passed on the same, there was no valid petition in the eye of the law.

5. Appellant 1, Ramesh B. Desai (Petitioner 1 in the company petition) filed reply on the grounds, inter alia, that the application was not maintainable as the same had been filed when the company petition had already been notified for final hearing and was on the final hearing board. The company petition had been filed in September 1987 on which notice had been issued and Respondents 2 and 3 in the company petition filed their detailed affidavit and reply on 22-3-1988 and the Company also filed reply on the said date. In their reply the contesting respondents raised a preliminary objection regarding limitation and contended that on the preliminary issue the main petition should be dismissed in limine. The said preliminary objection was raised at the time of hearing and after considering the objections the

learned Company Judge considered it appropriate to admit the main petition as far back as on 24-6-1988. It was also submitted that by the order of the learned Company Judge dated 17-2-1995 the company petition had already been fixed for final hearing and in view of the said order Company Application No. 113 of 1995

moved by the contesting respondents was not maintainable at that stage and was liable to be dismissed. It was also submitted that the contesting respondents wanted that the issue regarding limitation should be heard as a preliminary issue which cannot be done in law. The respondents had committed serious fraud on the shareholders and also on the Company and the Company's funds had been fraudulently utilised to purchase its own shares, which is violative of Section 77 of the Companies Act. Whether there is a fraud committed or not and whether in the circumstances of the case delay can be condoned or not and what is the point of time for commencement of limitation, are questions of fact and such questions cannot be tried as a preliminary issue as they require evidence. It was specifically asserted in para 4 of the affidavit filed in reply that the question of limitation involved in the petition is not a pure question of law as the same had to be decided on the basis of fraud, which will be a question of fact and the Company Court will have to decide whether the petitioners in the company petition had got the knowledge of the fraud and, if so, at what stage. This being a purely factual matter could not be decided as a preliminary issue as the whole matter had to be heard. That apart there being clear averments of fraud in the company petition, under law, the limitation would start running only from the date the fraud was discovered.

6. As mentioned earlier, the learned Company Judge allowed Company Application No. 113 of 1995 and dismissed the company petition as being barred by the law of limitation. The appellants preferred an appeal against the decision of the learned Company Judge before the Division Bench of the High Court but the same was also dismissed on 10-3-2000.

7. Mr Soli J. Sorabjee, learned Senior Counsel for the appellants, has submitted that the Code of Civil Procedure shall be applicable in the proceedings before the learned Company Judge. Sub-rule (1) of Order 14 Rule 2 CPC lays down that notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (*a*) the jurisdiction of the court, or (*b*) a bar to the suit created by any law for the time being in force. Learned counsel has submitted that the grounds on which a plaint can be rejected are given in Order 7 Rule 11(*d*) CPC and the plea raised by the contesting respondents was one as contemplated by clause (*d*) of the said Rule, which lays down that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. The plea raised by the contesting respondents in the company application was a plea of demurrer where only the allegation made in the company petition had to be seen and after assuming the averments made in the petition to be true and

correct it had to be seen whether the petition was barred by any law including that of limitation. The learned counsel has elaborated his arguments by submitting that the petitioners in the company petition had clearly averred and taken a plea of fraud that they could not get knowledge of the fact that the funds of the Company were utilised by Bipinbhai and his family members in buying the shares of the Company and they got knowledge of the same only in May 1987 and in this view of the matter the provisions of Section 17 of the Limitation Act are clearly attracted and the limitation shall not begin to run till the date the petitioners discovered the fraud or got

knowledge of the same. Mr Sorabjee has also submitted that at any rate the plea raised by the petitioners involved adjudication into questions of fact, which could not have been done until the parties got opportunity to lead evidence and the learned Company Judge committed manifest error of law in deciding the issue of limitation as a preliminary issue and recording a finding against the petitioners even before they had got an opportunity to lead evidence.

8. Mr Iqbal Chagla, learned Senior Counsel for the respondents, has supported the judgment of the learned Company Judge and also of the Division Bench and has submitted that the expression "a bar to the suit created by any law for the time being in force" occurring in sub-rule (1)(*b*) of Order 14 Rule 2 CPC contains within its ambit a plea relating to the bar of limitation. The learned counsel has elaborated his contention by submitting that Section 3 of the Limitation Act mandates that subject to the provisions contained in Sections 4 to 24, every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence and sub-rule (*d*) of Order 7 Rule 11 also says that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. In view of these provisions, it has been submitted that the company petition was rightly dismissed as the transaction in shares in question took place on 13-11-1982 and as the period of limitation by virtue of Article 137 of the Limitation Act is only three years, the company petition which was filed in May 1987, was clearly barred by limitation. The learned counsel has further submitted that the petitioners could not take any advantage of Section 17 of the Limitation Act as the company petition did not contain full particulars of the alleged fraud which is mandatory in view of Order 6 Rule 4 CPC nor any averment has been made therein that the knowledge of right or title on which the petition is founded was concealed by the fraud of the contesting respondents. Mr Chagla has also submitted that transfer of shares had taken place as the father Vadilal Lallubhai Mehta wanted that the control of two companies viz. M/s Sayaji Industries Ltd. and M/s C.V. Mehta Pvt. Ltd. should vest with Bipinbhai and some other companies viz. M/s Industrial Machinery Manufacturers Pvt. Ltd., M/s C. Doctor and Company Pvt. Ltd., M/s Mehta Machinery Manufacturers Pvt. Ltd. and M/s Oriental Corporation Pvt. Ltd. should vest with Suhasbhai and the particulars of the arrangement so made was recorded in MOU dated 30-1-1982 and the modified MOU dated 13-11-1982. The fact that Suhasbhai supported the petitioners of the company petition clearly demonstrated that he had turned dishonest and

wanted to deprive Bipinbhai of the control of the two companies, which he had got after transfer of shares in his name. The whole thing had been done in the knowledge of the father Vadilal Lallubhai Mehta, who was the Chairman and also his two sons and thus the High Court had rightly held that the petition was barred by limitation.

9. Before examining the contentions raised by the learned counsel for the parties it will be useful to refer to the relevant statutory provisions and the basic principles which are involved in the case. The company petition has been filed seeking rectification of the register of members as contemplated by Section 155 of the Companies Act. This provision has been deleted by Section 21 of the Companies (Amendment) Act, 1988 (Act 31 of 1988) with effect from 31-5-1991 and has been incorporated in a modified form in Section 111. Prior to its omission the said section stood as under:

"155. *Power of Court to rectify register of members.*—(1) If—

(*a*) the name of any person—

(*i*) is without sufficient cause, entered in the register of members of a company, or

(*ii*) after having been entered in the register, is, without sufficient cause, omitted therefrom; or

(*b*) default is made, or unnecessary delay takes place, in entering on the register the fact of any person having become, or ceased to be, a member;

the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either reject the application or order rectification of the register; and in the latter case, may direct the company to pay the damages, if any, sustained by any party aggrieved.

In either case, the Court in its discretion may make such order as to costs as it thinks fit.

(3) On an application under this section, the Court—

(*a*) may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand; and

(*b*) generally, may decide any question which it is necessary or expedient to decide in connection with the application for rectification.

(4) From any order passed by the Court on the application, or on any issue raised therein and tried separately, an appeal shall lie on the grounds mentioned in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908)—

(*a*) if the order be passed by a District Court, to the High Court;

(*b*) if the order be passed by a Single Judge of a High Court consisting of three or more Judges, to a Bench of that High Court.

(5) The provisions of sub-sections (1) to (4) shall apply in relation to the rectification of the register of debenture-holders as they apply in relation to the rectification of the register of members."

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10. Section 77 of the Companies Act imposes restrictions on purchase by company, or loans by company for purchase, of its own or its holding company's shares. Relevant part of sub-sections (1) and (2) of this section read as under:

"77. *Restrictions on purchase by company, or loans by company for purchase, of its own or its holding company's shares.*—(1) No company limited by shares, and no company limited by guarantee and having a share capital, shall have power to buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of Sections 100 to 104 or of Section 402.

(2) No public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company:

Provided that.... (omitted as not relevant)"

11. The vexed question of the legality of the purchase by a limited company of its own shares was set at rest by the decision of the House of Lords in *Trevor* v. *Whitworth*[1] since which it has been clear law that a limited company cannot purchase its own shares except by way of reduction of capital with the sanction of the court. (See *Buckley on the Companies Act*, 14th Edn., p. 1499.) In the same decision it was also held that even express authority to the contrary in the memorandum was unavailing. The main reasons for this prohibition were that such a purchase could either amount to "trafficking" in its own shares, thereby enabling the Company in an unhealthy manner to influence the price of its own shares on the market, or it would operate as a reduction of capital which can only be effected with the sanction of the court and in the manner laid down in the statute (see *Palmer's Company Law*, 23rd Edn., p. 440). In *Guide to the Companies Act* by A. Ramaiya (16th Edn., p. 951) apart from *Trevor* v. *Whitworth*[1], *British and American Trustee and Finance Corpn.* v. *Couper*[2] has also been referred to as a leading authority on the subject. Reference has also been made to several decisions rendered by the superior courts in Australia and New Zealand wherein it has been unequivocally held that "a transaction which upon examination can be seen to involve a return of capital, in whatever form, under whatever label, and whether directly or indirectly, to a member, is void". It is, therefore, a well-settled legal principle that any valuable consideration paid out of the Company's assets will make a transaction amounting to a purchase and, therefore, invalid.

12. It may be mentioned here that in view of Rule 6 of the Companies (Court) Rules, the provisions of the Code of Civil Procedure will be applicable in the proceedings under the Companies Act. (See *Sangramsinh P. Gaekwad* v. *Shantadevi P. Gaekwad*[3].)

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13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (*a*) the jurisdiction of the court, or (*b*) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in *Major S.S. Khanna* v. *Brig. F.J. Dillon*[4] and it was held as under: (SCR p. 421)

> "Under Order 14 Rule 2, Code of Civil Procedure where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit."

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the abovequoted decision still

holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

14. The plea raised by the contesting respondents is in fact a plea of demurrer. Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further. In *O.N. Bhatnagar* v. *Rukibai Narsindas*[5] (SCC para 9) it was held that the appellant having raised a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by Respondent 1 under Section 91(1) of the Act and those allegations must be taken to be true. In *Roop Lal Sathi* v. *Nachhattar Singh Gill*[6] (SCC para 24) it was observed that a preliminary objection that the election petition is not in conformity with Section 83(1)(*a*) of the Act i.e. it does not contain the concise statement of the material facts on which the petitioner relies, is but a plea in the nature

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of demurrer and in deciding the question the Court has to assume for this purpose that the averments contained in the election petition are true. Reiterating the same principle in *Abdulla Bin Ali* v. *Galappa*[7] it was said that there is no denying the fact that the allegations made in the plaint decide the forum and the jurisdiction does not depend upon the defence taken by the defendants in the written statement. In *Exphar SA* v. *Eupharma Laboratories Ltd.*[8] (SCC para 9) it was ruled that where an objection to the jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law. In this case the decision of the High Court on the point of the jurisdiction was set aside as the High Court had examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of the Delhi High Court and also that Respondent 2 did not carry out business within the jurisdiction of the said High Court. Following the same principle in *Indian Mineral & Chemicals Co.* v. *Deutsche Bank*[9] (SCC paras 10 and 11), it was observed that the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on the point of demurrer.

15. The principle underlying clause (*d*) of Order 7 Rule 11 is no different. We will refer here to a recent decision of this Court rendered in *Popat and Kotecha Property* v. *State Bank of India Staff Assn.*[10] where it was held as under in para 10 of the report: (SCC p. 515)

> "*10.* Clause (*d*) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (*d*) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force."

16. It was emphasised in para 25 of the report that the statement in the plaint without addition or subtraction must show that it is barred by any law to attract

application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by clause (*d*) of Order 7 Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the said principle, the plea raised by the contesting respondents that the company petition was barred by limitation has to be examined by looking into the averments made in the company

petition alone and any affidavit filed in reply to the company petition or the contents of the affidavit filed in support of Company Application No. 113 of 1995 filed by the respondents seeking dismissal of the company petition cannot at all be looked into.

17. Paras 14 and 21 of the company petition read as under:

"*14*. Even the action on the part of Respondents 2 and 3 to use the Company's funds would amount to fraud on the statute. They have clearly played fraud on Section 77 of the Act and it is also settled law that the party who has committed fraud could not be allowed to retain the fruits of the fraudulent action perpetrated by them. On this principle also status quo ante should be restored so that Respondents 2 and 3 do not get benefit of the fraud played upon the statute."

"*21*. The petitioners further say that though the share transfers were effected in the year 1982, the petitioners could not have detected the fraud earlier, but they came to know about the fraud in detail when the specific criminal complaint was filed by some interested persons, the office-bearers of the union of the Company before the criminal court at Narol and they came to know by or about in the month of May 1987. Hereto annexed and marked Annexure I is the copy of the said complaint. Thereafter they enquired into the matter and collected whatever additional material available. Petitioner 1 gave notice dated 14-6-1987. However, Respondents 2 to 11 wasted too much time in correspondence and thereafter this petition was filed immediately."

18. The case set up by the petitioners in the company petition is that they had absolutely no knowledge of the alleged utilisation of the funds of the Company for purchase of shares by Bipinbhai and they came to know about it by or about in the month of May 1987 when a criminal complaint was filed by some office-bearers of the union of the Company and thereafter Petitioner 1 gave notice dated 14-6-1987. As mentioned earlier two cheques of Rs 10 lakhs and 5 lakhs were given on 13-11-1982 and another cheque of Rs 5 lakhs was given on 25-11-1982 by M/s Sayaji Industries Ltd. to M/s Santosh Starch Products and on the same day M/s Santosh Starch Products gave Rs 20 lakhs through cheques to Bipinbhai and his family members. Thereafter, Bipinbhai purchased 8600 shares of the Company M/s Sayaji Industries Ltd. and became its Managing Director on 18-11-1982. Though we should not be understood as recording any finding on this point, but in the natural course of events or at least it looks quite probable that the petitioners in the company petition, who are small shareholders of the Company, may not have come to know about the aforesaid transactions.

19. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order 7 Rule 11(*d*) CPC

would also include the ground that it is barred by law of limitation has been recently considered by a

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two-Judge Bench of this Court to which one of us was a member (Ashok Bhan, J.) in *Balasaria Construction (P) Ltd.* v. *Hanuman Seva Trust*[1] it was held: (SCC p. 661, para 8)

> "*8.* After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(*d*) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time."

This principle would be equally applicable to a company petition. Therefore, unless it becomes apparent from the reading of the company petition that the same is barred by limitation the petition cannot be rejected under Order 7 Rule 11(*d*) CPC.

20. In the natural course of events it looks quite probable that a third party may not come to know that the Company had advanced money to M/s Santosh Starch Products on 13-11-1982 and M/s Santosh Starch Products gave Rs 20 lakhs to Bipinbhai and his family members on the same day and the said money was utilised for purchasing the shares. It is noteworthy that M/s Santosh Starch Products is a supplier of the Company M/s Sayaji Industries Ltd. and in such circumstances the payment of money by the Company to M/s Santosh Starch Products could not have raised any suspicion. At any rate accepting the version given in the company petition as correct and without taking into consideration any plea raised in the affidavits filed in reply thereto or any other material or evidence, it is absolutely clear that having regard to the provisions of Section 17(1) of the Limitation Act, the limitation for filing the company petition had not begun to run until May 1987 when the petitioners claim to have got knowledge of the alleged fraud committed by the respondents in utilising the funds of the Company for purchase of its shares, which is a clear violation of Section 77 of the Companies Act. Thus the company petition cannot be thrown out at the preliminary stage as being barred by limitation and the view to the contrary taken by the learned Company Judge and also by the Division Bench is clearly erroneous in law.

21. As mentioned earlier, before the admission of the company petition, notice was issued and affidavit-in-reply was filed by R.T. Doshi, who was working as Company Secretary of the Company. This affidavit was filed for the purpose of opposing the admission of the company petition. It was averred therein that the company petition was barred by gross laches, delay, acquiescence as the petition had been filed after more than five years of transaction in question. The plea raised by the petitioners that they came to know about the alleged transaction in May 1987 when a criminal complaint was filed was sought to be refuted by stating that the criminal complaint was

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filed on 18-6-1987, but before that Petitioner 1 had given a notice to the Company

dated 17-6-1987. It was also averred in the affidavit of R.T. Doshi that the petitioners were aware of the transaction right from November 1982 and Petitioner 1 Ramesh B. Desai, who was Administrative Manager of the Company, resigned from the post held by him on 7-10-1983. Based upon these facts it was submitted in the reply affidavit of R.T. Doshi that Petitioner 1 was aware of the fact that the petition was barred by limitation. The learned Company Judge, after referring to the aforesaid material and the contentions raised by the learned counsel for the parties, held as under:

> "Here, before me, looking to the averments in the petition and in the affidavit-in-reply, it can be said that, a material proposition regarding the limitation has been affirmed by the petitioners and the same is being denied by the other side and, therefore, there is a subject of a distinct issue and that issue appears to be an issue of law, for the reasons which I shall have to assign."

The learned Company Judge then proceeded to hold that "there is not only no proof of fraud, but even the 'averments of fraud' made in the petition do not amount to the averments of fraud in the eye of the law" and finally held that "the petition appears prima facie to be barred by the law of limitation, regard being had to the residuary Article 137 of the Limitation Act". After referring to some authorities and Order 7 Rule 4 CPC the learned Company Judge held that "though the word 'fraud' and the terms 'fraud on the Company', 'fraud on statute' and 'fraud on the shareholders' are used more than once, but absolutely no particulars in that respect have been given". After so observing, the learned Company Judge has concluded that "the position would be that, these averments of fraud said to be made in the petition cannot be said to be the averments of fraud, in the eye of the law, within the meaning of Order 6 Rule 4 CPC".

22. Undoubtedly, Order 6 Rule 4 CPC requires that complete particulars of fraud shall be stated in the pleadings. The particulars of alleged fraud, which are required to be stated in the plaint, will depend upon the facts of each particular case and no abstract principle can be laid down in this regard. Where some transaction of money takes place to which 'A', 'B' and 'C' are parties and payment is made by cheques, in normal circumstances a third party 'X' may not get knowledge of the said transaction unless he is informed about it by someone who has knowledge of the transaction or he gets an opportunity to see the accounts of the parties concerned in the Bank. In such a case an assertion by 'X' that he got no knowledge of the transaction when it took place and that he came to know about it subsequently through some proceedings in court cannot be said to be insufficient pleading for the purpose of Order 6 Rule 4 CPC. In such a case 'X' can only plead that he got no knowledge of the transaction and nothing more. Having regard to the circumstances of the case, we are of the opinion that the High Court was in error in holding that there was no proper pleading of fraud.

23. The learned Company Judge has referred to the affidavit-in-reply filed by R.T. Doshi opposing the admission of the company petition and on

the basis of the said affidavit has laid great emphasis on the fact that the father Vadilal Lallubhai Mehta was present all along with Appellant 1 Ramesh B. Desai at all material times and that things were done in the presence of everyone viz. two sons of Vadilal Lallubhai Mehta, namely, Bipinbhai and Suhasbhai. Emphasis has also been laid on the fact that the last cheque dated 25-11-1982 given by the Company to M/s Santosh Starch Products was signed by Petitioner 1 Ramesh B. Desai himself. These are all questions of fact, findings on which could be recorded only after the parties had been given opportunity to adduce evidence. The mere fact that one cheque for Rs 5 lakhs was signed by Ramesh B. Desai does not lead to the only inference that he got

knowledge of the entire transaction relating to payment of Rs 20 lakhs by the Company to M/s Santosh Starch Products and the payment of the said amount on the same day by M/s Santosh Starch Products to Bipinbhai and his family members. The learned Company Judge and the Division Bench in appeal have referred to these facts and have recorded a finding that the petitioners had knowledge of the entire transaction and the company petition was barred by limitation. It is important to point out that apart from Ramesh B. Desai there are 8 other shareholders who had filed the company petition. There is not even the slightest inkling in the impugned judgments of the High Court that the other 8 petitioners had acquired knowledge of the transaction much earlier. In our opinion the approach adopted by the High Court is clearly illegal as no finding on the point of knowledge could have been recorded until the parties had been given opportunity to lead evidence and in such circumstances dismissal of the company petition at a preliminary stage on the finding that it was barred by limitation is clearly erroneous in law.

24. Mr Iqbal Chagla, learned counsel for the respondents, has submitted that the full particulars of fraud had not been given in the company petition and as such there was no compliance with Order 6 Rule 4 CPC in the company petition and the learned Company Judge has rightly dismissed the same. In support of this submission he has placed reliance on *Bishundeo Narain* v. *Seogeni Rai*[12] wherein it was held that: (SCR p. 556)

> "[I]n cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be...."

Reliance has also been placed on *Bijendra Nath Srivastava* v. *Mayank Srivastava*[13] and paras 208 and 228 of the report in *Sangramsinh P. Gaekwad* v. *Shantadevi P. Gaekwad*[3] where the same principle has been reiterated. We have already considered this aspect of the matter and in our opinion in the facts and circumstances of the case the plea raised in the company petition cannot be held to be wanting in compliance with Order 6 Rule 4 CPC.

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25. The learned Company Judge and the Division Bench of the High Court have dealt with the point of limitation by posing the question whether the petitioners could avail of the benefit of Section 17(1)(*b*) of the Limitation Act as they were claiming that they did not get any knowledge of the transaction prior to May 1987 and that the petition was within time from the date on which they got knowledge of the transaction. Mr Chagla has strenuously urged that in order to invoke the aid of Section 17(1)(*b*) of the Limitation Act the petitioners must establish that there has been fraud and that by such fraud they have been kept away from knowledge of their right to or of the title whereon it is founded. For substantiating this submission, reliance has been placed on *Syed Shah Ghulam Ghouse Mohiuddin* v. *Syed Shah Ahmed Mohiuddin Kamisul Quadri*[14], *Kasturi Lakshmibayamma* v. *Sabnivis Venkoba Rao*[15] and *Marappa Goundar, In re*[16] wherein the aforesaid principle has been enunciated.

26. The petitioners in the company petition have relied upon Section 17 of the Limitation Act in support of their claim that the limitation will start running only when they got knowledge of the fraud committed by the contesting respondents i.e. in May

or June 1987. The relevant part of sub-section (1) of Section 17 on which the petitioners base their claim is being reproduced below:

"17. *Effect of fraud or mistake*.—(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,—

(*a*) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(*b*) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(*c*) the suit or application is for relief from the consequences of a mistake; or

(*d*) (omitted as not relevant)

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it, or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that.... (omitted as not relevant)"

27. In our opinion, in view of the facts pleaded in the company petition, the case is covered by Section 17(1)(*a*) of the Limitation Act and not by Section 17(1)(*b*) as the petitioners are not claiming any right or title over the shares of the Company, which according to them were purchased out of the funds of the Company. Section 17(1)(*b*) will apply when the plaintiff or the applicant is claiming any kind of right or title to any movable or immovable property, etc. Their simple case is that in view of the fact that the funds of the Company were utilised for purchase of shares by Bipinbhai, which were then

recorded in his name, the whole transaction was in violation of Section 77 of the Companies Act, and consequently the register of the Company required to be rectified in accordance with Section 155 of the Companies Act. It was also pleaded that the petitioners had got no knowledge of the fraud played by the respondents of the company petition whereby the funds of the Company were utilised for purchase of shares and they came to know about it in May 1987 through the criminal complaint. In view of the pleadings as aforesaid, it is Section 17(1)(*a*) of the Limitation Act which would govern the situation and not Section 17(1)(*b*) of the Limitation Act.

28. The decisions cited by Mr Chagla have been rendered on Section 18 of the Limitation Act, 1908 which reads as under:

"18. *Effect of fraud*.—Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application—

(*a*) against the person guilty of the fraud or accessory thereto, or

(*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production."

The corresponding provision of Section 18 of the Limitation Act, 1908 is Section the Limitation Act, 1963. The Statement of Objects and Reasons for amending n 18 of the old Limitation Act read thus:

OBJECTS AND REASONS

Clause 16.—Section 18 of the existing Act has been recast on the lines of tion 26 of the Limitation Act, 1939, of the United Kingdom so as to include ons based on fraud and also for relief founded on mistake. The clause also seeks afford suitable protection to purchasers for valuable consideration in all such es.

Sub-clause (2) incorporates the principle contained in the proviso to Section 48 he Code of Civil Procedure, 1908, which now finds a place in this Bill (see Article). The benefit is, however, made available only if the application for extension is le within one year from the date of discovery of the fraud or cessation of force."

Clause (*a*) of sub-section (1) of Section 17 of the Limitation Act, 1963 is the as clause (*a*) of Section 26 of the English Act. There was no corresponding on like clause (*a*) of sub-section (1) of Section 17 in Section 18 of the old tion Act and this provision has been introduced for the first time as a result of nendment. All the decisions cited by Mr Chagla have been rendered on Section the Limitation Act, 1908. In view of the amendment incorporated in the tion Act, 1963 and specially the language in which Section 17 is cast now, they ve no application to the facts of the present case.

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Soli Sorabjee has also submitted that the continuance of the name of Bipinbhai register of the Company was a continuing wrong and, therefore, the period of ion would begin to run at every moment of time during which the wrong name nbhai continues to remain in the register. Learned counsel has submitted that in situation the principles enshrined in Section 22 of the Limitation Act will apply e company petition cannot be held to be barred by limitation and the view to ntrary taken by the High Court is erroneous in law. Since we have held above e company petition could not be dismissed on a preliminary issue, namely, as barred by limitation as the petitioners had not been given opportunity to lead ce and the finding of the High Court has been reversed on that point, we do not er it appropriate to examine the aforesaid contention on merits. However, as the Court has to hear the company petition again, the findings recorded by the High on the point of continuing wrong and condonation of delay are set aside.

The appeal accordingly succeeds and is hereby allowed with costs throughout. dgment and order dated 12-3-1996 passed by the learned Company Judge and the Division Bench dated 10-3-2000 are set aside. The High Court shall decide mpany petition afresh in accordance with law.

It is made clear that any observation made in this order is only for the limited e of deciding this appeal and shall not be construed as an expression of opinion merits of the case.

———

he Judgment and Order dated 10-3-2000 of the High Court of Gujarat at Ahmedabad in OJ Appeal No. 9

12 AC 409 : (1886-90) All ER Rep 46 (HL)

C 399 : (1891-94) All ER Rep 667 (HL)

11 SCC 314

4 SCR 409 : AIR 1964 SC 497

2 SCC 244

3 SCC 487

2 SCC 54

3 SCC 688

12 SCC 376

) 7 SCC 510

) 5 SCC 658, below

SCC 447 : 1951 SCR 548 : AIR 1951 SC 280

) 6 SCC 117

) 1 SCC 597 : AIR 1971 SC 2184

970 AP 440 : (1970) 2 An LT 176

959 Mad 26 : (1958) 1 MLJ 260

2022 SCC OnLine SC 737

In the Supreme Court of India

(BEFORE S. ABDUL NAZEER AND VIKRAM NATH, JJ.)

Kattukandi Edathil Krishnan and Another ... Appellant(s);

Versus

Kattukandi Edathil Valsan and Others ... Respondent(s).

Civil Appeal No(s). 6406-6407 of 2010

Decided on June 13, 2022

Family and Personal Law — Marriage, Divorce, Other Unions and Children — Legitimacy of children — Presumption of legitimacy in absence of proof against presumption of marriage of long co-habiting couple — Hence, held entitled to share in family property

Impugned judgment of Kerala High Court, *reversed*

The Judgment of the Court was delivered by

S. ABDUL NAZEER, J.:— The instant appeals arise out of the judgment and decree dated 05.02.2009 passed by the High Court of Kerala at Ernakulam in A.S. No. 102 of 1996(A) and A.S. No. 107 of 1996 whereby the High Court has allowed the appeals and set aside the decree for partition passed by the Trial Court.

2. The appellants were the plaintiffs and Kattukandi Idathil Karunakaran was the defendant who died during the pendency of the suit. Therefore, his legal representatives were brought on record as defendants no. 2 to 5. For the sake of convenience, the parties are referred by their respective ranking before the Trial Court.

3. In the suit, the plaintiffs contended that the suit property belonged to one Kattukandi Edathil Kanaran Vaidyar who had four sons viz. Damodaran, Achuthan, Sekharan and Narayanan. The first plaintiff is the son of Damodaran, born in the wedlock with one Chiruthakutty, and the second plaintiff is the son of the first plaintiff. Achuthan had one son by name Karunakaran, the predecessor in-interest of the defendants. Sekharan was a bachelor and died without any issue. Narayanan married one Lakshmi and they had a daughter by the name of Janaki, who also died as a spinster. The plaintiffs claimed half share in the suit schedule property.

4. It is the case of the defendants that all the children except Achuthan died as bachelors and Karunakaran is the only son of Achuthan. They denied the contention of the plaintiffs that Damodaran had married Chiruthakutty and that the first plaintiff was the son born to them in the said wedlock. Their further contention was that Chiruthakutty was not the wife of Damodaran. Thus, it was pleaded that the plaintiffs are not entitled for any share in the suit schedule property.

5. On the basis of the pleadings of the parties, the Trial Court framed relevant issues. The Trial Court on examination of the evidence on record held that Damodaran had a long co-habitation with Chiruthakutty and that due to such co-habitation, it could be concluded that Damodaran had married Chiruthakutty and that the first plaintiff was the son born in the said wedlock. The Trial Court accordingly passed a preliminary decree for partition of the suit property into two shares and one such share was allotted to the plaintiffs.

6. Aggrieved by the said judgment and decree, the first defendant filed an appeal, A.S. No. 102 of 1996, and the other defendants filed another appeal A.S. No. 107 of 1996 before the High Court. While the matter was being argued, yet another contention was put forward by the defendants that if the first plaintiff was born to Damodaran through Chiruthakutty, he could only be an illegitimate child. As long as

the marriage between Damodaran and Chiruthakutty is not proved, the plaintiffs cannot claim the right over the coparcenary property. This plea of the defendants was without any pleading to that effect and no such contention was put forth by the defendants before the Trial Court.

7. The High Court, on appreciation of the evidence on record, held that the first plaintiff was the son of Damodaran. However, the documents produced before the Court would not go to show that Damodaran actually married Chiruthakutty and that no presumption of a pre-existing valid marriage between Damodaran and Chiruthakutty could arise. The High Court opined that the position of the first plaintiff to be of an illegitimate child. That being so, the plaintiffs would not be entitled for a share in the coparcenary property since the marriage between Damodaran and Chiruthakutty was not a valid one. On the basis of this conclusion, the High Court remitted the matter back to the Trial Court for fresh consideration. The Trial Court permitted the parties to adduce additional evidence and, if necessary, to amend the pleadings so as to consider the factum of marriage.

8. The plaintiffs challenged the above order of remand before this Court and this Court allowed the appeals by setting aside the order of remand with a direction to the High Court to decide the appeals on the basis of the evidence on record.

9. The High Court, thereafter, heard the appeals and allowed the same by holding that there is no evidence to establish the long cohabitation between the father and the mother of the first plaintiff and the documents only proved that the first plaintiff is the son of Damodaran, but not a legitimate son, thereby denied partition of the property. As noticed above, this judgment of the High Court is under challenge in these appeals.

10. We have heard Mr. V. Chitambaresh, learned senior counsel for the appellants-plaintiffs and Mr. R. Basant & Mr. V. Giri, learned senior counsel for the respondents-defendants.

11. Mr. V. Chitambaresh submits that the voluminous documents produced by the plaintiffs would show that Damodaran was the father of the first plaintiff and Chiruthakutty was the wife of Damodaran. Since their marriage took place more than 50 years prior to filing of the suit (now 90 years), there is no possibility of having any documentary evidence of their marriage. He has taken us through the various documents produced by the plaintiffs wherein there are references to periodical payments made to Chiruthakutty from the husband's house. He has also taken us through the evidence of plaintiffs and, the witnesses examined on behalf of the plaintiffs in support of his contention. It is further argued that the documents produced by the plaintiffs were in existence long before any controversies between the parties arose. These documents would conclusively show that the first plaintiff was the son of Damodaran and Chiruthakutty and the contention of the defendants that Damodaran died as a bachelor or without any legitimate son, cannot be believed at all. It is further submitted that the law is in favour of declaring legitimacy, as against bastardy. Long course of living together between a male and female will raise a presumption of marriage between them and the children born in such relationship are considered to be legitimate children. It is further argued that while such presumption, made under Section 114 of the Indian Evidence Act, 1872, is a rebuttable one, as rightly held by the Trial Court that the defendants have not produced any worthwhile evidence to rebut this presumption in the present case.

12. On the other hand, Mr. R. Basant and Mr. V. Giri, learned senior counsel for the defendants, would submit that Damodaran had not married Chiruthakutty and that the first plaintiff was not the legitimate son of Damodaran. The suit was deliberately filed at a belated stage when production of conclusive evidence as to this issue was no longer a possibility. No claim for partition whatsoever was made during the lifetime of Chiruthakutty. It is argued that there is no proof whatsoever either of the marriage or

of the long cohabitation and that all the documents relied upon by the plaintiffs are documents that came into existence after the death of Damodaran except Exhibit A-3. It is further argued that even Exhibit A-3 does not prove the marriage/long co-habitation between Damodaran and Chiruthakutty. It is also contended that the plaintiffs have not come to the court with clean hands. Therefore, the court should not show any indulgence in their favour. Accordingly, the defendants have prayed dismissal of the appeals.

13. We have carefully considered the submissions made at the Bar by learned senior counsel for the parties and perused the materials placed on record.

14. It is not disputed that the suit property belongs to one Kattukandi Edathil family which is a Thiyya family of Calicut governed by the Mitakshara Law of Inheritance. The said property originally belonged to one Kattukandi Edathil Kanaran Vaidyar who had four sons, namely, Damodaran, Achuthan, Sekharan and Narayanan. It is also admitted that Achuthan married Kalyani and they had a son named Karunakaran (Defendant No. 1). Karunakaran married Umadevi (Defendant No. 3) and they had three children, namely, Valsan, Kasturi and Saraswati Bai (Defendant Nos. 2, 4 and 5 respectively). Sekharan and Narayanan did not marry. The plaintiffs have contended that Damodaran married one Chiruthakutty and they had a son by the name of Krishnan (Plaintiff No. 1). However, the defendants have contended that Damodaran never married Chiruthakutty. The court below has recorded a finding of fact that the first plaintiff was the son of Damodaran and Chiruthakutty, but not a legitimate son.

15. It is well settled that if a man and a woman live together for long years as husband and wife, there would be a presumption in favour of wedlock. Such a presumption could be drawn under Section 114 of the Evidence Act. Although, the presumption is rebuttable, a heavy burden lies on him who seek to deprive the relationship of legal origin to prove that no marriage took place.

16. In *Andrahennedige Dinohamy* v. *Wijetunge Liyanapatabendige Balahamy*[1], the Privy Council laid down the general proposition as under:

> "...where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage."

17. In *Mohabbat Ali Khan* v. *Mohd. Ibrahim Khan*[2], once again it was laid down by the Privy Council as under:

> "The law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years."

18. In *Badri Prasad* v. *Dy. Director of Consolidation*[3], it was held by this Court that a strong presumption arises in favour of wedlock where two partners have lived together for long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seek to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon the bastardy.

19. In *S.P.S. Balasubramanyam* v. *Suruttayan alias Andali Padayachi*[4], this Court held as under:

> "4. What has been settled by this Court is that if a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two. But the presumption is rebuttable. [See: *Gokul Chand* v. *Parvin Kumari*, (1952) 1 SCC 713 : AIR 1952 SC 231 : 1952 SCR 825]"

20. Similar view has been taken by this Court in *Tulsa* v. *Durghatiya*[5]; *Challamma* v. *Tilaga*[6]; *Madan Mohan Singh* v. *Rajni Kant*[7] and *Indra Sarma* v. *V.K.V. Sarma*[8]

21. According to the plaintiffs, Damodaran had married Chiruthakutty in the year 1940. However, there is no direct evidence of their marriage. The first plaintiff-

Krishnan was born in the year 1942. Therefore, the question for consideration in these appeals is whether there is sufficient evidence to prove the long co-habitation to establish the relationship of husband-wife between Damodaran and Chiruthakutty.

22. The first plaintiff was examined as PW-1 who deposed that his father-Damodaran and mother-Chiruthakutty resided in the suit schedule property. PW-1 further deposed that he shifted his residence along with his mother after the demise of his father when he obtained a job. PW-1 has also stated that the defendants gave a share of the income till the death of his mother in the year 1985. PW-2 is a neighbour. In his evidence he has stated that Kattukandi Edathil Damodaran had married Chiruthakutty. They had resided at Kattukandi Edathil House as husband and wife. They have a son by the name of Krishnan. In his cross-examination, he has stated that, as per custom, some persons had participated in their marriage. Even before marriage, Chiruthakutty had been at Kattukandi Edathil House. PW-2 has also stated that Chiruthakutty had rented a room at Chalapurram and after marriage, they had stayed in a rented house and that Damodarana's sister also participated in the marriage. The evidence of PW-2 also shows that the marriage between Damodaran and Chiruthakutty was a love marriage.

23. The plaintiffs have produced the birth certificate of the first plaintiff as Ex.A-9. As per this document, the date of birth of the first plaintiff is shown as 12.05.1942. K.E. Damodaran and Chiruthakutty are described as father and mother. Ex.B-1 is the copy of the similar certificate produced by the defendants. On comparing Ex.A-9 and Ex.B-1, it is seen that some corrections have been made in Ex.A-9 with regard to the place of birth. However, it is to be noted that in both the documents, the name of the father and the mother of the first plaintiff are one and the same i.e. K.E. Damodaran and Chiruthakutty respectively. Ex.A2 is the Insurance Policy which shows name of his house as Kattukandy Edathil. Ex. A2 dated 26.04.1966. Ex.A3 is the Secondary School Leaving Certificate of K.E. Damodaran kept in his possession. According to him he got the same since he is the son of Damodaran. Ex. A4, dated 01.08.1963, is a Trade certificate issued in favour of the first plaintiff which was issued by the Secretary of State Council for training in vocational Trades, since he was a student of the Junior Technical School, Manjeri. In this certificate the name of the first plaintiff is shown as Krishnan K. S/o Sri. K.E. Damodaran. The name of the house is shown as Edathil house, Chalappuram.

24. The plaintiffs have produced Ex.A5, the Malayala Manorama Daily dated 16.02.1985. In this paper it is reported that Chiruthakutty, wife of Kattukandy Edathil Damodaran, aged 75 years had expired. The name of the first plaintiff is shown as the son of Chiruthakutty. Ex.A6 is the true copy of a voters list of the year 1970. In this document, the name of Chiruthakutty is shown as the wife of K.E. Damodaran. Ex.A7 dated 24.03.1980 is the petition filed by the first plaintiff before the village officer, Panniyankara. In this document the first plaintiff is certified as the son of Damodaran by the village officer. The same is dated 24.03.1980. Ex.A8 is also a similar certificate describing the first plaintiff as the son of Damodaran by the village officer. This is dated 04.05.1979. In the death certificate of Chiruthakutty dated 15.12.1985 (Ex.A10) the name of her husband is shown as Damodaran. Ex.A11 is the Electoral card of the first plaintiff in which the first plaintiff is described as the son of Damodaran and Chiruthakutty is described as the wife of Damodaran. Plaintiffs have also produced several other documents such as electoral card (Ex.A12) dated 02.11.1983, Ex.A13, a community certificate dated 07.11.1980, Ex.A14-Marriage certificate dated 29.04.1971, Ex.A15, the receipt issued by the Life Insurance Corporation of India in favour of the plaintiffs etc. Ex.A20 is an important document which is a Discharge Certificate of the first plaintiff from the Military Service wherein he is described as the son of K.E. Damodaran. Ex.A21 is the S.S.L.C. book of the first plaintiff.

25. There is also enough materials on record to show that Chiruthakutty was getting some money from the family of Damodaran, including in particular the letters at Exs.A22 and A23, which were addressed to the first plaintiff by his mother-Chiruthakutty long back in the year 1976. The Trial Court has discussed this aspect of the matter as under:

> "…..There is sufficient evidence to prove that K.E. Damodaran, Kattukandy Edathil had married Chiruthakutty and the 1st plaintiff is the son of Damodaran. It is the pertinent to note that the definite case of the plaintiffs is that the family used to give income from the family property to Chiruthakutty till her death in the year 1985. The plaintiff has produced Exts. A22 and A23 letters, addressed to the 1st defendant. On going through Ext. A22 it is seen that the same has been addressed to the 1st plaintiff by his mother Chiruthakutty long back in the year 1976. Of course the date is not mentioned in the letter but from the seal affixed in the document it is seen that the same has been posted in the year 1976. In this letter it is seen recorded that the mother went to Edathil House and also the 3rd defendant is mentioned as Umadathi. It is also seen from the letter that she is getting some money from the family. In Ext. A23 also it is seen that she is getting money from the family and there is reference to the 3rd defendant and the other defendant i.e., the daughter of the 3rd defendant i.e. DW1 has admitted that she is called as Umadathi. So Exts. A22 and A23 supports the case of the plaintiffs. The letters are seen addressed to the 1st plaintiff while he was in military service. From the letters it is seen that the mother has written the same when the 2nd child was born to him and there is also enquiries with regard to the illness of the 1st plaintiff. On going through these letters it can be seen that the documents are genuine. I find it difficult to conclude the same has been created by the plaintiffs to support their case as contended by the defendants."

26. As noticed above, the contention of the plaintiffs is that the marriage of Damodaran and Chiruthakutty was performed in the year 1940. The first plaintiff was born on 12.05.1942 as is evident from Ext.A9. The documents produced by the plaintiffs were in existence long before the controversy arose between the parties. These documents, coupled with the evidence of PW-2, would show the long duration of cohabitation between Damodaran and Chiruthakutty as husband and wife. The first plaintiff joined military service in the year 1963 and retired in the year 1979. Thereafter he has taken the steps to file a suit for partition of the suit schedule property.

27. We have also perused the evidence of the defendants. We are of the view that the defendants have failed to rebut the presumption in favour of a marriage between Damodaran and Chiruthakutty on account of their long co-habitation. In the circumstances, the High Court was not justified in setting aside the said judgment of the Trial Court.

28. Resultantly, the appeals succeed and are accordingly allowed. The judgment of the High Court impugned herein is set aside and the judgment and decree passed by the Trial Court is restored. Parties are directed to bear their respective costs.

Re.: Delay in initiating final decree proceedings under Order XX Rule 18 of the Civil Procedure Code, 1908

29. Before parting, we deem it necessary to address a concerning trend of delay in drawing up the final decrees under Rule 18 of Order XX of the Civil Procedure Code, 1908 (for short, 'CPC'). This provision deals with decrees in suits for partition or separate possession of share therein. It provides as under:

> "18. Decree in suit for partition of property or separate possession of a share therein.- Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the right of the several parties, interested in the property and giving such further directions as may be required."

Sub section (2) of Section 2 defines the decree as under:

"(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include —

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

30. It is clear from the above that a preliminary decree declares the rights or shares of the parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and placing the parties in separate possession of the divided property, then such inquiry shall be held and pursuant to the result of further inquiry, a final decree shall be passed. Thus, fundamentally, the distinction between preliminary and final decree is that: - a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in preliminary decree and after the inquiry having been conducted and rights of the parties being finally determined, a final decree incorporating such determination needs to be drawn up.

31. Final decree proceedings can be initiated at any point of time. There is no limitation for initiating final decree proceedings. Either of the parties to the suit can move an application for preparation of a final decree and, any of the defendants can also move application for the purpose. By mere passing of a preliminary decree the suit is not disposed of. [See: *Shub Karan Bubna* v. *Sita Saran Bubna*[9]; *Bimal Kumar* v. *Shakuntala Debi*[10]]

32. Since there is no limitation for initiating final decree proceedings, the litigants tend to take their own sweet time for initiating final decree proceedings. In some States, the courts after passing a preliminary decree adjourn the suit sine die with liberty to the parties for applying for final decree proceedings like the present case. In some other States, a fresh final decree proceedings have to be initiated under Order XX Rule 18. However, this practice is to be discouraged as there is no point in declaring the rights of the parties in one proceedings and requiring initiation of separate proceedings for quantification and ascertainment of the relief. This will only delay the realization of the fruits of the decree. This Court, in *Shub Karan Bubna* (supra), had pointed out the defects in the procedure in this regard and suggested for appropriate amendment to the CPC. The discussion of this Court is in paragraphs 23 to 29 which are as under:

"A suggestion for debate and legislative action

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

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

25. Because of the artificial division of suits into preliminary decree proceedings, final decree proceedings and execution proceedings, many trial Judges tend to believe that adjudication of the right being the judicial function, they should concentrate on that part. Consequently, adequate importance is not given to the final decree proceedings and execution proceedings which are considered to be ministerial functions. The focus is on disposing of cases rather than ensuring that the litigant gets the relief. But the focus should not only be on early disposal of cases, but also on early and easy securement of relief for which the party approaches the court. Even among lawyers, importance is given only to securing of a decree, not securing of relief. Many lawyers handle suits only till preliminary decree is made, then hand it over to their juniors to conduct the final decree proceedings and then give it to their clerks for conducting the execution proceedings.

26. Many a time, a party exhausts his finances and energy by the time he secures the preliminary decree and has neither the capacity nor the energy to pursue the matter to get the final relief. As a consequence, we have found cases where a suit is decreed or a preliminary decree is granted within a year or two, the final decree proceeding and execution takes decades for completion. This is an area which contributes to considerable delay and consequential loss of credibility of the civil justice system. Courts and lawyers should give as much importance to final decree proceedings and executions, as they give to the main suits.

27. In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The

proverbial obser-21 vation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant.

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

29. The present system involving a proceeding for declaration of the right, a separate proceeding for quantification or ascertainment of relief, and another separate proceeding for enforcement of the decree to secure the relief, is outmoded and unsuited for present requirements. If there is a practice of assigning separate numbers for final decree proceedings, that should be avoided. Issuing fresh notices to the defendants at each stage should also be avoided. The Code of Civil Procedure should provide for a continuous and seamless process from the stage of filing of suit to the stage of getting relief."

33. We are of the view that once a preliminary decree is passed by the Trial Court, the court should proceed with the case for drawing up the final decree suo motu. After passing of the preliminary decree, the Trial Court has to list the matter for taking steps under Order XX Rule 18 of the CPC. The courts should not adjourn the matter sine die, as has been done in the instant case. There is also no need to file a separate final decree proceedings. In the same suit, the court should allow the concerned party to file an appropriate application for drawing up the final decree. Needless to state that the suit comes to an end only when a final decree is drawn. Therefore, we direct the Trial Courts to list the matter for taking steps under Order XX Rule 18 of the CPC soon after passing of the preliminary decree for partition and separate possession of the property, suo motu and without requiring initiation of any separate proceedings.

34. We direct the Registry of this Court to forward a copy of this judgment to the Registrar Generals of all the High Courts who in turn are directed to circulate the directions contained in paragraph '33' of this judgment to the concerned Trial Courts in their respective States.

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[1] AIR 1927 PC 185

[2] AIR 1929 PC 135

[3] (1978) 3 SCC 527

[4] (1994) 1 SCC 460

[5] (2008) 4 SCC 520

[6] (2009) 9 SCC 299

[7] (2010) 9 SCC 209

[8] (2013) 15 SCC 755

[9] (2009) 9 SCC 689

[10] (2012) 3 SCC 548

(2003) 10 Supreme Court Cases 691 : 2003 SCC OnLine SC 1013

(BEFORE R.C. LAHOTI AND ASHOK BHAN, JJ.)

MITHAILAL DALSANGAR SINGH AND OTHERS . . Appellants;

Versus

ANNABAI DEVRAM KINI AND OTHERS . . Respondents.

Civil Appeals Nos. 7396-97 of 2003, decided on September 16, 2003

A. **Civil Procedure Code, 1908 — Or. 22 — Abatement — Nature of — Held, occurs automatically by operation of law — Specific order dismissing the suit as abated is not called for**

B. **Civil Procedure Code, 1908 — Or. 22 Rr. 9, 3 & 4 and Or. 6 Rr. 2 & 1 — Abatement — Setting aside of — Pleading under Or. 22 — Requirements of — Prayer for bringing LRs on record — Pleading implicit in — Held, a simple prayer for bringing LRs on record without specifically praying for setting aside of abatement may in substance be construed as a prayer for setting aside the abatement — Joint suit — Death of one plaintiff — Abatement of suit as a whole due to non-joinder of LRs of — Prayer for setting aside of abatement on part of one party only — Pleading implicit in — Necessity for such prayer on part of each of affected parties to joint suit — Held, a prayer for setting aside the abatement as regards one of the parties can be construed as a prayer for setting aside abatement of suit in its entirety**

C. **Civil Procedure Code, 1908 — Or. 22 Rr. 3 & 4 — Joint suit — Ad interim injunction granted in — Cross-appeal against — Application moved therein by defendants for bringing on record LRs of deceased plaintiff — Effect on joinder of such LRs to suit in addition to cross-appeal — Held, the application made by the defendant-appellants in the cross-appeal once allowed would have the effect of bringing the LRs on record, not only in the cross-appeal but also in the suit**

D. **Civil Procedure Code, 1908 — Or. 22 Rr. 3 & 4 and 9 — Different stages of proceedings — Impleadment of LRs — Whether necessary to make prayer for at every stage — Held, LRs being brought on record at any stage of the proceedings enures for the benefit of the entire proceedings**

Held :

Abatement of suit for failure to move an application for bringing the LRs on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. For a period of ninety days from the date of death of any party the suit remains in a state of suspended animation. And then it abates. The converse would also logically follow.

(Paras 8 and 10)

Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the LRs proposing to be brought on record or any other applicant proposing to bring the LRs of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the LRs on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement

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though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.

(Para 8)

A simple prayer for bringing the LRs on record without specifically praying for the setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for

setting aside the abatement of the suit in its entirety.

(Para 8)

Once the prayer made by the LRs of the deceased plaintiff for setting aside the abatement as regards the deceased plaintiff was allowed, and the LRs of the deceased plaintiff came on record, the constitution of the suit was rendered good; it revived and the abatement of the suit would be deemed to have been set aside in its entirety even though there was no specific prayer made and no specific order of the court passed in that behalf.

(Para 10)

The Division Bench has proceeded on the reasoning that the suit filed by three plaintiffs having abated in its entirety by reason of the death of one of the plaintiffs, and then the fact that no prayer was made by the two surviving plaintiffs as also by the LRs of the deceased plaintiff for setting aside of the abatement in its entirety, the suit could not have been revived. Such an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no order in writing passed by the court dismissing the entire suit as having abated.

(Para 10)

There is yet another aspect of the matter. The appeal against the order of ad interim injunction passed by the learned trial Judge was pending before the Division Bench. Therein the defendants had themselves moved an application for bringing on record the LRs of the deceased plaintiff, that is, the respondent in their appeal. The LRs being brought on record at any stage of the proceedings enures for the benefit of the entire proceedings. The prayer made by the defendants in their appeal for bringing on record the LRs of the deceased plaintiff-respondent in appeal was not opposed by the LRs or by any of the co-plaintiffs. Rather the prayer was virtually conceded to by the LRs themselves moving an application for being brought on record in the suit in place of the deceased plaintiff. The application made by the defendant-appellants in the appeal once allowed would have the effect of bringing the LRs on record, not only in the appeal but also in the suit. All that would remain to be done is the ministerial act of correcting the index of the parties by the applicants in appeal and then in the suit. In view of the defendants themselves having sought for impleadment of the LRs in the appeal the delay in moving the application in the suit by the LRs, being subsequent in point of time, became meaningless.

(Para 11)

E. **Civil Procedure Code, 1908 — Or. 22 Rr. 9(2) & 4 — Trial court's finding of "sufficient cause" for delay under R. 9(2) and S. 5, Limitation Act — Setting aside of abatement on basis of — Interference with — Permissibility of — Held, the opinion of the trial Judge and his finding on the question of availability of "sufficient cause" under, deserves to be given weight, and once arrived at would not normally be interfered with by superior courts — Limitation Act, 1963, S. 5**

The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of "sufficient cause" within the

meaning of Order 22 Rule 9(2) CPC and of Section 5, Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction.

(Para 9)

In the present case, the learned trial Judge found sufficient cause for condonation of delay in moving the application and such finding having been reasonably arrived at and based on the material available, was not open for interference by the Division Bench. In fact, the Division Bench has not even reversed that finding.

(Para 10)

Annabai Devram Kini v. *Mithilal Dalsangar Singh*, AIR 2002 Bom 332, *reversed*

F. **High Courts — Bombay High Court Letters Patent — Cl. 15 — "Judgment" — Meaning of — *Babulal Khimji case* followed — Whether an order setting aside abatement of suit a "judgment" under the LP — Held, whether trial Judge passes an order setting aside abatement or allowing substitution of LRs, no valuable right of parties is adjudicated upon —**

Only constitution of suit rendered good and suit proceeds ahead for being tried on merits — Such an order therefore not "judgment" within the meaning of Letters Patent — LPA against such order not maintainable — Civil Procedure Code, 1908 — S. 104 and Or. 43 R. 1 (k)

The Letters Patent do not exclude or override the application of Section 104 read with Order 43 Rule 1 CPC to internal appeals within the High Court. Even if it is assumed that Order 43 Rule 1 does not apply to letters patent appeals yet the principles governing those provisions would apply by a process of analogy. A perusal of Section 104 read with Rule 1 of Order 43 CPC shows that while an appeal is provided against an order refusing to set aside the abatement or dismissal of a suit, there is no appeal provided against an order whereby the abatement or dismissal of a suit has been set aside. Whether the trial Judge passed an order setting aside an abatement or allowed substitution of the LRs, no valuable right of parties was decided. The constitution of the suit was rendered good and the suit proceeded ahead for being tried on merits. Such an order does not amount to "judgment" within the meaning of Letters Patent.

(Para 12)

Shah Babulal Khimji v. *Jayaben D. Kania*, (1981) 4 SCC 8 : AIR 1981 SC 1786, *followed*

Nurul Hoda v. *Amir Hasan*, AIR 1972 Cal 449 : 76 CWN 1039 (FB); *Chando Devi* v. *Municipal Committee, Delhi*, AIR 1961 Punj 424 : ILR (1960) 2 Punj 386; *Maria Flaviana Almeida* v. *Ramchandra Santuram Asavle*, AIR 1938 Bom 408 : 40 Bom LR 658, *approved*

[**Ed.**: See also (1983) 3 SCC 15 in this regard.]

G. **Civil Procedure Code, 1908 — Or. 22 — Object and nature — Held, inasmuch as abatement results in denial of hearing on merits, the provision of abatement to be strictly construed — Conversely, prayer for setting aside abatement/dismissal consequent on abatement to be considered liberally — Reason therefor**

Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally.

(Para 8)

The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross

negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court.

(Para 9)

Appeals allowed

D-M/ANTZ/29008/S

Advocates who appeared in this case:

Arun Khosla, Ms Manisha Singh and M.A. Chinnasamy, Advocates, for the Appellants;

Vinay Bhasin, Senior Advocate (Mahesh Jani, Sanjeev Kr. Singh, Pradeep Kr. Malik and Bhargava V. Desai, Advocates, with him) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (1981) 4 SCC 8 : AIR 1981 SC 1786, *Shah Babulal Khimji* v. *Jayaben D. Kania* 697f

2. AIR 1972 Cal 449 : 76 CWN 1039 (FB), *Nurul Hoda* v. *Amir*

Hasan 698*b*, 698*b-c*, 698*f-g*, 698*g*

3. AIR 1961 Punj 424 : ILR (1960) 2 Punj 386, *Chando Devi* v. *Municipal Committee, Delhi* 698*b-c*, 698*c-d*

4. AIR 1938 Bom 408 : 40 Bom LR 658, *Maria Flaviana Almeida* v. *Ramchandra Santuram Asavle* 698*b-c*, 698*d-e*, 698*f-g*

The Judgment of the Court was delivered by

R.C. LAHOTI, J.— Leave granted.

2. A brief résumé of relevant facts would suffice. There was an agreement to sell relating to the suit property entered into by the owners thereof, impleaded as defendants in the suit, in favour of three persons, namely, Bharat Singh, Mithailal Singh and Smt Nirmala on 29-10-1987. The three vendees joined as co-plaintiffs and filed a suit for specific performance of the agreement to sell. There was a prayer for the grant of ad interim injunction which was allowed by the learned Single Judge of the High Court who was trying the suit. As against the order granting ad interim injunction, the defendants preferred an appeal and therein the three plaintiffs were impleaded as respondents. On 5-4-1997 Bharat Singh, one of the plaintiffs expired. The appeal filed by the defendants came up for hearing before the Division Bench of the High Court. On 17-6-2000, which was the date of hearing, a statement appears to have been made before the High Court that Bharat Singh had expired. The counsel for the plaintiff-respondents wrote a letter to the two surviving plaintiffs informing them of the factum of death of the third plaintiff and the need for taking steps for bringing the legal representatives on record. On 29-6-2000 the legal representatives of the deceased plaintiff took out chamber summons on the original side of the High Court for being brought on record in the suit in place of the deceased plaintiff. The defendants in the suit objected to the prayer for impleadment submitting that the prayer was hopelessly barred by time and that the suit had abated. It was also submitted that inasmuch as the cause of action arising to the three plaintiffs was only one, the death of one of the plaintiffs had resulted in the suit having abated in its entirety and, therefore, the prayer made by the legal representatives of the deceased plaintiff for being brought on record was not maintainable unless and until the other two surviving plaintiffs had also made a prayer for setting aside the abatement. That having not being done, the chamber summons at the instance of the legal representatives of the deceased plaintiff only was not maintainable. The

learned Single Judge allowed the prayer made by the legal representatives for condonation of delay in moving the application, set aside the abatement of the suit and allowed the legal representatives to be brought on record. The learned Single Judge held that the legal representative-applicants had duly established the sufficient cause for condonation of delay in moving the application and for setting aside the abatement. To quote from the order of the learned Single Judge, he held:

"The chamber summons is hereby allowed in terms of prayers (*a*), (*b*) and (*c*)."

3. Prayers (*a*), (*b*) and (*c*) referred to in the order of the learned Single Judge are as under:

"(*a*) that delay in taking out chamber summons be condoned;

(*b*) that abatement of suit with regard to Plaintiff 1 be set aside; and

(*c*) that the applicants and the respondent be brought on record in place of and instead of Plaintiff 1 as per the schedule annexed hereto."

4. It appears that in the appeal preferred by the defendants pending in the High Court, the defendant applicants also moved an application for bringing on record the legal representatives of the deceased plaintiff-respondent in that appeal.

5. The defendants laid challenge to the order dated 23-3-2001 of the learned Single Judge by preferring an intra-court appeal which has been allowed and the order of the learned Single Judge has been set aside. The result is that the suit stands dismissed as having abated. The aggrieved plaintiffs have filed this appeal by special leave.

6. A perusal of the order of the Division Bench shows that an objection was taken to the maintainability of the letters patent appeal but the same has been overruled by the Division Bench forming an opinion that an order setting aside abatement and bringing on record the legal representatives of the deceased plaintiff amounts to "judgment" within the meaning of the Letters Patent. The Division Bench has also held that the prayer made by the legal representatives of the deceased plaintiff and as allowed by the learned Single Judge was only for setting aside the abatement of the suit as regards Plaintiff 1; there was neither a prayer made nor an order made by the learned Single Judge setting aside the abatement of the suit in its entirety, and therefore, so far as the other two surviving plaintiffs are concerned, for failure on their part to make a prayer for setting aside the abatement, the suit continues to remain abated as against them, and therefore, the prayer, as also the order passed on that prayer, for setting aside the abatement only partly was bad in law and did not enure to the benefit of the surviving plaintiffs. The findings so arrived at by the Division Bench have been vehemently attacked by the learned counsel for the appellants.

7. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed and the judgment of the Division Bench deserves to be set aside.

8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied.

Too technical or pedantic an approach in such cases is not called for.

9. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of "sufficient cause" within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction.

10. In the present case, the learned trial Judge found sufficient cause for condonation of delay in moving the application and such finding having been reasonably arrived at and based on the material available, was not open for interference by the Division Bench. In fact, the Division Bench has not even reversed that finding; rather the Division Bench has proceeded on the reasoning that the suit filed by three plaintiffs having abated in its entirety by reason of the death of one of the plaintiffs, and then the fact that no prayer was made by the two surviving plaintiffs as also by the legal representatives of the deceased plaintiff for setting aside of the abatement in its entirety, the suit could not have been revived. In our opinion, such an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no order in writing passed by the court dismissing the entire suit as having abated. The suit has been treated by the Division Bench to have abated in its entirety by operation of law. For a period of ninety days from the date of death of any party the suit remains in a state of suspended animation. And then it abates. The converse would also

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logically follow. Once the prayer made by the legal representatives of the deceased plaintiff for setting aside the abatement as regards the deceased plaintiff was allowed, and the legal representatives of the deceased plaintiff came on record, the constitution of the suit was rendered good; it revived and the abatement of the suit would be deemed to have been set aside in its entirety even though there was no specific prayer made and no specific order of the court passed in that behalf.

11. There is yet another aspect of the matter. As we have already noticed, the appeal against the order of ad interim injunction passed by the learned trial Judge was pending before the Division Bench. Therein the defendants had themselves moved an application for bringing on record the legal representatives of the deceased plaintiff, that is, the respondent in their appeal. The legal representatives being brought on record at any stage of the proceedings enures for the benefit of the entire proceedings. The prayer made by the defendants in their appeal for bringing on record the legal representatives of the deceased plaintiff-respondent in appeal was not opposed by the legal representatives or by any of the co-plaintiffs. Rather the prayer was virtually conceded to by the legal representatives themselves moving an application for being brought on record in the suit in place of the deceased plaintiff. In our opinion, the application made by the defendant-appellants in the appeal once allowed would have the effect of bringing the legal representatives on record, not only in the appeal but also in the suit. All that would remain to be done is the ministerial act of correcting the index of the parties by the applicants in appeal and then in the suit. In view of the defendants themselves having sought for impleadment of the legal representatives in the appeal the delay in moving the application in the suit by the legal representatives,

being subsequent in point of time, became meaningless.

12. We are also of the opinion that the letters patent appeal against the order setting aside the abatement of the suit was not maintainable. What is a "judgment" within the meaning of Letters Patent came up for the consideration of this Court in *Shah Babulal Khimji* v. *Jayaben D. Kania*[1]. It was held that a decision by a trial Judge on a controversy which affects valuable rights of one of the parties is a "judgment". However, an interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties, and which work serious injustice to the party concerned. This Court further held that there is no inconsistency between Section 104 read with Order 43 Rule 1 CPC and the appeals under the Letters Patent. The Letters Patent do not exclude or override the application of Section 104 read with Order 43 Rule 1 CPC to internal appeals within the High Court. Even if it is assumed that Order 43 Rule 1 does not apply to letters patent appeals yet the principles governing those provisions would apply by a process of analogy. A perusal of Section 104 read with Rule 1 of Order 43 CPC shows that while an appeal is provided against an order refusing to set aside the abatement or dismissal of a suit; there is no appeal

provided against an order whereby the abatement or dismissal of a suit has been set aside. Whether the trial Judge passed an order setting aside an abatement or allowed substitution of the legal representatives, no valuable right of parties was decided. The constitution of the suit was rendered good and the suit proceeded ahead for being tried on merits. Such an order does not amount to "judgment" within the meaning of Letters Patent.

13. The learned counsel for the appellant has invited attention of the Court to the Full Bench decision of the Calcutta High Court in *Nurul Hoda* v. *Amir Hasan*[2] and the Division Bench decisions of the Punjab High Court in *Chando Devi* v. *Municipal Committee, Delhi*[3] and of the Bombay High Court in *Maria Flaviana Almeida* v. *Ramchandra Santuram Asavle*[4].

14. In *Nurul Hoda*[2] Sabyasachi Mukharji, J. (as His Lordship then was), speaking for the Full Bench, held that a decision setting aside an abatement does not in any way affect any right accrued to the defendant and, therefore, does not amount to a "judgment". No merits, in controversy between the parties, have been decided; the order merely reopens the controversy.

15. A Division Bench of the Punjab High Court, consisting of D. Falshaw and G.L. Chopra, JJ., in *Chando Devi case*[3] has held that the order setting aside the abatement of a suit or appeal is not a decision which affects the merits of the question between the parties by determining some right or liability in the suit. Such an order cannot be regarded as deciding a question materially in issue between the parties and directly affecting the subject-matter of the suit and, therefore, it would not amount to a "judgment".

16. In *Maria Flaviana Almeida*[4] Chief Justice Beaumont speaking for the Division Bench observed that an order setting aside an abatement is really one in procedure. The party originally had a cause of action which through no fault of its own came to an end by the death of its opponent and the effect of setting aside the abatement is merely to excuse delay in restoring the suit to an actionable condition. The Division Bench held that the order setting aside an abatement does not affect the merits of the dispute between the parties though it certainly determines a right and, therefore, does

not amount to a "judgment".

17. We find ourselves in agreement with the view so taken by the High Courts.

18. The *Calcutta*[2] and *Bombay*[4] decisions were cited in the High Court also. In its impugned judgment the Division Bench has opined that the two rulings had no applicability to the case at hand. As to the *Calcutta*[2] decision the impugned judgment states that it was a simple case of setting aside abatement while in the present case on account of the inaction of Plaintiffs 2 and 3 in seeking setting aside of the abatement qua them the suit had abated as a whole, depriving the Court of its jurisdiction to set aside the abatement as against the deceased plaintiff only. We cannot countenance the narrow technical view so taken by the Division Bench for the reasons already stated.

19. The appeals are allowed. The judgment of the Division Bench is set aside. Instead the order dated 23-3-2001 passed by the learned Single Judge is restored.

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' Arising out of SLPs (C) Nos. 17349-50 of 2002. From the Judgment and Order dated 3-4-2002 of the Bombay High Court in LPAs Nos. 448 and 449 of 2001 : AIR 2002 Bom 332

[1] (1981) 4 SCC 8 : AIR 1981 SC 1786

[2] AIR 1972 Cal 449 : 76 CWN 1039 (FB)

[3] AIR 1961 Punj 424 : ILR (1960) 2 Punj 386

[4] AIR 1938 Bom 408 : 40 Bom LR 658

(2022) 5 Supreme Court Cases 736 : 2022 SCC OnLine SC 165

In the Supreme Court of India

(BEFORE M.R. SHAH AND SANJIV KHANNA, JJ.)

Civil Appeal No. 439 of 2022[1]

SREE SURYA DEVELOPERS AND PROMOTERS . .
Appellant;

Versus

N. SAILESH PRASAD AND OTHERS . . Respondents.

With

Civil Appeals Nos. 440-41 of 2022[2]

RAJA PUSHPA PROPERTIES PRIVATE LIMITED . .
Appellant;

Versus

N. SAILESH PRASAD AND OTHERS . . Respondents.

Civil Appeal No. 439 of 2022 with Nos. 440-41 of 2022, decided on February 9, 2022

A. **Civil Procedure Code, 1908 — Or. 23 R. 3-A and Or. 7 R. 11(d) — Bar under Or. 23 R. 3-A on suit seeking to set aside compromise/consent decree on ground that compromise on which decree is based was not lawful — Applicability of — Suit whether barred under Or. 23 R. 3-A — Determination of — Reliefs sought in suit whether subject-matter of consent/compromise decree in question — Rejection of plaint on ground of bar of Or. 23 R. 3-A — Whether justified in present case**

— Suit in question challenging compromise/consent decree entered into/granted when the plaintiff was a minor — Suit in question being filed upon attainment of majority by the plaintiff — Relevance of

— An independent suit challenging compromise/consent decree on ground that it is not lawful is not maintainable — Proper remedy for challenging compromise/consent decree on ground that it is not lawful, reiterated, is to approach the same court, which had passed the compromise/consent decree, which the plaintiff in present case had already done by filing an appropriate application — Said application, held, to be decided in accordance with law, though the plaint in the suit in question had been rightly rejected

— Plaintiffs claimed declaration of title, recovery of possession, cancellation of revocation of gift deed, declaration for development-cum-general power of attorney (DGPA) and deed of assignment-cum-DGPA — All aforesaid reliefs were subject-matter of earlier suits and thereafter also

subject-matter of suit in which compromise decree was passed — Therefore, held, trial court correctly held that suit in present form and for reliefs sought barred under Or. 23 R. 3-A and therefore trial court rightly rejected plaint in exercise of powers under Or. 7 R. 11(d)

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B. Civil Procedure Code, 1908 — Or. 23 R. 3 and Or. 23 R. 3-A — Compromise/consent decree — Permissible mode for challenging, on ground that it is not lawful — Substantive independent suit questioning compromise decree — Held, not maintainable in view of Or. 23 R. 3-A — To challenge consent decree on ground that it is not lawful, reiterated, party to such decree has to approach the same court, which recorded compromise based on which the consent decree in question was issued

— This, the plaintiff in present case had already done by filing an appropriate application before the court concerned — Said application, held, to be decided in accordance with law

C. Civil Procedure Code, 1908 — Or. 7 R. 11(d), Or. 23 R. 3-A and Or. 32 R. 7 — Rejection of plaint — Jurisdiction of High Court in appeal against order of trial court rejecting plaint under Or. 7 R. 11(d), held, is the same as that of trial court i.e. at stage of deciding application under Or. 7 R. 11, only thing required to be considered even in appeal, is whether suit would be maintainable or not only upon consideration of averments in the plaint — Trial court or High Court cannot enter into merits of the matter at the Or. 7 R. 11 stage

— Suit in question challenging compromise/consent decree entered into/granted when the plaintiff was a minor — Suit in question being filed upon attainment of majority by the plaintiff — Relevance of

— Plaintiff filed suit challenging compromise decree — Trial court rejected plaint under Or. 7 R. 11(d) on ground that said suit not maintainable in view of specific bar under Or. 23 R. 3-A — Against said order appeal filed before High Court — High Court, held, could not enter into merits of validity of compromise decree on ground that same was hit by Or. 32 R. 7, which was not permissible at stage of deciding application under Or. 7 R. 11

— An independent suit challenging compromise/consent decree on ground that it is not lawful is not maintainable — Proper remedy for challenging compromise/consent decree on ground that it is not lawful, reiterated, is to approach same court, which had passed the compromise/consent decree, which the plaintiff in present case had already done by filing an appropriate application — Said application, held, to be decided in accordance with law

D. **Civil Procedure Code, 1908 — Or. 7 R. 11(d), Or. 23 R. 3 and Or. 23 R. 3-A — Rejection of plaint on ground of being barred by law — Clever drafting — Held, would not permit plaintiff to make suit maintainable which otherwise would not be maintainable and/or barred by law — When clever drafting of plaint has created illusion of a cause of action, court will nip it in the bud at the earliest so that bogus litigation will end at earlier stage**

— In present case, plaintiff sought multiple reliefs — However, those multiple reliefs could only be granted only if compromise decree in question were to be set aside — Therefore, by seeking such multiple reliefs, plaintiff by clever drafting wants to get his suit maintainable, which otherwise would not be maintainable questioning compromise decree — Plaint liable to be rejected

Suit schedule property was gifted to Respondent 1-original plaintiff during his minority by his paternal grandmother (Respondent 2 and original defendant in OS No. 537 of 2018) vide registered gift deed dated 13-2-2003. The said gift settlement deed was revoked vide revocation of gift deed dated 10-12-2004 by the grandmother of Respondent 1-original plaintiff. Thereafter a registered development agreement-cum-general power of attorney dated 18-1-2008 came to be executed between the grandmother of the plaintiff and the appellant-original Defendant 2. Under the said development agreement, the grandmother was entitled to 35,000 sq ft of fixed saleable super built-up area.

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The father of Respondent 1-original plaintiff filed a suit being OS No. 1750 of 2015 as the next friend of then minor Respondent 1 seeking for declaration that revocation of gift deed dated 10-12-2004 as being illegal and not binding on the plaintiff therein and also for perpetual injunction. Subsequently, a compromise was arrived at between the parties to OS No. 1750 of 2015 vide compromise deed dated 30-12-2015. Under the compromise, it was agreed that Respondent 1-original plaintiff would be entitled to entire 35,000 sq ft of the constructed area, which was agreed to be allocated to the grandmother under the development agreement. It was further agreed as per the compromise decree that the developer would be entitled to assign the development rights accrued to it under the said development agreement to the third parties. In furtherance of the compromise, IA No. 31 of 2016 under Order 23 Rule 3 CPC came to be filed along with the compromise memo praying for passing of decree in terms thereof. The father of Respondent 1 (original Defendant 3) filed IA in the said suit under Rule 172 of the Civil Rules of Practice seeking permission to act on behalf of Respondent 1 and the trial court was pleased to permit him to do so.

Thereafter, the compromise decree came to be passed by Civil Judge dated 13-

1-2016 in OS No. 1750 of 2015 in terms of the memorandum of compromise entered into by the father on behalf of Respondent 1, the grandmother and the appellant Developer. Thereafter the appellant developer assigned its development rights under the abovementioned development agreement to Respondent 4 under a deed of assignment and on the basis of the same, Respondent 4 started developing the subject property in OS No. 537 of 2018.

On attaining the age of majority, Respondent 1 herein filed the present suit being OS No. 537 of 2018 through his general power of attorney praying inter alia declaration of right, title and interest over the suit schedule property and declaration of compromise decree. He also prayed for the revocation of deed as null and void.

The appellant filed application under Order 7 Rule 11 CPC for rejection of the plaint on various grounds and mainly on the ground that the suit for setting aside the consent decree/compromise decree would be barred under Order 23 Rule 3-A CPC. The trial court vide order dated 2-5-2019 allowed the said application and rejected the plaint on the ground that in view of Order 13 Rule 3-A CPC, no independent suit would be maintainable against the compromise decree.

Feeling aggrieved and dissatisfied with the order passed by the trial court the original plaintiff preferred the present appeal before the High Court. By the impugned judgment and order, the High Court has allowed the said appeal and has quashed and set aside the order passed by the trial court rejecting the plaint and has remanded the matter to the trial court by recording finding that the effect of the provisions of Order 32 Rules 1 to 7 CPC has not been considered by the trial court, which would have a direct bearing on the validity of the compromise decree.

Thus, the present appeal in the Supreme Court by the original Defendants 2 and 4 developer and its assignee. The appellant contended that only remedy available to the aggrieved party would be to submit an appropriate application before the same court which recorded the compromise. The appellant further contended that by mere clever drafting of the plaint, the plaintiff cannot be permitted to maintain the suit, which otherwise would not be maintainable and/or barred by any law.

The issues for determination before the Supreme Court were:

(*i*) Extent of enquiry that is permissible by the High Court in appeal against order of trial court rejecting plaint under Order 7 Rule 11(*d*) CPC?

(*ii*) Whether in view of Order 23 Rule 3-A CPC substantive independent suit questioning compromise decree would be maintainable?

(*iii*) Whether clever drafting of plaint would permit plaintiff to make suit maintainable which otherwise would not be maintainable and/or barred by law?

(*iv*) Whether in view of multiple reliefs claimed by plaintiffs which were subject-matter of earlier suits and thereafter also subject-matter of suit in which

compromise decree was passed, suit in present form and for reliefs sought would be barred under Order 23 Rule 3-A CPC?

Allowing the appeals, the Supreme Court

Held :

On plain reading of Order 23 Rule 3-A CPC, no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. An agreement or compromise which is clearly void or voidable shall not be deemed to be lawful and the bar under Rule 3-A shall be attracted if compromise on the basis of which the decree was passed was void or voidable. Party to a consent decree based on a compromise to challenge the compromise decree on the ground that the decree was not lawful i.e. it was void or voidable has to approach the same court, which recorded the compromise and a separate suit challenging the consent decree is not maintainable.

(Paras 8 and 9)

R. Janakiammal v. *S.K. Kumarasamy*, (2021) 9 SCC 114, *followed*

Banwari Lal v. *Chando Devi*, (1993) 1 SCC 581; *Pushpa Devi Bhagat* v. *Rajinder Singh*, (2006) 5 SCC 566; *R. Rajanna* v. *S.R. Venkataswamy*, (2014) 15 SCC 471 : (2015) 4 SCC (Civ) 238; *Triloki Nath Singh* v. *Anirudh Singh*, (2020) 6 SCC 629 : (2020) 3 SCC (Civ) 732, *relied on*

Thus, the trial court was absolutely justified in rejecting the plaint on the ground that the suit for the reliefs sought challenging the compromise decree would not be maintainable.

(Para 10)

Mere clever drafting would not permit the plaintiff to make the suit maintainable which otherwise would not be maintainable and/or barred by law. It has been consistently held by the Supreme Court that if clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage.

(Paras 11.1 and 11.2)

T. Arivandandam v. *T.V. Satyapal*, (1977) 4 SCC 467; *Ram Singh* v. *Gram Panchayat Mehal Kalan*, (1986) 4 SCC 364, *followed*

Considering the reliefs of declaration of title, recovery of possession, cancellation of revocation of gift deed, declaration for development-cum-general power of attorney ("DGPA") and deed of assignment-cum-DGPA, the said reliefs can be granted only if the compromise decree dated 13-1-2016 passed in OS No. 1750 of 2015 is set aside. Therefore, by asking such multiple reliefs, the plaintiff by clever drafting wants to get his suit maintainable, which otherwise would not be maintainable questioning the compromise decree. All the aforesaid reliefs were subject-matter of earlier suits and thereafter also subject-matter of OS No. 1750 of 2015 in which the compromise decree has been passed. Therefore, it is rightly held by the trial court that the suit in the present form and for the reliefs sought would be barred under Order 23 Rule 3-A CPC and therefore the trial court rightly

rejected the plaint in exercise of powers under Order 7 Rule 11(*d*) CPC. The High Court has erred in setting aside the said order by entering into the merits of the

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validity of the compromise decree on the ground that the same was hit by Order 32 Rule 7 CPC, which was not permissible at this stage of deciding the application under Order 7 Rule 11 CPC and the only issue which was required to be considered by the High Court was whether the suit challenging the compromise decree would be maintainable or not.

(Para 12)

N. Sailesh Prasad v. *Sree Surya Developers and Promoters*, 2019 SCC OnLine TS 2287, *reversed*

Horil v. *Keshav*, (2012) 5 SCC 525 : (2012) 3 SCC (Civ) 303; *Madanuri Sri Rama Chandra Murthy* v. *Syed Jalal*, (2017) 13 SCC 174 : (2017) 5 SCC (Civ) 602; *Canara Bank* v. *P. Selathal*, (2020) 13 SCC 143; *Raghwendra Sharan Singh* v. *Ram Prasanna Singh*, (2020) 16 SCC 601, *cited*

RM-D/68550/CV

Advocates who appeared in this case :

Mukul Rohatgi and B. Adinarayana Rao, Senior Advocates {D. Ramakrishna Reddy, Ms D. Bharathi Reddy (Advocate-on-Record), S. Udaya Kr. Sagar, Ms Bina Madhavan, Krishna Kr. Singh, Tushar Gupta [for M/s Lawyer's Knit & Co. (Advocate-on-Record)], Santosh Krishnan (Advocate-on-Record), Siddhant Buxy (Advocate-on-Record) and B. Shravanth Shanker (Advocate-on-Record), Advocates}, for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (2021) 9 SCC 114, *R. Janakiammal* v. *S.K. Kumarasamy* 743*a*, 745*e-f*, 745*g*
2. (2020) 16 SCC 601, *Raghwendra Sharan Singh* v. *Ram Prasanna Singh* 743*e-f*
3. (2020) 13 SCC 143, *Canara Bank* v. *P. Selathal* 743*e-f*
4. (2020) 6 SCC 629 : (2020) 3 SCC (Civ) 732, *Triloki Nath Singh* v. *Anirudh Singh* 749*a-b*

5. 2019 SCC OnLine TS 2287, *N. Sailesh Prasad* v. *Sree Surya Developers and Promoters* **(reversed)**	740*g*, 742*c*, 742*d*, 743*f*, 745*a*, 745*a-b*, 751*c-d*
6. (2017) 13 SCC 174 : (2017) 5 SCC (Civ) 602, *Madanuri Sri Rama Chandra Murthy* v. *Syed Jalal*	743*e-f*
7. (2014) 15 SCC 471 : (2015) 4 SCC (Civ) 238, *R. Rajanna* v. *S.R. Venkataswamy*	743*a*, 748*a-b*
8. (2012) 5 SCC 525 : (2012) 3 SCC (Civ) 303, *Horil* v. *Keshav*	743*a*
9. (2006) 5 SCC 566, *Pushpa Devi Bhagat* v. *Rajinder Singh*	743*a*, 747*b-c*, 749*a*
10. (1993) 1 SCC 581, *Banwari Lal* v. *Chando Devi*	743*a*, 746*a*, 749*a*
11. (1986) 4 SCC 364, *Ram Singh* v. *Gram Panchayat Mehal Kalan*	750*e*
12. (1977) 4 SCC 467, *T. Arivandandam* v. *T.V. Satyapal*	743*e-f*, 750*b-c*

The Judgment of the Court was delivered by

M.R. SHAH, J.— Feeling aggrieved and dissatisfied with the impugned judgment and order dated 1-10-2019 passed by the High Court for the State of Telangana at Hyderabad in *N. Sailesh Prasad* v. *Sree Surya Developers and Promoters*[1] by which the High Court has allowed the said appeal preferred by Respondent 1 herein—original plaintiff and has quashed and set aside the order passed by the learned IInd Additional District Judge, Ranga Reddy District dated 2-5-2019 in IA No. 108 of 2019 in OS No. 537 of 2018 by which the learned trial court rejected the plaint under Order 7 Rule 11(*d*) of the Civil Procedure Code (hereinafter referred to as "CPC"), the original defendants to OS No. 537 of 2018 have preferred the present appeals.

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2. The facts leading to the present appeals in a nutshell are as under:

2.1. That the suit schedule property was gifted to Respondent 1 herein—original plaintiff during his minority by his paternal grandmother (Respondent 2 herein and original defendant in OS No. 537 of 2018) vide registered gift deed dated 13-2-2003. That the said gift settlement deed was revoked vide revocation of gift deed dated 10-12-2004 by the grandmother of Respondent 1 herein—original plaintiff. That thereafter a registered development agreement-cum-general power of attorney dated 18-1-2008 came to be executed between the grandmother of the plaintiff and the appellant herein M/s Sree Surya Developers and Promoters, original Defendant 2. It appears that under the said development agreement, the grandmother was entitled to 35,000 sq ft of fixed saleable super built-up area along with proportionate number of car parking spaces and undivided share in the land.

2.2. The father of Respondent 1 — original plaintiff (original Respondent 3 herein and Defendant 3 in OS No. 537 of 2018) filed a suit being OS No. 1750 of 2015 as the next friend of then minor Respondent 1 herein seeking for declaration that revocation of gift deed dated 10-4-2004 as being illegal and not binding on the plaintiff therein and also for perpetual injunction. Subsequently, a compromise was arrived at between the parties to OS No. 1750 of 2015 vide compromise deed dated 30-12-2015. Under the compromise, it was agreed that Respondent 1 herein—original plaintiff would be entitled to entire 35,000 sq ft of the constructed area, which was agreed to be allocated to the grandmother under the development agreement. It was further agreed as per the compromise decree that the developer would be entitled to assign the development rights accrued to it under the said development agreement to the third parties. In furtherance of the compromise, IA No. 31 of 2016 under Order 23 Rule 3 CPC came to be filed along with the compromise memo praying for passing of decree in terms thereof. The father of Respondent 1 (Respondent 3 herein—original Defendant 3) filed IA in the said suit under Rule 172 of the Civil Rules of Practice seeking permission to act on behalf of Respondent 1 herein and the trial court was pleased to permit him to do so.

2.3. Thereafter, the compromise decree came to be passed by the VIIIth Additional Senior Civil Judge, R.R. District dated 13-1-2016 in OS No. 1750 of 2015 in terms of the memorandum of compromise entered into by the father on behalf of Respondent 1 herein, the grandmother and the appellant herein Developer. It appears that

thereafter the appellant Developer assigned its development rights under the abovementioned development agreement to Respondent 4 herein under a deed of assignment dated 6-4-2016 and on the basis of the same, Respondent 4 has started developing the subject property in OS No. 537 of 2018.

2.4. That on attaining the age of majority, Respondent 1 herein filed the present suit being OS No. 537 of 2018 through his general power of attorney praying inter alia declaration of right, title and interest over the suit schedule property and declaration of compromise decree. He also prayed for the revocation of deed as null and void.

2.5. That having been served with a notice of the suit, the appellant filed written statement denying all the material allegations. The appellant also filed IA No. 108 of 2019 under Order 7 Rule 11 CPC for rejection of the plaint on various grounds and mainly on the ground that the suit for setting aside the consent decree/compromise decree would be barred under Order 23 Rule 3-A CPC. The trial court vide order dated 2-5-2019 allowed the said IA and rejected the plaint on the ground that in view of Order 13 Rule 3-A CPC, no independent suit would be maintainable against the compromise decree.

2.6. Feeling aggrieved and dissatisfied with the order passed by the trial court rejecting the plaint in exercise of powers under Order 7 Rule 11(*d*) CPC on the ground that in view of the provisions of Order 23 Rule 3-A CPC, no independent suit would be maintainable against the compromise decree, the original plaintiff preferred the present appeal before the High Court.

2.7. By the impugned judgment and order[1], the High Court has allowed the said appeal and has quashed and set aside the order passed by the trial court rejecting the plaint and has remanded the matter to the trial court by observing that the effect of the provisions of Order 32 Rules 1 to 7 CPC has not been considered by the trial court, which would have a direct bearing on the validity of the compromise decree dated 13-1-2016 in OS No. 1750 of 2015.

2.8. Feeling aggrieved and dissatisfied with the impugned judgment and order[1] passed by the High Court, the original Defendants 2 and 4 developer and its assignee have preferred the present appeals.

3. Shri Mukul Rohatgi, learned Senior Advocate appearing on behalf of the appellant Developer has vehemently submitted that in the facts and circumstances of the case, the High Court has committed a grave

error in quashing and setting aside the order passed by the trial court rejecting the plaint in exercise of powers under Order 7 Rule 11 CPC holding that in view of Order 23 Rule 3-A CPC, no independent suit would be maintainable against the compromise decree.

3.1. It is submitted that Order 23 Rule 3 CPC provides for compromise of suit. It is submitted that by way of amendment in 1976 made by Act 104 of 1976, Rule 3-A has been inserted, which specifically provides that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. It is submitted that therefore the present suit filed by Respondent 1 herein—original plaintiff challenging the compromise decree would be barred under Order 23 Rule 3-A CPC and therefore the trial court rightly rejected the plaint.

3.2. It is further submitted by Shri Rohatgi, learned Senior Advocate appearing on behalf of the appellant Developer and the learned counsel for the assignee that as held by this Court in a catena of decisions, the only remedy available to the aggrieved party would be to submit an appropriate application before the same court which recorded the compromise. Reliance is placed on

the decisions of this Court in *Banwari Lal* v. *Chando Devi*[3]; *Pushpa Devi Bhagat* v. *Rajinder Singh*[2]; *Horil* v. *Keshav*[4]; *R. Rajanna* v. *S.R. Venkataswamy*[5] and recently in *R. Janakiammal* v. *S.K. Kumarasamy*[6].

3.3. It is submitted that in the present case as such the original plaintiff had already filed an application under Order 23 Rule 3-A before the same court which passed the consent compromise decree. It is submitted that in the present case even the original plaintiff has filed a first appeal under Order 43 before the first appellate court challenging the compromise decree. It is submitted that therefore as such the plaintiff has already availed the other remedies available to him. It is submitted that therefore the present suit is nothing but an abuse of process of law. It is submitted that in any case, the substantive independent suit questioning the compromise decree shall not be maintainable in view of Order 23 Rule 3-A CPC.

3.4. It is further submitted by Shri Rohatgi, learned Senior Advocate appearing on behalf of the appellant that in the present case Respondent 1 herein—original plaintiff has indulged in clever drafting seeking one relief by way of drafting multiple prayers. It is submitted that the only relief that the plaintiff seeks is setting aside the compromise decree dated 13-1-2016 which he has sought by drafting

multiple prayers in order to avoid the bar to suit envisaged under Order 23 Rule 3-A CPC, which in other words is mere clever drafting. It is submitted that as held by this Court in a catena of decisions by mere clever drafting of the plaint, the plaintiff cannot be permitted to maintain the suit, which otherwise would not be maintainable and/or barred by any law. It is further observed and held by this Court that if clever drafting of the plaint has created the illusion of a cause of Action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage. Reliance is placed on the decisions of this Court in *T. Arivandandam* v. *T.V. Satyapal*[7]; *Madanuri Sri Rama Chandra Murthy* v. *Syed Jalal*[8]; *Canara Bank* v. *P. Selathal*[9]; and *Raghwendra Sharan Singh* v. *Ram Prasanna Singh*[10].

3.5. Shri Rohatgi, learned Senior Advocate has further submitted that even otherwise the impugned judgment and order[1] passed by the High Court is unsustainable. It is submitted that in the entire judgment, there is no discussion by the High Court on the maintainability of the suit and/or any discussion on Order 23 Rule 3-A CPC on the basis of which the trial court rejected the plaint.

3.6. It is submitted that on the contrary, the High Court has gone into the validity of the compromise decree considering Order 32 Rules 1 to 7 CPC and the High Court has virtually given the findings relying upon Order 32 Rule 7 CPC that the compromise decree was not binding to the plaintiff. It is submitted that the High Court ought to have addressed itself to the maintainability of the suit and at this stage the High Court was not required to consider at all on the validity of the compromise decree.

3.7. Number of other submissions have been made by the learned counsel appearing on behalf of the appellant on the validity of the compromise decree. However, for the reasons stated hereinbelow, we propose to consider the only issue with respect to maintainability of the suit and the issue before this Court is not on the validity of the compromise decree, therefore, we do not propose to deal with any of the submissions on merits on the validity of the compromise decree.

4. The present appeals are vehemently opposed by Shri B. Adinarayana Rao, learned Senior Advocate appearing on behalf of the original plaintiff(s).

4.1. It is submitted that in the present case, the compromise decree is hit by Order 32 Rule 7 CPC. It is submitted that therefore on

attaining the majority immediately when Respondent 1 herein—original plaintiff instituted a suit for various reliefs, which otherwise can be granted in a substantive independent suit, the High Court has rightly set aside the order passed by the trial court rejecting the plaint.

4.2. It is vehemently submitted by the learned Senior Advocate appearing on behalf of the original plaintiff that in the present case, the reliefs prayed in the suit are not only with respect to the compromise decree, but other reliefs are sought for which an independent substantive suit shall be maintainable. It is submitted that as such the plaintiff has not prayed to set aside the compromise decree. It is submitted that what is prayed is to declare that the compromise decree is not binding on him. It is submitted that therefore for the other reliefs sought, it can be said that an independent suit under Order 23 Rule 3-A shall not be barred.

4.3. However, the learned Senior Advocate appearing on behalf of the respondents—original plaintiff(s) is not disputing that the plaintiff has already filed an application under Order 23 Rule 3-A before the same Court, which passed the compromise decree. He is also not in a position to dispute that in the said application, the plaintiff can very well make submission on the validity of the compromise decree on whatever grounds, which may be available to him including non-compliance of Order 32 Rule 7 CPC.

5. We have heard the learned counsel appearing on behalf of the respective parties at length.

6. At the outset, it is required to be noted that in the present case, the trial court rejected the plaint of OS No. 537 of 2018 in exercise of powers under Order 7 Rule 11 CPC on the ground that the said suit would not be maintainable in view of specific bar under Order 23 Rule 3 -A CPC. The High Court by the

impugned judgment and order[1] has set aside the said order and has remanded the matter to the trial court by observing that while passing the order rejecting the plaint, the trial court had not considered the provisions of Order 32 Rules 1 to 7 CPC. However, it is required to be noted that while passing the impugned judgment and order[1], the High Court has not at all dealt with and considered the provisions of Order 23 Rule 3-A CPC and has not considered at all whether in fact the suit challenging the compromise decree and/or for the reliefs sought in the suit would be maintainable or not. What was required to be considered by the High Court was whether the independent suit questioning the compromise decree would be maintainable or not. The aforesaid crucial

aspect has not been dealt with by the High Court at all and the High Court has gone into the validity of the compromise decree in view of Order 32 Rule 7 CPC. At the stage of deciding the application under Order 7 Rule 11 CPC, the only thing which was required to be considered by the High Court was whether the suit would be maintainable or not and that the suit challenging the compromise decree would be maintainable or not in view of Order 23 Rule 3-A CPC and at this stage, the High Court/Court was not required to consider on merits the validity of the compromise decree.

7. Now, so far as the main issue whether the trial court rightly rejected the plaint in exercise of powers under Order 7 Rule 11 CPC on the ground that an independent suit challenging the compromise decree would be barred in view of Order 23 Rule 3-A CPC is concerned, on plain reading of Order 23 Rule 3-A CPC, the trial court was justified in rejecting the plaint. Order 23 Rule 3-A CPC, which has been inserted by amendment in 1976 reads as under:

> "**3-A. *Bar to suit*.**—No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

8. Therefore, on plain reading of Order 23 Rule 3-A CPC, no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. Identical question came to be considered by this Court in *R. Janakiammal*[6]. It is observed and held by this Court that Rule 3-A of the Order 23 bars the suit to set aside the decree on the ground that the compromise on which decree was passed was not lawful. It is further observed and held that an agreement or compromise which is clearly void or voidable shall not be deemed to be lawful and the bar under Rule 3-A shall be attracted if compromise on the basis of which the decree was passed was void or voidable. In this case, this Court had occasion to consider in detail Order 23 Rule 3 as well as Rule 3-A.

9. The earlier decisions of this Court have also been dealt with by this Court in paras 53 to 57 as under : (*R. Janakiammal case*[6], SCC pp. 132-36)

> "*53*. Order 23 Rule 3 as well as Rule 3-A came for consideration before this Court in large number of cases and we need to refer to a few of them to find out the ratio of judgments of this Court in context of Rule 3 and

Rule 3-A. In *Banwari Lal* v. *Chando Devi*[4], this Court considered Rule 3

as well as Rule 3-A of the Order 23. This Court held that the object of the Amendment Act, 1976 is to compel the party challenging the compromise to question the court which has recorded the compromise. In paras 6 and 7, the following was laid down : (SCC pp. 584-85)

> '6. The experience of the courts has been that on many occasions parties having filed petitions of compromise on basis of which decrees are prepared, later for one reason or other challenge the validity of such compromise. For setting aside such decrees suits used to be filed which dragged on for years including appeals to different courts. Keeping in view the predicament of the courts and the public, several amendments have been introduced in Order 23 of the Code which contain provisions relating to withdrawal and adjustment of suit by the Civil Procedure Code (Amendment) Act, 1976. Rule 1 Order 23 of the Code prescribes that at any time after the institution of the suit, the plaintiff may abandon his suit or abandon a part of his claim. Rule 1(3) provides that where the Court is satisfied : (*a*) that a suit must fail by reason of some formal defect, or (*b*) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw such suit with liberty to institute a fresh suit. In view of Rule 1(4) if the plaintiff abandons his suit or withdraws such suit without permission referred to above, he shall be precluded from instituting any such suit in respect of such subject-matter. Rule 3 Order 23 which contained the procedure regarding compromise of the suit was also amended to curtail vexatious and tiring litigation while challenging a compromise decree. Not only in Rule 3 some special requirements were introduced before a compromise is recorded by the court including that the lawful agreement or a compromise must be in writing and signed by the parties, a proviso with an Explanation was also added which is as follows:
>
> "Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.
>
> *Explanation*.—An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this Rule."
>
> 7. By adding the proviso along with an Explanation the purpose

and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the court which had recorded the compromise in question. That court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The Explanation made it clear that

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an agreement or a compromise which is void or voidable under the Contract Act shall not be deemed to be lawful within the meaning of the said Rule. Having introduced the proviso along with the Explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree on the basis of a compromise saying:

> "**3-A. *Bar to suit*.**—No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful." '

54. The next judgment to be noted is *Pushpa Devi Bhagat* v. *Rajinder Singh*[3], R.V. Raveendran, J. speaking for the Court noted the provisions of Order 23 Rule 3 and Rule 3-A and recorded his conclusions in para 17 in the following words : (SCC p. 576)

> '*17.* The position that emerges from the amended provisions of Order 23 can be summed up thus:
>
> (*i*) No appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) CPC.
>
> (*ii*) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (*m*) of Rule 1 Order 43.
>
> (*iii*) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3-A.
>
> (*iv*) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the

question as to whether there was a valid compromise or not. This is so because a consent decree is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21-8-2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter

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(that is on 27-8-2001) filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by the second defendant was not maintainable, having regard to the express bar contained in Section 96(3) of the Code.'

55. The next judgment is *R. Rajanna* v. *S.R. Venkataswamy*[5] in which the provisions of Order 23 Rule 3 and Rule 3-A were again considered. After extracting the aforesaid provisions, the following was held by this Court in para 11 : (SCC p. 474)

'*11.* It is manifest from a plain reading of the above that in terms of the proviso to Order 23 Rule 3 where one party alleges and the other denies adjustment or satisfaction of any suit by a lawful agreement or compromise in writing and signed by the parties, the Court before whom such question is raised, shall decide the same. What is important is that in terms of Explanation to Order 23 Rule 3, the agreement or compromise shall not be deemed to be lawful within the meaning of the said Rule if the same is void or voidable under the Contract Act, 1872. It follows that in every case where the question arises whether or not there has been a lawful agreement or compromise in writing and signed by the parties, the question whether the agreement or compromise is lawful has to be determined by the court concerned. What is lawful will in turn depend upon whether the allegations suggest any infirmity in the compromise and the decree that would make the same void or voidable under the Contract Act. More importantly, Order 23 Rule 3-A clearly bars a suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful. This implies that no sooner a question relating to lawfulness of the agreement or compromise is raised before the court that passed the decree on the basis of any such agreement or compromise, it is that court

and that court alone who can examine and determine that question. The court cannot direct the parties to file a separate suit on the subject for no such suit will lie in view of the provisions of Order 23 Rule 3-A CPC. That is precisely what has happened in the case at hand. When the appellant filed OS No. 5326 of 2005 to challenge the validity of the compromise decree, the court before whom the suit came up rejected the plaint under Order 7 Rule 11 CPC on the application made by the respondents holding that such a suit was barred by the provisions of Order 23 Rule 3-A CPC. Having thus got the plaint rejected, the defendants (the respondents herein) could hardly be heard to argue that the plaintiff (the appellant herein) ought to pursue his remedy against the compromise decree in pursuance of OS No. 5326 of 2005 and if the plaint in the suit has been rejected to pursue his remedy against such rejection before a higher court.'

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56. The judgments of *Pushpa Devi*[2] as well as *Banwari Lal*[3] were referred to and relied on by this Court. This Court held that no sooner a question relating to lawfulness of the agreement or compromise is raised before the court that passed the decree on the basis of any such agreement or compromise, it is that court and that court alone which can examine and determine that question.

57. In subsequent judgment, *Triloki Nath Singh* v. *Anirudh Singh*[11], this Court again referring to earlier judgments reiterated the same proposition i.e. the only remedy available to a party to a consent decree to avoid such consent decree is to approach the court which recorded the compromise and separate suit is not maintainable. In paras 17 and 18, the following has been laid down : (SCC p. 638)

'*17*. By introducing the amendment to the Civil Procedure Code (Amendment) Act, 1976 w.e.f. 1-2-1977, the legislature has brought into force Order 23 Rule 3-A, which creates bar to institute the suit to set aside a decree on the ground that the compromise on which decree is based was not lawful. The purpose of effecting a compromise between the parties is to put an end to the various disputes pending before the court of competent jurisdiction once and for all.

18. Finality of decisions is an underlying principle of all adjudicating forums. Thus, creation of further litigation should

never be the basis of a compromise between the parties. Rule 3-A of the Order 23 CPC put a specific bar that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. The scheme of Order 23 Rule 3 CPC is to avoid multiplicity of litigation and permit parties to amicably come to a settlement which is lawful, is in writing and a voluntary act on the part of the parties. The court can be instrumental in having an agreed compromise effected and finality attached to the same. The court should never be party to imposition of a compromise upon an unwilling party, still open to be questioned on an application under the proviso to Order 23 Rule 3 CPC before the court.' "

That thereafter it is specifically observed and held that a party to a consent decree based on a compromise to challenge the compromise decree on the ground that the decree was not lawful i.e. it was void or voidable has to approach the same court, which recorded the compromise and a separate suit challenging the consent decree has been held to be not maintainable.

10. In view of the above decisions of this Court, the trial court was absolutely justified in rejecting the plaint on the ground that the suit for the reliefs sought challenging the compromise decree would not be maintainable.

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11. Now, so far as the submission on behalf of the plaintiff that in the suit the plaintiff has not specifically prayed for setting aside the compromise decree and what is prayed is to declare that the compromise decree is not binding on him and that for the other reliefs sought, the suit would not be barred and still the suit would be maintainable is concerned, the aforesaid cannot be accepted.

11.1. As held by this Court in a catena of decisions right from 1977 that a mere clever drafting would not permit the plaintiff to make the suit maintainable which otherwise would not be maintainable and/or barred by law. It has been consistently held by this Court that if clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage.

11.2. In *T. Arivandandam* v. *T.V. Satyapal*[2], it is observed and held as under : (SCC p. 470, para 5)

"*5.* We have not the slightest hesitation in condemning the

petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10 CPC. An activist Judge is the answer to irresponsible law suits."

11.3. In *Ram Singh* v. *Gram Panchayat Mehal Kalan*[12], this Court has observed and held that when the suit is barred by any law, the plaintiff cannot be allowed to circumvent that provision by means of clever drafting so as to avoid mention of those circumstances, by which the suit is barred by law of limitation.

12. If we consider the reliefs of declaration of title, recovery of possession, cancellation of revocation of gift deed, declaration for DGPA and deed of assignment-cum-DGPA, the said reliefs can be granted only if the compromise decree dated 13-1-2016 passed in OS No. 1750 of 2015 is set aside. Therefore, by asking such multiple reliefs, the plaintiff by clever drafting wants to get his suit maintainable, which otherwise would not be maintainable questioning the compromise decree. All the aforesaid reliefs were subject-matter of earlier suits and thereafter also subject-matter of OS No. 1750 of 2015 in which the compromise decree has been passed. Therefore, it is rightly held by the trial court that the suit in the present form and for the reliefs sought would be barred under Order 23 Rule 3-A CPC and therefore the trial court rightly rejected the

plaint in exercise of powers under Order 7 Rule 11(*d*) CPC. The High Court has erred in setting aside the said order by entering into the merits of the validity of the compromise decree on the ground that the same was hit by Order 32 Rule 7 CPC, which was not permissible at this stage of deciding the application under Order 7 Rule 11 CPC and the only issue which was required to be considered by the High Court was whether the suit challenging the compromise decree would be maintainable or not.

13. As observed hereinabove and it is not in dispute that as such Respondent 1 — original plaintiff has already moved an appropriate application before the court concerned, which passed the decree setting aside the compromise decree by submitting an application under Order 23 Rule 3-A CPC, therefore, the said application will have to be decided and disposed of in accordance with law in which all the defences/contentions which may have been available to the respective parties on the validity of the compromise decree would have to be gone into by the court concerned in accordance with law and on its own merits.

14. In view of the above and for the reasons stated above, the present appeals succeed. The impugned judgment and order[1] passed by the High Court allowing the appeal and quashing and setting aside the order passed by the IInd Additional District Judge, Ranga Reddy District passed on 2-5-2019 in IA No. 108 of 2019 in OS No. 537 of 2018 is hereby quashed and set aside. The order passed by the trial court dated 2-5-2019 in IA No. 108 of 2019 in OS No. 537 of 2018 rejecting the plaint is hereby restored. However, it is observed that we have not expressed anything on merits on validity of the compromise decree and the same shall have to be decided and considered by the Court which passed the decree in an application under Order 23 Rule 3-A CPC, which as observed hereinabove has been filed by the original plaintiff and the said application be decided and disposed of by the court concerned in accordance with law and on its own merits and the contentions/defences which may be available to the respective parties on the validity of the compromise decree are kept open to be considered by the court concerned in accordance with law and on its own merits.

15. The present appeals are allowed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs. Pending application(s), if any, also stand disposed of.

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[*] Arising from the Judgment and Order in *N. Sailesh Prasad* v. *Sree Surya Developers and Promoters*, 2019 SCC OnLine TS 2287 (Telangana High Court, AS No. 454 of 2019, dt. 1-10-2019) **[Reversed]**

[1] *N. Sailesh Prasad* v. *Sree Surya Developers and Promoters*, 2019 SCC OnLine TS 2287

[2] *Banwari Lal* v. *Chando Devi*, (1993) 1 SCC 581

[3] *Pushpa Devi Bhagat* v. *Rajinder Singh*, (2006) 5 SCC 566

[4] *Hori* v. *Keshav*, (2012) 5 SCC 525 : (2012) 3 SCC (Civ) 303

[5] *R. Rajanna* v. *S.R. Venkataswamy*, (2014) 15 SCC 471 : (2015) 4 SCC (Civ) 238

[6] *R. Janakiammal* v. *S.K. Kumarasamy*, (2021) 9 SCC 114

[7] *T. Arivandandam* v. *T.V. Satyapal*, (1977) 4 SCC 467

[8] *Madanuri Sri Rama Chandra Murthy* v. *Syed Jalal*, (2017) 13 SCC 174 : (2017) 5 SCC (Civ) 602

[9] *Canara Bank* v. *P. Selathal*, (2020) 13 SCC 143

[10] *Raghwendra Sharan Singh* v. *Ram Prasanna Singh*, (2020) 16 SCC 601

[11] *Triloki Nath Singh* v. *Anirudh Singh*, (2020) 6 SCC 629 : (2020) 3 SCC (Civ) 732

[12] *Ram Singh* v. *Gram Panchayat Mehal Kalan*, (1986) 4 SCC 364

(2011) 8 Supreme Court Cases 249 : (2011) 4 Supreme Court Cases (Civ) 1 : (2011) 3 Supreme Court Cases (Cri) 481 : 2011 SCC OnLine SC 874

In the Supreme Court of India

(BEFORE DALVEER BHANDARI AND DEEPAK VERMA, JJ.)

RAMRAMESHWARI DEVI AND OTHERS . . Appellants;

Versus

NIRMALA DEVI AND OTHERS . . Respondents.

Civil Appeals Nos. 4912-13 of 2011, decided on July 4, 2011

A. **Civil suit — Abuse of process of court — Dilatory tactics — Consequent harassment of opposite party, wastage of court's time and benefit to wrongdoer under existing system of administration of civil litigation — Wrongdoer should not get benefit out of frivolous litigation — Steps for improving the system — Penal costs, mesne profits and prosecution for perjury**

— Prolonging trial by creating obstacles by making frivolous applications or filing forged documents with motive of avoiding dispossession of unauthorised persons (defendants) from immovable property of plaintiff — Even if wrongdoers are ultimately evicted from property by court after a long lapse of time, they are not generally adequately punished — Thus there is an inherent gain or incentive for wrongdoers under present system which requires to be eliminated

— Steps laid down for trial courts for improving the existing system — Court should scrutinise, check and verify pleadings and documents filed by parties immediately after filing of plaint — It should prepare a complete schedule and fix dates for all stages of suit at time of filing of plaint — It should resort to discovery and production of documents and interrogatories at the earliest

— It should impose actual, realistic and proper costs on wrongdoers, grant mesne profits at market rate to affected party and also order prosecution of wrongdoer for perjury in appropriate cases — Principle of restitution should be fully applied

— Ad interim ex parte injunction should be granted only in exceptional cases and ordinarily court should issue short notice to defendants and pass appropriate order only after hearing parties concerned — If any party is found to have obtained ex parte injunction on the basis of false pleadings and forged documents, it should be punished

— Court should resolve human or commercial problems involved in the case in accordance with settled principles of law and justice — Civil Procedure Code, 1908 — Ors. 6, 7, 8, 11, 14, 18, Or. 20 R. 12 and Ss. 35, 35-A and 144 — Restitution — Disgorgement of gains of wrongdoer — Litigant making unjust gains from abuse of process of court — Disgorgement of such gains — Specific Relief Act, 1963 — Ss. 5 and 6 — Penal Code, 1860, Ss. 191 to 193 and 196 to 200

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B. **Civil Procedure Code, 1908 — Or. 39 Rr. 1, 2, 3 & 3-A, Or. 20 R. 12 and S. 144 — Ad interim ex parte injunction — Principles for grant of — Should be granted only in exceptional cases — Ordinarily, court should pass appropriate order only after issuing short notice to defendant and hearing both parties — While granting ex parte injunction, court should record undertaking from applicant that he would pay full restitution, mesne profit at market rate and actual costs in the event of dismissal of the application and suit — If anyone obtains ex parte injunction on false pleadings and forged documents, he should be prosecuted for perjury and adequately punished — If ex parte injunction is granted, court should dispose of injunction application at the earliest preferably as soon as defendant appears in court — Ad interim ex parte injunction should be granted only for a short period i.e. one week or so — Penal Code, 1860 — Ss. 191 to 193 and 196 to 200 — Practice and Procedure — Interim orders**

C. **Civil Procedure Code, 1908 — Ss. 35, 35-A and 35-B — Realistic costs — Determination of — Abuse of process of court — Frivolous and dishonest litigation causing harassment to opposite party and wastage of court's time — Disgorgement of gains of wrongdoer — Factors to be**

considered for determining actual and realistic costs — Prevalent fee structure of lawyers — Other miscellaneous expenses which have to be incurred towards drafting and filing of counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc. — How long defendants or respondents were compelled to contest and defend the litigation in various courts — Relevance of — Costs of Rs 2 lakhs imposed on appellants by Supreme Court in addition to Rs 75,000 costs imposed by High Court — Constitution of India — Art. 136 — Exemplary costs — When warranted — Penal Code, 1860 — Ss. 191 to 193 and 196 to 200 — Restitution — Disgorgement of gains of wrongdoer — Unjust enrichment from abuse of process — Imposition of exemplary costs to disgorge

D. **Civil Procedure Code, 1908 — Or. 14 R. 2, Or. 7 Rr. 11(b) & (c) and Or. 20 R. 5 — Preliminary issue — When may an issue be treated as a preliminary issue and be disposed of as such — Stage to which suit had advanced — Relevance of — Issue relating to proper valuation of suit for purpose of court fees and jurisdiction — If could be treated as a preliminary issue — Said issue, held, was only an averment made in the plaint and it neither related to jurisdiction of court to entertain suit nor to bar created by any law as provided in Or. 14 R. 2(2) — Suit had reached stage of final arguments after entire evidence had been led — Treating the issue as a preliminary issue would be against spirit of Or. 14 R. 2 and Or. 20 R. 5**

(Para 25)

The Government allotted a residential house to one *R* (one of the respondents, since deceased) in 1952 and the lease deed was executed in his favour in 1964. On humane considerations of shelter, *R* allowed his three younger brothers (the appellants) to reside with him in the house. The appellants filed a suit in 1977 in the High Court claiming that the house belonged to a joint Hindu family and sought partition of the property on that basis. The suit was dismissed by the Single Judge of the High Court in 1982. The appellants filed a regular first appeal which was dismissed in 2000. Against the concurrent findings

of both the judgments, the appellants filed a special leave petition which was also dismissed by the Supreme Court in 2001.

During the pendency of the regular first appeal, *R* had filed a suit in 1992 for mandatory injunction to remove the appellants and for recovery of mesne profits. The suit was stayed on application of the appellants in view of the pendency of the first appeal. But after dismissal of the first appeal and the special leave petition the suit filed by *R* stood revived. In the suit of *R*, one of the issues (Issue 4) was whether the suit had been properly valued for the purpose of court fees and jurisdiction. In the suit the defendant-appellants sought amendment of the written statement which was refused in 2004. Against this order a civil miscellaneous application was filed in the High Court which was disposed of with the liberty to move an application before the trial court for framing an additional issue. The additional issue as to whether the defendants had become owner of 3/4th share of the suit property by adverse possession was framed and the case was fixed for recording of evidence. An application for transfer of the suit was also moved but the same was again rejected. After the trial commenced, an adjournment was sought which was granted against costs.

The plaintiff's evidence was concluded on 10-2-2005. But the defendants failed to produce their evidence and their evidence was closed on 28-5-2005. Against that order an application was filed before the High Court. Stay was granted and the application was dismissed in 2007 with the liberty to move an application for taking on record further documents. Thereafter, an application under Order 18 Rule 17-A CPC was moved in 2008 which was allowed on "no objection" from the plaintiff and affidavits were taken on record. On 23-10-2009 the matter was fixed for evidence.

The appellants filed an application under Order 7 Rule 11(*b*) CPC for rejection of the 1992 plaint of *R* on the ground of not paying ad valorem court fees on the market value of the property and for undervaluation of relief. The Civil Judge dismissed the application taking the view that entire evidence had been led, the matter was at the stage of final arguments and the point raised was not covered by Order 14 Rule 2(2) CPC as it was only an averment made in the plaint. The defendant-appellants preferred a revision petition thereagainst in the High Court in 2010. At the preliminary hearing, the petition was allowed to be withdrawn leaving the trial court at liberty to consider the request of the appellants to treat Issue 4 (framed in the 1992 suit filed by *R*) regarding court fee as a preliminary issue. The defendants filed an application before the Civil Judge for treating Issue 4 as a preliminary issue. The application was rejected with costs.

While the matter was at the stage of final arguments before the trial court, the appellants filed a petition under Article 227 of the Constitution against the order of the Civil Judge. The High Court dismissed the petition by a detailed judgment rendered at the preliminary hearing and imposed costs of Rs 75,000 to be deposited with the Registrar General. The review petition filed by the appellants was also dismissed. The present appeals were filed against the order imposing costs and dismissing the review petition.

Dismissing the appeals with costs of Rs 2 lakhs, the Supreme Court

Held :

It is abundantly clear from the facts and circumstances of this case that the appellants have seriously created obstacles at every stage during the course of

trial and virtually prevented the court from proceeding with the suit. This is a typical example of how an ordinary suit moves in our courts. Some cantankerous and unscrupulous litigants on one ground or the other do not permit the courts to proceed further in the matter.

(Para 28)

The Supreme Court has to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his illegitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs.

(Para 47)

Swaran Singh v. *State of Punjab*, (2000) 5 SCC 668 : 2001 SCC (Cri) 190; *Mahila Vinod Kumari* v. *State of M.P.*, (2008) 8 SCC 34 : (2008) 3 SCC (Cri) 414, *relied on*

In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately, wasted in a large number of uncalled for cases. The credibility of the entire judiciary is at stake unless effective remedial steps are taken without further loss of time.

(Paras 43 and 29)

The prevailing delay in civil litigation can be curbed. The existing system of administration of civil litigation can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:

A. Pleadings are the foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial Judge to carefully scrutinise, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of the judgment and the courts should strictly adhere to the said dates and the said timetable as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.

C. The court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at the truth of the matter and doing substantial justice.

D. Every case emanates from a human or a commercial problem and the court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well-settled principles of law and justice.

E. The courts should be extremely careful and cautious in granting ex parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing the parties concerned appropriate orders should be passed.

F. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after

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hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

G. Litigants who obtained ex parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

H. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

I. The court must adopt realistic and pragmatic approach in granting mesne profits. The court must carefully keep in view the ground realities while granting mesne profits.

J. Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

(Para 52)

Arun Mohan: *Justice, Courts and Delays, relied on*

In case the court has to grant ex parte injunction in exceptional cases then while granting injunction it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits.

(Para 44)

If an ex parte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court.

(Para 45)

It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the ex parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex parte injunction orders or stay orders may not find encouragement.

(Para 46)

While imposing costs, the court has to take into consideration pragmatic realities and be realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different courts. The court has to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc. The other factor is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years.

(Paras 54 and 55)

There is no infirmity in the well-reasoned impugned order. These appeals are consequently dismissed with costs quantified at Rs 2,00,000 (Rupees two lakhs only). Imposition of the costs is not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation. The appellants are directed to pay the costs imposed by the Supreme

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Court along with the costs imposed by the High Court of Rs 75,000 to the respondents within six weeks from the date of the present judgment.

(Para 56)

The suit pending before the trial court is at the final stage of the arguments; therefore, the said suit is directed to be disposed of as expeditiously as possible and in any event within three months from the

date of the communication of the order as the matter has not been decided on merits of the case. The trial court should not be influenced by any observation or finding arrived at by the Supreme Court in dealing with these appeals as the matter has not been decided on merits of the case.

(Para 57)

E. **Civil Procedure Code, 1908 — Or. 14 R. 1 and S. 11 — Issue which may not be framed — Res judicata — Issue on which adjudication in earlier round of litigation had attained finality — Determination of title of respondent-plaintiff having attained finality in earlier round, issue regarding adverse possession of appellant-defendants, held, should not have been framed — Specific Relief Act, 1963, Ss. 5 and 6**

(Paras 41 and 42)

F. **Civil Procedure Code, 1908 — Or. 14 R. 1 — Framing of issues — Duty of court — Framing of issues is a very important stage in civil litigation and it is bounden duty of court that due care, caution, diligence and attention must be bestowed by Presiding Judge while framing issues**

(Para 41)

G. **Advocates — Amicus curiae — Duties of — Assistance rendered by amicus curiae in present case, deeply appreciated — It is extremely rare that such good assistance is provided by amicus curiae — Learned amicus curiae has discharged his obligation towards the profession in an exemplary manner**

(Para 58)

R-D/A/48222/CVR

Advocates who appeared in this case:

Dr. Arun Mohan (Amicus Curiae), Senior Advocate (Vikas Mahajan, Vinod Sharma, Ms Tulika Prakash and Kuber Giri, Advocates) for the Appellants;

R.P. Sharma, Advocate, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2008) 8 SCC 34 : (2008) 3 SCC (Cri) 414, *Mahila Vinod Kumari* v. *State of M.P.* 26

2. (2000) 5 SCC 668 : 2001 SCC (Cri) 190, *Swaran Singh* v. *State of Punjab* 266g-h, 26

The Judgment of the Court was delivered by

DALVEER BHANDARI, J.— Leave granted. These appeals are directed against the judgment and order dated 1-9-2010 passed in Civil Miscellaneous Petition (Main) No. 1084 of 2010 and the order dated 25-10-2010 passed in Review Petition No. 429 of 2010 in Civil Miscellaneous Petition (Main) No. 1084 of 2010 by the High Court of Delhi at New Delhi.

2. The apparent discernible question which requires adjudication in this case seems to be a trivial, insignificant and small one regarding imposition of costs, but in fact, these appeals have raised several important questions of law of great importance which we propose to deal in this judgment. Looking to the importance of the matter we requested Dr. Arun Mohan, a distinguished Senior Advocate to assist this Court as an amicus curiae.

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3. This is a classic example which abundantly depicts the picture of how the civil litigation moves in our courts and how unscrupulous litigants (the appellants in this case) can till eternity harass the respondents and their children by abusing the judicial system.

4. The basic facts which are necessary to dispose of these appeals are recapitulated as

under: in the year 1952, almost about half a century ago, the Government allotted a residential house bearing Nos. 61-62, I Block, Lajpat Nagar I, measuring 200 yd to Ram Parshad. The lease deed was executed in his favour on 31-10-1964. On humane considerations of shelter, Ram Parshad allowed his three younger brothers—Madan Lal, Krishan Gopal and Manohar Lal to reside with him in the house. On 16-11-1977, these three younger brothers filed Civil Suit No. 993 of 1977 in the High Court of Delhi claiming that this Lajpat Nagar property belonged to a joint Hindu family and sought partition of the property on that basis. The suit was dismissed by a judgment dated 18-1-1982 by the learned Single Judge of the High Court of Delhi.

5. The appellants (younger brothers) of Ram Parshad, aggrieved by the abovesaid judgment preferred Regular First Appeal (Original Side) No. 4 of 1982 which was admitted for hearing on 9-3-1982. During the pendency of the appeal, Ram Parshad on 15-1-1992 filed a suit against his three younger brothers for mandatory injunction to remove them and for recovery of mesne profits. In 1984 Ram Parshad sold the western half (No. 61) to an outsider. That matter is no longer in dispute.

6. The first appeal filed by the other three younger brothers of Ram Parshad against Ram Parshad was dismissed on 9-11-2000. Against the concurrent findings of both the judgments, the appellants filed Special Leave Petition No. 3740 of 2001 in this Court which was also dismissed on 16-3-2001.

7. In the suit filed by Ram Parshad (one of the respondents) (now deceased) against the appellants in these appeals, the following issues were framed:

1. Whether the suit is liable to be stayed under Section 10 CPC as alleged in Para 1 of the Preliminary Objection?

2. Whether the defendants are licensees in the suit premises and if so whether the plaintiff is entitled to recover possession of the same from them?

3. Whether the suit of the plaintiff is time-barred?

4. Whether the suit has been properly valued for the purpose of court fees and jurisdiction?

5. Whether the suit property is joint family property of the parties?

6. Whether the plaintiff is entitled to mesne profits for use and occupation of the suit property by the defendants and if so at what rate and for which period?

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7. Whether the defendants have become the owners of three-fourth share of the suit property by adverse possession?

8. Relief

and fixed the matter for evidence on 22-11-2004.

8. The defendants in the suit contended that inasmuch as Regular First Appeal (Original Side) No. 4 of 1982 was still pending, therefore, Ram Parshad's suit be stayed under Section 10 of the Code of Civil Procedure. Accepting the contention, on 20-7-1992, the 1992 suit was ordered to be stayed.

9. The regular first appeal was dismissed on 9-11-2000 and the special leave petition against the said appeal was also dismissed on 16-3-2001. Consequently, the suit filed by Ram Parshad for mandatory injunction and for mesne profits stood revived on 5-12-2001.

10. In the first round of litigation from 16-11-1977 to 16-3-2001 it took about 24 years and thereafter it had taken 10 years from 16-3-2001. In the 1992 suit, the defendants (the appellants herein) sought amendment of the written statement which was refused on 28-7-2004. Against this order, Civil Miscellaneous (Main) No. 1153 of 2004 was filed in the High Court which was disposed of on 2-9-2004 with liberty to move an application before

the trial court for framing an additional issue. The additional issue regarding the claim of adverse possession by the three younger brothers was framed on 6-10-2004. The issue was whether the defendants have become the owners of three-fourth share of the suit property by adverse possession and the case was fixed up for recording of the evidence.

11. According to the learned amicus curiae, the court before framing Issue 7 and retaining the other issues, ought to have recorded the statement of the defendants under Order 10 Rule 2 of the Code of Civil Procedure (for short "CPC") and then re-cast the issues, as would have been appropriate on the pleadings of the parties as they would survive after the decision in the previous litigation.

12. According to the learned amicus curiae, the practice of mechanically framing the issues needs to be discouraged. Framing of issues is an important exercise. Utmost care and attention is required to be bestowed by the judicial officers/Judges at the time of framing of issues. According to Dr. Arun Mohan, twenty minutes spent at that time would have saved several years in court proceedings.

13. In the suit, on 6-11-2004 the application seeking transfer of the suit from that court was filed which was dismissed by the learned District Judge on 22-3-2005. The trial commenced on 22-11-2004, adjournment was sought and was granted against costs. The plaintiffs' evidence was concluded on 10-2-2005.

14. On 28-5-2005 the defendants failed to produce the evidence and their evidence was closed. Against that order, Civil Miscellaneous (Main) No. 1490 of 2005 was filed in the Delhi High Court. Stay was granted on 15-7-2005

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and the application was dismissed on 17-12-2007 with liberty to move an application for taking on record further documents.

15. On 12-2-2008, an application under Order 18 Rule 17-A CPC was moved. On "no-objection" from the plaintiff, it was allowed on 31-7-2008 and the documents and affidavits were taken on record. On 23-10-2009, the matter was fixed for evidence. The appellants filed an application under Order 7 Rule 11(*b*) CPC for rejection of the 1992 plaint on the ground of not paying ad valorem court fees on the market value of the property and for undervaluation of relief. This application was dismissed by the Civil Judge on 9-7-2010 by the following order:

"M-61/2006

9-7-2010

Present : Learned counsel for the plaintiff

Learned counsel for the defendant

Application under Section 151 CPC is filed by the defendant for treating Issue 4 as preliminary issue. It pertains to court fees and jurisdiction. It is pertinent to mention that the suit is at the stage of final arguments and both the parties have led the entire evidence. The learned counsel for the defendant submits that this application has been filed by the defendant in view of the liberty granted to the defendant by the Hon'ble High Court vide order dated 26-4-2010 dismissing Civil Revision Petition Application No. 76 of 2010 as withdrawn against the order dated 12-10-2006 passed by this Court. It is pointed out to the counsel for the defendant that the case is at the stage of final arguments and the law enjoins upon the court to return finding on all the issues. The counsel for the defendant filing this application seeks disposal of the same.

Perused the application and gone through the record.

Order 20 Rule 5 clearly states that the court has to return finding on each issue. Even Order 14 Rule 2 CPC states that the court has to pronounce the judgment on all issues notwithstanding that the case may be disposed of on a preliminary issue. Sub-rule (2) refers to the discretion given to the court where the court may try an issue

relating to the jurisdiction of the court or the bar to the suit created by any law for the time being in force as preliminary issue. It further relates to disposal of the suit treating these points as preliminary issues and also relates to deferring the settlement of other issues.

But there is no such case. Entire evidence has been led, the matter is at the stage of final arguments and the point raised does not relate to the point pertaining to sub-rule (2). Neither it relates to bar created by any law nor the jurisdiction of the court to entertain the suit. It is the averments made in the plaint. Contention of the applicant for treating the issue as preliminary issue is against the spirit of law as referred in Order 20 Rule 5 and Order 14 Rule 5 CPC. I do not see any merit in this application and the same is dismissed with the costs of Rs 2000.

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To come up for payment of costs and final arguments. Put up on 9-8-2010.

(Vipin Kumar Rai)
ACJ/ARC(W)"

16. Aggrieved by the order dated 23-10-2009, the defendants (the appellants herein) preferred Civil Revision Petition No. 76 of 2010 in the High Court of Delhi. At the preliminary hearing, the petition was allowed to be withdrawn, leaving the trial court at liberty to consider the request of the appellants to treat Issue 4 regarding court fee as a preliminary issue.

17. On 9-7-2010, the defendants filed an application before the Civil Judge for treating Issue 4 as a preliminary issue. This application was rejected by the civil court on 9-7-2010 with costs. The matter is at the stage of final arguments before the trial court. At this stage, against the order of the Civil Judge, on 7-8-2010, the appellants filed a petition being Civil Miscellaneous (Main) No. 1084 of 2010 under Article 227 of the Constitution in the High Court which came up for preliminary hearing on 26-8-2010. On 1-9-2010, the High Court dismissed Civil Miscellaneous (Main) No. 1084 of 2010 by a detailed judgment rendered at the preliminary hearing and imposed costs of Rs 75,000 to be deposited with the Registrar General. Review Petition No. 429 of 2010 was filed which was dismissed on 25-10-2010. These appeals have been filed against the order imposing costs and dismissing the review petition.

18. The learned Single Judge observed that the present appellants belong to that category of litigants whose only motive is to create obstacles during the course of trial and not to let the trial conclude. Applications after applications are being filed by the appellants at every stage, even though orders of the trial court are based on sound reasoning. Moreover, the appellants have tried to mislead the court also by filing wrong synopsis and incorrect dates of events.

19. The High Court further observed that the purpose of filing of brief synopsis with list of dates and events is to give a brief and correct summary of the case and not to mislead the court. Those litigants or their advocates who mislead the courts by filing wrong and incorrect particulars (the list of dates and events) must be dealt with heavy hands.

20. In the list of dates and events, it is stated that the respondents filed a suit for mandatory injunction and recovery of Rs 36,000 on 22-9-2003. In fact, as per typed copy of the plaint placed on record, the suit was filed by the predecessor-in-interest of the respondents in 1992. Written statement was filed by the predecessor-in-interest of the appellants in 1992. Thus, the appellants tried to mislead the court by mentioning wrong date of 22-9-2003 as the date of filing.

21. The High Court has also dealt with a number of judgments dealing with the power of the High Court under Article 227 of the Constitution. According to the High Court, the

suit was filed in the trial court in 1992. The written statement was filed as far back on 15-4-1992. On pleadings, Issue 4

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was framed with regard to court fee and jurisdiction. The appellants never pressed that Issue 4 be treated as a preliminary issue. Both the parties led their respective evidence. When the suit was fixed before the trial court for final arguments, the application in question was filed. The appellants argued that Issue 4 should also be determined along with the other issues.

22. In the impugned judgment, it is also observed that it is revealed from the record that the appellants have been moving one application after the other, though all were dismissed with costs.

23. It may be pertinent to mention that the appellants also moved a transfer application apprehending an adverse order from the trial Judge, which was also dismissed by the learned District Judge. This conduct of the appellants demonstrates that they are determined not to allow the trial court to proceed with the suit. They are creating all kinds of hurdles and obstacles at every stage of the proceedings.

24. The learned Single Judge observed that even according to Order 14 Rule 2 CPC the court has to pronounce the judgment on all issues notwithstanding that the case may be disposed of on a preliminary issue. Order 14 Rule 2 CPC reads as under:

> "ORDER 14 — Settlement of Issues and Determination of Suit on Issues of Law or on Issues Agreed upon
>
> **2. *Court to pronounce judgment on all issues***.—(1) Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues."

25. Sub-rule (2) refers to the discretion given to the court where the court may try an issue relating to the jurisdiction of the court or the bar to the suit created by any law for the time being in force as a preliminary issue. It further relates to disposal of the suit treating these points as preliminary issues and also relates to deferring the settlement of other issues, but there is no such case. The entire evidence has been led, the matter is at the stage of final arguments and the point raised does not relate to the point pertaining to sub-rule (2). Neither does it relate to the bar created by any law nor the jurisdiction of the court to entertain the suit. It is just an averment made in the plaint. Contention of the appellants for treating the said issue as a preliminary issue is against the spirit of law as referred in Order 20 Rule 5 and Order 14 Rule 2 CPC. These observations of the courts below are correct and in pursuance of the provisions of the Act.

26. The High Court properly analysed the order of the trial court and observed as under:

> "Looking from any angle, no illegality or infirmity can be found in the impugned order. The only object of the petitioners is just to delay the trial, which is pending for the last more than 18 years. To a large extent, the petitioners have been successful in delaying the judicial proceedings by filing false, frivolous and bogus applications, one after the other. It is well settled that frivolous litigation clogs the wheels of justice making it

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difficult for courts to provide easy and speedy justice to the genuine litigations. Dismissed. List for compliance on 7-10-2010."

27. We have carefully examined the impugned judgment of the High Court and also the order dated 9-7-2010 passed by the learned Civil Judge, Delhi.

28. It is abundantly clear from the facts and circumstances of this case that the appellants have seriously created obstacles at every stage during the course of trial and virtually prevented the court from proceeding with the suit. This is a typical example of how an ordinary suit moves in our courts. Some cantankerous and unscrupulous litigants on one ground or the other do not permit the courts to proceed further in the matter.

29. The learned amicus curiae has taken great pains in giving details of how the case has proceeded in the trial court by reproducing the entire court orders of the 1992 suit. In order to properly comprehend the functioning of the trial courts, while dealing with civil cases, we deem it appropriate to reproduce the order-sheets of the 1992 suit. This is a typical example of how a usual civil trial proceeds in our courts. The credibility of the entire judiciary is at stake unless effective remedial steps are taken without further loss of time. Though original litigation and the appeal commenced from 1977 but in order to avoid expanding the scope of these appeals, we are dealing only with the second litigation which commenced in 1992.

30. The order-sheets of the suit of 1992 are reproduced as under:

Proceedings of the suit — 1992

17-1-1992—Summons to the defendants on the plaintiff and RC.

28-2-1992—Fresh summons to Defendants 1 and 2. Defendant 3 refused service. Proceeded ex parte.

30-3-1992—Time sought to file written statement for all the defendants. Allowed.

20-4-1992—Written statement filed. Fixed on 30-4-1992 for replication, admission/denial and framing of issues.

1-5-1992—The plaintiff sought time to file the replication.

11-5-1992—Replication filed. Adjourned for admission/denial on joint request.

26-5-1992—No document for admission/denial. Issues framed. Fixed for arguments on 17-7-1992.

17-7-1992—Arguments heard on preliminary issue.

20-7-1992—Suit stayed. The plaintiff granted liberty to make application for revival after disposal of RFA (OS) No. 4 of 1982.

1-6-2001—File sent to the District Judge for transferring the case to the proper court.

4-6-2001—The District Judge marked the case to the Court of Shri Naipal Singh, Additional District Judge.

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2-7-2001—The Presiding Officer is on vacation leave. Fixed for 3-7-2001.

3-7-2001—Miscellaneous application notice issued to the respondent. Main Suit No. 47 of 1992 summoned.

23-8-2001—Suit file be summoned. Notice of application to the defendant on PF & RC.

16-10-2001—Copy of application given to all the defendants. Adjourned for reply to application and further proceedings.

5-12-2001—Suit has to proceed for the decision on merits.

28-2-2002—Application under Order 6 Rule 17 moved by the defendant for amendment of written statement. Adjourned for reply and arguments on the application.

16-4-2002—As the value of the suit is below Rs 3 lakhs, the suit is transferred to the Court of the Civil Judge.

23-4-2002—Reply to application filed. Summons to the defendants other than Defendant 3.

21-8-2002—Counsel for the parties not present.

28-11-2002—Presiding Officer on leave.

7-12-2002—At joint request, adjourned. Last opportunity.

22-9-2003—None present. Adjourned for arguments on Order 6 Rule 17. File transferred to the Court of Shri Prashant Kumar, Civil Judge.

12-11-2003—Son of the plaintiff stated that the plaintiff has expired. Adjourned.

6-12-2003—Presiding Officer not available.

16-1-2004—Copy of the application under Order 22 Rule 3 supplied. As requested, adjourned.

16-2-2004—Reply not filed. The counsel for the defendant seeks time to file reply.

1-3-2004—Reply filed. The counsel for the defendant objected that the addresses of legal representatives are not correct.

24-3-2004—Application under Order 22 Rule 3 is allowed. Right to sue survives. Order 6 Rule 17 pending for disposal.

27-4-2004—Arguments heard.

22-5-2004—The plaintiff wants to file written submissions with regard to clarification. Allowed.

3-7-2004—None for the defendants. Written submissions filed by the plaintiff.

28-7-2004—None present. Order 6 Rule 17 application dismissed.

2-9-2004 to 6-10-2004—None for the defendants. Fixed for PE.

28-9-2004—The defendant moved the application under Order 14 Rule 5. Notice issued.

6-10-2004—Issues reframed. The defendant sought time to cross-examine PW.

22-11-2004—PW present. The defendant prayed for adjournment. The defendant moved the application for transfer of the case. Last opportunity for cross-examination.

21-12-2004—PW present. Previous cost not pressed for. PW sought time for obtaining copies of documents.

10-2-2005—PW cross-examined. PE closed.

15-3-2005—No DW present.

19-4-2005—Affidavit of DW filed. However DW stated that he is not feeling well. Adjourned.

28-5-2004—The defendant stated that he does not want to lead evidence. DE closed. Fixed for final arguments.

15-7-2005—Stay by the High Court in CM (Main) No. 1490 of 2005.

18-7-2005—Counsel for the defendant states that the High Court has stayed the matter. Directed to file the copy of the order.

25-8-2005—No copy of the order is filed.

29-10-2005—Matter under stay by the High Court.

30-1-2006—Fresh suit received by transfer. Adjourned for proper orders.

2-5-2006—Notice to the defendants.

31-5-2006—Counsel for the defendants served but none appeared. Adjourned for

final arguments.

21-8-2006—File not traceable. Adjourned.

9-12-2006—Present: Counsel for the plaintiff. Adjourned for final arguments.

19-2-2007—Counsel for the plaintiff. Proceedings stayed by the High Court.

21-8-2007—Counsel for the plaintiff. Matter under stay by the High Court.

17-12-2007—CM (Main) No. 1490 of 2005 dismissed by the High Court. Stay vacated.

10-1-2008—Counsel for the plaintiff. None for the defendant. Adjourned.

12-2-2008—The defendant filed application under Order 18 Rule 17-A. Copy supplied. Adjourned for reply and arguments.

30-4-2008—Reply filed by the plaintiff. Application allowed on costs of Rs 7000, out of which Rs 1000 to be deposited in legal aid. Adjourned for DE.

31-7-2008—The defendant sought adjournment on the ground that witness is not feeling well.

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29-9-2008—The plaintiff moved application under Order 6 Rule 17. Copy supplied.

23-12-2008—Reply filed. Come up for arguments on the application.

21-5-2009—Part arguments heard.

22-7-2009—The plaintiff did not press for the application. Dismissed. To come up for DE.

5-10-2009—The defendants' witness not present. Application for exemption allowed. Affidavit already filed.

23-10-2009—Application under Order 7 Rule 1 CPC filed. Dismissed. Affidavit of Krishan Gopal tendered as DW 1, and he is cross-examined and discharged. No other witness. DE closed.

11-1-2010—Presiding Officer on leave.

23-3-2010—The defendant seeks adjournment on the ground that main counsel not available.

3-5-2010—Adjournment sought on behalf of the parties.

26-5-2010—File not traceable.

9-7-2010—Application under Section 151 CPC for treating Issue 4 as preliminary issue. Dismissed with cost of Rs 2000.

9-8-2010—Application for adjournment filed.

27-9-2010—Presiding Officer on leave.

23-10-2010—For final arguments.

18-12-2010—For final arguments.

22-1-2011—For final arguments.

5-2-2011—For final arguments.

26-2-2011—Sought adjournment on the ground that the matter regarding cost is pending in the Hon'ble Supreme Court.

31. Dr. Arun Mohan, learned amicus curiae, has written an extremely useful, informative and unusual book *Justice, Courts and Delays*. This book also deals with the main causes of delay in the administration of justice. He has also suggested some effective remedial measures. We would briefly deal with the aspect of delay in disposal of civil cases and some remedial measures and suggestions to improve the situation. According to our considered view, if these suggestions are implemented in proper

perspective, then the present justice delivery system of civil litigation would certainly improve to a great extent.

32. According to the learned author, 90% of our court time and resources are consumed in attending to uncalled for litigation, which is created only because our current procedures and practices hold out an incentive for the wrongdoer. Those involved receive less than full justice and there are many more in the country, in fact, a greater number than those involved who suffer injustice because they have little access to justice, in fact, lack of awareness and confidence in the justice system.

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33. According to Dr. Mohan, in our legal system, uncalled for litigation gets encouragement because our courts do not impose realistic costs. The parties raise unwarranted claims and defences and also adopt obstructionist and delaying tactics because the courts do not impose actual or realistic costs. Ordinarily, the successful party usually remains uncompensated in our courts and that operates as the main motivating factor for unscrupulous litigants. Unless the courts, by appropriate orders or directions remove the cause for motivation or the incentives, uncalled for litigation will continue to accrue, and there will be expansion and obstruction of the litigation. Court time and resources will be consumed and justice will be both delayed and denied.

34. According to the learned author lesser the court's attention towards full restitution and realistic costs, which translates as profit for the wrongdoer, the greater would be the generation of uncalled for litigation and exercise of skills for achieving delays by impurity in presentation and deployment of obstructive tactics. According to him the cost (risk)—benefit ratio is directly dependent on what costs and penalties will the court impose on him; and the benefit will come in as: the other "succumbing" en route and or leaving a profit for him, or even if it is a fight to the end, the court still leaving a profit with him as unrestituted gains or unassessed short levied costs. Litigation perception of the probability of the other party getting tired and succumbing to the delays and settling with him and the court ultimately awarding what kind of restitution, costs and fines against him—paltry or realistic. This perception ought to be the real risk evaluation.

35. According to the learned amicus curiae if the appellants had the apprehension of imposition of realistic costs or restitution, then this litigation perhaps would not have been filed. According to him, ideally, having lost up to the highest court (16-3-2001), the appellants (the defendants in the suit) ought to have vacated the premises and moved out on their own, but the appellants seem to have acted as most parties do—calculate the cost (risk)—benefit ratio between surrendering on their own and continuing to contest before the court. Procrastinating litigation is commonplace because, in practice, the courts are reluctant to order restitution and actual cost incurred by the other side.

Profits for the wrongdoer

36. According to the learned amicus curiae, every lease on its expiry, or a licence on its revocation cannot be converted itself into litigation. Unfortunately, our courts are flooded with these cases because there is an inherent profit for the wrongdoers in our system. It is a matter of common knowledge that domestic servants, gardeners, watchmen, caretakers or security men employed in a premises, whose status is that of a licensee indiscriminately file suits for injunction not to be dispossessed by making all kinds of averments and may be even filing a forged document, and then demand a chunk of money for withdrawing the suit. It is happening because it is the general impression that even if ultimately the unauthorised person is thrown out of the premises the court would not ordinarily punish the

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orised person by awarding realistic and actual mesne profits, imposing costs or g prosecution.

It is a matter of common knowledge that lakhs of flats and houses are kept locked rs, particularly in big cities and metropolitan cities, because owners are not certain en after expiry of lease or licence period, the house, flat or the apartment would be d or not. It takes decades for final determination of the controversy and wrongdoers ver adequately punished. Pragmatic approach of the courts would partly solve the g problem of this country.

The courts have to be extremely careful in granting an ad interim ex parte ion. If injunction has been granted on the basis of false pleadings or forged ents, then the court concerned must impose costs, grant realistic or actual mesne and/or order prosecution. This must be done to discourage the dishonest and pulous litigants from abusing the judicial system. In substance, we have to remove entive or profit for the wrongdoer.

While granting an ad interim ex parte injunction or stay order the court must record ertaking from the plaintiff or the petitioner that he will have to pay mesne profits at rket rate and costs in the event of dismissal of interim application and the suit.

According to the learned amicus curiae the court should have first examined the gs and then not only granted leave to amend but directed amendment of the gs so that the parties were confined to those pleas which still survived the High decision. Secondly, it should have directed discovery and production of documents eir admission/denial. Thirdly, if the Civil Judge on 6-10-2004, which was three-and-years after the dismissal of the special leave petition on 16-3-2001, instead of g the issues that he did, had, after recording the statements of the parties and y hearing the matter should (*sic* not) have passed the following order:

In my prima facie view, your pleadings are not sufficient to raise an issue for erse possession; secondly, how can you contend adverse possession of three-fourth e? And thirdly, your pleadings and contentions before the High Court had the effect ompletely negating any claim to adverse possession...."

Framing of issues is a very important stage in the civil litigation and it is the en duty of the court that due care, caution, diligence and attention must be ed by the learned Presiding Judge while framing of issues.

In the instant case when the entire question of title has been determined by the ourt and the special leave petition against that judgment has been dismissed by urt, thereafter the trial court ought not to have framed such an issue on a point has been finally determined up to this Court. In any case, the same was exclusively by the principles of res judicata. That clearly demonstrates total non-application of

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We have carefully examined the written submissions of the learned amicus curiae e learned counsel for the parties. We are clearly of the view that unless we ensure rongdoers are denied profit or undue benefit from the frivolous litigation, it would be t to control frivolous and uncalled for litigations. In order to curb uncalled for and us litigation, the courts have to ensure that there is no incentive or motive for d for litigation. It is a matter of common experience that court's otherwise scarce

aluable time is consumed or more appropriately, wasted in a large number of d for cases.

Usually the court should be cautious and extremely careful while granting ex parte rim injunctions. The better course for the court is to give a short notice and in some even dasti notice, hear both the parties and then pass suitable bipartite orders. ence reveals that ex parte interim injunction orders in some cases can create havoc etting them vacated or modified in our existing judicial system is a nightmare. ore, as a rule, the court should grant interim injunction or stay order only after g the defendants or the respondents and in case the court has to grant ex parte ion in exceptional cases then while granting injunction it must record in the order the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full tion, actual or realistic costs and mesne profits.

If an ex parte injunction order is granted, then in that case an endeavour should be to dispose of the application for injunction as expeditiously as may be possible, ably as soon as the defendant appears in the court.

It is also a matter of common experience that once an ad interim injunction is d, the plaintiff or the petitioner would make all efforts to ensure that injunction ues indefinitely. The other appropriate order can be to limit the life of the ex parte ion or stay order for a week or so because in such cases the usual tendency of essarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex njunction orders or stay orders may not find encouragement.

We have to dispel the common impression that a party by obtaining an injunction on even false averments and forged documents will tire out the true owner and ely the true owner will have to give up to the wrongdoer his legitimate profit. It is matter of common experience that to achieve clandestine objects, false pleas are aken and forged documents are filed indiscriminately in our courts because they ardly any apprehension of being prosecuted for perjury by the courts or even pay costs. In *Swaran Singh* v. *State of Punjab*[1] this Court was constrained to observe rjury has become a way of life in our courts.

It is a typical example of how a litigation proceeds and continues and in the end s a profit for the wrongdoer.

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The learned amicus articulated the common man's general impression about on in following words:

Make any false averment, conceal any fact, raise any plea, produce any false ument, deny any genuine document, it will successfully stall the litigation, and in case, delay the matter endlessly. The other party will be coerced into a settlement ch will be profitable for me and the probability of the court ordering prosecution for ury is less than that of meeting with an accident while crossing the road."

This Court in *Swaran Singh*[1] observed as under: (SCC p. 679, para 36)

36. ... Perjury has also become a way of life in the law courts. A trial Judge knows the witness is telling a lie and is going back on his previous statement, yet he does wish to punish him or even file a complaint against him. He is required to sign the plaint himself which deters him from filing the complaint. Perhaps law needs ndment to clause (*b*) of Section 340(3) of the Code of Criminal Procedure in this ect as the High Court can direct any officer to file a complaint. To get rid of the evil erjury, the court should resort to the use of the provisions of law as contained in pter XXVI of the Code of Criminal Procedure."

In a recent judgment in *Mahila Vinod Kumari* v. *State of M.P.*[2] this Court has shown

great concern about the alarming proportion of perjury cases in our country.

52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:

A. Pleadings are the foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial Judge to carefully scrutinise, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at the truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider

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ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The court must adopt realistic and pragmatic approach in granting mesne profits. The court must carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing the parties concerned appropriate orders should be passed.

F. Litigants who obtained ex parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well-settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of the judgment and the courts should strictly adhere to the said dates and the said timetable as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.

53. According to us, these aforementioned steps may help the courts to drastically improve the existing system of administration of civil litigation in our courts. No doubt, it would take some time for the courts, litigants and the advocates to follow the aforesaid steps, but once it is observed across the country, then the prevailing system of adjudication of civil courts is bound to improve.

54. While imposing costs we have to take into consideration pragmatic realities and be

realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc.

55. The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and

defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years.

56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well-reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs 2,00,000 (Rupees two lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation. The appellants are directed to pay the costs imposed by this Court along with the costs imposed by the High Court to the respondents within six weeks from today.

57. The suit pending before the trial court is at the final stage of the arguments, therefore, the said suit is directed to be disposed of as expeditiously as possible and in any event within three months from the date of the communication of the order as we have not decided the matter on merits of the case. We make it abundantly clear that the trial court should not be influenced by any observation or finding arrived at by us in dealing with these appeals as we have not decided the matter on merits of the case.

58. Before parting with this case we would like to record our deep appreciation for the extremely valuable assistance provided by the learned amicus curiae. Dr. Arun Mohan did not only provide valuable assistance on the questions of law but inspected the entire record of the trial court and for the convenience of the court filed the entire court proceedings, other relevant documents, such as the plaint, written statement and relevant judgments. It is extremely rare that such good assistance is provided by the amicus curiae. In our considered view, the learned amicus curiae has discharged his obligation towards the profession in an exemplary manner.

59. These appeals are accordingly disposed of in terms of the aforementioned directions.

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* Arising out of SLPs (C) Nos. 3157-58 of 2011. From the Judgment and Order dated 1-9-2010 of the High Court of Delhi at New Delhi in Civil Misc. (Main) No. 1084 of 2010 and Order dated 25-10-2010 in Review Petition No. 429 of 2010

[4] (2000) 5 SCC 668 : 2001 SCC (Cri) 190

[2] (2008) 8 SCC 34 : (2008) 3 SCC (Cri) 414