CPC

S. 9 – Electricity Act, S. 145 – Bar to Civil Court's jurisdiction – Applicability – Suit raising dispute regarding payment of bill and disconnection of electricity – Aggrieved party can move to appellate authority under revisions of Act of 2003 – Civil suit filed by party not maintainable in view of bar to Civil Court's jurisdiction as provided under S. 145 of Act

In the present case, the suit of the plaintiff was itself not maintainable as there was an express bar and, therefore, the matter was liable to be dismissed in view of Section-9, Code of Civil Procedure, therefore, this Court finds that there is no substantial question of law on which this appeal can be admitted. **(Kulsoom Khan alias Kulsoom Begum v. Uttaranchal Power Corporation Ltd.; AIR 2012 Uttarakhand 105)**

S. 9—Land Acquisition Act - Ss. 4, 6 Nagar Mahapalika Adhiniyam, S. 365(2)—Jurisdiction of Civil Court—Ouster of—Acquisition of land made under Land Acquisition Act cannot be challenged in Civil Court

The authority of the Supreme Court ousting the jurisdiction of the Civil Court to entertain suit challenging land acquisition under a local Act Squarely applies to the acquisition for schemes under U.P. Nagar Maha Palika Adhiniyam (U.P.M.C. Act). **(Mithai Lal vs. State of U.P.; 2012 (5) ALJ 682)**

S. 11—Res Judicata—Applicability—Acquisition of land—Earlier writ proceedings relating to re-determination of compensation—Judgment in writ petition cannot operate as resjudicata against A.D.A.

It is clear that though a decision given at an earlier stage of suit will bind the parties at later stages of the same suit, but it is equally well settled that because a matter has been decided at an earlier stage by an interlocutory order and no appeal has been taken therefrom or no appeal did lie, a higher Court is not precluded from considering the matter again at a later stage of the same litigation. Accordingly, in any view of the matter this Court is not precluded from examining the correctness of the decision of the Courts below on all issues. **(Union of India vs. Indrajit Tewari; 2012 (5) ALJ 586)**

S. 11 - Provincial Small Causes Courts Act, S. 15 – U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, Ss. 2(2), 21 – Suit for eviction - Bar of res judicata - For operation of res judicata, judgment should be passed by court of competent jurisdiction

The only question argued before this court was landlord earlier filed an application under Section 21 of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act 1972") before Prescribed Authority i.e. P.A. Case no. 2 of 1983 seeking release of premises in question on the ground of personal need. The application was partly allowed vide order dated 13.12.1983 by Prescribed Authority directing eviction of defendant No. 1 and 2, namely, Prabhu Dayal and Ram Naresh and directing them to hand over possession of vacant premises to plaintiff No. 1, i.e. respondent No. 3 in the present writ petition, but it was dismissed against present petitioner and one Fakire Yadav.

Vide plaint dated 24.4.1984, respondent No. 3, however, filed another suit No. 13 of 1984 in the Court of Judge, Small Cause Court, Konch seeking eviction of petitioner and stated therein that the construction of premises in question since was completed in 1977 therefore Act No. 13 of 1972

(referred to as "Act, 1972" hereinabove) was not applicable to premises in question. Hence he filed the aforesaid suit of 1984. Petitioner raised an objection that once a suit under Section 21 of Act, 1972 was filed presuming that Act No. 13 of 1972 was applicable and that was decided, no suit was maintainable on the ground that Act No. 13 of 1972. The finding given by prescribed Authority would operate as res judicata and therefore the subsequent suit was wholly illegal and not maintainable.

Both the Court below have framed issue, "whether Act No. 13 of 1972 was applicable to the premises in question" and have recorded a finding that building in dispute admittedly having been completed in 1977, Act No. 13 of 1972 would not be applicable to the premises in question. This finding could not be shown perverse of otherwise bad.

It was contended that once a person has taken legal steps under a particular statue and has failed, thereafter he cannot retract by taking another step on the ground that earlier step was illegal or not maintainable and therefore the Courts below have erred by rejecting his submission in this respect.

In this case the building in question having been constructed and completed in 1977, in 1983, then years having not passed, Act No. 13 of 1972 was not applicable by virtue of Section 2(2) of Act, 1972. That being so the Prescribed Authority under Section 21 of Act, 1972 lacked patent jurisdiction. A jurisdiction cannot be conferred even by consent of parties. It is an elementary principle, where a Court has no jurisdiction over the subject-matter of the action in which an order is made, such order is wholly void, for jurisdiction cannot be conferred by consent of parties. No waiver or acquiescence on their part can make up the patent lack or defect of jurisdiction. If the decision/order of court/authority is void for want of jurisdiction over the subject-matter, it since the essential pre-requisite is that it should be the within the meaning of Section 11 of the Civil procedure Code. Something which is wholly without jurisdiction, that is nullity in the eyes of law, no principle of law would come to confer any kind of effectiveness to such proceedings so as to have any legal consequence. **(Ramesh Chandra Yadav II Addl. District Judge, Jalaun at Orai and Ors; 2012 (6) ALJ 130)**

S. 47 - Execution of decree - Impleadment of necessary party - Suit for specific performance filed by decree holder - Not bad for want of impleadment of Bank Manager with whom judgment debtor had some transaction

Under Section 47 of the Code of Civil procedure, the main plea raised by the revision petition/judgment debtor was that the suit for specific performance filed by the decree holder was bad for want of impleadment of the necessary party namely, the Bank Manager. Ex facie and prima facie the said plea is not tenable under law and prima facie the said Bank Manager with whom the judgment debtor had some transaction is having nothing to do with specific performance suit.

Hence, there is nothing wrong in the order passed by the lower Court. It is not that in all cases blindly, the Court is expected to number application filed under Section 47 of the Code of Civil Procedure and deal with it; if prima facie, no case is made out, then the lower Courts are not enjoined to mechanically number it and waste its judicial time. **(A. L. Helan Christina Mary v. Sivaganesh; AIR 2012 Mad 249)**

S. 100—Second Appeal—Interference with concurrent findings of fact—Scope of

In Major Singh vs. Rattan Singh, (1997) 3 SCC 546, it has been observed that when the courts below had rejected and disbelieved the evidence on unacceptable grounds, it is the duty of the High Court to consider whether the reasons given by the courts below are sustainable in law while hearing an appeal under/S. 100 of the Code of Civil Procedure.

In Vidhyadhar vs. Manikrao, (1999) 3 SCC 573, it has been ruled that the High Court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the courts below are perverse being based on no evidence or that on the evidence on record no reasonable person could have come to that conclusion. We may note here that solely because another view is possible on the basis of the evidence, the High Court would not be entitled to exercise the jurisdiction u/s. 100 of the Code of Civil Procedure. This view of ours has been fortified by the decision of this Court in Abdul Raheem vs. Karnataka Electricity Board, (2007) 14 SCC 138. **(Vishwanath Agrawal vs. Sarla Vishwanath Agarwal; (2012) 3 SCC (Cri) 347)**

S. 114 - Review – Notice of SLP not served on respondent - Review petition maintainable

In the case on hand, though during the course of hearing, a reference was made as to the presence of learned Attorney General by learned senior counsel for the respondents. Court are satisfied that the Union of India was not given an opportunity to represent its case due to mistake on the part of the Registry. Applying the well settled principles governing a review petition and giving our anxious and careful consideration to the facts and circumstances of this case, Court have come to the conclusion that the review petition filed by the Union of India should be admitted on the basis of the above reasoning. **(Union of India v. Sandur Manganese & Iron Ores Ltd & Ors.; 2012 (7) Supreme 318)**

S. 115 and O. 39, Rules 1 & 2 - Wakf Act, 1995 – S. 83 - Rejection of Temporary injunction application - Revision against - Maintainability of

Since there is specific provision in the Act under sub-section (9) of Section 83 of the Act that no appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal, therefore, in view of the Proviso appended to sub-section (9) of Section 83 of the Act, the order passed by the Tribunal are revisable. So far as the correctness, legality or propriety of determination is concerned, this Court is of the view that the matter can be examined in revision, therefore, the present revision is maintainable in respect of the order passed by the Tribunal on the temporary injunction application. (**Haji Rao Sharafat Ali vs. State of Uttarakhand; 2012(3) ARC 853 (Uttarakhand High Court)**

O. 2 R. 2(2) and (3) - Applicability of – Cause of action in the later suit must be the same as in the first suit

The cardinal requirement for application of the provisions contained in Order II Rule 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression, i.e. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in the Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee [JT 2012 (6) SC 149]. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Law of England. (4th Edition). The following reference from the above work would, therefore, be apt for being extracted herein below:

> "Cause of Action" has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical a cause of action."

(M/s. Virgo Industries (Eng.) P. Ltd. Vs. M/s. Venturctech Solutions P. Ltd.; 2012(6) Supreme 557)

(a) Civil Procedure Code, 1908, O. 6 R. 17 - Amendment of Pleadings - Held, the power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice

(b) Civil Procedure Code, 1908, O. 6 R. 17 - Amendment of Pleadings - Held, it is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit - Challenge to the voidness of the sale deed was implicit in the factual matrix of the unamended plaint, therefore the relief of cancellation of sale deeds as sought by amendment does not change the nature of the suit

We reiterate that all amendments which are necessary for the purpose of determining the real questions in controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature or suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.In the light of various principles we are satisfied that the appellants have made out a case for amendment and by allowing the same, the respondents herein (Defendant Nos. 1-3) are in no way prejudiced and they are also entitled to file additional written statement if they so desire. Accordingly, the order of the trial court dated 06.06.2007 dismissing the application for amendment of plaint in Suit No. 320 of 2003 as well as the High Court in Civil Revision No. 4486 of 2007 dated 13.11.2007 are set aside. The application for amendment is allowed. Since the suit is of the year 2003, Court direct the trial Court to dispose of the same within a period of six months from the date of receipt of copy of the judgment after affording opportunity to all the parties concerned. The appeal is allowed. No order as to costs. **(Abdul Rehman and another Vs. Mohd. Ruldu and others; (2012) (30) LCD 2032 Supreme Court)**

O. - 7 R. 11 - Rejection of Plaint - Exercise of power under - If plaint found manifestly vexatious and merit-less then Munsif should exercise his power under Order 7, Rule 11

The petitioners have not moved any application before the learned Trial Court for rejection of plaint under Order VII, Rule 11 C.P.C. Without resorting to the judicial forum, the petitioners have directly approached this Court which cannot capture or override, overlap or prevail over the hierarchical judicial system prevailing in this Country for centuries together. (**Khan Mohammad vs. Civil Judge (J.D.) Kaiserganj, District Behraich; 2012 (3) ARC 779 (All HC Lucknow-Bench)**

O. 7, R. 11 – Power to reject plaint can be exercised at any stage of suit i.e. before registering plaint or after issuance of summon to defendent or at any time before conclusion of trial

Since the appellant herein, as the first defendant before the trial Judge, filed application under Order 7 Rule 11 of the Code for rejection of the plaint on the ground that it does not show any cause of action against him.

It is clear from the Order 7, Rule 11 CPC, that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the court, insufficiently stamped and not rectified within the time fixed by the court, barred by an law, failed to enclose the required copies and the plaintiff fails to comply with the provisions of Rule 9, the court has no other option except to reject the same. A reading of the provision of Order 7, Rule 11 CPC also makes it clear that power under Order 7, Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial. **(Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust; (2012) 8 SCC 706)**

O. 7, R. 11(a) and S. 20 – "Cause of action" – Meaning – Reiterated

While scrutinizing the plaint averments, it is the bounden duty of the trial court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action 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 useful to refer the judgment in Bloom Dekor Ltd. v. Subhash Himatlal Desai; (1994) 6 SCC 322, wherein a three-Judge Bench of the Court held as under:

> "28. By 'cause of action' it is meant 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, (Cooke v. Giff; (1873) LR 8 CP 107); in other words, a bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit."

It is mandatory that in order to get relief, the plaintiff has to aver all material facts. In other words, it is necessary for the plaintiff to aver and prove in order to succeed n the suit. **(Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust; (2012) 8 SCC 706)**

O. 9, R. 4 Limitation Act, S. 5 - Restoration of suit - Consideration of

The Court of considered opinion that trial court and revisional court below were required to examine the cause shown by the petitioner in restoration application moved before the trial court in respect of delay caused after 14.2.1997 and they were not required to examine and assess the antecedents of the petitioner prior to the aforesaid date for rejecting the said application for restoration of the suit in question. (**Ram Nayan vs. DJ Gorakhpur; 2012(3) ARC 836 (All HC)**

O. 9 R. 7 - Order recalling the order for proceeding ex parte against defendants - Imposing condition that the defendant shall deposit a sum equivalent to 10% of the amount claimed in the suit which would be refundable - Condition directing deposit of refundable amount held to be legally unsustainable

The respondent-Bank filed a suit for recovery of a certain amount. The suit proceeded and 11th October, 1995 was the date fixed for hearing. The suit was proceeding ex-parte as the defendants had not put in appearance.

This attitude of the defendants who are the revisionists before this Court led to the passing of the impugned order 10.10.1997 imposing a condition that the defendant shall deposit a sum equivalent to 10% of the amount as claimed in the suit which would be refundable in the circumstances as defined in the impugned order itself.

This revision was preferred by the defendants questioning correctness of the said order as being beyond the purview of the court to impose such condition while exercising powers under Rule 7 of Order IX of the Civil Procedure Code, and this Court way back in the year 1997 stayed all further proceedings in the suit.

Having considered the aforesaid submissions and facts on record, there is no doubt that the defendants were not cooperating with the Court that let to the passing of the order on 11th October, 1995. They, however, moved an application under Order IX Rule 7 C.P.C. and the Court passed the impugned order for depositing 10% of the amount claimed under the plaint allegations. In the

opinion of the Court the word otherwise used in Order IX Rule 7 C.P.C. does not contemplate the imposition of such a condition and it only indicates that the Court can pass an order of imposing costs or impose any such terms otherwise that may be in the nature of costs. The amount directed to be deposited. Therefore, cannot be made refundable as has been done by the trial court. In opinion of the Court, the impugned order is manifestly contrary to the scope of the provisions of under Rule 7 of Order IX of C.P.C., and cannot be sustained.

At the same time, keeping in view the attitude of the defendant and the manner in which the case has proceeded, it would be in the interest of justice to impose costs for the purpose of allowing the applicant-defendant to participate in the suit from the stage that the ex-parte order was passed on 11th October, 1995.

In opinion of Court a sum of Rs. 5,000/- as cost would be sufficient for the said purpose which shall be deposited by the defendants-revisionist before the Court below within one month from the date of passing of this order.

The revision is allowed. The order dated 10.10.1997 is set aside. The ex-parte order dated 10.10.1995 is also set aside as costs have been imposed by this Court and the suit shall now proceed on day to day basis without any further unnecessary adjournments being granted to the defendant-revisionist. **(M/S New Manufacturing Com. and others Vs. State Bank of India; (2012 (30) LCD 2614) (Allahabad High Court)**

O. 9, R. 13 - Hindu Marriage Act (25 of 1955), Ss. 13, 28 - Application for setting aside ex parte decree did not stay infructuous only on ground of husband's remarriage on next day of service of notice for application - Second remarriage was totally mala fide and performed only to defeat application filed by wife - Setting aside ex parte decree, not improper

After passing of a decree of divorce dissolving marriage between the parties, either party to the marriage can lawfully remarry in the following circumstances:-

(i) Immediately after passing of the decree of divorce without any waiting period, if there is no right of appeal against the decree by which the marriage has been dissolved.

(ii) If there is such a right of appeal, the time for appealing has expired without on appeal having been presented. Therefore, in a case in which a decree of divorce has been passed dissolving the marriage between the parties and the aggrieved party does not file an appeal within the period of 30 days as prescribed by S. 28 of the Act, the other party, on the expiry of such period of 30 days, has a right to lawfully remarry.

(iii) In a case an appeal has been presented and the same has been dismissed, any of the party to the decree is entitled to marry again after dismissal of such an appeal. That means during pendency of appeal none of the party is entitled to remarry.

In a case in which ex parte decree of divorce has been passed by the Court, provisions of O. 9, R. 13, CPC are applicable and the party against whom the ex parte decree has been passed has a right to file an application under this provision for setting aside the ex parte decree. Although, S. 15 of the Act does not refer to an application filed under O. 9, R. 13, CPC but on the analogy of an appeal as referred in this section, the provisions of O. 9, R. 13, CPC are also applicable and in view of that, if S. 15 of the Act is further analyzed, the circumstances In which a party to the decree of divorce can lawfully remarry emerges as follows:-

(i) If an application under O. 9, R. 13, CPC for setting aside an ex parte decree of divorce is not filed within the period of 30 days as prescribed in Art. 123 of Limitation Act, the other party in whose favour ex parte decree has been passed has a right to lawfully remarry after the expiry of period of 30 days.

(ii) In a case in which an application under O. 9, R. 13, CPC has been filed, no party to the decree is entitled to lawfully marry again unless that application has been dismissed. That means during pendency of the application neither of the party is entitled to marry again.

Where notice issued for application filed under O.9, R. 13, CPC to set aside ex parte decree granting divorce was served upon husband and he married again on next day in accordance with Customs and Usages of Arya Samaj, application under O. 9, R. 13, CPC filed by wife was pending during re-Marriage of husband and, therefore, the husband was not entitled to lawfully marry again. Application for setting aside the ex parte decree did not stand infructuous as soon as husband remarried. **(Kuldip Kumar Lal v. Suman Rani; AIR 2012 Raj 175)**

O. 11, R. 14, 15 and 21 – Evidence Act, 1872, Section 114 (g) – Presumption – Party duty bound to lead the best evidence in his possession – If such material withheld Court may draw adverse inference

The law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the Court taking into consideration the pleadings of the parties and by deciding whether any document/ evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The Court cannot loose sight of the fact that burden of proof is on the party which makes a factual averment. The Court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI, C.P.C. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the Court to direct the other side to produce the document and other side failed to comply with the Court's order, the Court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary. (**Union of India vs. Ibrahim Uddin; 2012(117) RD 783)**

O. 12, R. 6 - Admission made on the basis of pleadings in a given case – Cannot be taken as an admission in a different fact situation

Admission made on the basis of pleadings in given case cannot obviously be taken as an admission in a different fact situation. That precisely is the view taken by this court in Jeevan Diesel & Electricals Ltd. relied upon by the High Court where this Court has observed:

> "Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the fact of the case. The question, namely, whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. Therefore, even though the principles in Karam kapahi may be unexceptionable they cannot be applied in the instant case in view of totally different fact situation."

(M/s Payal Vision Ltd. V. Radhika Choudhary; 2012 (7) Supreme 119)

O. 21, R. 1 – Scope of - Does not confine to decretal amount – It includes all monies

Once Court steer clear of the said position as regards the decree passed by the learned Single Judge, Court are posed with the next question as to while applying Order XXI Rule 1 when payments were made towards the satisfaction of the said decree as provided under Order XXI Rule 1 (a), (b) and (c) what would be the implication of sub-rules 4 and 5 of Order XXI. In order to understand the said legal implication of Order XXI Rule 1 read along with sub-rules 4 and 5, in the foremost it will be necessary to understand what is contemplated under Order XXI Rule ·1, in particular, the opening set of expressions, namely, "all money, payable under a decree shall be paid as follows, namely:-

It will be necessary to keep in mind that the said provision does not state the decretal amount. The expression used is all money payable under a decree. TERSELY stated, as pointed out by us in the earlier paragraph, the decree dated 31.05.1985 affirm the award amount, the interest payable at the rate of 12 per cent per annum from 12.03.1981 till the date of its realization if not paid within two months from the date of the decree, namely, 31.05.1985. Therefore, the said decree dated 3l.05.1985 consisted of the award amount plus interest payable thereon from 12:0.3.1981 up to the date of the decree, namely, 3l.05.1985 to be payable within two months from that date and in the event of non- payment of the said amount within two months from 3l.05.1985 to calculate future interest at the very same rate of 12 per cent per annum from the date of the decree till the realization of the award amount. In our considered opinion, a reading of the opening set of expressions of Order XXI Rule 1 is clear to the above effect. In the case on hand the payment effected by the appellant after 3l.05.1985 was once on 18.10.1985 and thereafter on 13.12.2000 when the issue was dealt with by the Court in the order dated 12.07.2002. It is not in dispute that the award amount of Rs.1,41,68A74/- earned interest at the rate of 12 per cent per annum up to the date of first payment, namely, 18.10.1985 which worked out to a sum of Rs.78,30,314/- i.e. for the period from 12.03.1981 to 18.10.1985. The total amount payable as on that date under the decree, both the award amount along with the interest, worked out to Rs.2,19,61,134/-. The said figure, as calculated by the appellant, was not disputed by the respondent. On 18.10.1985, the appellant paid a sum of Rs.1 crore by way of deposit pursuant to the order of the Division Bench dated 13.09.1985 when the appellant challenged the decree dated 31.05.1985. The respondent was also permitted to withdraw the said sum of Rs.1 crore in the said order dated 13.09.1985. **(Bharat Heavy Electrocals Ltd. V. R.S. Avtar Singh & Co.; 2012 (7) Supreme 243)**

O. 21, Rules 1 & 4 - Rs. 1 crore paid by judgment debtor as part payment of entire dues on the date of notice and also with drawer by decree holder

The following principles were emerged on the basis of the decision of the Court:

(a) The general rule of appropriation towards a decretal amount was that such an amount was to be adjusted strictly in accordance with the directions contained in the decree and in the absence of such directions adjustments be made firstly towards payment of interest and cost and thereafter towards payment of the principal amount subject, of course, to any agreement between the parties.

(b) The legislative intent in enacting sub-rules 4 and 5 is clear to the pointer that interest should cease to run on the deposit made by the judgment debtor and notice given or on the amount being tendered outside the Court in the manner provided in Order XXI Rule 1 sub-clause (b).

(c) If the payment made by the judgment debtor falls short of the decreed amount, the decree holder will be entitled to apply the general rule of appropriation by appropriating the amount deposited towards the interest, then towards cost and

finally towards the principal amount due under the decree.

(d) Thereafter, no further interest would run on the sum appropriated towards the principal. In other words if a part of the principal amount has been paid along with interest due thereon as on the date of issuance of notice of deposit interest on that part of the principal sum will cease to run thereafter.

(e) In cases where there is a shortfall in deposit of the principal amount, the decree holder would be entitled to adjust interest and cost first and the balance towards the principal and beyond that the decree holder cannot seek to reopen.

(Bharat Heavy Electricals Ltd. V. R.S. Avtar Singh & Co.; 2012 (7) Supreme 243)

O. 21, R. 7 r/w S. 304 and S. 3(3) (c), Interest Act - Payable under a decree - Date of commencement of Interest or awarded changed by Rule of the Court

When court examined the Rule of the Court, Court wish to specifically note that the Court made a conscious direction to the specific effect that the entitlement of the respondent for future interest at the rate of 12 per cent per annum from the date of decree, namely, 31.05.1985 till the date of realization would be on the award amount if it was not paid within two months from 31.05.1985. Therefore, the calculation of interest payable up to the date of the decree as well as the time granted therein, namely, two months from 31.05.1985 and what is interest payable subsequent thereto has been clearly set out in the said part of the Rule. If the said Rule is to be understood in the manner in which the Court had directed the calculation of interest to be made it can be only in the following manner, namely, that the interest from 12.03.1981 up to 3l.07.1985 at the rate of 12 per cent per annum would be on the award amount, namely, Rs.1,41,68,474/-. If the award amount was not paid, namely, the sum of Rs.1,41,68,474/- on or before 3l.07.1985, the future interest again at the rate of 12 per cent per annum can be claimed In our considered opinion, it should be or the award amount which was in a sum of Rs.1,41,68,474/-. Court say so because both the award of the learned Arbitrator as well as the Rule of the Court makes a clear distinction between the award amount and the interest payable. The award having become the Rule of the Court and while making the said Rule it was clearly made known that the award contained an amount which was payable to the respondent quantifying the said amount in a sum of Rs.1,41,68,474/-. After quantification of the said amount, the learned Arbitrator dealt with the grant of interest independent of the said payment and fixed the rate of such interest at 12 per cent per annum. When such a clear distinction was consciously made by the learned Arbitrator while passing the award no one can even attempt to state that the award amount and the interest mentioned in the award dated 15.03:1982 should be merged together and state that the Court award amount would comprise of a sum of Rs.1,41,68,474/- and the interest worked out thereon became payable when once it was made the Rule of the Court and thereby became the decretal amount. Such a construction of the said award cannot be made having regard to the specific terms of the decree dated 31.05.1985. **(Bharat Heavy Electrocals Ltd. V. R.S. Avtar Singh & Co.; 2012 (7) Supreme 243)**

O. 23, R. 3 - When parties arrive at a compromise settlement court should take notice and order accordingly

In view of the agreement that is executed between the parties outside the court, Court dispose of these appeals in accordance with the settlement that is arrived at between the parties under the aforesaid agreement. **(T.T. Raghunathan & Anr. V. New Bridge Holding B.V. & Ors.; 2012 (7) Supreme 128)**

O. - 26, R. 10 & 11 Appointment of Commissioner – For spot inspection - Necessary condition

It is well settled that under Order 26 Rule 10 and 11 of Code of Civil Procedure the Court is not bound to appoint Commissioner on mere asking of parties but it is for the court when it found necessary to appoint Commissioner for some further investigation or information, it can do so. Power of the court to appoint Commissioner is not disputed but it is not the legal right of parties to force the court to appoint Commissioner. A local inspection, whether necessary or not, depends on several facts, factors and circumstances which have been considered by the court below and in absence of anything to show that court finds it necessary to obtain Commissioner's report, such appointment cannot be forced.

Considering the aforesaid provisions a Special Bench of this Court in The **Sunni Central Board Vs. Sri Gopal Singh Visharad, 2010 ADJ 1 (SFB)** in the judgement delivered by (Hon. Sudhir Agarwal, J.) in paras 3749 and 3750 observed that a discretion is vested in the Court. When it is of the opinion that any local inspection or scientific investigation is required, it can order accordingly so as to help it in extracting truth. This shows that appointment of Commissioner for local inspection is not a matter of right or matter of course but it is for the Court to satisfy itself whether it is so required to extract the truth or not. If in its opinion it is not so required it cannot be compelled. (**Som Singh vs. Smt. Santoshi Devi; 2012(3) ARC 520 (All HC)**

O. 39, R. 1 - Constitution of India, Articles, 133, 136 - Discretionary interim order passed by High Court - Interference by Supreme Court only in atypical cases

There is, a self-imposed limited discretion for interference available to Supreme Court, and it would, generally, be more appropriate for an aggrieved litigant to approach the High Court for rectifying any error that it may have committed in passing an interim order. However in an emergent and appropriate situation it is always open to a litigant to approach Supreme Court in its remedial jurisdiction. It is only in a typical case that Supreme court entertains a petition against a discretionary interim order passed by the High Court where, for example, the repercussions are grave or the legal basis for passing the interim order are obscure or there is a miscarriage of justice or it is imperative to the Supreme Court exercises its corrective jurisdiction. **(Vice-chancellor, Guru Ghasidas University v. Craig Mcleod; AIR 2012 SC 3356)**

O. 39, Rules 1 & 3—Refusal to grant interim injunction against forcible possession of property—Validity

Court observed that the property in dispute was a joint property in which there were various co-shares, it was not possible for respondents-1 and 2 to give possession to the plaintiff over any specific portion of the property. Neither in the alleged deed dated 15.11.2009, nor in the plaint, any specific portion of the property has been shown, over which the possession of the plaintiff is being claimed. In the plaint, the plaintiff claimed 1/3rd western portion, while share of defendants- 1 and 2 is less than 1/3rd as such, they were not able to hand over possession of 1/3rd share. In view of the aforesaid discussion, the suit of the appellant being based upon an unregistered document is not maintainable. The plaintiff has no prima facie case and accordingly not entitled for interim injunction. The order of the trial Court does not suffer from any illegality. The appeal has no merit and is accordingly dismisses. **(Subhash Verma vs. Narendra Kumar; 2012 (5) ALJ 686)**

O. 39, R. 3 – Exparte injunction order - Compliance of mandate of Rules 3 and 3-A

On references Shiv Kumar Chadha’s case, the Hon'ble Supreme Court has held as under:

"The imperative nature of the proviso has to be judged in the context of Rule 3 of Order 39 of the Code. Before the proviso aforesaid was introduced, Rule 3 said 'the Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct-notice of the application for the same to be-given to the

opposite party'. The proviso' was introduced to provide a condition, where Court proposes to grant an injunction without giving notice of the application to the opposite party, being of the opinion that the object Of granting injunction itself shall be defeated-by delay. The condition so introduced is that the Court 'shall record the reasons' why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of ex parte injunction cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the Court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the Court about the gravity of the situation and Court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the Court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions, it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that Court must record reasons before passing such order. If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplus age for all practical purposes. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not all. This principle was approved and accepted in well known cases of Taylor v. Taylor (1875) 1 Ch D.426: 45 U Ch 373) and Nazir Ahmed v. Emperor (AIR 1936 PC 253 (2): 63 IA 372: 36 Cri LJ 897). This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of Ramchandra Keshav Adke v. Govind Joti Chavare; (1975) 1 SCC 915: AIR 1975 SC 915). As such, whenever a Court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed. But any such ex parte order should be in force up to a particular date before which the plaintiff should be required to serve the notice on the defendant concerned. In the Supreme Court Practice 1993, Vol.1 at page 514, reference has been made to the views of the English Courts saying: ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion .. ..

An ex parte injunction should generally be until a certain day, usually the next motion day ....

Supreme Court observed that it need no emphasis that provisions of Rule 3 and 3-A of Order XXXIX of the Code of Civil Procedure are mandatory in nature. However, the factual position of the-instant case is some what different. Here the learned trial Court fixing date of hearing within thirty days in its impugned order has discussed the facts of the case in brief and has also noted the evidence filed by the respondent in support of his contention and has indicated the reasons for granting ex parte ad interim injunction order. It has observed that as the partnership has not been dissolved, so prima facie case in favour of the plaintiff is found. No doubt in so many words it has not been stated that the object of granting the injunction would be defeated by the delay, but in the facts and circumstances of this case, we find that the provisions of Rule 3 have been substantially followed. **(Ramji Singh v. Anuj Kumar Singh; 2012 (6) ALJ 188)**

O. 39, R. 4 – Order granting injunction/status quo—Compliance of

In a democratic polity, it is always incumbent upon the governing authorities to implement the interim order or injunction order, granted by the trial Court or this Court. In case, the injunction is not complied with by the private parties, the Court has got ample powers to issue appropriate orders under S. 151, C.P.C., directing the district authorities to implement the injunction granted by it. Non-compliance of the Court's order or injunction is the antithesis of the rule of law.

In case, an objection is filed under O. 39, R. 4 of the Code of Civil Procedure, it shall be always incumbent upon the trial Court to decide such objection in accordance with law expeditiously. Continuance of an ex parte injunction for a long period, erode the belief and faith of people. Objection filed under O. 39, R. 4 must be decided on priority basis.

Even if the amendment application is moved along with some other application, priority must be given to an application moved under O. 39, R. 4, C.P.C. Reason behind this is that while granting ex parte injunction the affected parties are not being heard. There may be cases where injunction is granted on the basis of pleadings of record raised by the plaintiff. In such situation, defendant may suffer irreparable loss, in case objection is not decided within reasonable period.

Court has got ample power to proceed under the contempt jurisdiction or in case, district authorities fail to enforce the injunction granted by it and feel helpless, the High Court may interfere under extraordinary jurisdiction conferred by Art. 226 of the Constitution of India to strengthen administration of justice and maintain the majesty of law.

Where respondents were raising construction over land in question in spite of fact that trial Court had passed the order directing district authorities to ensure compliance of order passed by it, Court ought to have decided objection filed u/O. 39, R. 4 by opposite parties expeditiously. **(Sukhvir Singh vs. The District Inspector of Schools; 2012 (5) ALJ 404)**

O. 41, R. 23 - Remand of case - Exercise of – Remand is the last option before any appellate court and it shall be exercise with due and diligence

The appellant has earlier filed FAFO No. 127/2002, which has been decided by this Court vide judgement dated 16.11.2007. That FAFO was also allowed and the Judgment of the Learned District Judge dated 10.1.2002 was set aside and he was directed to take up both the appeals together and decide both the appeals through a common judgment in the light of the observations made hereinabove. Taking advantage of the observation made by this Court, the learned First Appellate Court was set at liberty to exercise option of remanding back the matter, the First Appellate Court has remanded the matter on flimsy grounds and this is not warranted under the law. Remand of case is the last option before any appellate Court, which should be exercised with due care and diligence. It is the duty of every Court of law to decide the lis finally, in an effective manner and, ensure that the dispute between the parties is resolved quickly. (**Mumtaz Ullah Khan vs. Rani Govind Kumari; 2012(3) ARC 838 (All HC- Lucknow-Bench)**

Civil Procedure Code

S. 24 – Transfer application under – Legality of

Through this transfer application under Section 24, C.P.C., transfer of Civil Appeal No. 24 of 1999 pending before District Judge, Jhansi has been sought to some other district by legal representative of defendant respondent no. 6 in the appeal. In this transfer application following order was passed by the Court on 21.02.2012:

> "It appears that both the parties are quite influential and wealthy and holding the District judiciary to ransom. The court completely fails to understand as to why

appeal was earlier transferred in 2007. Order sheet of 2007 has been filed along with supplementary affidavit. At that time appeal was being heard before A.D.J. Court No. 4, Jhansi, Sri Raja Ram Saroj. The learned A.D.J. was unable to decide the appeal in spite of his best efforts. Now it appears that pendulum has swung other way. Records of the appeal shall be remitted to this Court by District Judge, Jhansi through special messenger. Registrar General is directed to send a copy of this order to District Judge, Jhansi through fax immediately."

The Court strongly deprecates the attitude of both the parties. Each and every allegation made in this transfer application against learned District Judge is utterly baseless.

In view of utterly irresponsible attitude of both the parties, it is essential to transfer the case to a district which is farthest from Jhansi even though each and every allegation made against Presiding Officer of the court of District Judge, Jhansi is disbelieved by the Court. It is also essential in the interest of justice to impose heavy cost in the form of damages against both the parties for not only misusing but also abusing the process of court. **(Vishrant Agarwal v. District Judge, Jhansi and others; 2012 (2) ARC 776 (All HC)**

S. 100 - Substantial question of law – Meaning

Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a second appeal does not lie on question of facts or of law. In SBI Vs. S.N. Goyal, (2008) 8 SCC 92 this Court explained the terms "substantial question of law" and observed as under: (SCC p. 103, para 13)

"13. …… The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. "Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties , …… any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. ……There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in case." (**Union of India Vs. Ibrahim Uddin & another; (2012) 8 SCC 148)**

S. 100 – Interference in second appeal

In exceptional circumstantial, High Court can interfere in second appeal even on question of fact when factual findings are perverse.

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straitjacket definition as to when a substantial question of law arises in case."

The first appellate court allowed the application filed by the plaintiff under Order 41 Rule 27 CPC vide order dated 28.4.1999 which reads as under:

> "The will in question is necessary for the disposal of the appeal because the appellant/applicant obtains right in the disputed property from this will. The respondent-defendants have neither opposed it that as to why it was not produced in the subordinate court, there is not any relevancy of it. The applicant has given reason of not producing the will in the subordinate court that this will was lost. In my opinion, the will appears to be necessary for the disposal of the appeal for the property which was obtained to the appellant earlier by this will. Proper reason has been given for not producing this will in the subordinate court."

(**Union of India Vs. Ibrahim Uddin and another; (2012) 8 SCC 148)**

S. 149 – Power to make up deficiency of court fee – Legality of – Jurisdiction U/s. 149 being discretionary in nature

When, the Court on more than one occasion held that the jurisdiction under Section 149 CPC is discretionary in nature. (See: P.K. Palanisamy v. N. Arumugham & Anr.; (2009) 9 SCC 173 and (2012) 13 SCC 539: 2009 (2) ARC 751).

Thus, it is well settled that the judicial discretion is required to be exercised in accordance with the settled principles of law. It must not be exercised in a manner to confer an unfair advantage on one of the parties to the litigation. In a case where the plaint is filed within the period of limitation prescribed by law but with deficit court fee and the plaintiff seeks to make good the deficit of the court fee beyond the period of limitation, the Court, though has discretion under Section 149 CPC, must scrutinize the explanation offered for the delayed payment of the deficit court fee carefully because exercise of such discretion would certainly have some bearing on the rights and obligations of the defendants or persons claiming through the defendants. (The case on hand is a classic example of such a situation.). It necessarily follows from the above that Section 149 CPC does not confer an absolute right in favour of a plaintiff to pay the court fee as and when it pleases the plaintiff. It only enables a plaintiff to seek the indulgence of the Court to permit the payment of court fee at a point of time later than the presentation of the plaint. The exercise of the discretion by the Court is conditional upon the satisfaction of the Court that the plaintiff offered a legally acceptable explanation for not paying the court fee within the period of limitation. **(A. Nawab John & Ors. V. V.N. Subramaniyam; 2012(2) ARC 652 (SC)**

S.151 – Inherent powers of the court - Power to correct is always inherent in every court, even purely executive authority cannot refuse to correct a calculation error - Whenever pointed out

In my opinion appeal of the State was wrongly allowed on highly technical grounds. The application prayer for correction of calculation error which had been allowed by the Prescribed Authority through the subsequent order (challenged in the appeals giving rise to the instant writ petition) was held to be barred by time. Even if the objection was raised beyond time still an error of calculation could be corrected by the Prescribed Authority at any time. Such power is always inherent in every Court, tribunal, judicial or quashi judicial authority. Even purely executive authority also cannot refuse to correct a calculation error whenever pointed out. (**Shyam Behari Lal v. State of U.P.; 2012 (116) RD 34)**

S. 151 - Inherent powers of the court are to do justice in addition to and complementary to powers conferred under C.P.C. expressly or by implication

In a democratic and civilized society while dispensing Justice, Court possesses two folds of duty. For the purpose to secure statutory and constitutional right delivery of

judgment or pass an order or direction to meet the ends of justice and secondly to ensure that order passed by it while dispensing justice is implemented in its letter and spirit by the parties or authorities concerned. These are basic tenets of rule of law in a civilized society so far as Courts are concerned. Failure on the part of Court to ensure the ends of justice may result into destruction of rule of law creating chaos in the society and breaking up social order. Accordingly, judicial officers or Judges should always be alert to ensure that their orders are complied with by persons or authorities concerned.

In view of above, the Court has got ample power to enforce its order. Local authorities or officers concerned may be directed to ensure the compliance of injunction granted by the Court. The Court has got ample power to direct the police to ensure that no construction should be raised and parties may not remove any structure standing over the disputed land in terms of injunction granted by the Court. It should be paramount consideration of Court to ensure that rule of law should be maintained and orders of the Court must be complied within its letter and spirit. Power to punish under the contempt procedure has to fulfil the requirement and in case Court remain moot spectator and permit the parties or authorities to violate its order, damage may cause to parties and may suffer from irreparable loss and injury. Accordingly Trial Court should have issued appropriate direction or order to the local authorities and administration to ensure compliance of injunction granted by it in pursuance to inherent power conferred by section 151 of the CPC and it shall be obligatory for the State authorities to comply with such order. (**Smt. Shanti Devi v. Pankaj Kumar & others; 2012 (115) RD 585)**

O.1, R. 9 and 10(2) – Striking out or adding parties – Legality of – Being discretion of Court under facts and circumstances

In the judgment of the Apex Court in Mumbai International Airport Private Limited, the Apex Court in the said case has laid down that the discretion to either allow or reject the application of the person claiming to be the proper party depends upon the facts and circumstances of the case and no person has a right to insist that he should be impleaded as a party merely because he is a proper party. Following propositions were laid down by the Court in para Nos. 22 to 25 of the aforesaid case.

> "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 sue moto 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 reiterated in SCC P. 96 para 20 the classic definition of 'discretion' by Lord Mansfield in R. V. Wilkes (ER P. 334) that 'discretion' when applied to courts 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 Order1. 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 non-joinder of a necessary party.

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

24.3 If a person makes an application for being impleaded contending that he is a necessary party, and if the Court finds that he is a necessary party, it can implead him. If the plaintiff opposes such impleadment, then instead of impleading such a party, who is found to be a necessary party, the Court may proceed to dismiss the suit by holding that the applicant was a necessary party and in his absence the plaintiff was not entitled to any relief in the suit.

24.4 If an application is made by a plaintiff for impleading someone as a proper party, subject to limitation, bona fides etc., the Court will normally implead him, if he is found to be a proper party. On the other hand, if a non-party makes an application seeking impleadment as a proper party and Court finds him to be a proper party, the Court may direct his addition as a defendant; but if the Court finds that his addition will alter the nature of the suit or introduce a new cause of action, it may dismiss the application even if he is found to be a proper party, if it does not want to widen the scope of the specific performance suit; or the Court may direct such applicant to be impleaded as a proper party, either unconditionally or subject to terms. For example, if 'D' claiming to be a co-owner of a suit property, enters into an agreement for sale of his share in favour of 'P' representing that he is the co-owner with half share, and 'P' files a suit for specific performance of the said agreement of sale in respect of the undivided half share, the Court may permit the other co-owner who contends that 'D' has only one-fourth share, to be impleaded as an additional defendant as a proper party, and may examine the issue whether the plaintiff is entitled to specific performance of the agreement in respect of half a share or only one-fourth share; alternatively the Court may refuse to implead the other co-owner and leave open the question in regard to the extent of share of the vendor-defendant to be decided in an independent proceeding by the other co-owner, or the plaintiff; alternatively the Court may implead him but subject to the term that the dispute, if any, between the impleaded co-owner and the original defendant in regard to the extent of the share will not be the subject matter of the suit for specific performance, and that it will decide in the suit, only the issues relating to specific performance, that is whether the defendant executed the agreement/contract and whether such contract should be specifically enforced.

25. In other words, 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."

On relying above proposition laid down by Hon'ble Supreme Court this court has observed that striking out or adding the parties is discretion of court which depends on fact

and circumstances of the case.

(Manju Gupta (Smt.) v. District Magistrate, Allahabad and Others; 2012 (3) ARC 288)

O. 1. R. 10(2) – Suit for specific performance - Addition of subsequent purchaser as defendant - Permissibility - Subsequent transferee is necessary party

In view of the provisions as contained in section 19(b) of the Specific Relief Act the subsequent transferee is a necessary party as this question that whether the subsequent transferee purchased the property for value and paid the money in good faith and without notice of the original contract is to be decided in his presence.

Here the other aspect of the matter is that the plaintiff is praying for addition of purchaser as party defendant on the ground that the purchasers are necessary party. The learned counsel based his claim on the basis of the aforesaid decisions of the Apex Court. It is admitted that the petitioner has sold the properties to the purchaser. It is for the purchaser to have objected. In view of the Apex Court a purchaser is a necessary party, therefore, the party cannot be added and deleted at the instance of a party defendant. The plaintiff is dominus litis. In such circumstances when it has already been settled by the Apex Court that the purchaser in necessary party in suit for specific performance of contract the learned court below could not have rejected the application of the plaintiff. Therefore, the learned court below has not exercised a jurisdiction vested in it by law and thereby occasioned failure of justice. The impugned order suffers from jurisdictional error and therefore it is liable to be set aside. **(Kalawati Devi & Anr. V. Yoganti Devi & Ors.; AIR 2012 Patna 125)**

O. 1 R. 10 – Consideration of

It is settled legal position that a party against whom no relief is claimed in the application is not a necessary party at all. (**Church of Christ Charitable Trust and Educational Charitable Society vs. Ponniamman Educational Trust; 2012(4) AWC 3883(SC)**

O. 1, R. 10 (2) – Question of title not to be decided in summary proceedings

"In the present case, undisputed position is that JSCC Suit No. 43 of 2000 had been filed against defendant-respondent No. l for recovery of arrears of rent and ejectment. In the said suit, defendant- respondent No. l filed written statement, denying landlord-tenant relationship. The case in hand has to be decided on the basis of the facts disclosed in the plaint. Merely because Shakil Ahmad claims that he is owner of the property and he has filed suit for declaration of his rights, then ipso facto, it is not necessary to implead him as party in JSCC suit, which has to be decided on its own merit. Revisional Court has clearly erred in law in directing impleadment of Shakil Ahmad in JSCC suit. JSCC suit has to be decided on its own merit as to whether there existed any landlord-tenant relationship inter se parties. In case petitioner fails to substantiate the said fact that he is not landlord, his suit would fail. Revision has been wrongly allowed." (**Smt. Krishna v. Ram Kumar and others; 2012 (115) RD 734)**

O. 6. R. 17

The Court said finally, the original plaint proceeds that the exercise of power by the Central Government by passing the impugned Notifications dated 02.11.2004 and 4.11.2004 under Sections 58(3) and 58(3) and 58(4) of the MPR Act was arbitrary, unjust and unfair and had resulted in serious anomalies in the apportionment of assets and liabilities. In our view, after praying for such relief, if the amendment as sought for by the plaintiff is allowed and the plaintiff is permitted to challenge the vires of the said provisions, then the very basis on which the plaintiff is claiming its right to apportionment of assets, rights and liabilities of the undivided Board will cease to be in existence and the entire suit of the plaintiff will be

rendered infructuous. Moreover, it is settled principle of law that leave to amend will be refused if it introduces a totally different, new and inconsistent cases or challenges the fundamental character of the suit. **(State of Madhya Pradesh v. Union of India; AIR 2012 SC 2518)**

O. VI, R. 17 – Amendment of W.S. – Allowed – Legality – By amendment the nature of suit will not be challenged

By means of the present revision, the applicant who is a tenant in a suit filed by the landlord for eviction and arrears of rent being SCC suit No. 36 of 2011 has challenged the order allowing challenged the order allowing amendment. In the said suit after filing of the written statement, the landlord plaintiffs have filed an amendment application. The said amendment application has been allowed against which the present revision has been filed alleging that instead of filing a replica in view of the amendment allowed in the written statement, amendment has been sought in the plaint itself which cannot be permitted. The suit is for eviction and arrears of rent. By the aforesaid amendment, it cannot be said that the nature of the suit will change. It will continue to be a suit for eviction and arrears of rent. However, certain other pleadings have been brought on record. The petitioner will have opportunity to rebut the same by filing the additional written statement. From the order impugned it appears that the court has permitted the same to the revisionist. **(Om Prakash Agrawal v. Shri Jai Kumar Mishra and others; 2012 (2) ARC 692 (All HC)**

O. 7, R. 7 and 8 and O. 6, R. 2 and 4 – Pleadings – Relief not founded on pleadings, cannot be granted – All material facts shall be pleaded and party cannot be allowed to go beyond pleading

Relief not founded on the pleadings cannot be granted. A decision of a case cannot be based on grounds outside the pleadings of he parties. No evidence is permissible to be taken on record in the absence of the pleadings in that respect. The Court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the court, it is just to be ignored. Though it may be a difference case where in spite of specific pleadings, a particular issue is not framed and parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it. (**Union of India Vs. Ibrahim Uddin & another; (2012) 8 SCC 148)**

O. 7, R. 11

The law is settled that while considering an application under Order VII Rule 11 Code of Civil Procedure, the Court has to examine the averments in the plaint and the pleas taken by the Defendants in its written statements would be irrelevant.

High Court is fully justified in confirming the decision of the appellate Court remitting the matter to the trial Court. (**Bhau Ram Vs. Janak Singh; 2012 (5) AWC 5067)**

O. VIII, R. 6-A – Amendment in WS for counter-claim on property in dispute – Permissibility of

In this case it was contended that Revisional Court has no considered that counter claim set up by respondent was highly barred by time and since under Order VIII, Rule 6-A (4) CPC, counter claims is to be treated as a plaint and governed by the rules applicable to plaints, it was incumbent upon Revisional Court to consider the same to find out counter claim set up by the defendant is within the period of limitation or not. Even otherwise, it is beyond the scope of Order VIII Rule 6-A as it was filed after evidence was already recorded and not before the defendant has delivered his defence as is the condition prescribed in sub rule (1) of Rule 6-A Order VIII, CPC.

The kind of amendment sought by defendants/respondents refers to the possession

and construction on the property in question by the petitioners without giving the dates on which it is allowed to have been done though from the plaint it appears that possession of property in question and construction was claimed to have been made by petitioners since 1982 and therefore ex facie amendment sought by way of counter claim was barred by limitation. Moreover, the said amendment has been sought after evidence was over and thus also it is beyond the scope of Order VIII, Rule 6-A CPC. It was not in a manner of amendment under Order VIII but is an amendment sought for setting up a counter claim under Order VIII Rule 6-A and the Court below has erred in law by ignoring to consider the relevant conditions in which such counter claim could have been set up by the defendant. The impugned revisional order therefore cannot sustain. **(Rajjab Ali & another v. Zila Panchayat, Sultanpur and others; 2012 (3) ARC 238 (All HC, LB)**

O. 8, R. 10 – Judgment in case no written statement is filed – Passed blindly by relying on facts stated in plaint

The effect of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non-filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8, Rule 10, CPC and before passing a judgement, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint. **It** is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgement and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an exparte judgement without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately, gives rise to several layers of appeal, after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes, the cause of speedy trial. However if' the Court is clearly of the view that the plaintiff's case even without any evidence is prima facie unimpeachable and the defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial court who is seized of the trial of the suit. **(C.N. Ramappa Gowda v. C.C. Chandregowda (Dead) By LRs & Anr.; AIR 2012 SC 2528)**

O. 9, R. 13 – Availability of benefit under

Petitioner has challenged the order of the Court below by which his delay condonation application filed along with application under order 9 Rule 13 CPC has been rejected on the ground that proper explanation for the delay has not been explained. Against the aforesaid order revision was filed being Revision No. 30 of 2010, which has also been rejected vide order dated 05.08.2010, hence this writ petition.

It is not disputed that the aforesaid decree is an ex-parte decree against which petitioner has filed application for recall and also condonation of delay in filing the aforesaid recall application on the ground that he had no knowledge of the proceeding. He claims to have obtained knowledge only on 17.5.2008. However, it is not disputed that for

the execution of the aforesaid decree before Execution Court, the petitioner himself had filed an application as far back as on 05.03.2008 for adjournment of the Execution Case, therefore, obviously petitioner had full knowledge of proceeding much prior to 17.05.2008 and therefore, claim of the petitioner cannot be accepted that he came to know of the ex-parte decree only on 17.5.2008.

In view of the aforesaid, the Court not inclined to interfere with the order impugned. The writ petition is accordingly dismissed. **(Mahrunnisha (Smt.) v. District Judge, Rae Bareli; 2012 (2) ARC 686 (All HC)**

O. 15, R. 1 & 3 and O. 10, R. 2 – For proper framing of issues necessary – Court must critically examine pleading before framing of issues

Framing of issues is a very important stage of a civil trial. It is imperative for a Judge to critically examine the pleadings of the parties before framing of issues. Rule 2 of Order 10 CPC enables the court, in its search for the truth, to go to the core of the matter and narrow down, or even eliminate the controversy. It is a useful procedural device and must be regularly pressed into service. (**A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President & others; (2012) 6 SCC 430)**

O. 15, R.5 – Striking off defence – Application for – Objection against – Trial Court struck off defence – Legality of

The respondent/plaintiff filed a suit for arrears of rent and ejectment against the petitioner. During the pendency of the SCC Suit, plaintiff moved an application under Order 15 Rule 5 CPC for striking off the defence of the petitioner.

Respondent filed its objections stating that the application for striking off the defence has been filed by plaintiff on wrong facts as she was depositing the rent regularly. She further stated that she deposited the rent in lump sum for some months, if in the opinion of the Court; it is found that there is any delay in depositing the rent, it may be condoned.

The Trial Court after considering the material available on recorded by order dated 17.08.2009 struck off the defence of the petitioner. Being aggrieved and dissatisfied with the said order dated 17.08.2011, the petitioner filed a SCC revision, which was registered as Rent Revision No. 8 of 2010. The said Revision was dismissed by the Revisional Court on 04.05.2012. Hence, the present writ petition.

Order 15 Rule 6 (UP) CPC, inter alia provides that the tenant throughout the continuation of the suit regularly deposit the monthly amount due within a week from the day of its accrual and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due, the Court may subject to the provisions of Sub-rule (2) strike off his defence.

Therefore, in view of the above, the petitioner has not complied with the provisions of Order 15 Rule 5 CPC (UP).Apart from it, the petitioner neither filed any representation as provided under Sub-rule (2) of Order 15 Rule 5 CPC nor given any explanation whatsoever for not complying with t he aforementioned provision, even no reasons have been assigned by the petitioner in its objections much less strong and compelling reasons for her failure to comply with the provisions of Order 15 Rule 5 CPC. Thus, the court below was fully justified in striking off the defence of the petitioner. **(Rajni Mishra (Dr. Smt.) v. Kanta Prasad Agrawal; 2012 (2) ARC 687)**

O. XXII, R. 10 – Recall application against order passed under O. XXII, R. 10 C.P.C. – Rejection of – Legality – Petitioner only attempt is to delay the execution proceeding even after more than three decade, hence rightly dismissed

Writ petition is directed against the order dated 11.05.2012 passed by Civil Judge

(Senior Division), Agra in Execution Case No. 16 of 1993 rejecting petitioners' application for recall of order dated 23.09.2011 passed on application No. 54C of respondent no. 1/3 under Order 22 Rule 10 of Code of Civil Procedure.

The application was filed seeking recall of order dated 23.09.2011 on the ground that copy of said application was never served upon petitioners-applicants and order has been passed without giving any opportunity of hearing and is an ex-parte order.

The court below however has recorded a finding that copy of aforesaid application no. 54C was served upon judgment-debtors on 03.09.2004 and thereafter due opportunity of hearing was afforded to all parties and after almost seven years since then the order was passed on 23.09.2011. This finding has not been challenged in the entire writ petition to be perverse or contrary to record. There is no averment in the entire writ petition that copy of application was not served upon petitioners on 03.09.2011.

From the record it appears that one Fakhruddin filed Original Suit No. 430 of 1979 against the tenant Smt. Kallo seeking her eviction and the suit was decreed on 02.02.1981. It is not disputed that the judgement has attained finality having not been challenged before any higher court. Thereafter Sri Fakhruddin himself filed Original Suit No. 405 of 1992 seeking partition of property No. 23/459 Wazirpura Agra which included the part of premises subject matter of dispute in Original Suit No. 430 of 1979. In the meantime he died and his heirs are substituted. The partition suit was decided vide a compromise decree passed on 27.01.2003, as a result whereof the premises which was subject matter of Original Suit No. 430 of 1979 came in the share of applicants of Application No. 54C. It is pursuant thereto, application seeking their impleadment as judgment executor in Execution Case No. 16 of 1993 was filed. The said application filed in August, 2004/September, 2004 but could be decided by execution court only on 23.09.2011. i.e., after seven years after hearing both the parties. The only ground raised for seeking recall of said order is that the copy of application was not served upon petitioners which have been found incorrect by court below. The Court has observed that the said application was received by judgment debtor on 03.09.2004. As already said, this finding has not been shown perverse, thus the impugned orders warrant no interference. It is clear that petitioner's only attempt is to delay the execution proceedings even after more than three decades. **(Kallo (Since Deceased) (Smt.) & Others v. Fakhruddin (Since Deceased) & Others; 2012(2) ARC 594 (All HC)**

Ss. 38 and 39 – Grant or Refusal of injunction - Principles laid down in Maria Margarida Sequeria; (2012) 5 SCC 370, reiterated

In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370, (of which one of us, Dr. Bhandari, J. was the author of the judgment), this court had laid stress on purity of pleadings in civil cases. We deem it appropriate to set out paras 61 to 77 of that judgment dealing with broad guidelines provided by the Court which are equally relevant in this case: (SCC pp. 389-91)

"61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.

62. Possession is an incidence of ownership and can be transferred by the owner of an immovable property to another such as in a mortgage or lease. A licensee holds possession behalf of the owner.

63. Possession is important when there are no title documents and other relevant records before the court, but, once the documents and records of title come before the court, it is the title which has to be looked at fist and due weightage be given to it. Possession cannot be considered in vacuum.

64. There is a presumption that possession of a person, other than the owner, if at

all it is to be called possession, is permissive on behalf of the title-holder. Further, possession of the past is one thing, and the right to remain or continue in future is another thing. It is the latter which is usually more in controversy than the former, and it is the latter which has seen much abuse and misuse before the courts.

65. A suit can be filed by the title-holder for recovery of possession or it can be one for ejectment of an ex-lessee or for mandatory injunction requiring a person to remove himself or it can be a suit under Section 6 of the Specific Relief Act to recover possession.

66. A title suit for possession has two parts - first, adjudication of title, and second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected.

67. In an action for recovery of possession immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for th3e person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person ion possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title-holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

69. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim and details of subsequent conduct which establish his possession.

70. It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and not exhaustive:

(a) who is or are the owner of owners of the property;

(b) title of the property;

(c) who is in possession of the title documents;

(d) identity of the claimant or claimants to possession;

(e) the date of entry into possession;

(f) how he came into possession – whether he purchased the property or inherited or got the same in gift or by any other method;

(g) in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, licence fee or lease amount;

(h) if taken on rent, licence fee or lease – then insist on rent deed, licence deed or lease deed;

(i) who are the persons in possession/occupation or otherwise living with him, in what capacity; as family members, friends or servants, etc.;

(j) subsequent conduct i.e. any event which might have extinguished his entitlement to possession or caused shift therein; and

(k) basis of his claim that not to deliver possession but continue in possession.

71. Apart from these pleadings, the court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the court must carefully and critically examine the pleadings and documents.

72. The court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

73. Discovery and production of documents and answers to interrogatories, together with an approach of considering what in the ordinary course of human affairs is more likely to have been the probability, will prevent many a false claims or defences from sailing beyond the stage for issues.

74. If the pleadings do not give sufficient details, they will not raise an issue, and the court can reject the claim or pass a decree on admission. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

75. In pleadings, whenever a person claims right to continue in possession of another property, it becomes necessary for him to plead with specificity about who was the owner, on what date did he enter into possession, in what capacity and in what manner did he conduct his relationship with the owner over the years till the date of suit. He must also give details on what basis he is claiming a right to continue in possession. Until the pleadings raise a sufficient case, they will not constitute sufficient claim of defence.

76. * * *

77. The court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case."

23. We reiterate the immense importance and relevance of purity of pleadings. The pleadings need to be critically examined by the judicial officers or Judges both before issuing the ad interim injunction and/or framing of issues. (**A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and others; (2012) 6 SCC 430)**

O. 39, R. 2 –Temporary injunction – Irreparable loss - Suit for specific performance of contract of agency – Relief of damages having been claimed as alternative to relief of specific performance – Cannot be said that plaintiff would suffer irreparable loss in case injunction is reused – Grant of injunction claimed, improper even if plaintiff had prima facie case

On a reading of clause B-2 of the agreement, we find that Liberty Agencies had given a warranty that the suit schedule property was owned by it and that it will retain the possession of the suit schedule property until the expiry of the agreement. Clause D of the agreement clearly stipulated that the duration of, the agreement shall be for a period of twelve years from the. Date of the agreement/unless terminated in accordance with the provisions of the agreement. Clause E-2 further provides that respondent No.1 and not Liberty Agencies could terminate the agreement by giving a notice of not less than three months after the end of six years from the date of the agreement and respondent No.1 had not terminated the agreement under this clause. Before the expiry of six years from the date of the agreement, Liberty Agencies sent the letter dated 26.02.2010 to the respondent No.1 committing a breach of clause B-2 of the agreement which provided that Liberty Agencies

will retain possession of the suit schedule property until the expiry of the agreement. This was the breach of the agreement which was sought to be prevented by the trial court by an order of temporary injunction. The trial court and the High Court were thus right in coming to the conclusion that the respondent No.1 had a prima facie case.

Despite this claim towards damages made by the respondent No.1 in the plaint, the trial court-has held that if the temporary injunction as sought for is not granted, Liberty Agencies may lease or sub-lease the suit schedule property or create third party interest over the same and in such an event, there will be multiplicity of proceedings and thereby the respondent No.1 will be put to hardship and mental agony, which cannot be compensated in terms of money. Respondent No.1 is a limited company carrying on the business of readymade garments and we fail to appreciate what mental agony and hardship it will suffer except financial losses. The High Court has similarly held in the impugned judgment that if the premises is let out, the respondent No.1 will be put to hardship and the relief claimed would be frustrated and, therefore, it is proper to grant injunction and the trial court has rightly granted injunction restraining the partners of Liberty Agencies from alienating, leasing, sub-leasing or encumbering the property till the disposal of the suit. The High Court lost sight of the fact that if the temporary injunction restraining Liberty Agencies and its partners from allowing, leasing, sub-leasing or encumbering the suit schedule property was not granted, and the respondent No.1 ultimately succeeded in the suit, it would be entitled to damages claimed and proved before the court. In other words, the respondent No.1 will not suffer irreparable injury. To quote the words of Alderson, B. in The Attorney-General vs. Hallett [153 ER 1316: (1857) 16 M. & W.569]:

> "I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the Court can pronounce in the result of the cause."

For the aforesaid reasons, we set aside the order of temporary injunction passed by the trial court as well as the impugned judgment and the order dated 16.07.2010 of the High. Court. The appeals are allowed with no order as to costs. **(M/s. Bet Sellers Retail (India) Pvt. Ltd. v. M/s. Aditya Birla Novo Ltd. & Ors. With A.C. Thirumalaraj v. M/s. Aditya Birla Novo Ltd. & Ors.; AIR 2012 SC 2448)**

Order XXXIX, R. 2-A and S. 151 – Remedy to non compliance of courts order by the district authorities

The Trial Court has ample power to enforce its order by issuing appropriate direction to the district authorities. Needless to say that in case the district authorities do not implement the order passed by the trial Court the latter has ample power to refer the matter to this Court. We reiterate the proposition of law discussed in the case of Mohd. Hamja (supra) and permit the petitioner to approach the trial Court by moving appropriate application. The Trial Court shall ensure that the order passed by it is complied with in its letter and spirit by the district authorities.

It shall be obligatory on the part of the district authorities to implement the order passed by the Trial Court. Attention of this Court has been invited to the order dated 14.7.2011 (Annexure-6). In case the private respondents have got any grievance against the order passed by the trial Court, then option is open to them to approach the higher forum like revisional or appellate jurisdiction but there shall not be any connivance between the private respondents and the district authorities in complying the order passed by the Trial Court. Non-compliance of the Court's order by the district authorities is a symptom which shows the breakage of the constitutional machinery. We hope and trust that the district authorities including the Superintendent of Police, Lucknow shall enforce the order passed

by the Trial Court in its letter and spirit. **(Hari Om Rastogi and another v. State of IT.P. through its Secretary Home, Lucknow and others; 2012 (115) RD 728)**

Order XXXIX, Rule 4 – Two field remedy provided to the incumbent against when such injunction may be discharged

On the parameters of judicial pronouncements and the statutory provisions, the situation which emerges in the present case, that two fold remedy has been provided for to an incumbent against whom injunction order has been passed and who is dissatisfied with the said order of injunction. Rule 4 of Order XXXIX provides that an order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order. Order XLIII, Rule l(r) provides that an appeal shall lie from an order under Rules 1, 2 and Rule 4 of Order XXXIX. The Legislature deliberately and consciously has provided the forum of appeal against the order passed under Rules 1, 2 and 4 of Order XXXIX, the stages being different. Under Order XJc. XIX Rule 1 of the Code whenever an ex parte order of injunction is passed, against the same also appeal is maintainable under Order XLIII Rule 1 (r) and at the point of time said appeal is decided, the question to be agitated is as to whether in the facts of the case Trial Court was justified in issuing injunction order and no new material can be taken into consideration until application under Order XLI, Rule 27 of the Code is taken on record and allowed. Said appeal in question has to be confined on the material which was available before the Court at the point of time when an injunction order had been granted ex parte. As far as proceeding under Order JLXXLX, Rule 4 of the Code is concerned, a person who is dissatisfied with the order of injunction has a right to apply for revocation. variation or for rescinding the order of injunction and therein all necessary material particulars can be placed before the Court in respect of his claim preferred under Order XXXIX Rule 4 of the Code, and the Court has to consider the claim of a party on the premises as to whether it would be just and in the interest of justice to continue with injunction order or not in the facts of the case and even against the said order passed either way, remedy of appeal has been provided for against the order passed under Order XXXIX, Rule 4 of the Code. Appeal is maintainable both against grant of ex parte injunction order as well as against the order passed after hearing both the parties. Thus, there is procedural difference in the two and the stage of the appeal is also different, for the simple reason that while considering the appeal under Order XLIII Rule l(r) against the order passed under Order JLXXLX, Rule 1 of the Code, only material on which injunction order has been passed is taken into consideration, whereas in the appeal preferred under Order XLIII, Rule 1 (r) against the order passed under Rule 4 of Order XXXIX entire material has to be taken into consideration, including the documents which have been submitted by the defendant at the said stage of the proceeding. There is no statutory embargo, whatsoever imposed upon the defendant to invoke the two proceedings simultaneously. Apex Court in the case of Transcore v. Union of India, AIR 2007 SC 212, has considered at length, the doctrine of election of remedies by mentioning that said doctrine is evolved by Courts on equality, and there are three elements of election, namely existing of two or more remedies; inconsistencies between such two remedies and choice of one of them. If one of the three elements is not there, the doctrine will not apply. Here the remedies provided for are not at all inconsistent to each other rather both the remedies recognize existence of same facts. Both, the application under Order XXXIX, Rule 4 as well as appeal under Order XLIII, Rule 1 (r) are to be decided on different parameters as already noted above. In view of this the proposition that the appeal in question is not maintainable, cannot be accepted, for the simple reason that right of appeal is statutory right and such right cannot be curtailed unless the statute expressly or by necessary

implication says so. The sentence "the choice is for the party affected by the order either to move the appellate Court or to approach the same Court which passed ex parte order for any relief' as mentioned in the case of A. Venkatasubbiah Naidu v. S. Chellappan and others, 2007(7) SCC 695, has to be read and understood, in the backdrop of the issue before Apex Court. At no point of time, the issue of simultaneous election of remedy was ever engaging the attention of Court, moreover judgments cannot be substitute of statutory provisions, and same has to be seen, in the facts and circumstances of each case. Here, scheme of things provided for do not reflect that by necessary implication or by express statutory provision, appeal in question is in any way prohibited on application also being moved under Order XXXIX, Rule 4 of the Code. It is well known rule of construction, that a Court must construe a section unless it is impossible to do so, to make such provision workable rather proceeding to make it unworkable. No word can be rendered ineffective or purpose less. Courts are required to carry out legislative intent fully and completely while construing provisions, full effect is to be given to the language used therein giving reference to context and the other provisions of the Statute and by construction a provision shall not be reduced as dead letter. Here the language used in C.P.C. is very clear and does not require any interpretation, as there is no ambiguity in it, rather the same is clear and specific. Dual remedy provided for, cannot be made redundant and otiose merely because one of the remedies has been availed of. However, when both the remedies are opted and the matter is inter se parties, then whatsoever, decision is taken, such decision has to be taken into account by the Court dealing with such cases and the said Court will weigh the impact of the decision, which has been taken at the earlier point of time. In view of this the objection so raised is unsustainable. (**Anil Agarwal v. Indian Oil Corporation Ltd. Mumbai & others; 2012 (115) RD 746)**

O. - 41, R. 27 – Additional evidence – Discretion of

Appellate Court has discretion to allow production of additional evidence in exceptional circumstances but it must exercised judicial and with circumspection only where any of the prerequisite conditions provider O.15 R. 27 exist?

The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is t be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide K. Venkataramia V. A. Seetharama Reddy, AIR 1963 SC 1526, Muncipal Corpn. Of Greater Bombay V. Lala Pancham, AIR 1965 SC 1008, Soonda Ram V. Rameshwarlal, (1975) 3 SCC 698 and Syed Abdul Khader v. Rami Reddy, (1979) 2 SCC 601. (**Union of India Vs. Ibrahim Uddin & another; (2012) 8 SCC 148)**

Interim injunction Violated - Court below ought not to have waited for final decision. As the proceedings under Order XXXIX, Rule 2 - A are separate proceedings and Court can go on in spite of any interim order that may be passed in as, to proceed in contempt, is the sole discretion of the Court

The claim of the petitioner is that proceeding under Order XXXIX, Rule 2-A, C.P.C. are separate proceedings and it would not come in the way of the interim order granted by this Court dated 18.12.1990, by which further proceedings in the suit has been stayed.

According to the learned Counsel for the petitioner the said writ petitioner in which interim order was granted being Writ Petition No. 32472 of 1990 has since been dismissed in default vide order dated 13.10.2008. It is submitted that Writ Petition No. 32472 of 1990 was his writ petition and a recall application has also been filed but the Court below ought not to have waited for final decision in that writ petition as the proceedings under Order XXXIX, Rule 2-A, C.P.C. are separate proceedings and can go on in spite of any interim order that may be passed in that writ petition. (**Sri Mahadeo Ji Maharaja Viraj Man Mandir vs. Munna Lal; 2012(116) RD 745)**

Adverse Possession cannot be proved merely be obtaining ration card and house tax receipts

The appellant has also failed to prove the adverse possession of the suit property. Only by obtaining the ration card and the house tax receipts, the appellant cannot strengthen his claim of adverse possession. The High Court was fully justified in reversing the judgment of the First Appellate Court and restoring the judgment of the Trial Court. In our considered opinion, no interference is called for. (**A. Shanmugam vs. Ariya K.R.V.M.N.P., Sangam; 2012(116) RD 567)**

If there is no prima facie case for trial, question for considering balance of convenience and irreparable injury is not required

Hon'ble Apex Court in Kashi Math Samsthan and another vs. Shrimad Sudhindra Thirth Swami and another, 2010(79) ALR 167 (SC) held that if there is no prima facie case for trial, question for considering balance of convenience and irreparable injury is not required. (**Raj Kumar Singh Bhadouria vs. Satya Mohan Pandey; 2012(116) RD 847)**

Civil Procedure Code

S. 2(14) - Trust Act, Ss. 59, 72 and 73 – Provisions under - Meaning of

The expression "Original Petition" as such is not defined either in the Trust Act or in the Code of Civil Procedure. However, Rule 3(9) of the Code of Civil Procedure defines Original Petition as follows:

> "3(9)."Original petition means a petition whereby any proceeding other than a suit or appeal or a proceedings in execution of a decree or order, is instituted in a court."
>
> Section 2(14) C.P.C. defines the term „Order" which reads as under:
>
> "2 (14). "Order" means the formal expression of any decision of a civil court which is not a decree;"

Section 59 of the Act confers a right upon the beneficiaries to sue for execution of the trust which would indicate that the beneficiaries may institute a suit for execution of the trust. Therefore, the above-mentioned provisions would show that in order to execute the trust, the right is only to file a suit and not any original petition. Under the Trust Act also for certain other purposes original petitions can be filed. Section 72 of the Trust Act provides for a trustee to apply to a principal civil court of original jurisdiction by way of petition to get himself discharged from his office. Similarly, section 73 of the Act empowers the principal civil court of original jurisdiction to appoint new trustees. Few of the provisions of the Act permit for filing of

original petitions. (**Sinnamani vs. G. Vettivel; 2012 (2) ARC 321(SC))**

S. 9 - Provincial small cause courts Act, Ss.15 and 23 – Regular suit for recovery of arrears of rent and damages – Jurisdiction of Court (whether J.S.C.C. or Regular Civil Court) – It cannot be said that suit triable by J.S.C.C. court can under no circumstances be decided by regular civil court

In this regard reference may also be made to two Full Bench authorities of this Court first in Manzural Haq v. Hakim Mohsin Ali AIR 1970 All 604, and the other in Bisheswar Prasad Gupta v. Dr. R.K. Agarwal, AIR 1977 All 103, holding that J.S.C.C. is Court of Preferential jurisdiction and not of exclusive jurisdiction. Accordingly it cannot be said that a suit which is triable by JSCC can under no circumstances be decided by the regular civil court and the decision of regular civil court and the decision of regular civil court in such suits is a nullity.

Moreover in the Full Bench decision of Bisheswar Prasad (supra) and in Lala Hari Shyam v. Mangal Prasad, AIR 1983 All 275, it has been held that if question of jurisdiction in such matters (JSCC or regular civil court) is not raised before the trial court. It cannot be permitted to be raised before the appellate court in the instant case before the trial courts no such objection was raised. (**Trilok Nath Agarwal (D) through L.Rs. v. Bata India Ltd.; 2012(2) AWC 2813)**

Sec. 35 – Costs should be imposed judiciously

The Union of India, in this appeal is primarily aggrieved by the order passed by the High Court in imposing exemplary costs on two officers. Learned senior counsel appearing for the sole respondent would submit that in the facts and circumstances of the case, the High Court ought not to have imposed any costs. The statement of the learned senior counsel appears to be very fair and requires to be accepted. Therefore, the appeal is allowed to the extent of waiving of costs imposed on the two officers and to that extent the impugned judgment and order of the High Court is set aside. (**Sayed Darain Ahas @ Darain v. State of West Bengal & anr.; 2012 (92) Supreme 570)**

(i) S. 80 - Notice - Scope - Requirement of

In view of above exposition of law laid down by Special Bench, it is quite clear that objection with respect to want of notice under Section 80 CPC cannot be taken by a private individual since it is for the benefit of Government and its officials and, therefore, it can be taken only by them and would be considered if it is pressed by those for whose benefit the provision has been made. A private individual cannot challenge the proceeding by taking the plea of want of notice under Section 80CPC. (**Rekha (Smt.) vs. Smt. Veermati; 2012 (2) ARC 389 (All))**

(ii) S.80 - Notice - Object and waiver of

Referring to the judgment in Ishtiyaq Husain Abbas Husain Vs. Zafrul Islam Afzal Husain and others AIR 1969 Alld. 161 has also expressed the where the court view:

"It appears to me that the plea of want of notice is open only to the Government and the officers mentioned in section 80 and it is not open to a private individual. In this particular case the State Government did not even put in appearance. The notice, therefore, must be deemed to have been waived by it."

In view of above exposition of law laid down by Special Bench, it is quite clear that objection with respect to want of notice under Section 80 CPC cannot be taken by a private individual since it is for the benefit of Government and its officials and, therefore, it can be taken only by them and would be considered if it is pressed by those for whose benefit the provision has been made. A private individual cannot challenge the proceeding by taking the plea of want of notice under Section 80CPC. (**Rekha (Smt.) vs. Smt. Veermati; 2012 (2) ARC 388 (All))**

S. 100 - Special Relief Act, S-20 - Suit for Specific performance - Discretion as to decree suit - Exercise of powers - Legality of

(a) Court has observed that the Court can exercise jurisdiction only on the basis of substantial question of law framed at the time of admission as held by this Court in Dnyanoba Bhaurao Shemade vs.

Maroti Bhaurao Marnor reported in (1999) 2 SCC 471. But in the present case, the High Court framed more issues at the time of hearing without giving any opportunity to the parties to lead their respective evidence.

(b) The question whether the plaintiffs were always ready to perform their part of the contract and entitled for a decree for specific performance does not raise any question of law, (Refer: Harjeet Singh vs. Amrik Singh reported in (2005)12 SCC 270), but such questions have been framed and concurrent finding of trial court and the first appellate court has been reversed by the impugned judgment.

(c) The question whether a proceeding was collusive or not is essentially a question of fact, and it cannot be considered in a second appeal, as held by this Court in Nagubai Ammal and others vs. B. Shama Rao and others reported in AIR 1956 SC 593, but by the impugned judgment learned Single Judge decided such questions though there was no such issue framed.

(d) In a second appeal the re-appreciation of evidence and interference with the finding of fact ignoring the question of law is not permissible but such interference has been made by the impugned judgment. (**Sinnamani vs. G. Vettivel; 2012 (2) ARC 321(SC))**

S. 100 – Substantial question of law consideration of

The jurisdiction of the High Court in hearing a second appeal under Section 100 CPC has come up for consideration before this Court on numerous occasion. In long line of cases, this Court has reiterated that the High Court has a duty to formulate -the substantial question/s of law before hearing the second appeal. As a matter of law, the High Court is required to formulate substantial question of law involved in the second appeal at the initial stage if it is satisfied that the matter deserves to be admitted and the second appeal has to be heard and decided on such substantial question of law. The two decisions of this Court in this regard are: Kshitish Chandra Purkait v. Santosh Kumar Purkait and Others,and Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor. It needs to be clarified immediately that in view of sub-section (5) of Section 100, at the time of hearing of second appeal, it is open to the High Court to re-formulate substantial question/s of law or

formulate fresh substantial question/s of law or hold that no substantial question of law is involved. This Court has repeatedly said that the judgment rendered by the High Court under Section 100 CPC without following the procedure contained therein cannot be sustained. That the High Court cannot proceed to hear the second appeal without formulating a substantial question of law in light of the provisions contained in Section 100 CPC.

In M.S. vs. Raja, this Court found that the High Court in paragraph 22 of the judgment under consideration therein had dealt with substantial questions of law. The Court further observed that the finding recorded by both the courts below with no evidence to support it was itself considered as a substantial question of law by the High Court. It was further observed that the other questions considered and dealt with by the learned Judge were substantial questions of law. Having regard to the questions that were considered and decided by the High Court, it was held by this Court that it could not be said that the substantial questions of law did not arise for consideration and they were not formulated. The sentence `maybe substantial questions of law were not specifically and separately formulated‟ in M.S.vs. Raja must be understood in the above context and peculiarity of the case under consideration. The law consistently stated by this Court that formulation of substantial question of law is a sine qua non for exercise of jurisdiction under Section 100 CPC admits of no ambiguity and permits no departure. (**Hardeep Kaur vs. Malkiat Kaur; 2012 (2) ARC 135 (SC))**

S.100 – Second Appeal - Considerations for

The jurisdiction of the High Court in hearing a second appeal under Section 100 CPC has come up for consideration before this Court on numerous occasion. In long line of cases, this Court has reiterated that the High has a duty to formulate the substantial question/s of law before hearing the second appeal. As a matter of law, the High Court is required to formulate substantial question of law involved in the second appeal at the initial stage if it is satisfied that the matter deserves to be admitted and the second appeal has to be heard and decided on such substantial question of law. The two decisions of this Court in this regard are; Kshitish Chandra Purkait v. Santosh

Kumar Purkait and others, (1997) 5 SCC 438, and Dnyonoba Bhaurao Shemade v. Maroti Bhaurao Marnor, (1999) 2 SCC 471. It needs to be clarified immediately that in view of sub-section (5) of Sec. 100, at the time of hearing of second appeal; it is open to the High Court to re-formulate substantial question/s of law formulate fresh substantial question/s of law or hold that no substantial question of law is involved. The Court has repeatedly said that the judgment rendered by the High Court under Section 100 CPC without following the procedure contained therein cannot be sustained. That the High Court can not proceed to hear the second appeal without formulation a substantial question of law in light of the provisions contained in Sec. 100 CPC. (**Hardeep Kaur v. Malkiat Kaur; (2012 (2) Supreme 551)**

Inherent powers of the court - S.151 CPC - Power to correct is always inherent in every court. Even purely executive authority cannot refuse to correct a calculation error whenever pointed out

In courts' opinion appeal of the State was wrongly allowed on highly technical grounds. The application prayer for correction of calculation error which had been allowed by the Prescribed Authority through the subsequent order (challenged in the appeals giving rise to the instant writ petition) was held to be barred by time. Even if the objection was raised beyond time still an error of calculation could be corrected by the Prescribed Authority at any time. Such power is always inherent in every Court, tribunal, judicial or quasi judicial authority. Even purely executive authority also cannot refuse to correct a calculation error whenever pointed out. (**Shyam Behari Lal v. State of U.P.; 2012 (116) RD 34)**

O. 1, R. 10(2) - Question of title not to be decided in summary proceedings

8. "In the present case, undisputed position is that JSCC Suit No. 43 of 2000 had been filed against defendant-respondent No. l for recovery of arrears of rent and ejectment. In the said suit, defendant-respondent No. l filed written statement, denying landlord-tenant relationship. The case in hand has to be decided on the basis of the facts disclosed in the plaint. Merely because Shakil Ahmad claims that

he is owner of the property and he has filed suit for declaration of his rights, then ipso facto, it is not necessary to implead him as party in JSCC suit, which has to be decided on its own merit. Revisional Court has clearly erred in law in directing impleadment of Shakil Ahmad in JSCC suit. JSCC suit has to be decided on its own merit as to whether there existed any landlord-tenant relationship inter se parties. In case petitioner fails to substantiate the said fact that he is not landlord, his suit would fail. Revision has been wrongly allowed." (**Smt. Krishna v. Ram Kumar and others; 2012(115) RD 734)**

O.1, R.1 and O. VI, R.17 - Amendment and Impleadment Application - Who may be joined as plaintiff

Order VI, Rule 17 of the Code enables the parties to make amendment of the plaint which reads as under;

> "17. Amendment of pleadings – The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> 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."

Order I, Rule 1 of the Code speaks about who may be joined in a suit as plaintiffs. Learned senior counsel for the appellant, after taking us through the agreement for sale dated 02.02.2006, pointed out that the parties to the said agreement being only Rameshkumar Agarwal, the present appellant and Rajmala Exports Pvt. Ltd., respondent No.1 herein and the other proposed parties, particularly, Plaintiff Nos. 2 & 3 have nothing to do with the contract, and according to him, the Courts below have committed an error in entertaining the amendment application. In the light of the said contention, court has carefully perused the agreement for sale dated 02.02.2006, parties to the same and the relevant provisions from the Code. Court has already pointed out that the learned single Judge himself has agreed with the

objection as to proposed defendant Nos. 3-5 and found that they are not necessary parties to the suit, however, inasmuch as the main object of the amendment sought for by the plaintiff is to explain how the money was paid, permitted the other reliefs including impleadment of plaintiff Nos. 2 & 3 as parties to the suit.

In Rajkumar Gurawara (Dead) Through L.Rs vs. S.K. Sarwagi & Company Private Limited & Anr. (2008) 14 SCC 364, this Court considered the scope of amendment of pleadings before or after the commencement of the trial.

In paragraph 18, this Court held as under:-

> "……..It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation……"

It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations. (**Rameshkumar Agarwal vs. Rajmala Exports Pvt. Ltd.; 2012(2) ARC 891(SC))**

O. IV-A - Consolidation of suits and proceedings - Legality of

The petitioner, who is defendant no.3 in Original Suit No. 641 of 2005, moved an application to consolidate the aforesaid two suits together on the grounds that in both the suits the matter in issue is common; that the suits are pending between the same parties and that the evidence to be led in the suit would be common as well as that

common questions of facts and law are involved and have to be adjudicated upon in both the suits. If the parties file documentary evidence separately in both the suits and lead oral evidence therein twice, that would unnecessarily waste the time of the court, therefore, both the suits be consolidated.

In view of the judgment rendered by this Court in Writ Petition No. 336 of 2010 (M/S) and as per provisions of Order 4-A of the Code of Civil Procedure, the learned trial court, should have considered the fact that the property in question in both the suits is the same, the parties to the suit are the same and the vendor is the same and that the evidence to be led in both the suits is similar, therefore, to avoid conflicting judgments in both the suits and in the interest of justice both the suits ought to have been consolidated together. In this view of the matter, the trial court has committed a manifest error of law in not consolidating the two suits. Consequently, the writ petition deserves to be allowed. (**Peter Succoro Vaz s. Karanjit Singh; 2012 (2) ARC 171 (Uttarakhand))**

O. 6, R. 17 - Amendment of pleadings - Scope and object of

It is well settled law that an amendment ought to have been allowed if it does not change the nature of the suit nor intends to add a claim which is barred by limitation nor takes away the claim of the other party nor amounts to a fresh cause of action nor otherwise prejudice the other side. Instead of adding several authorities on this aspect, Court intend to refer to the decision of Apex Court in **North Eastern Railway Administration, Gorakhpur vs. Bhagwan Das (D) by Lrs.; AIR 2008 SC 2139** where the Court held:

> "Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 C.P.C. (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 C.P.C. postulates amendment of pleadings at any stage of the proceedings. In **Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and Ors. 1957 (1) SCR 595** which still holds the field, it was held that 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. 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. [Also see: **Gajanan Jaikishan Joshi v. Prabhakar Mohanlal Kalwar (1990)1 SCC 166**]"

From the above, the law discern is that in the matter of seeking amendment in the pleadings, Courts must have taken a pragmatic view as to whether amendment would delay the proceedings, will change the nature of the proceedings, will have the effect of giving new cause of action and so on but otherwise where the plaintiff himself has sought amendment in the plaint. (**Bhulai vs. Additional District Judge Vth Pratapagarh; 2012 (2) ARC 61(All. Lucknow-Bench)) O.VI,**

R. 2(2) and 2(3) – Provisions under - Explanation of

Order VI Rule 2 of the Code of Civil Procedure, 1908 makes it clear that every pleading shall contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence but not the evidence by which they are to be proved. Sub-rule (2) of Rule 2 makes it clear that every pleading shall be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph. Sub-rule (3) of Rule 2 mandates that dates, sums and numbers shall be expressed in a pleading in figures as well as in words. (**Rameshkumar Agarwal vs. Rajmala Exports Pvt. Ltd.; 2012(1) ARC 891(SC))**

Pleading - Importance of

The truth should be the guiding star in the entire judicial process.

Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.

Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. (**Maria Margarida Sequeria Fernandes vs. Erasmo Jack de Sequeria (dead); 2012 (2) ARC 325 (SC))**

O. VII, R. 10 – Effect of not proving affidavit and not filing written statement

The core question which requires determination in this appeal is whether the High Court exceeded its jurisdiction by directing the trial court for retrial of the suit and permitting the defendants to file written statement and documents without assigning any justifiable and legally sustainable reason particularly when the defendants-respondents were admittedly served with the summons and were also duly represented by their advocate in the trial court?

Further question which is related to the issue is whether the defendant-respondents who had chosen not to file written statement in spite of several opportunities granted by the trial court, could be granted fresh opportunity by the High Court to file written statement and order for retrial resulting into delay and prejudice to the plaintiff-appellant from enjoying the fruits of the decree in his favour?

Yet another important question which arises herein and frequently crops up before the trial court is whether the trial court before whom the defendants failed to file written statement in spite of repeated opportunities could straight way pass a decree in favour of plaintiff without entering into the merits of the plaintiff‟s case and without directing the plaintiff to lead evidence in support of his case and appreciating any evidence or in spite of the absence of written statement, the trial court ought to try the suit critically appreciating the merits of the plaintiff‟s case directing the plaintiff to adduce evidence in support of his own case examining the weight of evidence led by the plaintiff? (**C.N. Ramappa Gowda v. C.C. Chandregowda (D) by LRs & anr.; 2012 (3) Supreme 138)**

O-IX, Rule 7 and 13 - Rejection of application under - Legality of

This writ petition is directed against orders passed by the courts below rejecting petitioners‟ restoration application under Order IX Rule 13 CPC. First order was passed on 16.10.2004 by 1st Additional Civil Judge (Senior Division), in Misc. Case No. 29-C of 2000 rejecting petitioners‟ restoration application through which ex-parte decree dated 5.7.2000 passed in original Suit No. 51 of 1982 was sought to be set aside. Against the said order petitioners filed Misc. Civil Appeal No. 202 of 2004 which was dismissed by Additional District Judge, 12.7.2006 hence this writ petition.

On 22.12.1998 application was filed by the petitioners under Order -IX Rule 7 C.P.C. for recalling the order dated 27.7.1998. The said application was rejected on 24.4.2000. Thereafter ex-parte decree was passed on 5.7.2000. Restoration application under Order-IX Rule 13 C.P.C. was filed on 25.7.2000 which was rejected by the impugned order and appeal filed against the same was also dismissed as stated above.

Learned counsel for the plaintiff-respondent has argued that as against order dated 24.4.2000 rejecting the application of the petitioners under Order-IX Rule 7 C.P.C. no revision etc was filed hence subsequent restoration application was not maintainable. This is not correct legal position. Supreme Court in Arjun Singh vs. Mahendra Kumar A.I.R. 1964 S.C. 993 has held that "an order rejecting the application under Order-IX Rule 7 is not of the kind which can operate as res-judicate so as to bar the hearing on the merits of an application under Order IX Rule 13”. (**Mujizun Nisan (Smt.) Additional District & Sessions Judge; 2012(2) ARC 451) (All. Lucknow-Bench))**

O. XV, R.5 - Made of applicability - Provisions under observed to be divided into parts - Explained

On a careful analysis of the provisions of Order XV Rule 5 CPC it is seen that it is divided in two parts. The first part deals with the deposit of the "entire amount admitted by him to be due" together with interest at or before the first hearing of the suit. The second part deals with the deposit of "monthly amount due" which has to be made throughout the continuation of the suit.

It is, therefore, clear that Order XV Rule 5 CPC is in two parts.

The first part deals with the deposit of the "amount admitted by him to be due" while the second part deals with the "monthly amount due" whether or not the tenant admits any amount to be due. Thus, in a case where the defendant denies the existence of landlord and tenant relationship, he may not be required to deposit the amount admitted to be due at or before the first hearing of the suit but he would still be required to deposit the "monthly amount due" within a week from the date of its accrual throughout the continuation of the suit because such deposit has to be made whether or not he admits any amount to be due. (**Yusuful Haq Alias Yusuf vs. Smt. Ghayyur Fatima; 2012(2) ARC 149 (All.))**

O. XXI, R. 68 - As amended a period of 15 days provided in place of 30 days - Explained

As regard the auction before the expiry of 30 days, the assertion of the petitioner is wholly misconceived. The period of 30 days mentioned in Rule 68 of Order 21 is not mandatory. It could be less than 30 days as per consent of parties. It is relevant to point out that Rule 68 of Order 21 has been amended by Act No. 104 of 1976 and a period of 15 days has been prescribed in place of 30 days. Moreover, the petitioner had an opportunity of filing objection under Rule 90 of Order 21, which he failed to avail. (**Ganga Prasad (dead) through Lrs. vs. IInd ADJ, Sultanpur; 2012(2) ARC 305) (All. Lucknow-Bench))**

O.XXXIV, Rules 1 and 2 – Temporary injunction – Grounds for granting – Temporary injunction can be granted if three ingredients (Prima Facie Balance of convenience and irreparable loss) are in favour of plaintiff

In present case court has held that the appellant has miserably failed to establish a prima facie case.

The counsel for the appellant submitted that the balance of convenience is in favour of the appellant. He submitted that in case the injunction is not granted in favour of the appellant, the appellant will have greater loss in comparison to respondent No.1.

Now it has to be seen whether the appellant will suffer irreparable loss. Before granting injunction the Court has to satisfy that

non-interference by the Court would result in irreparable loss to the party seeking relief. In the present case, the trial court has recorded a finding that the appellant will not suffer any irreparable injury in case the injunction is not granted in his favour. This finding of the trial court has been recorded after weighing the competing possibilities or probabilities or likelihood of injury to both the parties. This finding suffers from no illegality or irregularity.

Since all the three ingredients for granting temporary injunction are not in favour of the appellant and the order of the trial court refusing to grant temporary injunction suffers from no illegality, we find no justification to interfere with the order of the trial court. (**Savy Homes (P) Ltd. v. Nikhil Indus Infrastructure Ltd. and others; 2012(2) AWC 2714)**

O. XXXIX, R. 2A and Section 151- Remedy to non compliance of courts order by the district authorities

The Trial Court has ample power to enforce its order by issuing appropriate direction to the district authorities. Needless to say that in case the district authorities do not implement the order passed by the trial Court the latter has ample power to refer the matter to this Court. We reiterate the proposition of law discussed in the case of Mohd. Hamja and permit the petitioner to approach the trial Court by moving appropriate application. The Trial Court shall ensure that the order passed by it is complied with in its letter and spirit by the district authorities.

It shall be obligatory on the part of the district authorities to implement the order passed by the Trial Court. Attention of this Court has been invited to the order dated 14.7.2011 (Annexure-6). In case the private respondents have got any grievance against the order passed by the trial Court, then option is open to them to approach the higher forum like revisional or appellate jurisdiction but there shall not be any connivance between the private respondents and the district authorities in complying the order passed by the Trial Court. Non-compliance of the Court's order by the district authorities is a symptom which shows the breakage of the constitutional machinery.

We hope and trust that the district authorities including the Superintendent of Police, Lucknow shall enforce the order passed by the Trial Court in its letter and spirit. (**Hari Om Rastogi and another v.**

State of IT.P. through its Secretary Home, Lucknow and others; 2012(115) RD 728)

O. XXXIX, R. 4 - Two fold remedy provided to the incumbent against when such injunction may be discharged

On the parameters of judicial pronouncements as noted above and the statutory provisions as quoted above, the situation which emerges in the present case, that two fold remedy has been provided for to an incumbent against whom injunction order has been passed and who is dissatisfied with the said order of injunction. Rule 4 of Order XXXIX provides that an order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order. Order XLIII, Rule l(r) provides that an appeal shall lie from an order under Rules 1, 2 and Rule 4 of Order XXXIX. The Legislature deliberately and consciously has provided the forum of appeal against the order passed under Rules 1, 2 and 4 of Order XXXIX, the stages being different. Under Order XIX Rule 1 of the Code whenever an ex parte order of injunction is passed, against the same also appeal is maintainable under Order XLIII Rule 1 (r) and at the point of time said appeal is decided, the question to be agitated is as to whether in the facts of the case Trial Court was justified in issuing injunction order and no new material can be taken into consideration until application under Order XLI, Rule 27 of the Code is taken on record and allowed. Said appeal in question has to be confined on the material which was available before the Court at the point of time when an injunction order had been granted ex parte. As far as proceeding under Order JLXXLX, Rule 4 of the Code is concerned; a person who is dissatisfied with the order of injunction has a right to apply for revocation. variation or for rescinding the order of injunction and therein all necessary material particulars can be placed before the Court in respect of his claim preferred under Order XXXIX Rule 4 of the Code, and the Court has to consider the claim of a party on the premises as to whether it would be just and in the interest of justice to continue with injunction order or not in the facts of the case and even against the said order passed either way, remedy of appeal has been provided for against the order passed under Order XXXIX, Rule 4 of the Code. Appeal is maintainable both against grant of ex parte injunction order as well as against the order passed after hearing both the parties.

Thus, there is procedural difference in the two and the stage of the appeal is also different, for the simple reason that while considering the appeal under Order XLIII Rule l(r) against the order passed under Order XXXIX, Rule 1 of the Code, only material on which injunction order has been passed is taken into consideration, whereas in the appeal preferred under Order XLIII, Rule 1 (r) against the order passed under Rule 4 of Order XXXIX entire material has to be taken into consideration, including the documents which have been submitted by the defendant at the said stage of the proceeding. There is no statutory embargo, whatsoever imposed upon the defendant to invoke the two proceedings simultaneously. Apex Court in the case of Transcore v. Union of India, AIR 2007 SC 212, has considered at length, the doctrine of election of remedies by mentioning that said doctrine is evolved by Courts on equality, and there are three elements of election, namely existing of two or more remedies; inconsistencies between such two remedies and choice of one of them. If one of the three elements is not there, the doctrine will not apply. Here the remedies provided for are not at all inconsistent to each other rather both the remedies recognize existence of same facts. Both, the application under Order XXXIX, Rule 4 as well as appeal under Order XLIII, Rule 1 (r) are to be decided on different parameters as already noted above. In view of this the proposition that the appeal in question is not maintainable, cannot be accepted, for the simple reason that right of appeal is statutory right and such right cannot be curtailed unless the statute expressly or by necessary implication says so. The sentence "the choice is for the party affected by the order either to move the appellate Court or to approach the same Court which passed ex parte order for any relief' as mentioned in the case of A. Venkatasubbiah Naidu v. S. Chellappan and others, 2007(7) SCC 695, has to be read and understood, in the backdrop of the issue before Apex Court. At no point of time, the issue of simultaneous election of remedy was ever engaging the attention of Court, moreover judgments cannot be substitute of statutory provisions, and same has to be seen, in the facts and circumstances of each case. Here, scheme of things provided for do not reflect that by necessary implication or by express statutory

provision, appeal in question is in any way prohibited on application also being moved under Order XXXIX, Rule 4 of the Code. It is well known rule of construction, that a Court must construe a section unless it is impossible to do so, to make such provision workable rather proceeding to make it unworkable. No word can be rendered ineffective or purposeless. Courts are required to carry out legislative intent fully and completely while construing provisions, full effect is to be given to the language used therein giving reference to context and the other provisions of the Statute and by construction a provision shall not be reduced as dead letter. Here the language used in C.P.C. is very clear and does not require any interpretation, as there is no ambiguity in it, rather the same is clear and specific. Dual remedy provided for, cannot be made redundant and otiose merely because one of the remedies has been availed of. However, when both the remedies are opted and the matter is inter se parties, then whatsoever, decision is taken, such decision has to be taken into account by the Court dealing with such cases and the said Court will weigh the impact of the decision, which has been taken at the earlier point of time. In view of this the objection so raised is unsustainable. (**Anil Agarwal v. Indian Oil Corporation Ltd. Mumbai and others; 2012(115) RD 746)**

Section 2(2)-Decree-Ingredients-Dismissal u/o XXII Rule 9(2)-Whether amounts to decree?

The Supreme Court referred to a full Bench decision of the Lahore High Court in **Niranjan Nath v. Afzal Hussain - AIR 1916 Lahore 245** and quoted with approval the following observation made by a Full Bench of MP High Court in **Mitthulal vs. Badri Prasad- AIR 1981 Madh. Pradesh 1-**

> **—**There seems to be a general consensus of judicial opinion that all orders of abatement are not decrees. Only those orders of abatement are decrees in which the Court comes to the conclusion that the right to sue does not survive on the death of the sole plaintiff or on the death of one of the plaintiffs to the surviving plaintiffs. The orders of abatement which follow consequent on the failure of the legal representative of plaintiff to be brought on record within the period allowed by law or due to the Court deciding that a particular applicant is not the legal representative, such orders do not amount to decree. The reason being that the abatement is automatic consequent on the failure of the legal representative to be brought on record within the period of limitation and no formal order is necessary. So there is no adjudication on the

rights of the parties in the suit or appeal by such an order. An order under Order 22, Rule 5 cannot obviously be said to fall within the definition of decree for the following reasons (i) the order is made only for the purpose of determining who should continue the suit as brought by the original plaintiff. It is not intended to determine and it does not, in fact, determine the rights of the parties with regard to any of the matters in controversy in suit. The question that arises for decision and actually decided is not one arising in the suit itself but is one that arises in a collateral proceeding and has to be got decided before the suit can go on; and (ii) In order to operate as a decree, the adjudication must be one between the parties to the original suit or their legal representatives, and with regard to only matters in controversy between the original parties and, therefore, cannot include a decision of the question as to whether certain individual is or is not entitled to represent one of such parties. In cases where the Court comes to the conclusion that the right to sue does not survive consequent on the death of the sole plaintiff or one of the plaintiffs to the surviving plaintiffs, there is final adjudication of the rights of the parties and the order amounts to decree.‖

Thereafter, the Supreme Court summarised the law on this point after a combined reading of the several provisions of Order 22 of the Code as follows:

(a) When the sole plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of the deceased plaintiff to be brought on record and proceed with the suit.

(b) If the court holds that the right to sue does not survive on the death of the plaintiff, the suit will abate under Rule 1 of Order 22 of the Code.

(c) Even where the right to sue survives, if no application is made for making the legal representative a party to the suit, within the time limited by law (that is a period of 90 days from the date of death of the plaintiff prescribed for making an application to make the legal representative a party under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code.

(d) Abatement occurs as a legal consequence of (i) court holding that the right to sue does not survive; or (ii) no application being made by any legal representative of the deceased plaintiff to come on record and continue the suit. Abatement is not dependent upon any formal order of the court that the suit has abated.

(e) Even though a formal order declaring the abatement is not necessary when the suit abates, as the proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order recording that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code.

(f) Where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9(2) of the Code. If sufficient cause is shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1(k) of the Code.

(g) A person claiming to be the legal representative cannot make an application under rule 9(2) of order 22 for setting aside the abatement or dismissal, if he had already applied under order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative.

Held-

Where an application under Order 22 Rule 3 by a non-party is filed requesting the court to make him a party as the legal representative of the

deceased plaintiff, unless the same is allowed and the applicant is permitted to come on record as the legal representative of the deceased, he will continue to be a non-party to the suit. When such an application by a non-party is dismissed after a determination of the question whether he is a legal representative of the deceased plaintiff, there is no adjudication determining the rights of parties to the suit with regard to all or any of the matters in controversy in the suit. It is determination of a collateral issue as to whether the applicant, who is not a party, should be permitted to come on record as the legal representative of the deceased. Therefore an order dismissing an application under Order 22 Rule 3 after an enquiry under Rule 5 and consequently dismissing the suit, is not a decree. But where a finding that right to sue does not survive on the death of sole plaintiff has been recorded, there is an adjudication determining the rights of parties in regard to all or any of the matters in controversy in the suit, and such order will be a decree. **(Mangluram Dewangan vs. Sundra Singh, 2011 (2) ARC 750(SC)**

Section 96 - First Appeal, exercise of jurisdiction in deciding - Held, High Court ought to have carefully examined the facts and given cogent reasons for setting aside the trial court judgment.(2005) 12 SCC 146, (2005) 10 SCC 243 and (2005) 12 SCC 186 ref.

The High Court, in the instant appeal, while deciding the First Appeal under Section 96 of the Code of Civil Procedure has allowed the appeal and set aside the judgment and decree of the Court without properly examining the facts and law.

This Court has observed in a number of cases that the first appeal is a valuable right of the appellant and therein all questions of fact and law decided by trail court are open for reconsideration. In a case where the High Court found the trial court judgment is unsatisfactory and wanted to set aside the judgment, the High Court ought to have carefully examined the facts and the law and given cogent reasons for setting aside the trial court judgment.

Learned counsel for the appellant also placed reliance on yet another judgement of this Court Rama Pulp & Papers Ltd. V. Maruti N. Dhitre, (2005) 12 SCC p. 186. In this judgment, this Court observed that in first appeal the High Court has to properly consider the evidence on record

or for that matter even the arguments and the grounds raised in support of their case. It is constrained to observe that in the impugned judgement the High Court has not followed the settled legal position crystallized by a number of judgments of this Court. Consequently, set aside the impugned and remit the matter to the Division Bench of the High Court for fresh consideration in accordance with law and request the High Court to dispose of the appeal as expeditiously as possible.

We direct the parties to maintain status quo, as of today, till the disposal of the appeal by the High Court.

With these observations, the appeal is disposed of, leaving the parties to bear their own costs. **(B.M. Narayana Gowda v. Shanthamma (D) by LRs. And another; (2011 (29) LCD 1393 (SC)**

S.100 – Second appeal – Jurisdiction of High Court to decide second appeal

The very jurisdiction of High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of Code provides that second appeal shall be heard on the question so formulated. It is, however, open to High Court to reframe substantial question of law afresh or hold that no substantial question of law is involved at the time hearing second appeal but reversal of judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of the law and a decision on such question. **(Umerkhan v. Bismillabi @ Babulal Shaikh & ors., 2011 (5) Supreme 543)**

S. 100 – Whether formulation of substantial question of law is condition precedent for entertaining and deciding a second appeal – Held, ―Yes‖

High Court, while deciding the second appeal, failed to adhere to necessary requirement of Section 100 CPC and interfered with concurrent judgment and decree of the courts below without formulating any substantial question of law. The formulation of substantial question of law is a must before second appeal is heard and finally disposed of by High Court. Judgment of High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating the substantial question of law. Unfortunately, High Court failed to keep in view the constraints of second appeal and overlooked the requirement of the second appellate jurisdiction as provided in Section 100 CPC and that vitiated its decision. If despite three opportunities, no evidence was let in by plaintiff, it deserved no sympathy in second appeal in exercise of power under Section 100 CPC. There was No justification at all for High Court in upsetting the concurrent judgment of the courts below. High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed. Impugned judgment and order of High Court was set aside. **(M/s. Shiv Contex v. Tirgun Auto Plast P. Ltd. and ors., 2011(6) Supreme 157)**

Section 115 - Revision under - Against an order issuing a notice to the defendant- On application for grant of temporary injunction filed under Order XXXIX, Rules 1 and 2, C.P.C.- Maintainability of - Held revision would not be maintainable- Reasons explained.

From the discussion above, for an order to be revisable under section 115, C.P.C., as is applicable in the State of U.P., firstly it must be an order which must decide a part of the case or the proceedings. The expression ―order‖ as it is defined in the C.P.C., requires determination which must bring finality by determining the rights of the parties in respect of the controversy in the application. Order XXXIX, Rule 3 is a duty conferred on the Court before granting an injunction to issue notice to the party. It is a procedural provision, a step in the case. The Court, in the event, arrives at a conclusion that the grant of ex parte injunction would be defeated by delay, can in the case of urgency proceed to grant an injunction

under Order XXXIX Rule 1 or Order XXXIX, Rule 2. If the injunction is granted or rejected, as observed earlier, it would be appealable under Order XLIII. The procedure followed under Order XXXIX, Rule 3 is determination by the Court of the urgency of the matter vis-a-vis the relief claimed by the plaintiff. On a failure to grant the injunction, no part of the case or the proceeding is disposed of, but the proceedings merely stand adjourned to the next date. In other words a step in the case or proceedings. In these circumstances in our opinion, it cannot be said that, by merely issuing notice on arriving at a finding that there is no urgency, the same amounts to an ―order‖ within the meaning of section 2(14), C.P.C. In that context, the question of applying Rule 3(ii) or section 115 would not come into play. That can only be applicable if the other precondition of ‗an order deciding the case' are satisfied. Therefore, merely issuing a notice on arriving at a conclusion that there is no urgency would not be an order which is revisable. It is not, as if a party is without a remedy if such a view is taken. The ex traordinary jurisdiction of this Court under Article 227 of the Constitution of India would always be available in such a case. (**Ram Dhani and others v. Raja Ram and others, 2011 (113) RD 657)**

Order 1, Rule 9 – Necessary party - Impleadment of a necessary party is mandatory

No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the proviso to Order 1, Rule 9, of the Code of Civil Procedure, 1908 provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the plaintiff/petitioner may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In Service Jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person is terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the plaintiff/ petitioner succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without

removing the person who filled the post manned by plaintiff/petitioner. (**J.S. Yadav v. State of U.P. and Anr., 2011(4)SLR 465(SC)**

Order I, Rule 10- Necessary and proper Party-Impleadment

Held-

It is a settled principle that non-joinder of ‗necessary party' may lead to dismissal of the suits, writ proceedings or any other proceedings. However, if nonjoinder is in the case of a ‗proper party', it would not be fatal to the case. It can safely be inferred from the scheme of Order 1 Rule 10(2) of the Code of Civil Procedure and also the aforesaid decisions of the apex court that there is no bar on this Court to issue direction for impleading proper parties, or to require the better description of the parties in the suit or other proceedings, including writ proceedings. Applying the principle of Order I Rule 10(2) of the Code of Civil Procedure this Court can issue directions for adding the ‗necessary' as well as ‗proper party'. (**Chetram vs. Union of India, 2011(3) ARC 98 (All.H.C. Lucknow Bench-DB)**

Order VI, Rule 17. First part of Order VI, Rule 17, C.P.C. is discretionary-While the second part is imperative and enjoins the Court to allow all the amendments- Which are necessary for purposes of determining the real question in controversy between the parties-Amendment will not change the basic nature

A party cannot be refused a just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court generally gives leave to amend the pleadings to a party unless it is satisfied that the party applying was acting mala fide or that by his blunder he had caused injury to his opponent. In the present case the amendments which have sought to be incorporated will not change the basic nature of the written statement. (sic-plaint.)

After engaging an advocate the party may remain supremely confident that the lawyer will look after his interest. It will not be proper that the party should suffer for the inaction, deliberate omission or misdemeanour of his Counsel. It is well settled that litigant should not suffer for the lapses on the part of his Counsel. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial

and real justice. (**Rajendra Shanker Tripathi v. Ajay Kumar Gupta, 2011 (113) RD 651)**

Amendment in Plaint - Order VI, Rule 17- Order I, Rule 10-Necessary and proper Party-Impleadment

The High Court referred the judgment of the Hon'ble Apex Court in the case of **Kasturi vs. Iyyamperumal (2005) 6 SCC 733** where the court considered the issue of joining necessary party and formulated two tests namely for determination and they 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. The Supreme Court pointed out that in considering application under section 1 Rule 10 CPC, only question involved in the suit has to be considered is whether the amendment is necessary or the proposed person is a proper or necessary party or not and not the controversies that would arise between the parties as a result of issues raised by them. The Apex Court observed:

> ―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.‖

The High Court held –

The suit considered by the Apex Court was in respect of specific performance of contract and therefore admittedly in such matters only party against whom specific performance was sought, was the proper party and therefore factual observations in the judgement are in context of the

nature of the suit involved therein. The general legal proposition as noticed above clearly shows if, the decree cannot be passed effectively in absence of person, he is necessary and proper party in the case. In a suit for declaration in respect of property if a person has no interest or right over the said property, he is neither a necessary nor proper party but if he claims to be the owner of the property or otherwise in possession thereto in his own rights, in his absence effective declaration may not be given and therefore he would be necessary and proper party.

Also held-

So far as amendment of the plaint is concerned, it has to be observed that amendment which is likely to change nature of the suit or otherwise may be barred by limitation etc., can only be rejected and not otherwise. For considering amendment in the plaint, the courts have to take lenient view and unless there is any legal or otherwise obstruction amendment generally has to be allowed. (**Amar Nath Shroff vs. Smt. Savitri Singh, 2011(3) ARC 63 (All.H.C- Single Judge)**

Order VI, Rule 17- Amendment- Consideration

The High Court found that the reasons given by the court below are superficial and has applied casual and superficial approach and the amendment sought by the petitioner does not cause any prejudice or loss to the respondents. It was held that while considering the amendment in the pleadings, a lenient and liberal view ought to have been taken by the court in order to advance justice to the parties. The trial court while allowing the amendment application was satisfied that amendment was necessary and the so-called admission of the petitioners in paragraph 1 of the written statement cannot be read in isolation and the entire contents of the written statement has to be taken into consideration while considering the amendment sought by the petitioner. The revisional court has taken a very technical view of the matter and did not examine the matter in proper perspective. In holding so the High Court made reference to the following observation made by the Supreme Court in the case of **Steel Authority of India Limited vs. State of West Bengal, AIR 2009 120.**

> **—**It is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that

> some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case.‖

(Bhagwan Swaroop Tripathi vs. Gaushala Committee Shikohabad, 2011 (3) ARC 279 (All. H.C.- Single Judge)

Order IX, Rule 13- Setting aside exparte decree- Sufficient cause- Explained- Approach

The expression ‗sufficient cause' used in the aforesaid Rule has to be construed as elastic expression for which no hard and fast guidelines can be prescribed. In fact it is court's discretion which to my mind is quite wide either to treat a ‗reason' for non appearance as ‗sufficient cause' or not. In **Collector, Land Acquisition**, **Anantnag vs. Mst. Katiji, A.I.R. 1987 SC 1353** the Apex Court while dealing with the expression ‗sufficient cause' has observed as under:-

> ―The expression ―sufficient cause‖ employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which sub serves the ends of justice that being the life- purpose for the existence of the institution of Courts. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable or removing injustice and is expected to do so.‖

Further in the case of **State of Bihar vs. Kameshwar Singh, JT 2000 (5) 389** the Apex Court while dealing with the word ‗sufficient cause' although in the delay condonation matter has observed as under:

> .....‖ The expression ‗sufficient cause' should, therefore, be considered with pragmatism in justice-oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause.‖

Further in the case of **Ramji Dass vs. Mohan Singh 1978 ARC 496** the Apex Court has held that ―we are inclined to the view that, as far as possible, Courts' discretion should be exercised in favour of hearing and not to shut out hearing.‖

After analysing the above case laws, the High Court went into the factual matrix of the instant case and found that the (Civil Judge) Junior Division, Kanpur Nagar has rejected the petitioner/defendant application for setting aside the ex parte decree on the ground that the ingredients as provided under Order 9 Rule 13 of the C.P.C. for setting aside an ex parte decree were not satisfied, as the summon was duly served on the defendant and knowing it well the defendant did not appear before the court. The Appellate Court has also arrived at the same conclusion as of the court of civil judge junior division and found that the grounds taken by the petitioner/defendant in the application for setting aside the ex parte decree were not disclosing sufficient cause to set aside the ex parte decree and the other grounds on which appeal was preferred before the Appellate Court, the learned District Judge observed that those grounds may be relevant for the purpose of setting aside the ex parte decree in appeal but the petitioner/defendant instead of filing the appeal has filed an application for setting aside an exparte decree under Order 9 Rule 13 C.P.C. and there the ex parte decree can only be set aside on the ground mentioned therein i.e., summons was not duly served or for sufficient cause the defendant could not appear on the date fixed for hearing. The only ground taken by the petitioner/defendant in the application for setting aside the ex parte decree was that petitioner company has already informed the court after receipt of

summons through letter dated 01.01.1998 that transfer of the shares has already been made in March 1996 prior to the date of filing of the suit, therefore, the petitioner/defendant was under impression that after the receipt of aforesaid letter the court will drop the proceeding of the suit that is why nobody could appear on behalf of company.

The High Court agreed with the view taken by the Courts below ‗to the extent that this was not the sufficient ground for setting aside the ex parte decree for the reasons that the petitioner/defendant is not an ordinary illiterate citizen and it is a company incorporated under Companies Act 1956 having high repute in the country, well equipped with the battery of legal experts' and ‗the duty of the officer of the company who was entrusted to look into the court's proceeding was to obtain legal advice in this regard from the legal experts with regard to the further steps to be taken after receipt of the summons issued by the court's below in the aforesaid suit, but instead of doing so a simple letter was sent to the court which is not a recognized method under the Code of Civil Procedure to drop the proceeding of a suit or to dismiss the suit', but pointing out the object of establishment of Civil Courts being substantial justice to the parties and referring to the judgments in **Collector, Land Acquisition**, **Anantnag vs. Ms. Katiji, State of Bihar vs. Kameshwar Singh and Ramji Dass, Mohan Singh (supra)**, the High Court held that the court below taking note of that very object should have set aside the ex parte decree and the inconvenience caused to the other side could have been compensated by imposing some costs. The High Court observed-

> ―The Code of Civil Procedure is self contained Code having complete mechanism/procedure for deciding a suit and once the suit was entertained and summons were issued such kind of application was not entertainable unless it is filed in consonance with the procedure provided under the Code of Civil Procedure. Such kind of ground if it would have been taken by a rustic villager who happens to be ignorant of the court's proceeding, the matter would have been different and it could have fallen under the category of ‗sufficient cause' for setting aside an ex parte decree, but the petitioner/defendant stands on high padestar and that

kind of discretion has rightly not been exercised in favour of the petitioner in that very circumstance, but the court's below should not have limit their discretion only on the ground taken in the application for setting aside its ex parte decree but it must have gone a step further and would have decided the application looking into the object of establishment of court which are respected and known for imparting substantial justice to the parties, on the approach of a party for setting aside an ex parte decree, instead, closing the door of justice particularly in the circumstance when the defendant was not going to gain anything by not filing the written statement and contesting suit proceeding. Further there was no allegation of malafides against defendant/petitioner for not filing the written statement. It was also necessary to look into the matter with an angle that it was not a case of default on particular date of hearing but it was a case where the defendant not at all participated in the proceeding of the suit. There happens to be difference in between the absence on a particular date and not at all participating in the suit proceeding, therefore it could have been interpreted taking note of justice oriented process of court. The reason taken by the petitioner in its recall application should have been looked into taking note of the very purpose of establishment of the court‖.

(Hindalco Industries Limited vs. Sri Brijesh Kumar Agarwal, 2011(3) ARC 261 (All.H.C.- Single Judge)

Order IX Rule 13- Setting aside ex-parte order

Where no evidence to show that summon has been served, liberal view should be taken and the ex-parte order should be set aside.

Mahendra Rathore vs. Omkar Singh and other, AIR 2002 SC 505 referred. (**Rajesh Gupta vs. Hazi Jamilluddin Khan, 2011(2) ARC 569 (All. H.C.-Single Judge)**

Order XIV Rule 1 Framing of Issues- Prevention of Delay in Civil Litigation- Steps to be taken by Civil Court- Section 35- imposition of Cost- Consideration

Held-

Framing of issues is a very important stage in the civil litigation and it is the bounden duty of the court that due care, caution, diligence and attention must be bestowed by the Judge while framing of issues.

The Supreme Court laid down the principles for granting or refusing interim injunction and said that the court should be cautious and extremely careful while granting ex-parte ad interim injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable exparte orders. Experience reveals that ex-parte interim injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore, as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and 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 suitis eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits. If an exparte 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.

The Supreme Court took note of the delaying tactics adopted by the party obtaining exparte injunction and remarked that 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. This common impression should be dispelled 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 legitimate 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. In **Swaran Singh v. State of Punjab (2000) 5 SCC 668** this court was constrained to observe that perjury has become a way of life in our courts.

The Supreme Court considered the issue of prevailing delay in civil litigation and pointed out that 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 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 scrutinize, 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 Code. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at 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 falsepleadings 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.

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 concerned parties 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 justice.

I. If in a given case, ex part injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides a 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 complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the courts should strictly adhere to the said dates and the said time table 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.

The Supreme Court thereafter concluded that 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 prevailing system of adjudication of civil courts is bound to improve.

Also held-

While imposing costs we have to take into consideration pragmatic realities and be realistic 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. 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. (**Ramrameshwari Devi vs. Nirmala Devi, 2011(2) ARC 759 (SC)**

Civil Procedure Code and U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972

Code of Civil Procedure, 1908- Order XV, Rule 5-U.P. Urbad Buildings (Regulation of Letting, Rent and Eviction) Act, 1972- Section 4-Striking off defence-S.C. suit for eviction and recovery of arrears of eviction and recovery of arrears of rent- Section 4 prohibits payment of premium of advance rent- if tenant petitioner had made advance contrary to provisions of Act- He is not entitled to any relief- Even if advance of Rs. 40,000 considered- Arrears of rent was still Rs. 58,000 –Thus, even if hypothetical amount deducted- Still petitioner would be in arrears on rend-Petitioner had not paid monthly rent-Even after claiming aforesaid amount of rent by landlord- He has not complied with Order XV, Rule 5 - No illegality or infirmity in order striking off defence of petitioner. **(Jagdish Dwivedi Vs. Munshi Ram Bhardwaj 2011 (4) AWC 3820)**

Order XVII, Rule 1- Adjournment- Restriction of three adjournments should be maintained- Relaxation in unavoidable situation-Consideration

Held-

No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice

delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained. When we say ‗justifiable cause' what we mean to say is, a cause which is not only ‗sufficient cause' as contemplated in sub-rule (1) of Order XVII CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive. However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit– whether plaintiff or defendant – must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril. Insofar as present case is concerned, if the stakes were high, the plaintiff ought to have been more serious and vigilant in prosecuting the suit and producing its evidence. If despite three opportunities, no evidence was let in by the plaintiff, in our view, it deserved no sympathy in second appeal in exercise of power under Section 100 CPC. We find no justification at all for the High Court in upsetting the concurrent judgment of the courts below. The High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed. **(M/s. Shiv Cotex vs. Tirgun Auto Plast P. Ltd, 2011(3) ARC 182 (SC)**

Order XXIII, Rule 3-Compromise - Order III, Rule 4 - Power of Counsel

Referring to the Judgements in **Pushpa Devi Bhagat (dead) through LR. Sadhna Rai (Smt.) vs. Rajinder Singh, (2006) 5 SCC 566, Gurpreet Singh vs. Chatur Bhuj Goel, (1988) 1 SCC 270,** it was held by the High Court that the counsel who was duly authorized by a party to appear by executing Vakalatnama and to continue on record until the proceedings in the suit are duly terminated, has power to make a statement on instructions from the party to withdraw the appeal. In such circumstance, the counsel making a statement on instructions either for withdrawal of appeal or for modification of the decree is well within his competence and if really the counsel has not acted in the interest of the party or against the instructions of the party, the necessary remedy is elsewhere. It is true that at the relevant time, namely, when the counsel made a statement during the course of hearing of second appeal one of the parties was ill and hospitalized. However, it is not in dispute that his son who was also a party before the High Court was very much available. Even otherwise, it is not in dispute that till filing of the review petition, the appellants did not question the conduct of their counsel in making such statement in the course of hearing of second appeal by writing a letter or by sending notice disputing the stand taken by their counsel. In the absence of such recourse or material in the light of the provisions of the CPC as discussed and interpreted by this Court, it cannot be construed that the counsel is debarred from making any statement on behalf of the parties. No doubt, as pointed out in **Byram Pestonji Gariwala vs. Union Bank of India, (1992) 1 SCC 31**, in order to safeguard the present reputation of the counsel and to uphold the prestige and dignity of legal profession, it is always desirable to get instructions in writing. **(Bakshi Dev Raj vs. Sudhir Kumar, 2011(3) ARC 123 (SC)**

Order XXVI Rule 9, 10, 12 and 18- Distinction between a commission u/o XXVI Rule 10 and Rule 18- whether commission report u/r 18 is evidence?

Held-

Order 26, Rule 10 Sub-rule (2) States that the report and the evidence taken by the Commissioner shall be evidence in the suit. Order

26, Rule 10(1) authorises the Commissioner to take evidence regarding those matters which he is competent to investigate and reduce the same in writing and file the same along with his report. It is a principle of natural justice that it is only evidence taken in the presence of a party that can be used against him. It is for this reason that Order 26, Rule 18 contemplates an opportunity to be given to the parties to be present before the Commissioner in the property at the time of investigation. Thus, the inevitable conclusion is that the court cannot take an absolute and final view till the evidence is finally concluded and the court applies its mind on the report of the commissioner. To put it differently, the report of the Commissioner is only one of the pieces of evidence amongst other evidence led by the parties.

The report of the Commissioner may be relied on after examining the Commissioner not as report forming the basis of an investigation contemplated by the Commissioner. The view by the lower court therefore that the report can be treated as evidence in the suit under Order 26, Rule 10, Sub-rule (2), C.P.C. is palpably incorrect. (**Ram Ujagar vs. Smt. Kaliasha, 2011 (2) ACR 611 (All. H.C. Lucknow Bench-Single Judge)**

Order XXVI, Rules 9 and 10. Purpose of appointing commission is not to fill a lacuna- nor to find out some evidence in favour of one or the other party at any stage.

The purpose of appointing commission is not to fill in a lacuna or to find out some evidence in favour of one or the other party at any stage. The Court in adjudication of a dispute try to find out the truth and the basic rational of appointment for a Commission for local investigation is to extract the truth. This Commission can be appointed by the Court on its own or it may find it expedient when an application is made by one of the party but the requirement of a Commission is to be seen by the Court itself whether it is required or not. The basic responsibility to adduce evidence lie upon the parties. This is how the purpose and scope of appointment of Commission under Order XXIV, Rules 10 and 10-A has been observed by a Special Bench of this Court in The Sunni Central Board of Waqfs U.P. Lucknow v. Sri Gopal Singh Visharad, 2010 ADJ 1 (SFB)(L.B.), and in the judgment delivered by myself (Hon‘ble Sudhir Agarwal, J.) in para 3749 a similar provision contained in Rule 10-A was referred and the Court observed that if the Court is of the opinion that it would be convenient to

have a Commission appointed to enquire into certain questions or making local investigation and file report, such a Commission may be appointed and not otherwise. The Court also observed in para 3750 of the judgment that it vests in the discretion of Court to appoint a Commission when it thinks necessary and expedient. In effect the Court should be of the opinion that such Commission is necessary to help it in extracting truth. If such a Commission is appointed and submit its report, it is an evidence in the suit subject to remedies available to parties concerned. Here is not a case where the Court find it expedient for appointment of such Commission. **(Radhey Shyam and another v. Additional District Judge, Court No.6 Allahabad and others, 2011 (113) RD 678)**

Order XXXII, Rule 2- Next friend- Word used is not confined to the natural guardian only- Next friend can be any person- Not necessarily any of the guardians enumerated in section 4 of Hindu Minority and Guardianship Act, 1956.

Admittedly, the father is not alive, though the mother is alive, but the suit has been filed through the grand father. Under Order XXXII, Rule 2 of the CPC, the word used is ‗next friend'. The ‗next friend' is not confined to the natural guardian only. The Patna High Court in the case of Narain Singh v. Sapurna Kuer and other, AIR 1968 Pat. 318, in paragraph 4, has observed that a next friend can be any person, not necessarily any of the guardians enumerated in section 4 of the Hindu Minority and Guardianship Act, 1956. Therefore, the suit filed by the minor through grand father cannot be said to be not maintainable. **(Iqbal Ahmad Khan v. Master Mahmood Raza Khan Sherwani, 2011 (113) RD 673)**

O. XXXIII, R.1and O. 44, R.1 – Appeal by indigent person – Determination of

The appellant had filed two suits for recovery of money against the respondent, who is a retired Deputy Conservator of Forest drawing a pension of 10,500/-. These suits were decreed in favour of the appellant. Being aggrieved, the respondent had preferred Regular First Appeals before the High Court of Kerala alongwith petitions to prosecute the said appeals as an indigent person under Order 44, Rule 1 of the Code of Civil Procedure, 1908. The High Court of Kerala, without holding any inquiry as contemplated under Order 33 Rule 1A of the CPC, permitted the

respondent to institute the said appeals as an indigent person, against which a special leave petition was preferred before this Court. This Court remanded the matter to the High Court for passing fresh orders after conducting an inquiry in accordance with Order 33 Rule 1A of the CPC.

Subsequently, the High Court after conducting the inquiry into the mean and financial capacity of the respondent, has permitted the respondent to prosecute Regular First Appeals as an indigent person vide its order dated 11.08.2008. Aggrieved by the same, the appellant is before Supreme Court by these appeals.

Admittedly respondent was a retired Deputy Conservator of Forest, Government of Kerala drawing a pension of 10,500/-. Deposition of respondent that his son was employed abroad and did not regularly send him money. However, respondent never denied that his son sended him money. Again respondent failed to establish that amount of money received from his son was not substantial or insufficient to pay court fee by not producing passbook of his bank account. Non-production of bank account transaction details, amounted to suppression of the fact and in view of this, an adverse inference could be drawn against respondent that he was receiving a substantial or sufficient amount of money from his son. Amount of money received by respondent from his son and by way of pension amounted to a sufficient means to pay court fee which disentitled him to be an indigent person under Order 33 Rule 1 and Order 44 Rule 1 of the CPC. Hence, respondent could not be declared as an indigent person in order to prosecute Regular First Appeal before High Court. Impugned final order of High Court was set aside. Appeals were allowed. **(Mathai M. Paikeday v. C.K. Anthony, 2011 (5) Supreme 341)**

Order 39, Rs. 1 and 2- Interim injunction, grant of- Held, court should not proceed for mini trial of the suit while granting or refusing an application for temporary injunction filed under Order 39 Rule 1 CPC. 2006 (24) LCD 137 ref.

The present appeal under Order 43 Rule 1(r) CPC has been preferred against the impugned order dated 6.12.2010 passed by Civil Judge (Senior Division), Lucknow in regular suit 587 of 2010, Amir Alam Khan v. Lucknow Development Authority and another.

In view of above the court is set aside the impugned order dated 6.12.2010 passed by learned Civil Judge in regular suit No. 587 of 2010 and direct to restore the injunction application to its original number and decide the same afresh after affording opportunity to the parties expeditiously say within a period of six weeks from the date of production of a certified copy of this order without being influenced by the earlier order. **(Amir Alam Khan v. Lucknow Development Authority, Lucknow and another (2011 (29) LCD 1695) (All. HC Lucknow Bench).**

O.41, R.33 – Scope and ambit of

In this case death of deceased aged 46 years was occurred, in a motor accident. At the time of his death deceased was working as a Bank Manager, State Bank of India and his monthly salary was 23,134/-. Tribunal, awarded a compensation of Rs. 24,12,936/- with interest at 9% per annum. On appeal by insurer, High Court, while upholding findings in regard to income and calculation of compensation, held that Tribunal ought to have deducted 30% of annual income towards income tax. High Court deducted 30% and reduced the compensation to Rs. 16,89,055/- with interest at 9% per annum.

Order 41 Rule 33 of the CPC which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. **(Ranjana Prakash & ors. V. Divisional Manager & anr., 2011 (5) Supreme 382)**

Effect of finality of preliminary decree on the final decree in of partition Suit

By virtue of the preliminary decree passed by the trial court, which was confirmed by the lower appellate court and the High Court, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully

and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. Likewise, if the law governing the parties is amended before the conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the court to take cognizance of the amendment and give affect to the same. If the rights of the parties to the suit change due to other reasons, the court dealing with the final decree proceedings is not only entitled but is duty-bound to take notice of such change and pass appropriate order. Venkata Reddy case, AIR 1963 SC 992 and Gyarshi Bai, AIR1965 SC 1055 only hold that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree. They do not hold that in a partition suit, a preliminary decree cannot be varied in the final decree proceedings. **(Prema Vs. Nanje Gowda and others; (2011) 6 SCC 462)**

Interpretation of Procedural law- purpose and object of procedural laws Expected approach of Courts in providing justice- Order 41 Rule 22 limitation, etc. principles, etc.- Right of a caveator

The Civil Procedure Code is a law relating to procedural law is always intended to facilitate the process of achieving ends of justice. The courts normally favour the interpretation which would achieve the said object. The provisions of procedural law which do not provide for penal consequences in default of their compliance should normally be construed as directory in nature and should receive liberal construction. The court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances. To put it simply, the procedural law must act as a linchpin to keep the wheel of expeditious and effective determination of dispute moving in its place. The procedural checks must achieve their end object of just, fair and expeditious justice to the parties without seriously prejudicing the rights of any of them.

The court has to give precedence to the right of a party to put forward its case. Unnecessary and avoidable technical impediments should not be introduced by virtue of interpretative process. At the same time any irreparable loss should not be caused to a party on whom the right might have vested as a result of default of other party. Furthermore, the courts

have to keep in mind the realities of explosion of litigation because of which the court normally takes time to dispose of the appeals. It would be a travesty of justice, if after passage of substantial time when the appeal is taken up for final hearing a cross-objector who was heard and participated in the hearing at the admission stage itself, claims that the limitation period for him to file his cross-objection will commence only from the date of service of a fresh notice on him or his pleader, in terms of Order 41 Rule 22 CPC. Such an interpretation would jeopardise the very purpose and object of the statute and prejudicially affect the administration of justice. It is trite that justice must not only be done but must also appear to have been done to all the parties to a lis before the court.

The cross-objections are required to be filed within the period of one month from the date of service of such notice or within such further time as the appellate court may see fit to allow depending upon the facts and circumstances of the given case. Since the provisions of Order 41 Rule 22 CPC itself provide for extension of time, the court would normally be inclined to condone the delay in the interest of justice unless and until the cross-objector is unable to furnish a reasonable or sufficient cause for seeking the leave of the court to file cross-objections beyond the statutory period of one month.

On interpreting Order 41 Rule 22 CPC, the following principles may be enunciated:

(a) The respondent in an appeal is entitled to receive a notice of hearing of the appeal as contemplated under Order 41 Rule 22 CPC

(b) The limitation of one month for filing the cross-objection as provided under Order 41 Rule 22 CPC shall commence from the date of service of notice on him or his pleader of the day fixed for hearing the appeal. The hearing contemplated under Order 41 Rule 22 CPC normally is the final hearing of the appeal.

(c) Where a respondent in the appeal is a caveator or otherwise puts appearance himself and argues the appeal on merits including for the purposes of interim order and the appeal is ordered to be heard finally on a date fixed subsequently or otherwise, in presence of the said respondent/caveator, it

shall be deemed to be service of notice within the meaning of Order 41 Rule 22. In other words the limitation of one month shall start form that date.

In law, the rights of a caveator are different from that of cross-objectors per se. In terms of Section 148-A of the Code, a caveator has a right to be heard mandatorily for the purposes of passing of an interlocutory order. The law contemplates that a caveator is to be heard by the court before any interim order can be passed against him. But in the present case when the appeal was listed for hearing at the admission stage itself, the appellants had appeared and argued the matter not only in relation to grant of an interim order but also on the merits of the appeal.
(Mahadev Govind Gharge and others Vs. Special land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka (2011) 6 SCC 321)

Requirement of filing affidavits in accordance with legal mandate

The rules regarding filing of proper affidavits which have been reiterated time and again, are aimed at protecting the Court against frivolous litigation, must not be diluted or ignored, however, in practice they are frequently flouted by the litigants and often ignored by the Registry of the Supreme Court. The instant petition is an illustration of the same. If the Rules for affirming an affidavit according to the Supreme Court Rules were followed, it would have been difficult for the petitioner to file this petition and so much of judicial time would have been saved. This case is not an isolated instance. There are innumerable cases which have been filed with affidavits affirmed in a slipshod manner. It is therefore directed that the Registry must henceforth strictly scrutinise all the affidavits, all petitions and applications and will reject or note as defective all those which are not consistent with the mandate of Order 19 Rule 3 CPC and Order 11 Rules 5 and 13 of the Supreme Court Rules.
(Amar Singh Vs. Union of India (2011) 7 SCC 69)

Civil Procedure Code

S. 2(2), 2(9), O. 20, R. 4(2) – Executability of decree – consideration of

Even a judgment passed on basis of admission made by defendant should comply with requirements which may constitute it to be a judgment so as to bring it in conformity with the definition of judgment as contained in Section 2(9) CPC and as indicated in O.XX, R. 4(2) CPC. Even a judgment pronounced under O. VII, R.10 CPC must satisfy the requirement of a „judgment" as defined in Sec. 2(9)

of the CPC.

On a plain reading of the judgment as order in question it would be apparent that it does not determine rights of parties with regard to any matter in controversy in suit and there is no adjudication.

Thus, it does not satisfy two of basic tests which are necessary for drawing an executable decree. Thus, judgment and order passed by Civil Court decreeing suit for permanent prohibitory injunction as against only one of defendants is not a judgment within meaning of Sec. 2(9) read with O. 20, R. 4, CPC and as such decree drawn on its basis is not legally valid which is capable of execution. **(Sabbir Ahmad v. Addl. District Judge, Kaushambi, 2011 (3) ALJ 209 (All HC)**

S. 2(8) – Judge – Meaning of

„Judge‟ is a generic term and other terms like. Umpire, Arbiter and Arbitrator are only species of this term. A Judge, primarily, determines all matters of disputes and pronounces what is law now, as well as what will be the law for the future and acts under the appointment of the Government. Pollock C.B. in ex parte Davis; [(1857) 5 WR 523] said, "Judges are philologists of the highest orders. They are not mere administrative officers of the Government but represent the State to administer justice." Thus, the Court have no hesitation in coming to the conclusion that the Family Court constituted under Section 3 of the Act has all the trappings of a Court and, thus, is a court and the Presiding Officer, that is, Judge of the Family Court is a „Judge‟ though of limited jurisdiction. **(S.D. Joshi**

& Ors. V. High Court of Judicature at Bombay & Ors.; AIR 2011 SC 848)

S. 9 – Court – Distinguished from Tribunal – All courts are Tribunal but Tribunal, unless it has all trapping of court is not court

It was held that all tribunals are not Courts though all Courts are tribunals. This view has been reiterated by the Court, more particularly, in relation to drawing a distinction between a tribunal and a Court. A tribunal may be termed as a Court if it has all the trappings of a Court and satisfies the above-stated parameters. Every Court may be a tribunal but every tribunal necessarily may not be a Court. The essential features of „Court" have been noticed by court above and once these essential features are satisfied, then it will have to be termed as a „Court". The statutory provisions of the Family Court squarely satisfy these ingredients and further Presiding Officers of Family Courts are performing judicial and determinative functions and, as such, are Judges. **(S.D. Joshi & Ors. V. High Court of Judicature at Bombay & Ors.; AIR 2011 SC 848)**

S. 11 – Plea as to res-judicata and bar to suit under O. 2, R. 2 are different and one will not include other

Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas O. 2, R. 2 of CPC requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. **(Alka Gupta v. Narender Kumar Gupta; AIR 2011 SC 9)**

S. 11 – Constructive res judicata – Plea must be clearly established

Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of attack or

defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2, Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed. The principle underlying Explanation IV to Section 11 becomes clear from Greenhalgh v. Mallard [1947 (2) All ER 2571] thus:

> "…..it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them". (Emphasis supplied)

In Direct Recruit Class II Engineering Officers" Association v. State of Maharashtra; [1990(2) SCC 7151: (AIR 1990 SC 1607: 1991 AIR SCW 2226), A Constitution Bench of this Court reiterated the principle of constructive res judicata after referring to Forward Construction Co. v. Prabhat Mandal; [1986 (1) SCC 100]: (AIR 1986 SC 391) thus:

> "an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence."

In this case the High Court has not stated what was the ground of attack that plaintiff-appellant ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata.

The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. **(Alka Gupta v. Narender Kumar Gupta; AIR 2011 SC 9)**

S. 11 – Res-judicata – Applicability of – Dismissal of special leave petition summarily by SC without going into merits of case and without deciding question of law would not operate as res judicata

In Kunhayammed v. State of Kerala; AIR 2000 SC 2587, a three-Judge Bench considered the questions whether summary dismissal of the special leave petition and that too without deciding any question of law operates as res judicata qua the special leave petition filed by other party and the judgment/order of the High Court merges in the order of the Court. After examining various facets of the doctrines of res judicata and merger, the Court laid down seven propositions including the following:-

> "(i) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.
>
> (ii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the

content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment, decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iii) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(iv) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings in recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the

special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties."

In view of Court, proposition Nos. (iii) and (iv) extracted hereinabove are attracted in the present case because special leave petition (C) No. 1608 of 1999 filed by the Union of India and the Land Acquisition Collector was summarily dismissed without going into the merits of the petitioners challenge to the judgment of the High Court and no question of law was decided by the Court. **(Delhi Development Authority v. Bhola Nath Sharma; AIR 2011 SC 428)**

S. 11 – Doctrine of res judicata – Meaning and importance

The principles of res judicata are of universal application as it is based on two age old principles, namely, „interest reipublicae ut sit finis litium" which means that it is in the interest of the State that there should be an end to litigation and the other principle is „nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause" meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of res judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the question litigated and should forever set the controversy at rest.

This principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of res judicata is not a

technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties. **(M. Nagabhushana v. State of Karnataka & Ors.; AIR 2011 SC 1113)**

S. 11, Expln. IV – Whether principle of constructive res judicata applies to writ petition –Held, "Yes"

In view of authoritative pronouncement of the Constitution Bench of the Court, there can be no doubt that the principles of constructive res judicata, as explained in explanation IV to Section 11 of the CPC, are also applicable to writ petitions. **(M. Nagabhushana v. State of Karnataka & Ors.; AIR 2011 SC 1113)**

S. 24 – Transfer of cases – Transfer of cases cannot be ordered on ground that court where case was pending has no jurisdiction

An order of transfer of a case can be passed where both the Courts, namely, the transferor Court as well as the transferee Court, have jurisdiction to hear the case and the party seeking transfer of the case alleges that the transferee Court would be more convenient because the witnesses are available there or for some other reason it will be convenient for the parties to have the case heard by the transferee Court. There is no question of transfer of a case which has been filed in a Court which has no jurisdiction at all to hear it.

In a case where a party alleges that the Court where the case is pending has no jurisdiction, he should apply to that Court for dismissing it on this ground. There is no question of transfer of such a case. **(Neha Arun Jugadar & Anr. V. Kumari Palak Diwan Ji; AIR 2011 SC 1164)**

S. 47 – Execution of decree – Limitation for objection – No limitation is prescribed for filing objection U/s. 47

The question whether the objections filed by the respondent-judgment debtor were barred by limitation should also not detain by Court, for Court endorse the view taken by the High Court that such objections could not be ignored or rejected on the ground that the same were filed beyond the period of limitation. **(Arun Lal and others v. Union of India and others; AIR 2011 SC 506)**

S. 89 – Alternate Dispute Redressal Mechanisim – Family Disputes, Business disputes should be resolved through mediation/arbitration

In the court‟s opinion, the lawyers should advise their clients to try for mediation for resolving the disputes, especially where relationships, like family relationships, business relationships, are involved, otherwise, the litigation drags on for years and decades often ruining both the parties. **(B.S. Krishna Murthy & Anr. V. B.S. Nagaraj & Ors.; AIR 2011 SC 794)**

S. 100-A – Whether special leave to appeal against interlocutory orders should be maintainable – Held, No

In view of Court, though the judgment of the learned Single Judge is a final judgment, it is in another sense an interlocutory order as it is well settled that an appeal is a continuation of the original proceedings. Since the original order of the learned Additional District Judge was an interlocutory order, hence the appeal against that order and the judgment of learned Single Judge in that sense was also interlocutory.

It is well settled that the Court does not ordinarily interfere under Article 136 of the Constitution with interlocutory orders. **(Mohd. Saud v. Shaikh Mahfooz; AIR 2011 SC 485)**

Ss. 151, 152 – Powers of court to reopening of reference case regarding land acquisition matter – Determination

It is patently obvious that the reference case and the matter of payment of compensation to the appellants became final and binding after the award was passed and the judgment was pronounced by the reference court and further by the High Court and thereafter, no appeal having been filed in the Court. Such a judgment and decree which has become final and binding could not have been reopened by the High Court on the basis of revision applications filed under Section 151 and 152 of CPC. **(Sarup Singh and another v. Union of India and another; AIR 2011 SC 514)**

O. 1, R. 8 – Representation suit – Leave of court – Necessity of

In this case, the plea which was raised and argued vehemently by the learned senior counsel appearing for the appellant was that the suit was bad for non-compliance of the provisions of Order 1, Rule 8 of the CPC. The said submission is also found to be without any merit as apart from being a representative suit, the suit was filed by an aggrieved person whose right to use Public Street of 10 feet width was prejudicially affected. Since affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-compliance of the provisions of Order 1, Rule 8 of the CPC.
(Hari Ram v. Jyoti Prasad & Anr.; AIR 2011 SC 952)

O. 1, R. 10(2) – Necessary party – Who is – Determination of

Two requirements are to be satisfied for determining question as to whether who is a necessary party. These are (1) There must be a right of some relief against such party in respect of controversy involved in the proceedings and (2) No effective decree can be passed in absence of such party. **(Basant Kumar Soni v. Mukund Das Soni and Others; AIR 2011 (NOC) 103 (AP)**

O. 2, Rule 2 – Bar to subsequent suit – When not applicable

In the instant case, the dispute in earlier suit related to the property of Sarvarahkar. Since the plaintiffs filed the suit to declare them as Sarvarahkar even being fully aware with the sale deed

executed by the petitioners, unless they were declared as Sarvarahkar, they had no locus to challenge the sale deed executed by the petitioners being null and void. The plaintiff succeeded in earlier suit and they were declared as Sarvarahkar. The proprietorship of Sarvarahkar of the petitioners was disputed nevertheless the other claimants (respondents) of suit executed sale deed in favour of the petitioners. The Sarvarahkar always keeps the status of Trustee and it is the Deity who is beneficiary of the offerings as well as the property attached thereto, being Trustee, the Sarvarahkar has had no right to transfer the property. After being successful in the suit the plaintiff filed the subsequent suit before the Civil Court for declaration of sale deed as void. Though the earlier dispute was still pending before High Court in the second appeal, but the decree passed by the trial Court as well as the appellate Court has not been interfered with till date, therefore, under the strength of the said decree having been attained the locus to challenge the sale deed, the plaintiffs filed the suit, which cannot be rejected merely on the basis of a technical plea raised by the petitioners. The cause of action of the subsequent suit was the illegal transaction of sale, which is altogether different to the earlier cause of action of earlier suit therefore, the subsequent suit was not barred by Order 2, Rule 2, CPC. **(Rameshwar Singh & Anr. V. District Judge, Faizabad & Ors.; AIR 2011 All 43)**

O. 2, R. 2 – Bar to suit under – Consideration of

Unless the defendant pleads the bar under O. 2, R. 2 and an issue is framed focusing the parties on that bar to suit, obviously the Court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. In the instant case, the defendant did not contend that suit was barred by O. 2, R.2. No issue was framed as to whether the suit was barred by O. 2, R. 2. Therefore dismissal of suit being barred

under O. 2, R. 2 would be illegal. **(Alka Gupta v. Narender Kumar Gupta; AIR 2011 SC 9)**

O. 3, Rr. 1 and 2 – Whether Principal is bound to his attorney before signing compromise petition?

In his order dated 7.6.2002, the learned Subordinate Judge-V, Bhagalpur has held that Dr. Sanjeev Kumar Mishra was only an attorney and he cannot claim any independent capacity in the proceedings. The Court agrees with this view. The principal Pushpa Biswas and Apurva Kumar Biswas have signed the compromise for partition of the property, which in opinion of the court in law amounts to implied revocation of power of attorney in favour of Dr. Sanjeev Kumar Mishra vide illustration to Section 207 of the Indian Contract Act. Pushpa Biswas and Apurva Kumar Biswas cannot be allowed to say that their own act of signing the compromise petition was collusive and fraudulent.

The learned Subordinate Judge-V, Bhagalpur has gone into the evidence in great detail and recorded findings of fact which could not have been interfered with by the High Court in civil revision.

The High Court has observed that defendant Nos. 2 and 2a viz., Pushpa Biswas and Apurva Kumar Biswas should have consulted the power of attorney Dr. Sanjeev Kumar Mishra before signing the compromise petition. This is a strange kind of reasoning. The principal is not bound to consult his attorney before signing a compromise petition. **(Deb Ratan Biswas & Ors. V. Most. Anand Moyi Devi & Ors.; AIR 2011 SC 1653)**

O. 6, R. 17 – Application for amendment moved at stage of hearing of appeal – Rejection of

It is settled law that all amendments which have been sought by the petitioner, do not in any way help the Court in determining the real controversy in dispute and cannot therefore be allowed on the touchstone of legal framework of Order VI Rule 17 CPC.

Admittedly also the amendment application has been moved at the stage of hearing of the appeal and the Court below has come to a conclusion that amendment sought for by the petitioner would not help the Court in deciding the matter and hence has rightly rejected the amendment application. **(Awadh Behari Lal v. Vijay Chandra Gupta & ors., 2011 (3) ALJ 138 (All HC)**

O. 6, R. 17 – Limitation Act, Art. 54 – Delay in seeking amendment of pleadings – Effect of

The appellant wanted to defend his action by referring to two facts (i) there was an acquisition proceeding over the said land under the Land Acquisition Act and (ii) in view of the provisions of the Ceiling Act, the appellant could not have made the prayer for specific performance. The said purported justification of the appellant was not tenable in law since if the alleged statutory bar referred to by the appellant stood in its way to file a suit for specific performance, the same would also be a bar to the suit which it had filed claiming declaration of title and injunction.

The appellant had the cause of action to sue for specific performance in 1991 but he omitted to do so. Having done that, he should not be allowed to sue on that cause of action which he omitted to include when he filed his suit. Its omission to include the relief of specific performance in the suit which it filed when it had cause of action to sue for specific performance would amount relinquishment of that part of its claim. The suit filed by appellant, therefore, would be hit by the provisions of Order 2, Rule 2 of the Civil Procedure Code. Though the appellant. Though the appellant had not subsequently filed a second suit, as to bring his case squarely within the bar of Order 2, Rule 2, but the broad principles of Order 2, Rule 2, which are also based on public policy, would be attracted to the facts of instant case.

The subsequent inclusion of the plea of specific performance by way of amendment would virtually alter the character of the suit,

and raise the pecuniary jurisdiction of Court and the plaint had to be transferred to a different Court. Therefore such a plea when not included in the original suit it could not be included after a period of 11 years having regard to Article 54 of the Limitation Act. Hence plea of specific performance, which is a discretionary relief, cannot be granted to the appellant in instant case. **(Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Maryadit (Regd.) v. Ramesh Chander & Ors.; AIR 2011 SC 41)**

O. 6, R. 17 – Amendment of WS at Appellate stage to incorporate counter claim to seek relief of possession – Validity of

Where the possession of the appellant in respect of the plaint schedule property as against the respondent was long, settled and uninterrupted and appellants had decree of permanent injunction in their favour and defendant respondents at appellate stage sought to incorporate relief of possession by way of counter claim, it was held that the amendment cannot be allowed. Permitting a counter claim at such stage would be to reopen a decree which had been granted in favour of appellants by trial court. The respondents had failed to establish any factual or legal basis for modification/nullifying the decree of the trial court.

There was also wholly untenable delay in filing the application. Generally the counter claim not contained in the original written statement may be refused to be taken on record, especially if issues have already been framed. In the instant case, the counter claim was sought to be introduced at the stage of appeal before the High Court therefore the amendment cannot be allowed. **(Gayathri Women‟s Welfare Association v. Gowramma and Another; AIR 2011 SC 785)**

O. 8, R. 6-A – Counter claim in SLP – Tenability of

In some of the counter affidavits filed in the special leave petitions by the claimants, they have alleged that their special leave petitions (challenging the judgment of the High Court and seeking

higher compensation) were dismissed as barred by time and therefore, they may be permitted to make a counter claim for a higher compensation. Such counter-claims in counter-affidavits in special leave petitions are impermissible and not maintainable and cannot be entertained. **(Land Acquisition Officer-cum-RDO, Chevella Division, Ranga Reddy District v. A. Ramachandra Reddy and others; AIR 2011 SC 662)**

O. 9, R. 13 – Setting aside exparte decree – Expression „sufficient cause" means the cause for which defendant could not be blamed of his absence

In order to determine the application under Order IX, Rule 13 CPC, the test has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the Court with a reasonable defence. Sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application. **(Parimal v. Veena; AIR 2011 SC 1150)**

O. 9, R. 13 – Setting aside exparte decree – Exparte decree liable to be set aside if no reason given as to why summons were served on son of petitioner and not upon petitioner

Respondent No. 3 instituted O.S. No. 301 of 1990 against the petitioner in court of Civil Judge, Hapur, District Ghaziabad for specific performance of agreement for sale of land dated 04.06.1990. The plaint was filed on 11.12.1990. Summons of the suit was served upon the petitioner"s son from his previous wife. According to the petitioner after the death of his first wife he had settled as Delhi and remarried, however his son Prem Singh from his previous wife continued to reside in the village in question where the land in dispute is situate alongwith his maternal grant-parents.

In this case, the suit was decreed ex parte on 04.04.1991. Defendant petitioner filed restoration application on 04.05.1992, which was registered as Misc. Case No. 23 (or 25) of 1992. The restoration application was rejected by the trial court on 24.08.1993. Against the said order, petitioner filed Misc. Appeal No. 171 of 1993, Atar Singh v. Hari Singh, District Judge, Ghaziabad dismissed the appeal on 27.10.1993, hence this writ petition.

Restoration application under Order IX, Rule 13, CPC was accompanied by application for condonation of delay under Section-5, Limitation Act.

Absolutely no reason was given as to why summons of the suit was served upon the son of the petitioner and not upon the petitioner. Under Order V, Rule 12, CPC it is provided that:

> "Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient."

Accordingly, writ petition is allowed. Both the impugned orders are set aside and the restoration application is allowed. **(Atar Singh v. District Judge, Ghaziabad & Ors.; 2011 (1) ALJ 640 (All HC)**

O. 14, R. 1 – Civil Suit cannot be dismissed without trial merely because court feels dissatisfied by conduct of plaintiff

Where the summons have been issued for settlement of issues, and a suit is listed for consideration of a preliminary issue, the Court cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. A suit cannot be short circuited by deciding issues of fact merely on pleading and documents produced without a trial. A suit cannot be dismissed without trial merely because the Court feels dissatisfied

with the conduct of the plaintiff. **(Alka Gupta v. Narender Kumar Gupta; AIR 2011 SC 9)**

Pre, O. 15, R. 1 – Civil suit – To be decided in accordance with law and provisions of CPC, not on whims of court

The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court.

Court has further held that civil suit cannot be dismissed without trial merely because court feels dissatisfied by conduct of plaintiff. **(Alka Gupta v. Narender Kumar Gupta; AIR 2011 SC 9)**

O. 18, R. 4 – Motor Vehicle Rules, 205, 221 – Recording of evidence in claim petition – O.18, R.4 can be applied

In case there is no conflict between the provisions contained in the CPC to the extent of Rule 221 and the Motor Vehicles Act, 1988, then inference may be drawn and the procedure prescribed in the Code of Civil procedure may be made applicable. Since the Rules itself provide that the provisions contained in the Code of Civil Procedure to some extent may be made applicable, the affidavit of witness filed by the claimant while approaching the Tribunal shall not suffer from inadmissibility of evidence. **(New India Assurance Co. Ltd. v. Richa Singh Kattiar, 2011 (3) ALJ 325 (All HC, LB)**

O. 19, R. 3 – Examination in chief – When affidavit in lieu of examination in chief is in accordance with law

Affidavit is a written or printed declaration or statement of facts made voluntarily and confirmed under the affirmation before a person authorized to administer affirmation.

When the affidavit in lieu of chief-examination would go to show that it was solemnly affirmed and sincerely stated on oath and

sworn and signed before the advocate at Hyderabad, the affidavit in lieu of chief examination filed by the election petitioner would be in accordance with law. **(Ajameera Hari Naik v. Smt. Suman Rathod & Ors.; AIR 2011 (NOC) 233 (AP)**

O. 23, R. 1 – Application praying for withdrawal of withdrawal application is maintainable

Rules of procedure are handmaids of justice. S. 151 of the Code of Civil Procedure gives inherent powers to the Court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the Court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is no express bar in filing an application for withdrawal of the withdrawal application.

Accordingly, the application praying for withdrawal of the withdrawal application would be maintainable. **(Rajendra Prasad Gupta v. Prakash Chandra Mishra & Ors.; AIR 2011 SC 1137)**

O. 23, R. 1 – Withdrawal of suit – Permission for

Once application under O. 23, R. 1 was made no one can be permitted to withdraw application for withdrawal of suit even before any order was passed on withdrawal application. But signatures on application if obtained fraudulently, party can be permitted to seek withdrawal of application. **(Abdul Malik & Ors. V. Additional District Judge, Kannauj & Ors.; 2011 (1) ALJ 267 (All HC)**

O. 41, R. 27 – Additional evidence – Situation in which it can be permitted

When an application for reception of additional evidence under Order 41, Rule 27 of CPC is filed by the parties, it is the duty of the High Court to deal with the same on merits.

Thus, if any petition is filed under Order 41, Rule 27 in an appeal, it is incumbent on the part of the appellate Court to consider

at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing in the issues involved. In the light of the separate application filed under Order 41, Rule 27 of CPC for reception of additional evidence by both sides, it is for the High Court to consider and take a decision one way or other as to the applicability of the same and decide the appeal with reference to the said conclusion. **(Malyalam Plantations Ltd. V. State of Kerala; AIR 2011 SC 559)**

O. 41, R. 31 – First Appeal – Duty of appellate court

Order 41, Rule 31 CPC provides for a procedure for deciding the appeal. The law requires substantial compliance of the said provisions. The first appellate Court being the final Court of facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The first appeal is a valuable right and the parties have a right to be heard both on question of law and on facts.

The first appellate Court should not disturb and interfere with the valuable rights of the parties which stood crystallized by the trial Court‟s judgment without opening the whole case for re-hearing both on question of facts and law. Moreso, the appellate Court should not modify the decree of the trial Court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate Court would fall short of considerations expected from the first appellate Court in view of the provisions of Order 41, Rule 31 CPC and such judgment and order would be liable to be set aside. **(Parimal v. Veena; AIR 2011 SC 1150)**

Civil Procedure Code

S. 9 – Jurisdiction of Civil Court – Scope of jurisdiction of Civil Court would not stand ousted by virtue of S. 331 of U.P.Z.A. & L.R. Act if land in dispute is not agriculture.

In view of the finding that the land is non agricultural in nature, the jurisdiction of the civil court does not stand ousted in any way by Section 331 of the Act. Last but not the least the defendant has failed to take objection regarding jurisdiction of the civil court in the court of first instance and when such objection is not permissible to be raised in the

appellate court the very order allowing amendment in the written statement to that effect and framing an issue on it by the appellate court was patently illegal and without jurisdiction. Thus, such an amendment or the framing of issue would not benefit the defendant to contend that the provisions of Section 331 (1-A) of the Act would not be attracted. In any case if the ouster of jurisdiction is pleaded under Section 331 of the Act then it has to be considered in the light of Section 331 (1-A) of the Act and not independently. **(Ram**
Prakash Agrawal v. Rishi Kumar; 2010(6) ALJ 76 (All HC)

S. 9 – Jurisdiction – Safeguards provided by CPC against frivolous suits.

Certain safeguards are built in Civil Procedure Code to prevent and discourage frivolous, speculative and vexatious suits. S. 35 provides for levy of costs. S. 35A provides for levy of compensatory costs in respect of any false or vexatious claim. O. 7, R. 11 provides for rejection plaint, if the plaint does not disclose a cause of action or is barred by any law. O. 14, R. 2 enables the Court to dispose of a suit by hearing any issue of law relating to jurisdiction or bar created by any law, as a preliminary issue. Even if a case has to be decided on all issues, the Court has the inherent power to expedite the trial/hearing in appropriate cases, if it is of the view that either party is abusing the process of Court or that the suit is vexatious. The Court can secure the evidence (examination-in-Chief) of witnesses by way of affidavits and where necessary, appoint a commissioner for recording the cross-examination so that it can dispose of the suit expeditiously. The Court can punish an erring plaintiff adopting delaying tactics, by levying costs under S. 35B or taking action under O. 17, Rules 2 & 3.

S. 95 provide for payment of compensation in a suit where arrest or attachment is effectual or temporary injunction is granted and the suit is found to be instituted without reasonable ground.

O. 25, R. 1 authorises Court to direct plaintiff to give security for payments of all costs incurred by defendant. **(Vinod Seth v. Devinder Bajaj; 2010 AIR SCW 4860)**

S. 11 – Res judicata – Applicability of – Administrative decisions by executive authorities do not bind courts and much less operate as res judicata.

Administrative decisions taken by executive authorities and do not bind courts and much less operate as res judicata. In this case, Chief Engineer did not acted in any judicial or quasi-judicial capacity. Thus, view taken by Chief Engineer in a matter directed to him by Administrative Tribunal that respondents were entitled to particular pay scale is not a decision, as there was no adjudication as such of any lis between parties by Chief Engineer. Hence it cannot operate as res judicata. **(State of West Bengal v. Subhas Kumar Chatterjee & Ors.; AIR 2010 SC 2927)**

S. 11 – Applicability of res-judicata – Filing on question of title recorded in earlier eviction suit would operate as res judicata in subsequent suit for declaration of title and recovery of possess in between same parties.

In the instant case the issue of title was expressly raised by the parties in the earlier eviction suit and it was expressly decided by the eviction Court. The question of title was directly and subsequently in issue between the parties in the earlier suit for eviction. Hence, the finding recorded in favour of the plaintiff in the earlier suit for eviction would operate as res judicata in the subsequent suit for declaration of title and recovery of possession between the parties. **(Mohd. Nooman v. Mohd. Jabed Alam; 2010 AIR SCW 5979)**

S. 11 – Applicability of Res-judicata – Administrative decisions by Executive Authorities do not operate as res-judicata.

Chief Engineer not acting in any judicial or quasi-judicial capacity. Thus, view taken by Chief Engineer in a matter directed to him by Administrative Tribunal that respondents were entitled to particular pay scale is not a decision, as there was no adjudication as

such of any lis between parties by Chief Engineer – Cannot operate as res judicata. **(State of West Bengal v. Subhas Kumar Chatterjee;**
AIR 2010 SC 2927)

S. 24 – Transfer of case – Consideration of

In this case, transfer of case has sought on ground that orderly of Civil Judge had taken bribe in front of presiding Officer and thus there was no hope of any justice from him. But history of case showed that applicant was in habit of filings such transfer applications on frivolous ground. Beside it application showed that allegations were filed on imaginary, concocted and frivolous grounds to scandalize Court. So, transfer application liable to be rejected. **(Akhtar v.**
Matura & Ors.; 2010(6) ALJ (DOC) 42 (All HC)

S. 151 – Setting aside of compromise decree – Maintainability of – Application U/s. 151 for setting aside compromise decree would be maintainable.

If compromise decree obtained by playing fraud upon Court then application U/s. 151 for setting aside compromise decree would be maintainable. **(Ashok Kumar Gupta & Anr. V. Xth Addl.**
District Judge, Muzaffarnagar & Ors.; 2010(6) ALJ (DOC) 50 (All) (DB)

O. 1, R. 10 – Necessary or proper party – Who is in suit for specific performance of contract

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 disputes 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. **(Mumbai International Airport Pvt. Ltd. V. Regency Convention Centre & Hotels Pvt. Ltd. & Ors.; AIR 2010 SC 3109)**

O. 1, R. 10(2) – Provision gives discretion to court for addition/deletion of 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. **(Mumbai International Airport Pvt. Ltd. V. Regency Convention Centre & Hotels Pvt. Ltd. & Ors.; AIR 2010 SC 3109)**

O. 9, R. 7 – Application to recall ex parte proceedings – Ground for

It is very well settled that the application under O. IX, Rule, 7 CPC can be moved at any stage till such time the arguments have not been heard.

It is also well settled that a litigant is not liable to be penalized for the mistake committed by his counsel.

Order IX, Rule, 7 CPC only requires the defendant to assign good cause for his previous non-appearance. In the present case, the defendant-respondent did show good cause for his previous non-appearance that his counsel did not inform him about the proceedings.

In view of the above facts and circumstances, no illegality has been committed by the two courts below in allowing the application filed by the defendant-respondents and the impugned orders do not call for any interference. **(Aneja Hire Purchase Pvt. Ltd., Bareilly v.**

Addl. Distt. Judge, Court No. 7, Bareilly & Ors.; 2010 (6) ALJ 80 (All HC)

O. 9, R. 13 – Application for setting aside ex parte decree for not accompanied by requisite deposit of amount due under decree – Effect of

The application for setting aside ex parte decree was not accompanied by requisite deposit of the amount due under the decree. Even after the order was passed by the court to deposit 50% of the decretal amount in cash and furnish security for rest of 50%, the order was not carried out in as much as neither half of the entire decretal amount was deposited nor security was furnished for the remaining half. It was only when the plaintiff-landlord pointed out, the applicant moved an application for furnishing security for the outstanding amount on the pretext that the entire amount could not be deposited due to miscalculation and mistake committed by the counsel.

The decree being very much clear, there could not be any possibility of any calculation mistake. Apart from above, it was the duty of the applicant to have calculated the amount as per decree. The applicant failed to do so. It appears that the applicant deliberately did not deposit the entire amount and it was only when an objection was raised by the plaintiff-landlord, an application was filed by the tenant to grant time which cannot be termed to be bona fide. Hon‟ble single
Judge of this Court in the case of Jai Prakash Pandey v. Baboo Lal Jaiswal; 2010(1) ALJ 455, in almost identical facts and circumstances, has held that such an application to be not maintainable. **(Dinesh Goyal v. Chimman Lal Agarwal; 2010(6)
ALJ 47 (All HC)**

O. 9, R. 13 – Application for setting aside exparte decree – Limitation – Determination of

Out of Court settlement between parties that plaintiff would withdraw suit. Defendants did not attend further proceedings in view of such settlement. Plaintiff however, pursued matter and ex parte decree was passed, plea by defendants that they came to know about ex parte decree when they were served with execution notice – Application for setting aside ex parte decree filed within 30 days from knowledge of passing of decree cannot be dismissed by taking hyper technical view that no separate application was filed under S. 5 of Limitation Act. Art. 123 of Limitation Act also cannot be invoked.

(Bhagmal v. Kunwar Lal; AIR 2010 SC 2991)

O. 22, R. 3 – When abatement of suit/appeal as whole – Principle regarding stated

Whether non-substitution of LRs of the defendants/respondents would abate the suit appeal in toto or only qua the deceased defendants/respondents, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interest inter se, the appeal may abate only qua the deceased defendant respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject-matter in the same suit. Thus, whether the judgment/decree passed in the proceedings vis-à-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test. Thus, where in an appeal against decree declaring that plaintiff were co-owners of suit property along with defendants/appellants and in joint possession thereof, one of respondents a proforma defendant died and his LRs were not substituted the appeal would stand abated in toto. Every co-owner has a right to possession and enjoyment of each and every part of the property equal to that of the other co-owner. Therefore, in theory, every co-owner has an interested in every infinitesimal portion of the subject-matter, each has a right irrespective of the quantity of its interest, to be in possession of every

part and parcel of the property jointly with others. A co-owner of property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place. The deceased respondent though a proforma defendant in suit had a share in joint suit property. Possibility of contradictory decrees, one in favour of deceased respondent and other in favour of appellants getting passed if decree under appeal is reversed cannot be ruled out. **(Budh Ram v. Bansi; 2010 AIR SCW 5071)**

O. 22, R. 4 – Abatement of appeal consideration of

Fact regarding death of respondent brought to notice of appellant within reasonable time. Yet no application was submitted by appellant

within period of limitation to substitute heirs and legal representative of respondent. As such period of limitation having been expired appeal had already stood abated. So, appeal liable to be dismissed. **(Smt. Krishna Dular and Ors. V. Kanhaiya Lal Verma & Ors.; 2010(6) ALJ (DOC) 56 (All)(DB)**

O. 22, R. 9 – Limitation Act, S. 5 – Condonation for delay of over two years for setting aside abatement application would not be liable to condoned.

It is clear from the bare reading of the application that the applicants were totally callous about pursuing their appeal. They have acted irresponsibly and even with negligence. Besides this, they have not approached the Court with clean hands. The applicant, who seeks aid of the Court for exercising its discretionary power for condoning the delay, is expected to state correct facts and not state lies before the Court. Approaching the Court with unclean hands itself, is a ground for rejection of such application.

The court feels that it would be useful to make a reference to the judgment of this Court in Perumon Bhagvathy Devaswom; AIR 2009 SC (Supp) 886. In this case, the Court, after discussing a number of judgments of the court as well as that of the High Courts, enunciated the principles which need to be kept in mind while dealing with applications filed under the provisions of Order 22, CPC along with an application under Section 5, Limitation Act for condonation of delay in filing the application for bringing the legal representatives on record. In paragraph 13 of the judgement, the Court held as under:-

"13(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words „sufficient cause" in Section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant."

(d) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decided the matter on merits. The courts tend to set

aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(e) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(f) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer‟s lapses more leniently than applications relating to litigant‟s lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in re-filing the appeal after rectification of defects.

(v) Want of "diligence" or "inaction" can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

On an analysis of the above principles, Court now reverts to the merits of the application in hand. As already noticed, except for a vague averment that the legal representatives were not aware of the pendency of the appeal before this Court, there is no other justifiable reason stated in the one page application. The court has already held that the application does not contain correct and true facts. Thus, want of bona fides is imputable to the applicant. There is no reason or sufficient cause shown as to what steps were taken during this period and why immediate steps were not taken by the applicant, even after they admittedly came to know of the pendency of the appeal before the Court. It is the abnormal conduct on the part of the applicants.

The cumulative effect of all these circumstances is that the applicants have miserably failed in showing any „sufficient cause‟ for condonation of delay of 778 days in filing the application in question.

(Balwant Singh (Dead) v. Jagdish Singh & Ors.; AIR 2010 SC 3043)

O. 39, Rr. 1, 2 and O. 43, R. 1 – Temporary injunction – Appeal – Interference with discretion exercised by Trial not to be done only

because different opinion is possible.

Once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the court and is supported by cogent reasons, the appellate court will be loath to interfere simply because on a denovo consideration of the matter it is possible for the appellate court to

form a different opinion on the issues of prima facie case, balance of convenience irreparable injury and equity. Unless the appellate Court comes to the conclusion that the discretion exercised by trial court in refusing to entertain the prayer for temporary injunction is vitiated by an error apparent or perversity and manifest injustice has been done, there will be no warrant for exercise of power. **(Skyline Education institute (Pvt.) Ltd. V. S.L. Vaswani & Anr.; AIR 2010 SC 3221)**

Civil Procedure Code

S. 11 – Bar of res-judicata – When not applicable.

In the case at hand the judgment in support of the decree passed in original suit No. 102 of 1984 ex facie does not in any manner decides any issue on merits. In the said suit the written statement on behalf of both the defendants i.e. Mahesh and Smt. Sugiya were filed separately disputing the claim of Smt. Ram Sakhi for the cancellation of the sale deed. However, the suit proceeded ex parte and was decreed by a totally non-speaking and unreasoned judgment.

A perusal of the aforesaid relevant portion of the judgment in unequivocal terms demonstrates that the same has been passed on account of the absence of the defendants which led the Court to record satisfaction with the plaint case. However, it does not even record the statements of the fact, the defence set-up in written statement, and the evidence adduced in support thereof as also the reasoning for arriving at the conclusion. Therefore, in nutshell the aforesaid judgment is not a decision within the meaning of Section 11, CPC and does not even conform to the definition of the judgment as contained under Section 2(9) read with Order XX, Rule 4(2) of the CPC. Accordingly, it cannot operate as a bar of res-judicata. **(Nitin Kumar & Ors. V. Rajendra Kumar; 2009 (3) ALJ 423)**

S. 11 – Res-judicata – Applicability of.

The application of the plaintiff rejecting the application for

attachment of the property before the judgment, was an interlocutory order, which was passed during the pendency of the suit and would not operate as res-judicata in so far as the execution of the decree is concerned.

The principle of res-judicata is based on the need of giving finality to judicial decisions and the principle of res-judicata is that the same matter should not be judged again and again. It primarily applies to the past litigation and future litigation on the same issue. In the present case, an interlocutory application for attachment before the judgment is not a decision which brings finality between the parties, which would operate as res-judicata after the decree is passed by the trial court. **(Mewa Lal v. Kedar Nath & Ors.; 2009(2) ALJ 575)**

◆ **S. 47 – Objection under – Rejected being time barred in execution proceeding sustainability of – No limitation is prescribed for an objection under S. 47 CPC.**

Court in Nar Singh Das clearly held that no limitation in provided under section 47 of the Code of Civil Procedure for filing objections and the relevant portion of the judgment is quoted below:-

> ―It was also urged on behalf of the decree holder that the objection was barred by limitation. Reliance in support was placed upon Gangadhar Martant v. Jagmohandas Varjivanda; AIR 1931 Bom 446, in which Article 181 of the Limitation Act was held applicable to an objection under section 47, CPC. With all respect it is difficult to hold that an objection under section 47, CPC can fall within the purview of the Article 181 of the Limitation Act. It was observed in AIR 1935 All 1016 that no limitation is prescribed for an objection under section
> 47, CPC. The objection was therefore not barred by limitation.‖

In view of the aforesaid decision, the Judge, Small Causes Courts was not justified in dismissing the objections filed by the petitioner under section 47 of the Code of Civil Procedure as being barred by limitation. **(Pradeep Kumar Awasthi v. Uma Kant Tripathi; 2009(106) RD 805)**

◆ **S. 100, 2(9) & O.XLI and XLII – Second Appeal – Maintainability of – Second appeal against order rejecting application U/s. 5 of Limitation Act for condonation of delay in filing first appeal maintainable.**

The Apex Court in the case of Shyam Sunder Sharma v. Pannalal Jaiswal and others; AIR 2005 SC 226: 2005 (1) AWC 410 (SC), wherein the Hon'ble Apex Court held as under:

―The question was considered in extenso by a Full Bench of the Kerala High Court in Thambi v. Mathew; 1987(2) KLT 848. Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3A of Order XLI, introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order XLI of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect is confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed alongwith an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.

In view of recent decision of the Apex Court in Shyam Sunder Sharma's case, now undisputedly, the rejection of an application for condoning the delay in fling the appeal is a decision in the appeal. In view of that, the objection raised by stamp reporter is overruled and the second appeal is held to be maintainable. **(Smt. Prem Wati and another v. Smt. Munni Devi alias Minakshi and another; 2009(2) AWC 1099)**

◈ **O. V, R. 2 – Envelope containing summons served on defendant was not accompanied by copy of plaint would not amount to service of summons U/O. V, R. 2.**

In Shafiqur Rahman Khan v. IInd Additional District Judge, Rampur and others; AIR 1983 Alld. 12, a Division Bench of the Hon'ble Court has examined the provisions of Order 5 Rule 2 of the CPC and held as under:-

―This provision makes it incumbent and mandatory for every summons to be accompanied by a copy of the plaint. Then a statute uses the word ―shall‖ prima facie it is mandatory. The word ―shall‖ raise a presumption that the particular provision is imperative. In ordinary parlance, the term ―shall‖ is considered as a word of command and one which always or which must be given a compulsory meaning. It has a peremptory meaning and it is generally imperative or mandatory. It has the invariably significance of excluding the idea of discretion, and has the significance of operating to impose a duty which must be discharged. Applying the aforesaid rule of construction, interpreting O. V. R. 2 of the Civil P.C., it appears to us that the word ―shall‖ has to be construed imperatively and failure to be accompanied by a copy of the plaint would not amount to service of summons as required by O.V, R. 2 CPC.‖

The Court held that the envelope which is not accompanied by a copy of the plaint would not amount to service of the summons as required under O. 5, R. 2 of the CPC. **(Chauthi Ram v. Balli & Ors.; 2009(3) ALJ 144)**

◆ **O.6, R. 17 Proviso – Amendment of pleading – Bar after trial has commences.**

It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed.

However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court‘s jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint. **(Vidyabai & Ors. v. Padmalatha & Anr.; AIR 2009 SC 1433)**

◆ **O. VI, R. 17 – Amendment of written statement – Power to allow amendment to be liberally exercised.**

It is useful to refer to the relevant provisions of CPC. Order VI, Rule 17 reads thus:

> **—Amendment of Pleadings.-** The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> 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.‖

This rule was omitted by the Code of Civil Procedure (Amendment) Act, 1999. However, before the enforcement of the Code of Civil Procedure (Amendment) Act, 1999, the original rule was substituted and restored with an additional proviso. The proviso limits the power to allow amendment after the commencement of trial but grants discretion to the Court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment.

With a view to shorten the litigation and speed up the trial of cases Rule 17 was omitted by amending Act 46 of 1999. This rule had been on the statute for ages and there was hardly a suit or proceeding where this provision had not been used. That was the reason it evoked much controversy loading to protest all over the country. Thereafter, the rule was restored in its original form by Amending Act 22 of 2002 with a rider in the shape of the proviso limiting the power of

amendment to some extent. The new proviso lays down that no application for amendment shall be allowed after the commencement of trial, 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. But whether a party has acted with due diligence or not would depend upon the facts and circumstances of each case. This would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in Courts to deal with the unforeseen situations whenever they arise. **(Chander Kanta Bansal v. Rajinder Singh Anand; 2009(106) RD 763)**

◆ **O. VI, Rule 17, Proviso – Reasons for adding proviso – To curtail delay and expedite hearing of cases.**

The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the others case. It also helps in checking the delays in filing the applications. Once the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea; it is for the Court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases. **(Chander Kanta Bansal v. Rajinder Singh Anand; 2009(106) RD 763)**

◆ **O. VIII, R.1 – Provision in O. VIII, R.1 is directory even after 2002 amendment – Time for filing WS can be extended on sufficient cause shown.**

The Supreme Court in a large number of decisions in Salem Advocate Bar Association, Tamilnadu v. Union of India; AIR 2005 SC 3353: 2005 (3) AWC 2996 (SC): Kailash v. Nanhku and others; (2005) 4 SCC 480: 2005(2) AWC 1490 (SC): Rani Kusum (Smt.) v. Kanchan Devi (Smt.) and others; (2005) 6 SCC 705: 2005 (4) AWC 3861G and Shaikh Salim Haji Abdul Khayum Sab v. Kumar and

others; AIR 2006 SC 396: 2006(1) AWC 529 (SC), has held that even after the amendment of the provisions of O. VIII, R.1, pursuant to the Amendment Act of 2002, the provision of the Order VIII, R.1 is still directory in nature and is not mandatory and that time could be extended on sufficient cause being shown. **(Somaroo v. Smt. Prakriti Acharya and others; 2009(2) AWC 1098)**

◆ **O. IX, R. 9 – Restoration Of petition dismissed for default – "Sufficient" – Petitioner had engaged two counsels, one could not appear due to illness and other was elevated to Bench – Cause shown for non-appearance is sufficient – Refusal of restoration of petition was improper.**

The appellant had engaged the services of two learned counsels. Unfortunately for him, one was elevated to the bench and other was suffering with physical ailment. All this information was forthcoming in the application filed for restoration. The High Court has not appreciated these facts. In the opinion of the Court whether the applicant has made out sufficient cause or not, in the application filed, the court is required to look at all the facts pleaded in the application. No doubt, the consideration of the existence of sufficient cause is the discretionary power with the court, but such discretion has to be exercised on sound principles and not on mere technicalities. The approach of the court in such matters should be to advance the cause of justice and not the cause of technicalities. A case as far as possible should be decided on merits and the party should not be deprived to get the case examined on the merits. **(Raj Kishore Pandey v. State of U.P. & Ors.; 2009(2) ALJ 541)**

◆ **O. IX, R. 13 – Exparte decree – Not challenged before superior court – Restoration application filed after a lapse of 3 years without filing any delay condonation application – Effect of.**

In the present case, judgment and decree dated 10.9.1996 has not been challenged by the petitioner on merits before the Superior Court, but only preferred restoration application under Order IX, Rule 13 of CPC, that too after a lapse of 3 years without filing any condonation application. The Court cannot look into the merits of

judgment and decree dated 10.9.1996 passed against the petitioner in a proceedings arising out of the rejection of restoration application filed under O. IX, Rule 13 of CPC. The scope of the writ petition is only to see whether the petitioner was prevented by sufficient cause form appearing when the suit was called for hearing. Over and above, in the present case neither the petitioner has filed condonation application under section 5 of the Limitation Act, nor assigned sufficient cause for not appearing when the suit was called for hearing. The petitioner, but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiffs claim.

(Noor Mohammad and Others v. 1st Addl. District Judge, Rae Bareli and Others; 2009(106) RD 816)

O. XIII, R. 3 – Documentary evidence – Admissibility when not in dispute and if same is marked as exhibit, prompt objection must be taken and judicially determined.

The objection relating to proof of document should be taken when the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not be admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. This proposition is rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would enable the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object become fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility there and then; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection

raised by the opposite party, is available to the party leading the evidence. Failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. If the objection to the proof of document is not decided and the document is taken on record giving tentative exhibit, then the right of the cross-examiner is seriously prejudiced. **(Hemendra Rasiklal Ghia v. Subodh Mody.; 2009(3) ALJ 69)**

Civil Procedure Code

O. 11, Rule 2 – Scope of

In Shiv Kumar Sharma v. Santosh Kumari; 2007(8) SCC 600, when the Court observed:

"If the respondent intended to claim damages and/or mesne profit, in view of Order II, Rule 2 of the Code itself, he could have done so, but he chose not to do so. For one reason or the other, he, therefore, had full knowledge about his right. Having omitted to make any claim for damages, in our opinion, the plaintiff cannot be permitted to get the same indirectly.

Law in this behalf is absolutely clear. What cannot be done directly cannot be done indirectly." **(Dadu Dayalu Mahasabhai, Jaipur (Trust) v. Mahant Ram Niwas; 2009(106) RD 493 (SC)**

O. III, R. 4(2) – Recall of order – Nonprinting of name of subsequent counsel in cause list – Itself would not be ground to recall judgment and order passed on merit.

When the party to the proceedings have chosen to engage two counsel without terminating the authority of the earlier counsel and the name of any of them is duly printed and no one attends the Court, it is obligatory for the party to give sufficient explanation for the absence of the both. The non-

printing of the name of the subsequent counsel itself would not be a sufficient ground to recall the judgment and order passed on merits. **(Smt. Krishna Kumari and Another v. Brijesh Kumar Gupta and Others; 2009(1) AWC 419)**

O. III, R. 4(2) – Appointment of counsel – Appointment of counsel shall be in force until determined with leave of court.

Order III, Rule 4(2), CPC specifically provides that every appointment of the Counsel by party shall be deemed to be in force until determined with the leave of the Court. A Division Bench of this Court in Bijli Cotton Mills (P) Ltd. V. M/s. Chhagenmal Bestimal and Others (AIR 1982 Alld 183), while considering the above provision laid down that the authority of the Counsel once engaged can be terminated by the client but this cannot be done orally and must be done in writing with the permission of the Court in the manner laid down by Rule 4(2) of Order III, CPC. **(Smt. Krishna Kumari and Another v. Brijesh Kumar Gupta and Others; 2009(106) RD 332)**

O. V, R. 2 & O. IX, R. 13 – Exparte Decree – When can be set aside.

Court holds that the service could not be held to be sufficient under Order V, Rule 2 of the CPC Since the petitioner was not served, the ex-parte decree was liable to be set aside and his application under Order IX, Rule 13 of the CPC was liable to be allowed. **(Chauthi Ram v. Balli and others; 2009(106) RD 331)**

O. V, R. 2 – Service of Summons – By refusal not accompanied by a copy by plaint is not a proper service in the eyes of law.

The Court finds that the service of the summons by refusal is not a proper service in the eyes of law as required under Order V, Rule 2 of the CPC. The order sheet of the Court below indicates that the envelope containing the plaint and summons came back with the endorsement of refusal by the petitioner and this endorsement has been treated to be sufficient service against the petitioner, but a striking fact has been ignored by the Trial Court, namely, that the Trial Court itself opened the envelope which did not contain the copy of the plaint or the summons and that a blank envelope was sent.

The Court held that the envelope which is not accompanied by a copy of the plaint would not amount to service of the summons as required under

Order V, Rule 2 of the CPC. **(Chauthi Ram v. Balli and Others; 2009(106) RD 331)**

◆ O. VI, R. 17 – Amendment can be made at any stage of the proceeding for sufficient cause to be shown.

The Supreme Court, in a large number of decisions, has held that the amendment can be made at any stage of the proceeding for sufficient cause to be shown and that an amendment could also be allowed even after the suit is decided in an appeal.

In the present case, the Court finds that the plaintiff sought to implead the son as plaintiff No. 2 in order to remove the lacuna, if any, since the defendant had raised a plea that the person injured has not been impleaded. The Revisional Court was justified in impleading the son of the plaintiff as the plaintiff No. 2 since a formal defect, if any, was only being removed.
(Dr. P.K. Pandey v. Atul Tiwari (Alld. HC); 2009 (106) RD 328)

◆ O. VII, R. 11 – Exercise of power under – Plaint could be rejected only upon failure to remove the defect in plaint.

Order VII, Rule 11 of the Code of Civil Procedure provides that the plaint would be rejected if 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, failed to do so. It clearly provides that if an objection with regard to undervaluation is taken by the defendant and the Court finds that the suit is undervalued, it cannot reject the plaint straightaway, but permit the plaintiff to rectify the defect and only upon its failure to do so that the Court would proceed to reject the plaint. **(Smt. Hiramani Devi and Another v. Sanjay Singh; 2009(106) RD 267 (Alld. H.C.)**

◆ O. VII, R. 11 – Institution of suit – Court cannot prevent anyone from instituting a suit when his authority is apparently satisfactory.

By showing such provision and relying upon the persuasive value of a Single Bench judgment of Delhi High Court in M/s. Nibro Limited v. National Insurance Co. Ltd., AIR 1991 Del 25, he stated that this provision only authorizes a person to sign and verify the pleadings on behalf of the corporation but does not authorize to institute suit on behalf of the corporation. He said that unless a power to institute a suit is specifically conferred on a particular Director, he has no authority to institute a suit on behalf of the company. Needless to say that such a power can be conferred by the Board of Directors only by passing a resolution in this regard. The

question of authority to institute a suit on behalf of the company is not a technical matter. It has for reaching effects. It often affects policy and finances of the company. Therefore, there is no wrong on the part of the Court below in dismissing the suits under Order VII, Rule 11 of the CPC, which the Court below is otherwise competent to pass when found from the statement in the plaint that the same is barred by any law. **(Bharat Petroleum Corporation Ltd. v. Amar Autos and Others; 2009(106) RD 511)**

O. 8, R. 1 – Written statements – Time of file – Consideration of.

Order 8 Rule 1 of the Code of Civil Procedure reads thus:

"**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.

Although in view of the terminologies used therein the period of 90 days prescribed for filing written statement appears to be a mandatory provision, the court upon taking into consideration the fact that in a given case the defendants may face extreme hardship in not being able to defend the suit only because he had not filed written statement within a period of 90 days, opined that the said provision was directory in nature. However, while so holding the court in no uncertain terms stated that defendants may be permitted to file written statement after expiry of period of 90 days only on exceptional situation.

The matter was yet again considered by a three-judge Bench of the court in R.N. Jadi & Brothers and Ors. v. Subhashchandra; (2007) 6 SCC 420. P.K. Balasubramanyan J., in his concurring judgment, stated the law thus:

"It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knockouts. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered.

A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasize that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional case, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in court.

In view of the authoritative pronouncements of the court, the court is of the opinion that the High Court should not have allowed the writ petition filed by the respondent, particularly, when both the learned trial Judge as also the Revisional Court had assigned sufficient and cogent reasons in support of their orders. **(Mohammed Yusuf v. Faij Mohammad & Ors.; 2009(2) ALJ 185 (All HC)**

O. VIII, R. 1 – Written statement – To be filed within 90 days from the date of service – Nature of provision – Directory being procedural.

The provision of Order VIII, Rule 1 of the CPC, stipulates that the written statement should be filed within 90 days from the date of service.

The Supreme Court, however has held in the case of Ram Kusum (Smt.) v. Kanchan Devi (Smt.) and Others; 2005 (33) AIC 85 (SC) = 2005 (99) RD 616 (SC), Kailash v. Nanku and Others; AIR 2005 (4) SCC 480 = 2005 (29) AIC 95 (SC), Shaikh Salim Haji Abdul Khaymsab v. Kumar and Others; 2006 (62) ALR 316 (SC) = 2006 (37) AIC 937 (SC) = AIR 2006 SC 396, and Salem Advocate Bar Association Tamil Nadu v. Union of India; AIR 2005 SC 3353 = 2005 (34) AIC 249 (SC), that the provision of Order VIII, Rule 1 of the CPC is directory in nature, being procedural and is not mandatory and that the Trial Court can extend the time for filing the written statement on sufficient cause being shown. The Supreme Court also observed that observance of the time schedule should be the rule and departure from it can only be made on satisfactory reasons to be recorded. **(Murli Manohar v.**

U.P. Sugar Company Ltd., Servahi through Deputy General Manager; 2009(106) RD 326)

O.XXII, R. 4(4) – Public Premises (Eviction of unauthorized occupants) Act – Appeal against eviction – Substitution – Though no prohibition against impleading them – Substitution application allowed subject to certain condition.

Firstly CPC does not apply to proceedings under PP Act. Secondly, even if the principle of Order XXII, Rule 4(4) applies, still by virtue of the said provision, it is not essential to implead legal representatives of the party, who has not filed written statement, however, there is no prohibition against impleading them.

According, writ petition is allowed. Impugned order is set aside. Substitution application of petitioner filed before lower appellate court seeking substitution of sons of late Abdul Rajjak as respondents is allowed subject to.

(Abdul Gaffar v. VIIIth Additional District Judge, Kanpur Nagar and Others; 2009(1) AWC 66)

O. XXXIX, Rules 1 & 2 – Wakf Act, S. 83(2) – Temporary injunction – Dispute as to management of Wakf – Jurisdiction of Wakf Tribunal – Determination of.

The expression „other matter relating to a wakf or wakf property‟ is very comprehensive and is of wide amplitude which may embrace in its sweep any matter relating to the management of *wakf* and *wakf* property, therefore, the appointment of *mutawalli* or Committee for management of the wakf and wakf property, in my considered opinion, would fall within the ambit of expression „other matter relating to a *wakf* or *wakf* property‟ and can be decided by the Wakf Tribunals. This view also finds support from the decisions of the Court in *Najma Khatoon v. U.P. Sunni Central Board of Wakf and Others*; 2003(21) LCD 266, wherein it has been held that Tribunal can adjudicate any dispute, question or other matter relating to wakf or wakf property under the Act and another Division Bench of the Court in *Wakf Dargah Shah Mohd. And Others v. U.P. Sunni, Central Board of Wakf, Lucknow and Others; 2003(52) ALR 571: 2003(5) AWC3469*, has held that the Wakf Tribunal has jurisdiction to entertain the case, even if no order is passed under the Wakf Act, 1995 as the scope of Section 83 is very wide, the Court has held that the Wakf Tribunal has power to grant interim order also.

(Zaheer Ahmad v. Waqf No. 12, Hauz Wali Masjid, Sarwat Gate, Muzaffar Nagar & others; 2009(1) AWC 483)

O. XLI, R. 5 – Order holding will null and void passed by trial court – Challenged in appeal – Appeal admitted – Order impugned in appeal has serious civil consequences must be suspended.

In Mool Chand Yadav and another v. Raza Buland Sugar Co. Ltd. Rampur and Others; 1983 (9) ALR 403 (SC), the Supreme Court held that where orders are challenged in appeal which orders have serious civil consequences, the judicial approach required that during the pendency of the appeal, the operation of the order should be suspended more so when the appeal had been admitted. **(Bhagwan Shankar Bajpayee v. District Judge, Kanpur Nagar and Others; 2009 (106) RD 503)**

(i) Res-judicata – Applicability of Order rejecting application for abetment before judgment would not operate as res-judicata.

The application of the plaintiff rejecting the application for attachment of the property before the judgment, was an interlocutory order, which was passed during the pendency of the suit and would not operate as res judicata in so far as the execution of the decree is concerned. **(Mewa Lal v. Kedarnath and others; 2009(106) RD 330)**

(ii) Res-judicata – Principle of – Explained.

The principle of res-judicata is based on the need of giving finality to judicial decisions and the principle of res-judicata is that the same matter should not be judged again and again. It primarily applies to the past litigation and future litigation on the same issue. In the present case, an interlocutory application for attachment before the judgment is not a decision which brings finality between the parties, which would operate as res judicata after the decree is passed by the Trial Court. **(Mewa Lal v. Kedarnath and others; 2009(106) RD 330)**

Practice and Procedure – A judgment and decree could be set aside on a limited ground namely on the ground of fraud or collusion.

A judgment or a decree could be set aside on a limited ground, namely, on the ground of fraud or collusion. If a judgment or a decree has been obtained on account of fraud or collusion, a suit for a declaration could be filed. **(Kedar Nath and others v. Fulena and others; 2009(106) RD 269)**

Practice and Procedure – No relief can be granted in absence of pleadings, issues and proof.

It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-jointer of causes of action or parties etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the Court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of Rs. One lakh, the Court cannot grant a decree for Rs. Ten lakhs. In a suit for recovery possession of property „A", court cannot grant possession of property „B". IN a suit praying for permanent injunction, court grants a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings prayer, court fee paid, evidence led in, etc. **(Bachhaj Nahar**
v. Nilima Mandal and Others; 2009(1) AWC 706 (SC)

S. 2(9) – Expression, "Decree" explained and judgment

In order that decision of a Court should become a decree there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. For that purpose the operative portion of the judgment dated 29.3.2008 passed in Appeal No. 8 of 1976 is required to be looked into which is reproduced below:

^^pwWfd m0iz0 tksr pdcUnh vf/kfu;e dh /kkjk&5¼2½ ds vUrxZr ;g vihy mi'kfer gks pqdh gS bl dkj.k vihy esa fufgr vU; foUnqvksa ijxq.k&nks"k ds vk/kkj ij fopkj fd;s tkus dh dksbZ vko';drk ugha gSA

vkns'k

orZeku vihy mRrj izns'k tksr pdcUnh vf/kfu;e dh /kkjk&5¼2½ ds vUrxZr

iz'kfer gks pqdh gS blfy;s nkf[ky nQ~rj dh tk;sA**

From the bare perusal of the meaning of the judgment as contained under section 2(9) of the CPC and Order XLI Rule 32 of the same Code, it transpires that judgment may be for confirming, varying or reversing the decree from which the appeal is preferred. Otherwise also the judgment must contain the pleadings of the parties, evidence led and the conclusion drawn thereon. **(Mahendra Dhar Dubey (Dead) Through LRs and others v. Prashu Ram Pandey and others; 2009(106) RD 262)**

◈ **S. 11 – Res-judicata – To constitute – essential conditions for – To be satisfied.**

In Sheodan Singh v. Daryao Kunwar; 1966 (4) SCR 300, the Court laid down the ingredients of section 11 of the Code of Civil Procedure stating:

"A plain reading of section 11 shows that to constitute a matter res judicata, the following conditions must be satisfied, namely-

(v)the matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit;

(vi)the former suit must have been a suit between the same parties or between parties under whom they or any of them claim;

The parties must have litigated under the same title in the former suit;

The Court which decided the former suit must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and

The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit. Further Explanation 1 shows that it is not the date on which the suit is filed that matters but the date on which the suit is decided, so that even if a suit was filed later, it will be a former suit if it has been decided earlier, in order therefore, that the decision in the earlier two appeals dismissed by the High Court operates as res judicata it will have to be seen whether all the five conditions mentioned above have been satisfied. **(Dadu Dayalu Mahasabhai, Jaipur (Trust) v. Mahant Ram Niwas; 2009(106) RD 493 (SC)**

◈ **S. 11 – Res-judicata – Order passed without jurisdiction is nullity – It is non est in eye of law – Principle of res-judicata will not apply in such cases.**

An order passed without jurisdiction would be a nullity. It will be a

coram non judice. It is non est in the eye of law. Principles of res judicata would not apply to such cases. **(Chandrabhai K. Bhoir and Others v. Krishna Arjun Bhoir and Others; 2009(1) AWC 715 (SC)**

◆ **S. 11 – Res-judicata – Dismissal of civil suit filed by workman for declaration of termination null and void would operate as res-judicata for workman to approach labour court.**

Where a dispute relates to enforcement of a right under the industrial law or an obligation created therein, the jurisdiction of the civil court is barred. However, if it is an industrial dispute arising out of a right or liability under the general or common law, the suitor can choose the forum either under the industrial law or before the civil court. The aforesaid proposition laid down by the Apex Court in the case of Premier Automobiles Ltd. V. K.S. Wadke and others; AIR 1975 SC 2238, holds the field till date. In the case at hand the respondent had chosen the remedy of a civil suit seeking a declaration that his services were deemed confirmed on expiry of the probation and he obtained a judgment on merits which was upheld in appeal, cannot be now allowed to turn around and say that the said judgment was void. From the judgment, it is apparent that he was seeking a declaration under the common law obligation and having once elected to approach the civil court he had already exercised his option and, therefore, could not have approached the labour court as the decision thereon would operate as res-judicata. **(Indian Institute of Technology, Kalyanpur, Kanpur v. Presiding Officer, Labour Court-II and others; 2009(1) AWC 206)**

◆ **S. 24 – Transfer of Cases – Ground for transfer of matrimonial suit for divorce – Temporary residing place of parties will not give jurisdiction to the court of that place to entertain – Suit will be transfer to place of permanent address for divorce.**

A perusal of sub-section (3) of Section 19 of the Act indicates that a petition could be presented to the District Court where the parties to the marriage last resided together. The word “reside” means a place where one

resides, abode, house. In the present context, the Legislature intended that where parties have lived under a roof in a permanent capacity or on a permanent basis and does not mean a temporary abode of living.

In view of divorce petition, the territorial jurisdiction of the Family Court, Kanpur was invoked on the ground that the parties had resided together at Kanpur at some place for the purpose of providing the medical treatment to the petitioner. This allegation by itself indicates that the residence at Kanpur, if any, was only temporary in nature and by this method a divorce petition would not lie at Kanpur. The address given by the defendant in the array of the parties indicates his residence at Lucknow and permanent address at Ambala. This also indicates the lack of territorial jurisdiction of the Family Court, Kanpur. **(Smt. Balvindar Kaur v. Mukul Kumar Srivastava; 2009(1) AWC 258)**

◈ **S. 24(3)(b) – Transfer of proceedings – District Judge has power and jurisdiction to transfer application for enforcement of award u/s. 36 of arbitration and conciliation Act.**

The language of S. 24(3)(b) of the CPC is clear and explicit and an application for the enforcement of the award filed under Section 36 of the Arbitration and Conciliation Act, 1996 would come under the category of the word "proceeding" under Section 24 of the CPC Consequently, the District Judge would have the power and jurisdiction to transfer the application filed by respondent under Section 36 of the Arbitration Act from Court which had no jurisdiction to decide case in first instance to Court of competent jurisdiction. **(Shahab Uddin alias Munnan v. District Judge, Muzaffarnagar & Anr.; 2009(2) ALJ 275 (All HC)**

◈ **S. 115 and O. XLIII, R. 1(s) – Maintainability of revision – Revision against orders asking parties to submit names for appointment as receiver not maintainable.**

The court is of the opinion that the application No. 12Ga of the opposite party, has not been fully allowed as yet and is still subject to certain conditions. Consequently, the issue with regard to appointment of a receiver, has not been finally decided and does not come under the category of the Explanation provided under Section 115 of the CPC The impugned order is not a case which has been decided finally nor does the impugned order decide the issue finally. Final order would be passed when a receiver is appointed, against which, the petitioner has a remedy of filing an appeal under Order XLIII, Rule 1(s) of the CPC.

In view of the aforesaid the Court is of the opinion that the court below has rightly rejected the revision, as not maintainable. **(Anil Sharma v. Rajan Pathak and others; 2009(1) AWC 152)**

◈ **Appeal – Revision – Revisable order can also be challenged in appeal**

against decree passed ultimately.

If a right of appeal from the decree is conceded to a defendant, in the opinion of the Court, he cannot be denied a right to challenge an order which was subject to revision in his memorandum of appeal filed from the decree ultimately passed. **(Wada Arun Asbestos (P) Ltd. v. Gujarat Water Supply and Sewerage Board; 2009(1) AWC 431d (SC)**

◆ **S. 25 – Transfer of case – Age of wife is relevant factor to transfer matrimonial proceedings at her instance.**

After going through the materials on record and after considering the age of the wife/petitioner, the court is of the view that the aforesaid case being civil proceeding no. 549 pending before the learned Judge, Family Court at Cuttack, Orissa be transferred to the Family Court at Jaipur in the State of Rajasthan. Accordingly, the Court allow the application for transfer and direct transfer of the aforesaid case to the Family Court at Jaipur, Rajasthan. **(Sapna Agarwal v. Om Prakash Jalan; 2009(1) AWC 560 (SC)**

◆ **S. 47 – Execution of consent decree – No authority with the executing court to set aside, modify or vary the consent decree – Application U/s. 47 CPC made by respondent was not maintainable.**

The Court is of the view that, in the present case, section 47, CPC, application made by the respondents herein was totally misconceived. It was not maintainable. The Executing Court had no authority to set aside, modify or vary the consent decree. Clause K makes the valuation by Ernst and Young final and binding on the disputing parties. If, according to the respondents, the opinion of the valuer was tainted, biased or that they had failed to do their duty as a valuer, then appropriate proceedings ought to have been taken by the respondents either for setting aside or modifying the consent decree before the Competent Court but not in the Executing Court which has no power to set aside, modify or vary the decree. It was not open to the respondents to move under section 47, CPC for the relief, namely, to have the valuation report set aside as that would amount to virtually setting

aside a portion of the consent decree which, as stated above, constituted very core and the basis of the consent decree.

In the opinion of the court, without going into the merits of the matter, we hold that section 47, CPC application made by the respondents was not maintainable and ought not to have been entertained by the Executing Court. **(M/s. Premium Exchange and Finance Ltd. and Another; 2009(106) RD 516)**

Ss. 115 and 47 and O. XXI, R. 54 – Revision validity of attachment not raised in objection under S. 47 CPC and raised for first time in revision – It could not be allowed to be raised.

The validity of the attachment proceedings was not raised by the defendants in his objections under Section 47 nor any objection was filed by the defendants under Order XXI, Rule 58 CPC. It transpires that the defendants raised this ground for the first time in the revision which, in the opinion of the court, could not be allowed to be raised for the first time in a revision. In M/s. Gangotri Sahkari Avas Samiti Ltd., Allahabad v. Smt. Usha Mukherji and others; 2002 (20) LCD 284, the court held that a point raised in the revision for the first time, which not raised in the objection under Section 47, could not be raised in the revision nor can it be decided by the revisional court. Similarly, the Supreme Court in the case of Khajan Singh (d) By LRs v. Gurbhajan Singh and others; AIR 2007 SC 2941: 2007 (3) AWC 3158 (SC), has held that the revisional court has a limited jurisdiction and the exercise of the revisional power could be exercised on limited grounds and that the appreciation of evidence on the basis of material brought on record was within the domain of the executing court and that the revisional court could not interfere in a finding of fact. **(Shobha Kant Chaturvedi v. Hon'ble the Addl. District Judge 2nd, Etawah Court (U.P.) (Revisioning Court) and Others; 2009(1) AWC 568)**