LAW COMMISSION OF INDIA

ONE HUNDRED FORTY - FOURTH

REPORT

ON

CONFLICTING JUDICIAL DECISIONS PERTAINING TO THE CODE OF CIVIL PROCEDURE, 1908

APRIL , 1992

K. N. SINGH
(EX-CHIEF JUSTICE OF INDIA)

D.O. No. 6(3)(14)/92-LC(LS)
CHAIRMAN

GOVERNMENT OF INDIA
SHASTRI BHAWAN
NEW DELHI-110001
Tel. Off. 38 44 75
Res. 3019465

April 28, 1992.

My dear Minister,

I have great pleasure in forwarding herewith the 144th Report of the Law Commission on the subject "Conflicting Judicial Decisions pertaining to the Code of Civil Procedure, 1908".

2. Incidentally, it is the first Report after the constitution of XIII Law Commission. Earlier, the Commission in its 136th Report considered a conflict of decisions on certain specific Acts relating to Hindu Family Law. The present Report deals with certain conflicting Judicial decisions pertaining to the provisions of the Civil Procedure Code, and recommendations have been made to resolve them, keeping the public interest in view.

3. The present Law Commission was constituted with effect from 1st September, 1991. I have been appointed as Honorary Chairman after may retirement as Chief Justice of India, and I have assumed office on 1st January, 1992. At present, the Commission consists of myself and the Member-Secretary, Shri G.V.G. Krishnamurty, and other Members are yet to be appointed.

4. The study in respect of this Report was conducted by Shri P.M. Bakshi earlier, as a Member of previous Law Commission, and it has been continued by the present Law Commission *suo motu*.

5. I hope this Report will be placed before the Parliament soon and expeditious action will be taken to implement the recommendations contained herein.

With kind regards.

Yours sincerely,

Sd/-

(K. N. SINGH)

Hon'ble Shri K. Vijay Bhaskar Reddy,
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Copy to :

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CHAPTER I

INTRODUCTION

1.1. GENESIS OF THE REPORT

In the present report, the Law Commission of India proposes to deal with the conflicts of judicial decisions pertaining to the Code of Civil Procedure, 1908. The Commission has already forwarded to Government its report on the subject of conflicts of decisions and the mechanism for solving those conflicts, and has in that report dealt with the conflcts of decisions on certain specific Acts relating to Hindu Family Law.* The present report seeks to carry further the task undertaken by the Commission, that is, to make recommendations for resolving conflicts of judicial decisions on important enactments. The subject has been chosen *suo motu* by the Commission.

1.2. Scope of the Report. We would like to make it clear that the report is confined to conflicts of decisions and does not purport to address itself to questions of other reforms, if any, that may be needed in the Code under consideration. As a pragmatic measure, and in order to enable the Commission to deal effectively and promptly with urgently needed amendments, this approach has been considered preferable.

*Law Commission of India (LCI), 136th Report.

CHAPTER II

SECTIONS 1 TO 20

2.1. SECTION 2(2) AND DISMISSAL FOR DEFAULT

2.1.1. Section 2(2) of the Code, which defines the expression 'decree", provides that "decree" shall not include—

"(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of *dismissal for default*".

2.1.2. *Question for consideration*—With reference to clause(b) quoted above, a question has arisen as to the precise scope of the expression "dismissal for default".

2.1.3. There exist, what may be called, the narrower view and the wider view on the subject. According to the narrower view, the expression "dismissal for default" covers only a dismissal for default of appearance. According to the wider view, however, any kind of default, e.g., default in furnishing better particulars, falls within clause (b) of section 2(2), so that dismissal for such a default is also excluded from the definition of "decree".

2.1.4. The narrower view of the expression "dismissal for default", and the consequent wider view as to the scope of "decree", has been taken by the following High Courts :—

(a) Allahabad [1].

(b) Calcutta,[2]

(c) Madhya Pradesh [3-4] and

(d) Nagpur. [5-6]

2.1.5. A wider view of the expression "dismissal for default", and consequent narrower view of the word "decree", has been taken by the following Courts: —

(a) Andhra Pradesh, [7]

(b) Assam, [8]

(c) Madras, [9]

(d) Oudh, [10]

(e) Patna, [11] and

(f) Allahabad (later case)[12].

2.1.6. Thus, in the 1942 case from Oudh[13], it was held that dismissal of an appeal for non-prosecution is not a "decree", even if a decree is actually prepared in the particular case.

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1. Syed Mohammadi v. Chandra, AIR 1937 All 284, 285. (Naiamtulah J.) (Dismissal for want of prosecution of suit is a decree. It is not dismissal for default).
2. Abdul Majid v. Amina, AIR 1942 Cal 539, 541 (Biswas J.).
3. Budhulal v. Chhotelal, AIR 1977 MP 1, para 22, 23 (FB) (failure to pay costs—dismissal is appealable.).
4. MP State Cooperative v. J.L. Chouksey, AIR 1980 MP 204, 206, para 8 (failure to give better particular—order of dismissal is "decree" (U.N. Bachawat J.).
5. Nazir Abbas Sujjat Ali v. Raza Azamshah, AIR 1941 Nag 223, 224 (Vivian Bose J.) (failure to give better particulars-order held to be "decree", and hence appealable, as a "decree". The order determines, conclusively, certain right).
6. Radhabai v. Purdibai, AIR 1943 Nag 149, 151 : ILR (1943) Nag 613 (Digby J.). When the suit is dismissed because adjornment costs are not paid, the order is a "decree" and appealable. Suit cannot be restored under the inherent power of the court.
7. *In re Choudury*, AIR 1955 AP, 74, 77, 78, para 13 (FB) (Judgment by Subba Rao C.J. want of prosecution—Dismissal).
8. Gauhati Bank v. Baliram, AIR 1950 Ass 169, 172, 173, 174, paras 22, 24 (Ram Labhaya J,) (dismissal for non-payment of costs or other defects is covered by dismissal for "default") (Thadani C.J. refused to express opinion on this point).
9. *In re N. Kayambu*, AIR 1941 Mad 836, 837 (FB) (non-payment of court fee).
10. Jagdish Kumar v. Hari Kishan Das, AIR 1942 Oudh 362, 364, 365 (Thomas E.J. and Agrawal J.) (see *infra*).
11. State of Bihar v. Mansoor Alam Khan, AIR 1983 Pat 61, 8, para 8 (B.P. Jha J.). (Order dismissing appeal for default in paying court jee is not a "decree" and is not appealable as a decree. It is covered by "dismissal for default").
12. Tafazzul v. Shah Mohammad, AIR 1949 All 261 (Seth J.) (want of prosecution).
13. Jagdish Kumar v. Hari Kishan Das, AIR 1942 Oudh 362 (Thomas CJ & Agarwal J.).

2.1.7. *Recommendation*.—It appears to us that it is better if the position is clarified by providing that dismissal of a suit *for any kind of default* should take the order out of the definition of "decree". On principle, when there is no adjudication on the merits, it should not be regarded as a "decree" and should not be appealable as a decree. Practically, all the defaults that have figured in the case law (summarised above) were defaults entailing dismissal for a technical fault or procedural non-compliance. There was no decision on the merits. If so, it should not be regarded as a determination enjoying the benefits available to a decree (one appeal as of right, on facts and law, plus second appeal on law).

We recommend that in section 2(2), an Explanation should be inserted, as under :—

"*Explanation.*—'Default' includes default of appearance as well as any other kind of default"

2.2. Section 2(11) and Joint Hindu Family

2.2.1. Section 2(11) of the Code reads as under :—

2(11) "legal representative" means a person who in law represents the estate of a deceased person, includes any person who interm eddles with the estate of the deceased and whereas party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;'

2.2.2. *Question for consideration*.—The question has arisen whether in the case of a Hindu undivided family, the surviving coparcener becomes a legal reprsentative for the purposes of the Code.

2.2.3. The following High Courts hold that a surviving coparcener is a legal representative:—

(a) Allahabad,[14]

(b) Madras,[15]

(c) Patna.[16]

2.2.4. But a judgment of Bombay High Court (in a Full Bench ruling) creates some doubt, as it contains dicta—

(a) that a son who takes property by survivorship is not a legal representative, but

(b) as regards separate property, he is a legal representative.[17]

2.2.5. In an earlier Bombay case[18] also, a view had been taken that joint family members cannot be "legal representatives", though this view was criticised, in part, in a later case of the same High Court.[19]

2.2.6. The Supreme Court has taken a broader view of the expression legal representative" as defined in the Code and have of served[20] as follows :

'The definition is inclusive in character and its scope is wide, it is not confined to legal heirs only instead it stipulates a person who may or may not be heir, competent to inherit the property of the deceased but he should represent the estate of the deceased person. It includes heir as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression 'Legal Representative'. If there are many heirs, those in possession *bona fide*, without there being any fraud or collusion, are also entitled to represent the estate of the deceased.'

In the above case, the Supreme Court referred to an earlier case decided by it[21], where it recognised the principleof representation of the estate by some heirs; in that case, the Court held that if after *bona fide* enquiry, some but not all the heirs of the deceased defendant are brought on record, the heirs so brought on record represent the entire estate of the deceased and the decision of the Court in the absence of fraud or collusion binds even those who are not brought on record as well as those who are impleaded as legal representatives of the deceased defendant.

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14. Gyan Datt v. Sadanand, AIR 1938 All 163, 164 (Ganga Nath J.).
15. Nagappa Nadar v. Karuppiah Nadar, AIR 1925 Mad 456, 457 (on the death of managing member becomes the legal representative).
16. Alekh Chandra v. Krishna Chandra, AIR 1941 Patna 596, 599 (Fazal Ali & Varma JJ.).
17. Jamburao v. Annappa, AIR 1941 Bom. 23, 24, 25 (FB).
18. Chunilal Harilal v. Bai Mani, AIR 1918 Bom. 165, 166 (Beaman & Heaton JJ.)
19. Ganesh v. Narayan, AIR 1931 Bom. 484.
20. Custodian of Branches of BANCO National Ultramalnino v. Nalini Bai Naique, AIR 1989 SC 1589 (K. N. Singh & K. N. Saikia, JJ.).
21. Dayaram v. Shyam Sundari, AIR 1965 SC 1049.

2.2.7.. Recommendation—It seems to us that in order to put the matter beyond doubt, it is desirable to clarify the position by providing that when a coparcener in a Hindu undivided family dies, a surviving coparcener shall be deemed to be a legal representative of the deceased. We recommend accordingly.

2.3 Section 10 and Identity of Relief

2.3.1 Section 10 of the Code of Civil Procedure in its main paragraph (so far as is material) provides as under :—

> "No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instiuted suit between the same parties.....where such suit is pending in the same or any other court *in India having jurisdiction to grant the relief claimed*....."

2.3.2. *Question for consideration*—For the present, we are concerned with the words "having jurisdiction to grant the relief claimed". Do these words refer to the relief claimed *in the second suit* or do they refer to the relief claimed in the first suit ?

2.3.3. The Calcutta High Court[22] has held that the above words refer to the relief claimed in the second suit.

2.3.4. However, it appears that in a Bombay case[23], Blagden J. had some difficulty in construing the section. Although he reached the same conclusion, he did describe the wording of the section as 'curious'.

2.3.5. *Recommendation*—It seems desirable to take the opportunity of making the matter clear, by adding in section 10, after the words "relief claimed", the words "in the suit subsequently instituted".

2.4 Section 11 and Consent Decrees

2.4.1. The principle of *res judicata*, as codified in section 11, has a number of facets, one of which is concerned with the operation of the doctrine in relation to compromise decrees.

2.4.2. *Question to be considered*—The question to be considered is this. Does this section 11 apply to consent decrees ?

2.4.3. One view is that it does not. The following High Courts, namely :—

(a) Bombay (one case),[24]
(b) Delhi, [25]
(c) Gauhati, [26]
(d) Rajasthan, [27] and
(e) Sind [28]

have taken the view mentioned above, namely, that section 11 does not apply to compromise decrees.

2.4.4. But some High Courts have taken the view that for the purpose of *res judicata*, a consent decree has "to all intents and purposes, the same effect as a decree" passed after hearing. This view has been taken by the following High Courts :—

(a) Bombay (another case), [29]
(b) Calcutta, [30] and
(c) Punjab, [31].

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22. Mirta Lina Private Ltd. v. Finlay Mills, AIR 1982 Cal. 41, 47, para 21, sub-para(2) (Mrs. Monjula Bose J.)
23. Sankalchand v. Prakash, AIR 1947 Bom. 84 (Blagden J.).
24. Minalal v. Kharsetji, ILR 30 Bom. 385, 408 , cited by Mulla, CPC (1981), Vol. 1, p. 14.
25. Manohar lall v. Naraindass, AIR 1987 Del 226, 230, 231, para 28 (G.C. Jain J.).
26. Uphars v. Ka. Esiboll, AIR 1986 Gauhati 55, 56, paras 4, 5 (Manisana Singh J.).
27. Bhanwarlal v. Raja Babu, AIR 1970 Raj 104, 106. (D.M. Bhandari C.J. and V.P. Tyagi J.)
28. Ratanchand v. Anandrai, AIR 1933 Sind 53, 55 (Aston A.J.C.) (Matters forming part of consept decrees are not *res judicata*, as they are not decided on the basis of hearing, though they may operate as estoppel, Mulla 9th Ed., p. 29 cited).
29. Bhai Shankar v. Morarji, ILR (1912) 36 Bombay 283, 287 cited by Mulla CPC (1981), Vol. 1, p. 144.
30. Krishna Subala v. Dhanpati, AIR 1957 Calcutta, 59, 64, 65 (DB).
31. Naidermal v. Uger Sain, AIR 1966 Punjab 509, 512, para 6.

2.4.5. In the Punjab case[32] , Ms. Justice S.K. Kapur observed as under :—

"It is well established that a judgement based on consent is as much intended to put a stop to litigation between the parties, as a judgment which results from the decision of the Court after the matter has been fought out to the end in so far as the matter is actually dealt with by the consent decree. The question in all such cases is whether the consent decree did settle the issue between the parties".

2.4.6. In a Madras case, 33 it was emphasised that before a consent decree can operate as estoppel, the court, on the facts provided, must come to a clear conclusion that the parties intended that the consent decree should have the effect of deciding finally the questin raised, for, "the fact that there was an active contest and the matter was actually put in issue, furnishes a valuable test".

2.4.7. In a Patna case[34], the position was thus described by the Division Bench :—

"A compromise decree, it is true, is not a decision of the court. It is the acceptance by the court of some thing to which th parties had agreed. It is in that sense, that compromise or consent decrees have been described as contract between the parties to which is superimposed the command of the court. The court merely sets its seal on the agreement entered into between the parties. It is, therefore, not a decision of the court non application of its mind and the statutory bar of *res judicata* under section 11 of the Code of Civil Procedure is not attracted. But, at the same time, it is equally well-established that a judgment by consent or default is as effective an estoppel between the parties, as the judgment whereby the court exercises its mind on a contested case".

2.4.8. Even though the matter may have passed from the stage of representation into an agreement, there are cases where the courts are entitled to entertain a plea of estoppel in order to ptevent fraud or circuitry of action. Reliance in this connection may be placed on the decisions of the Supreme Court in *Sunderbai* v. *Devaji Shankar Deshpande,* (AIR 1954 SC 82), *Sailendra Narayan Bhanja Deo* v. *The State of Orissa* (AIR 1956 SC 346) and *Pulavarthi Venkata Subba Rao p. Valluri Jagannadha Rao* (AIR 1967 SC 591). As a matter of act, a Bench decision of the Calcutta High court in *Secretary of State for India in Council* v. *Attendranath Dask*, ILR 63 Cal 550 at p. 558 was approved by the Supreme Court in the case of *Sailendra Narayan Bhanja Deo* (AIR 1956 SC 346). The paragraph quoted with approval runs as follows :

"..... the consent order is as effective as an order passed on contest, not only with reference to the conclusions arrived at in the previous suit but also with regard to every step in the process of reasoning on which the said conclusion is founded."

2.4.9. The point has come up before the Supreme Court more than once, but the decisions of the Court on the subject cannot with respect be easily reconciled. The earlier view of the Supreme Court was that a consent decree has the binding force of *res judicata.* [35, 36]

2.4.10. But later decisions of the Supreme Court seem to take a contrary view. It seems that the earlier decisions were not cited before the Court at the time when the later cases were decided. [37]

2.4.11. The Supreme Court decision[38] in Subba Rao's case was relied on in a Delhi case[39] recently, for holding that where a previous petition for eviction is withdrawn as a result of a compromise, a subsequent application for eviction on the same ground is not barred by *res judicata*, because in order to create the bar of *res judicata*, the earlier case must have been "heard and finally decided" by the court. That is not the case where the decree is passed on compromise.

2.4.12. The Supreme Court has, in a very recent case, [40] adhered to their earlier view, and have approvingly referred to the 1954 case where they observed that a consent decree is as binding upon the parties hethereto as a decree passed by invitum', and that the 'compromise having been found not to be vitiated by fraud misrepresentation, misunderstahding or mistake, the decree passed thereon

32. *Ibid.*

33. Appalanarasiah v. Cittavadu, AIR 1934 Mad 454, 456 (Venkata Subba Rao J.), following Govinda Krishna v. Venkatasubbiah, AIR 1929 Mad 694.

34. Garaj Narain v. Babulal, AIR 1975 Patna 38 pages 58, 62, Para 9 (D.B.).

35. Shankar v. Balkrishnan, AIR 1954 SC 352, 355, para 9.

36. Sunderabai v. Devaji. AIR 1954 SC 82.

37. Subbarao v. Jagannadha Rao, AIR 1967 SC 591, 594, 595, Para 10:
Baldev Das v. Filmistan Distributors, AIR 1970 SC 406.

38. Subba Rao v. Jagannadha Rao, AIR 1967 591.

39. Manoharlal v. Narain Dass AIR 1987 Delhi 226, 230, 231, para 28.

40. Byram Pestonji Gariwala v. Union Bank of India AIR 1991 S.C. 2234 (Dr. T. K. Thommen & R. M. Sahai, JJ.).

has the binding force of '*res judicata*'. The Supreme Court, further referred to the 1956 case [41] and observed that 'a judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the Court at the end of a long drawn out right', and that 'a compromise decree creats an estoppel by judgment'.

2.4.13. *Recommendation* --The matter is of practical importance and of a recurring nature, and is one which affects the very jurisdiction of the Court. It therefore seems desirable that it should be placed beyond doubt, by a suitable amendment. It is suggested that an *Explanation should be added* in Section 11 to provide that the provisions of Section 11 shall apply to a consent decree.

2.5 Section 20 and Place of Suing

2.5.1. The Code of Civil Procedure, in section 20, makes provision regarding the place of suing for various kinds of suits (apart from suits relating to immovable property etc.). Generally, money suits can be filed where the cause of action arises or the debtor resides, carries on business or personally works for gain.

2.5.2. *Question for consideration*—One of the qustions which has arisen is, whether a suit for money can be filed at the place where the creditor resides, carries on business or personally works for gain. This question is itself linked up with a question of substantive law, that is to say, the rule that the debtor must find out the creditor. Can this rule of substantive law be invoked for the purpose of giving competence into a court having jurisdiction at the place where the creditor resides, carries on business or personally works for gain, in cases where the loan was advanced elsewhere ?

2.5.3. Three views seems to prevail on the subject :—

(i) The above rule can be invoked to give territorial competence to the court within the local limits of whose jurisdiction the creditor resides or carries on business, unless the agreement indicates to the countrary.

(ii) The above rule yields an important material for constructing the contract, but does not itself give competence to th court.

(iii) The creditors' residence etc. is only one factor to be considered.

2.5.4. In 1927, the Privy Council stated that it is the duty of the debtor to find out the creditor to make payment, if the agreement does not fix a place for payment. The Privy Council was construing section 49 of the Indian Contract Act and, as a matter of construction of the contract at issue in the particular case, it held that the contract impliedly fixed a particular place for payment. The case was decided on an interpretation of the contract. But the judgment contains dicta as to the legal position, to the effect that the debtors' duty is to find the creditor.

2.5.5. The dicta of the Privy Council have been construed dfferently by different High Courts, which is one reason why the conflict of views has arisen with reference to sectin 20.

2.5.6. The view of the High Court of Andhra Padesh is that the above rule applies to India.[43]

2.5.7. This is also th view of the Gujarat High Court.[44]

2.5.8. According to a ruling of the Calcutta High Court[45] also, where no place of payment is fixed by the contract and the money to be paid is a liquidated sum, the general rule mentioned above applies. In the Calcutta case, certain money as due from the defendant (the State of Punjab) to the plaintiffs (a company). The court took note of the fact that the plaintiffs all along had their registered office in Calcutta and the bills were also sent from an office to the defendant, though the company had temporary arrangement at Nangal (which was in the Punjab at that time), during the progress of the work out of which the claim of the plaintiff arose. The High Court of Calcutta held that the suit at Calcutta was competent. [46]

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41. Sailendra v. State of Orissa, AIR 1956, SC 346.
42. Soniram v. R. D. Tata, AIR 1927 pp 156.
43. Maira v. Noore Mohammad, AIR 1956 A.P. 231, 233, 234, para 19 (reviews of case law) (Gopalakrishnan Nair J.)
44. Shobhasing v. Saurashtra Iron Foundary, AIR 1968 Guj. 276, 277, 278, para 2 (N.K. Vakil J.) (review cases).
45. State of Punjab v. A. K. Raha (Engineer) Ltd., AIR 1964 Calcutta 418, 420, 421, paras 4 & 5 (Bachawat & A. K. Mukherjee JJ.).
46. North Bengal et. Zamandary Co. Ltd. v. Surendra Nath, ILR (1957) 2 Cal. 6. Cf. Jagdish v. Sentimoyee, AIR 1961 Cal 321 (review case law), following Drexel v. D. (1961) 1 Ch. 25, 26.

2.5.9. The High Courts of Allahabad and Patna fall in the second category. According to the Allahabad High Court, [47] the rule that the debtor must seek the creditor, while not applicable as such in India, can be considered as a factor for determining the intention of the parties as to the place of payment. On that basis, the High Court held that in the circumstances of the case, the reasonable inference could be drawn that payment was to be made at the place of business of the plaintiff at Kalpi, where the plaintiff carried on business and could give a discharge for the money, or where he would have an agent who could give such a discharge.

2.5.10. The Patna High Court [48] takes a view substantially similar to Allahabad. It holds the English rule as to the obligation of the debtor to seek the creditor as not applicable to India, but also holds that it is permissible to take recourse to the English rule for the purpose of construing the terms of a contract, in order to find out whether the parties, by necessary implication, intended that the payment should be made at the creditor's place of business.

2.5.11. However, according to the Punjab High Court [49] (which represnts the third view), the English ruleon the subject is not, as a matter of law applicable in India to determine the forum for instituting the suit by the creditor. The creditor's place of residence or business is only one factor to be taken into account. This means that such place does not, in itself, confer jurisdiction on the court at such place of residence or business (of the creditor).

2.5.12. *Recommendation*—In our view, the position should be clarified and the place where the creditor resides should also be treated as the place where the payment is to be mae, unless the agreement expressly provides to the contrary. We would recommend that an *Explanation* may be added to Section 20, in suitable terms, to achieve the objective. This is the view of the majority of the High Courts and represents, in large number of cases, the intention of the parties.

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47. Manohar Oil Mills v. Bhawani, AIR 1971 Allahabad 326, 327, paras 4 and 5.
48. Johri Mull v. Hira Lal, AIR 1961 Patna 1981, 199. para 3 (v. Ramaswamy CJ. ond R.K. Choudhary J.).
49. Hira Lal v. Baijyanath, AIR 1960 Punjab 450, 453, 455, paras 9, 15, 22 (FB) (Dulat, Dua and Bishan Narain JJ.)

CHAPTER III

SECTIONS 21 TO 40

3.1 Section 34 and Rate of Interest

3.1.1 Under section 34, the Court can award interest *pendente lite* at such rate as it considers "reasonable" (subject to certain restrictions) in a money decree.

3.1.2 *Qestion for consideration* -On one point concering section 34 a conflict of views seems to exist. Can the Court acting under sectin 34 award interest pendente lite at a rate higher than the contractual rate ?

3.1.3 In a Rajasthan case, [1] the plaintiff's suit was decreed but no interest *pendente lite* or future interest was awarded. The defendant preferred appeal before the single Judge of the Rajasthan High Court, and the plaintiff filed a cross-objection praying for interest *pendente lite* and future at the rate of 3% per annum. The learned single Judge dismissed the defendants' appeal, disallowed interest *pendente lite*, but awarded future interest at the rate of 6% per annum, from the date of decree till the date of payment. The defendant preferred another appeal before the division Bench of the Rajasthan High court on the ground that when the future interest claimed in the cross-objection was only 3%, the plaintiff could not have been allowed6% per annum future interest, and that ordinarily interest stipulated in a bond is not to be exceeded when future interest is allowed because the creditor has additional security in the shape of a decree. The Division Bench observed that awarding of futurer interest on the principles contained in section 34 is fundamentally a matter of judicial discretion and noted that the learnedsingle Judge was persuaded to allow 6% future interest because he had disallowed interest *pendente lite*, and that the rate of future interest in some cases could possibly act as a lever to accelerate the payment of the decretal amount. They held that the single Judge was right when he awarded 6% per annum future interest against the defendant, even though the rate was higher than the one stipulated in the original bond or more than the interest claimed by the plaintiff in his cross-objection.

3.1.4 However, according to the Andhra Pradesh High Court[2], "the Court cannot grant a higher rate of interest than what was contracted between the parties, even *pendente lite*. The area is cover by contract or statute. Section 34(1), C.P.C., regulates the grey area. By implication, it is either the contractual rate or less, but not in excess thereof."

3.1.5 Accordingly, the Court in Andhra Pradesh held that the grant of rate of interest at 12% from the *date of institution* till the date of realisation was illegal.

3.1.6 While considering the question whether the Court can award interest *pendente lite* at a rate of interest higher than the contractual rate, it is to be pointed out that the ward of interest *peddente lite* itself is discretionary under section 34, and the Court may or may not award such interest. This view has been held by sevreal High Courts.[3] The Supreme Court[4] has also held that an arbitrator has the power to award interest *peddente lite* on the princple of section 34, and that it is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case.

3.1.7 The Supreme Court has observed:[5]

> "It is no doubt true that the rate of interest to be allowed in regard to mesne profits or under section 34 in such cases is discretionary, seeing there is in them no question of any contractual rate or any particular rate fixed by statute. The only limitation which is prescribed by section 34, as it stands now, is that the rate shall not exceed 6% per annlym—a limitation which did not figure in the section before its amendment though courts as a general rule seldom awarded any rate in excess of 6% per annum.....The amended section 34 is in fact a statutory recognition that 6% is not by itself an unconscionable or an unreasonably high rate. "

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1. Lehru Narain v. Kanhaya Lal, AIR 1973 Raj. 316 (B.P. Beri, C. J. and M. L. Joshi, J.).
2. Union Bank of India v. Krishnaiah, AIR 1989 AP 211
3. (a) United Bank of India v. Rashyan Udyog, AIR 1990 Calcutta 146;
   (b) Canara Bank v. K.S. Kushalappa, AIR 1990 Karnataka 145;
   (c) Kalyanpur Cold Storage v. Shohanlal Bajpai, AIR 1990 Allahabad 218;
   (d) United Commercial Bank, Silchar v. Satish Chandra Ghosh, AIR 1991 Guwahati 59;
   (e) Union Bank of India v. K. Kumarnanunni Nair, ArR 1991 Kerala 118;
   (f) M/s Jain Mills and Electrical Stores v. State of Orissa, AIR 1991 Orissa 117.
4. Secretary, Irrigation Department, V. G.C. Roy, 1991 (2) SCALE 1369.
5. Mahant Narayana Dasjee Varu v. Board of Ttrustees, Tirumala Tirupati Devastham, AIR 1965 SC 1231.

3.1.8. *Recommendation*—This question needs to be settled. Ordinarily, the contractual rate would not be exceeded. But there can be circumstances where the contractual rate is too low and does not meet the requirements of Justice. There can be a situation wherein the defendant has deliberately protracted the proceeding. In such cases, the court should have power to award a higher rate of interest than that contracted for. If the defendant has been detaining the money and earning interest at a higher rate in the market, the plaintiff should not suffer from the delay. From this point of view, it appears to be desirable to provide that the court may, in the interest of justice, direct that the defendant shall pay a rate of interest higher than the rate provided for in the contract. This *pendente lite* interest would of course be granted by the courts as per practice.

3.2. Section 34 and Negotiable Instruments

3.2.1 Section 34 CPC has also led to another problem pertaining to negotiable instruments.

3.2.2. *Question for consideration*—The question is whether the provisins of section 34 of the Code of Civil Procedure in so far as it concerns interest *pendente lite*, override the provisions of section 79 of the Negotiable Instruments Act, 1881. According to section 79, Negotiable Instruments Act 1881, "when interest at a sepecified rate is expressly made payable on a promisory note or bill of exchange interest *shall be calculated* at the rate specified, on the amount of principal money due thereon, from the date of intrument, until *such date after the institution of a suit* to cover such amount, as the court directs. Section 79 thus, makes (what appears to be) a mandatory provisions regarding interets, and the words "such date after the institution of a suit" seem to sugges that even for some period after the institution of the suit, the interest must run at the contractual rate, though the court has a discretion to fix the outer limit of the period.

3.2.3 In contrast, the provisions of section 34 of the Codeof Civil Procedur leave the matter to the discretion of the court for the entire period commencing with the institution of suit. Generally the contractual rate of interest is awarded by civil courts in decrees for the payment of money, where the contract provides for interest. Still, in exceptional circumstances, the court can, under section 34 of the Code, award a different rate of interest for the period beginning with the suit. Thus, there is a conflict between the two statutory provisions, inasmuch as—

(i) the Code of Civil Procedure leaves the matter to the discretion of the court, while

(ii) the Negotiable Instruments Act makes the award of interest at the contractual rate mandatory.

3.2.4. Consequently, judicial decisions on the subject are also conflicting. According to the High Court of Rajasthan, the provisions of section 79, Negotiable Instruments Act, prevail over those of section 34 of the Code of Civil Procedure.[6]

3.2.5 In contrast, the High Court of Andhra Pradesh has held that section 34 of the Code of Civil Procedure prevails over section 79 of the Negotiable Instruments Act. According to that High Court, the court has a discretion to award such interest as it thinks reasonable for the period of pendency of the suit on a promissory note or bill of exchange. It is not necessary that the court must grant interest at the rate specified in the promisory note or bill of exchange, as provided in section 79, Negotiable Instrument Act.[7]

3.2.6 The Jammu and Kashmir High Court (in a Division Bench ruling) has also held that even where section 79 of the Negotiable Instruments Act applies, the court is not bound to award interest at the contractual rate, and that the discretion of the court under section 34, Code of Civil Procedure remains unaffected, even in suits on negotiable instruments.[8]

3.2.7 *Recommendation to amend Negotiable Instruments Act*— In view of the conflict of decisions on the subject the law stands in need of clarification. On the whole, it seems preferable to confine section 79, Negotiable Instruments Act, to the period before the institution of the suit, thus adopting, in substance, the view taken by the High Courts of Andhra Pradesh and Jammu and Kashmir. Matters relating to the period of litigation can best be left to the discretion of the court and, from that point of view, section 34 should be allowed to operate even regarding suits on negotiable instrument. In practice, this will not make much difference because, even under section 34 , courts in most cases

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6. Utsav Lal v. Mohan Bros., AIR 1975 Raj. 236, 237, 238, paras 4, 5, 6, (V.P. Tyagi J.), following Ram Singh v. Dewan Chand, AIR 1960 Punj 286 and dissenting from Piara Lal v. S. Herchand Singh, AIR 1961 Punj. 442.
7. United Bank of India v. P. Krishnaiah, AIR 1989 A.P. 211. (Ramaswamy J.)
8. United Commercial Bank v. Hans Raj Saraf , AIR 1989 J & K 28, 30, paragraph 8 (DB).

do direct that interest *pendent lite* should be paid at the contractual rate. But as a matter of legislative provision, and on principle, it seems preferable to leave the discretion to the court and consequentially amend section 79, Negotiable Instruments Act, by substituting, for the words "such date after the institution of a suit," the words "not later than the institution of a suit." We recommend accordingly.

3.3 Section 39 and Execution of Decrees out side Jurisdiction

3.3.1 Section 39 authorises a court to send a decree for exection to another court in certain specified situations. Broadly speaking, these are situations where the property or person or against whom, execution is sought, is outside the local limits of the jurisdiction of the court.

3.3.2 *Question for consideration*—The section uses the word "may", and this has led to a controversy whether the court which passed the decree can itself execute the decree. In other words, does word "may" imply that sending the decree to another court (in the circumstances mentioned above) is discretionary ?

3.3.3 The Bombay High Court has held[9] that a court cannot execute a decree in which the subject matter of the suit or application for executi on is situated entirely outside its jurisdiction. Territorial jursdiction is a condition precedent to a court executing a decree. Hence, the court cannot attach property outside its local jurisdiction. If it does so, and the decree is subsequently transferred to another court, a private purchaser who has purchased the property after attachment can challenge the legality of attachment, in appeal, for the first time. Once it is held that the attachment is void, it must cause failure of justice. However, the Rajasthan High Court has taken a different view. [10—11] The Bombay judgement dissents from the Rajasthan view.

3.3.4 It appears that in 1890, the Calcutta High Court had held that a court cannot execute a decree against property outside its jurisdiction.[12]

3.3.5 But in 1982, the Calcutta High Court[13] has held that the word "may" in section 39 is permissive. The court possing a decree can execute it, no matter that the suit property is not within its jurisdiction. The Calcutta High Court distinguished the following cases :

(i) (1912) ILR 39 Cal 104 and

(ii) AIR 1932 Cal 213.

It relied on the decision in AIR 1939 Cal 403.

3.3.6 According to the Kerala High Court also, the court which passed the decree can execute it by attaching property outside its jurisdiction.[14]

3.3.7 The Rajasthan High Court has also taken the view that the court which passed the decree can execute it directly even outside its jurisdiction. [15—16]

3.3.8 *Recommendation*—It is submitted that the Bombay view is the correct view. The use of "may" in section 39 does not mean that the court which passed the decree can execute the decrees irrespective of territorial limitations. The word "may" is meant for cases where there are circumstances in which execution as such is considered illegal. Any other view would totally upset the entire secheme of the code as to jurisdiction. It seems desirable to clarify the position by inserting an *Explanation* below secion 39 to provide that nothing in the section shall be construed as authorising the court to execute a decree against a person or property outisde the local limits of its jurisdiction. We recommend accordingly.

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9. Sahaba Yeshwant Naik v. Vinod Kumar, AIR 1985 Bom. 79, 81, 83, paras 11, 13 (DB).
10. Tarachand v. Misrimal, AIR 1970 Raj 53, 55, 57, 58, paras 8, 12, 13, 14, 15, 20, 22 (DB) (paras 14, 15 in particular).
11. Laxmi Narain v. Firm Ram Kumar Suraj Bux, AIR 1971 Raj. 30 (Jagat Narayan CJ & Gattani J.) (dissenting from Vasireddi Srimanthu v. B. Benkatappaya, AIR 1947 Mad. 347.
12. Premchand Dey v. Nikhoda Deb, (1890) ILR 17 Cal 699 (FB).
13. Arati Rani Paul v. Balai Chandra Paul, AIR 1982 NOC 42 (Cal) (Monjula Bose J.).
14. Chithraru v. Gopala, AIR 1967 Ker. 81.
15. Laxmi Narain v. Firm Ram Kumar Suraj Bux, AIR 1971 Raj. 30.
16. Tarachand v. Misrimal, AIR 1970 Raj 53.

CHAPTER IV

SECTIONS 41 TO 100

4.1. Section 92 and Necessity of Notice before Granting Leave.

4.1.1 Section 92 of the Code, so far as is material, makes a provision for the grant of leave to file suits regarding public charities, in the following terms :

> "Section 92. *Public Charities*—(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the leave of the Court may institute a suit, whether contentious or not, in the principal civil court of original jurisdiction or in anyother Court empowered in that behelf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree....."

4.1.2 *Question for consideration*—The question has arisen whether, before granting leave under section 92, notice to the defendant is necessary.

4.1.3. According to the Punjab and Haryana High Court, notice is not needed. The case law has been reviewed in these words in its judgment[1] :—

> "A Single Bench of this Court in Prithipal Singh V. Magh Singh, AIR 1982 Punj. and Hr. 137 held that the Court does not have to write a reasoned order. It does not even have to give a notice to the defendant of the application seeking leave to file the suit, as the order granting leave is of an administrative nature. However, contrary view was taken by the Delhi High Court in Gurdwara Prabandhak Committee, Delhi Cantonment v. Amarjit Singh Sabharwal, AIR 1984 Delhi 39 and by the Madras High Court in T. M. Shanmugham v. Periyar Self-respect Propaganda Institution, AIR 1985 Mad. 93, though none of the said High Courts noticed judgement of this Court given earlier. It was under these circumstances that case was referred to the larger Bench, vide my order dated 12-8-1985."

4.1.4 As noted by the Punjab and Haryana High Court, the Madras High Court has taken the view that leave cannot be granted without ordering notice to the defendants. In the Madras case, it was held that a suit cannot proceed on the basis of a leave which was granted without such notice, although a fresh suit can be filed after obtaining proper leave[2]. The Delhi High Court[3] has held that the order is a judicial one and should state reasons.

4.1.5. The view of the Madras and Delhi High Courts has been impliedly overruled by the Supreme Court[4] in a recent case where it observed that the desirability of such notice being given to the defendant cannot be regarded as a statutory requirement to be complied with before leave under section 92 can be granted as that would lead to unnecessary delay and, in a given case, cuase considerable loss to the public trust. The Supreme Court held that if a suit is instituted on the basis of such leave granted without notice to the defendants, the suit would not thereby be rendered bad in law or non-maintainable. However, it further observed that as a rule of caution, the Court should normally, unless it is impracticable or inconvenient to do so, give a notice to the proposed defendants before granting leave under section 92 to institute a suit, as if felt that the defendants could bring to the notice of the Court that the allegations made in the plaint are frivolcus or reckless, or that the persons who are applying for leave are doing so merely with a view to harassing the trust or have such antecedents that it would be undesirable to grant leave to such persons.

4.1.6. *Recommendation*—To expect the court to issue notice and then to try the several points of detail before granting leave in the light of the objections put forth by the prespective defendants, would mean that there will be a trial before a trial. This would not be desirable, in our view. Our

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1. Lachmandas v. Ranjit Singh, AIR 1987 Punjab and Haryana 108, 109, paras 3 7.
2. T. M. Shanmugham v. Periyar Self-respect Propaganda Institution, AIR 1985 Mad. 93, 94, 95, paras 5 & 6 (Venkata-swami J.).
3. Gurdwara Prabhandhak Committee v. Amarjit Singh Sabharwal, AIR 1984 Del. 39, 14, 42, paras 11 & 12, (S.B. Wad, J.).
4. R.M. Narayan Chettiar v. N. Lakshmanan Chettiar, AIR 1991 SC 221.

recommendation, therefore, is to insert an *Explanation* below section 92 to the effect that the court may grant leave under this section without issuing notice to any other person. This does not, of course, mean that the court will grant leave as a matter of course. The said *Explanation* to section 92 may read as under :—

"*Explanation*.—It shall not be obligatory for the court before granting leave under this section to issue notice to the party proposed to be sued by the person applying for leave."

4.2 Section 96(3) And Consent Decree

4.2.1 Section 96(3) of the Code of Civil Procedure bars an appeal against a decree passed with the consent of the parties. However, under Order 43, rule 1A, it is permissible in an appeal against the main decree to contest the validity of the order of the court recording a compromise or refusing to record a compromise under Order 23 of the Code.

4.2.2. *Question for consideration*—There has arisen the question whether an order under Order 23, rule 3, recording or refusing to record a compromise, is appealable.

4.2.3. In an Andhra Pradesh case,[5] it was held that an order rejecting an pplication to record to compromise is not a "decree"and is not appealable under section 96 of the Code, because it does not conclusively determine the rights of the parties. This was the view of Sitaram Reddy J. and Raghuvir J. who held in the above case that such an order is a decree, but is not appealable, because of the deletion of Order 43, rule 1 (m), in 1976. They seem to have stressed the words "Save as otherwise expressly provided" in section 96. According to them, the intention of the Parliament is that no appeal would lie when the compromise is recorded or rejected under Order 23, rule 3. Actually, in the Andhra Pradesh case, the matter had not been dealth with in the Trial Court on the merits. It was a civil miscellaneous appeal, brought in by the petitioning first defendant, against an order made by the Sub-Judge, rejecting to record a compromise in terms of the affidavit and to pass a compromise decree.

4.2.4 Neither of the Judge seems to have noted Order 43, rule 1A which was itself inserted in 1976. Order 43 rule 1 (m) (before 1976) provided an appeal under section 104 against—

"an order under rule 3 of Order 23, recording or reusing to record an agreement, compromise or satisfaction."

This was deleted in 1976 by the amending Act. But as stated above, the same Act inserted Order 43 rule 1A, permitting the appellant in an appeal against the main decree, to challenge the recording or non-recording of compromise.

4.2.5 Some difficulty is created on the above point, as the High Court of Madhya Pradesh[6] has expressly dissented from the Andhra Pradesh case of 1981 mentioned above. In the Madhya Pradesh case (leaving aside facts which are not material for the present purpose), an application for recording a compromise had been accepted by the Trial Court, dismissing the objection raised by the opposite party, *inter-alia*, to the effect that his signature to the compromise had been taken under coercion and that it was not legal. Some question arose as to whether the compromise application embraced properties which were not subject matter of the suit, or whether it involved persons who were not parties to the suit.

4.2.6. The Trial Court, however, recorded the compromise apparently rejecting the objections and this point was raised before the District Judge by way of a miscellaneous civil appeal under Order 43, rule 1A. The appeal agianst the order rejecting the compromise was dismissed on merits. But in the meantime, against the order of the Trial Court, passing a decree in terms of the compromise, a civil revision was taken to the High Court. In 1983, the High Court (in that Civil revision) set aside the order of the Trial Court, because it embraced other properties and parties, as stated above. The case was remanded to the Trial Court with a direction that it will be open to the non-applicant to urge that decreee be passed with respect to that part of the compromise which related to the suit. But the applicant would be at liberty to show that the clause was inseparable from other clause, i.e. that he could raise that point in opposition to the non-applicant. The Trial Court, holding the clause to be separable, passed a decree in respect of eviction of the applicant from the suit property. Against this order a civil revision was preferred to the High Court. The applicant also preferred, before the District Judge, under Order 43, rule 1A, an appeal against the order. The District Judge held that as a regular appeal lies under section 96 of the code against the judgment and decree of the Trial Court, the proper court fee must be paid.

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5. G. Peddi Reddy v. G. Tirupatty Reddy, AIR 1981 A.P., 362 (Raghubir & Seetha Ram Reddy J J.).
6. Thakur Prasad v. Bhagwandas, AIR 1985 M.P. 171, 175, para 5.6 (C.P. Sen and Gulab Gupta, JJ.).

4.2.7 Against this order, the applicant took a civil revision in the High Court. The High Court held that no revision lies against the order of the Trial Court recording the compromise and passing a decree in terms thereof, because an appeal lies under section 95, read with Order 43, rule 1A, against such an order.

4.2.8 The Andhra Pradesh Judges, with respect, failed to notice Order 43, rule 1A. If they had noticed that provision, probably, the ruling would have been different.

4.2.9 The High Court of Madhya Pradesh has observed :

"*The apparent conflict between S.* 96(3) *and Order* 43, *Rule* 1*A can only be resolved in the manner suggested by us**. The court should lean against a construction which would make any particular provision futile. The court should also, as far as possible, avoid a construction which results in an anomaly. Clearly, the intention of the Legislature in making the amendments in the Civil Procedure Code was to simplify the procedure and avoid multiplicity of the proceedings in order to curtail litigation. Therefore, the clear intention in enacting Order 23, Rule 3A and deleting Order 43, Rule 1(m) and adding Rule 1A to Order 43, is that whatever objection may be against recording or non-recording of the compromise should be in the same proceeding, that is firstly *in the suit and then in appeal under S.* 96. If it is otherwise, then the party will be left with no remedy when the court wrongly records a compromise, because the party aggrieved cannot file a separate suit and the appeal under Order 43, Rule 1(m) has been abolished, so he has to challenge the same in the appeal against the decree that may be filed under S. 96 read with Order 43, Rule 1A. If the appellate court finds that a compromise was lawfully recorded, then the appeal has to be thrown out as incompetent. If any other interpretation is put, then Order 43, Rule 1A(2) becomes meaningless. If there can be no appeal against the decree recording a compromise, then what is the purpose is saying in this sub-rule that the recording of the compromise can be challenged in an appeal against the decree, which means that if the compromise is not lawful, then an appeal can be filed and recording of the compromise can be challenged under this sub-rule."

4.2.10 *Recommendation* —These two decisions have created a curious situation. In practice, a conflict is likely to arise on the question whether an order under rule 3 of Order 23, recording or refusing to record an agreement, compromise or satisfaction is appealable. Notwithstanding the provisions of Order 43, rule 1A, the lower courts in Andhra Pradesh will find the situation embarrassing. Apart from that, the Madhya Pradesh judgement shows that considerable confusion (though unnecessary) is created by failure of the courts to read section 96 with Order 43, rule 1A. In our view, the position should be clarified by an amendment.

4.2.11 We suggest that it would be desirable to add, under section 96 (3), a proviso, as under :—

"Provided that nothing in this sub-section shall affect any right, in any appeal against a decree passed in a suit, to contest the decree on the ground that the compromise should, or should not, have been recorded."

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*Emphasis supplied.

CHAPTER V

SECTIONS 101 TO 158

5.1 Section 104 and Appeals Against Orders

5.1.1 Section 104(1) provides as under:—

"(1) An appeal shall lie from the following orders and, save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders."

Section 104(2) reads as under :

"(2) No appeal shall lie from any order passed in appeal under this section."

Unlike sub-section (1), which *expressly saves* other laws, sub-section(2) contains no savings regarding other laws, and it seems that the legislative intention is to bar a second appeal against orders passed in first appeals against ordes. However, there is a conflict of decisions on the subject.*

5.1.2 *Question for consideration* -When an order is passed by a single Judge of the High Court in an appeal from an order passed by a lower court, the question often arises whether an appeal under the Letters Patent is maintainable against such an order

5.1.3 According to one view, the bar against appeal contained in section 104(2) operates in such cases.[1] But according to the other view, it does not so operate.[2]

5.1.4 In the Bombay case[3] the order of injunction had been passed by the City Civil Court Bombay, under Order 39, rules 1 and 2 of the Code. The party against whom the order was passed appealed to the Bombay High Court, and the appeal was allowed by a single Judge. From this appellate order, an attempt was made to take a letters Patent appeal to the Division Bench of the High Court, but the Division Bench held that no such appeal was maintainable in view of section 104(2) of the Code. There were earlier rulings of the same High Court, to the same effect.[4]

5.1.5 According to the Gujarat High Court also, a Letters Patent appeal is barred in such a situation.[5]

5.1.6. This is also the Kerala view.[6]

5.1.7 The Madhya Pradesh High Court has, however, held that a Letters Patent appeal from an appellate order under section 104 is not barred.[7]

5.1.8 This is also the Madras view.[8-9]

5.1.9 The Andhra Pradesh High Court [10] different from the Madras High Court and pointed out that the latter did not refer to the decision of the Supreme Court[11] in Shah Babulal Khimji's case. Subsequently, the Madhya Pradesh High Court [12] examined the decision of various High Courts and, relying on the decision of the Supreme Court, held that a Letters Patent appeal from the order of the single Judge of the High Court passed in appeal under Order 43, rule 1 is incompetent on account of the bar contained in sub-section (2) of section 104.

5.1.10 In the above circumstances, a clarification of the law is needed.

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*Paras 5.1.3 to 5.1.9 *infra*.

1. Bombay, Oujarat, Andhra Pradesh and Kerala see *infro*
2. Madhya Pradesh and Madras, see *infra*
3. Pandey Misra and Co. v. Anil Upendra Pitale, AIR 1989 Bombay 72.
4. Obedur Rahman v. Ahmedali Bharucha, AIR 1983 Bom. 120, 121, para 8 & 9, (DB); Charity Commissioner v. Rajendra Singh, AIR 1984 Bom 478, following Shah Babulal, v. Jayaben D. Kania, AIR 1981 SC 1786.
5. Madhusudan Vegetable Products v. Rupa Chemicals, AIR, 1986 Guj 156 (Gokulkrishnan CJ. & SB Majumdar J.).
6. Abraham v. Illani, AIR 1981 Ker. 129, 130, 131, para 6 (relying on the practice of the Kerala High Court with reference to section 5, Kerala High Court Act, 1958).
7. Shrichand v. Tejinder, AIR 1979 MP 78, 82, para 11 (DB).
8. V.S. Bhoopathi Vijaya Raghava Chettiar v. Radha Rukmini Ammal (1984) TNLJ 92, referred to in Pandey Mishra & Co. v. Anil Upendra Pitale, AIR 1989 Bom. 72.
9. Rukmani v. H.N. Thirumalai Chettiar, A R 1985 Madras 283, 284, para 3 (DB).
10. Ghantasala Seshamma v. Gollapalli Rajaratnam, AIR 1990. Andhra Pradesh 19.
11. Shah Babulal Khimji v. Jayaben, AIR 1981 SC 1786.
12. B.S. Adityan v. Fencying Association of India, AIR 1991. Madhya Pradesh 316 (DB).

5.1.11 *Recommendation*—It is suggested that the first view, i.e. the narrower view, should be preferred and incorporated in the section. Having regard to various considerations, including in particular the need for finality at some stage in such matters, the amendment should provide as above, by adding a suitable *Explanation* to section 104(2) on the subject. The present language of section 104(2) also favours this approach. The new *Explanation* could be somewhat on the following lines :

"*Explanation*—Where an order is passed by a single Judge of the High Court in an appeal from an order passed by a court subordinate to the High Court, no further appeal shall lie against the first mentioned order, notwithstanding anything to the contrary contained in the Letters Patent constituting the High Court."

5.2 Section 107 and Deficiency in the Court Fees

5.2.1 A question arising out of section 107 (also connected with Order 7, rule 11) may now be considered. Where the memorandum of appeal appears to be deficient in court fee, the question arises as to what order the court should pass. Section 167 reads as under :—

"S. 107(a) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to (d) x x x

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein."

Order 7 rule 11 reads as under :

"*Rejection of plaint*—The plaint shall be rejected in the following cases :—

(a) where it does not disclose a cause of action :

(b) where the relief claimed is under-valued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the Court, fails to do so:

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the palintiff, on being required by the court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so :

(d) where the suit appears from the statement in the plaint be barred by any law :

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be, within the time fixed by the Court and that refusal to extend the time would cause grave injustice to the plaintiff."

5.2.2. *Question for consideration*—The basic question is whether Order 7, rule 11(*b*) and (c) are attracted to appeals.

5.2.3. According to one view, in such a case, Order 7, rule 11 can be invoked. This means that where the relief claimed in the appeal is under-valued [clause (b)] or, (through the relief is properly valued), the plaint is written upon paper which is insufficiently stamped [clause (c)], the court is expected to call upon the appellant to correct the valuation or to supply the requisite stamp paper within a time fixed by the court. It is only thereafter, i.e. if the appellant does not rectify the deficiency within the fixed time, that the appeal can be rejected. The court cannot straightaway dismiss the appeal for deficiency in court fee.[13]

13. Anantha Naicken v. Vasudev Naichan, AIR 1967 Ker. 85, para 3 (Vaidialingam J.) "If it is found at the hearing that deficit court fee has not been paid, the proper thing would be to stop further hearing.....and direct the plaintiff or the party concerned to pay the necessary court fee."

5.2.4. In the case of a plaint such time is given. The question is whether such an opportunity must be given in the case of memorandum of appeal also. There is a conflict of decisions on the point. According to the following High Courts, time must be given for the purpose :—

(a) Bomay,[14]
(b) Kerala,[15]
(c) Orissa,[16]
(d) Patna,[17] and
(e) Tripura.[18]

5.2.5. In contrast, the following High Courts take the view that the appellate court is not bound to grant time, though it has a discretion to grant time :—

(i) Allahabad,[19]
(ii) Jammu and Kashmir,[20]
(iii) Madras,[21]
(iv) Nagpur,[22]
(v) Punjab,[23] and
(vi) Rajasthan.[24]

5.2.6. This question is connected with the question whether Order 7, rule 11(c) applies to the rejection of appeal. In 1914, the Bombay High Court took the view that a memorandum of appeal stands on the same footing as a plaint.[25] Exactly a year later, the Madras High Court[26] doubted the corretness of this judgment. In 1938, Mr. Justice Varadachariar of the Madras High Court, speaking for a Division Bench of the Madras High Court, in an elaborate judgment, held that Order 7, rule 11(c) does not apply to appeals.[27]

5.2.7. A Division Bench of the Punjab and Haryana High Court[28] has laid down the law as under in 1970 :

> "The latest judgment of the Madras High Court taking the same view is of *Varadachariar and Pandrang Row, JJ.* in *Sitharamayya v Ivaturi Ramayya* AIR 1038 Mad. 316. The learned Judges of the Madras High Court also after considering a large number of previous cases came to the conclusion that the provisions of Order 7, Rule 11(*c*) of the Code of Civil Procedure *do not apply* to appeals and that the appellate court is entitled to reject an appeal if the full court fee has not been paid without calling upon the appellant to pay the deficient court fee, because, in so far as the memorandum of appeal was concerned, express provision has been made in 0.41 Rule 3

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14. Phaltan Bank v. Baburao, AIR 1954 Bom. 43, 45, para 4; Achut Ramchandra v. Nagappa, AIR 1914 Bom. 249.
15. Anantha Naichen v. Vasudeva Naickan, AIR 1967 Ker. 85, para 3.
16. Achut v. Sibram, ILR (1962) Cut. 818.
17. Sarjug Prasad. Surendrapat, AIR 1939 Pat. 137 (DB);
    Ramati Singh v. Shitab Singh, AIR 1939 Pat. 432 (Opportunity must be given);
    Mahabir Ram v. Kapil Deo, AIR 1957 Pat. 11(1) (Raj Kishore Prasad J.);
    Tulsi Ram v. Keshri Prasad, AIR 1962 Pat. 189, 190 (case of plaint);
    (Anant Singh J.) (Opportinity must be given).
18. H.C. Sarkar v. H Jyoti Bali, AIR 1970 Tri. 26 (R.S. Bindra, J.C.) .
19. Wajid Ali v. Isar Bano, AIR 1951 All 64 (Full Bench of 5 Judges) (relying on section 149); Bibbi v. Shugan Chand, AIR 1968 All 216, 224 (court may give time).
20. Collector, Land Acquisition v. Dina Nath, AIR 1977 J & K 11, 15, para 20.
21. Sitaramiah v. Ramiah, AIR 1941 Mad. 838 (FB).
22. Atmaram v. Singhai Kasturchand, AIR 1930 Nag. 224 (Macnair, A.J.C.).
23. (a) Raj Kumar v. Amar Singh, AIR 1981 Punj 1 (FB).
    Jagat Ram v. Khairati Ram, AIR 1938 Lah 316 (FB). see *infra.*
    (o) Balwant Singh v. Jagjit Singh, AIR 1947 Lah 210 (Elaborate discussion).
24. Amar Singh v. Chaturbhuj, AIR 1957 Raj 367; Gulam v. Shrikalyan, AIR 1975 Raj. 150, 152 paras 7 and 8. (Kan Singh J.) (Time may be granted at the discretion of the court) (section 149 relied on).
25. Achut Ramachandra v. Nagappa, AIR 1914 Bom. 249.
26. Narayana Rao v. Seshamma, AIR 1915 Mad 426 (2).
27. Sitharamayya v. Ivaturi Ramayya, AIR 1938 Mad 316 (DB).
28. Aley Textile v. The British India Corporation, ILR (1979) 2 Punj and Har 127, cited in Raj Kumar v. Amar Singh, AIR 1981 P & H 1, 5 para 9 (FB).

for its rejection on the grounds stated in that rule. After hearing the learned counsel for the parties at length and after careful consideration of the matter, we are inclined to agree with the view taken by the Division Bench of the Madras High Court in *Sitharamayya's case (supra)*. The provisions of section 107 (2) have been expressly made subject to such conditions and limitations 'as may be prescribed.' In section 2(16) 'prescribed' is stated to mean 'prescribed by rules.' Whereas specific provision has been made in rule 11 of Order 7 relating to plaints, no corresponding provision has been made to that effect in Order 41 of the Code, which contains the entire relevant procedure relating to appeals. Agreeing with the reasoning on which the judgment of the Division Bench of the Lahore High Court was based, we do not appear to be bound to allow the appellants an opportunity to make up the deficiency in court fee after the expiry of the period of limitation for preferring the appeal particularly in a case where there is no dispute about the quantum of the court fee payable, but the appellants have knowingly and deliberately paid deficient court fee on the solitary ground that they were not possessed of sufficient funds to pay the requisite court fee within the period of limitation. Since the petition of appeal did not bear the requisite court fee, no proper appeal has in fact been filed in this case."

5.2.8. The Ful Bench judgment of the Punjab and Haryana High Court of 1981 aproves of the above reasoning.[29]

5.2.9. In an appeal filed under the Representation of the People Act, the Supreme Court held that if the claim of the appellant that on the pleadings in the election petition no triable issue arose is well-founded, then the petition was liable to be dismissed under Order 7, Rule, 11, *even in appeal.*

5.2.10. *Recommendation*—It appears to us that the controversy needs to be resolved and that the better course would be to adopt and incorporate a view which would apply the provisions of Order 7, Rule 11(b) and (c) to appeals also. It is not fair that a hearing on the merits should be precluded merely by reasons of dieficiencies in court fees. There should be inserted a suitable *Explanation* to section 107 for adopting the above view. In the alternative, in Order 41, a rule applying the provisions of Order 7, rule 11 *mutatis mutandis* to appeals can be inserted as suggested in the next paragraph. The latter course may perhaps be more convenient and we recommend its adoption.

5.2.11. We note that Order 41 rule 3(1), (so far as is material) provides of rejection of a memorandum of appeal. In rule 3, sub-rule (1A) should be added as under :

"(A1) The memorandum of appeal shall be rejected in the following cases :

(a) where the relief claimed is under-valued and the appellant, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so; or

(b) where the relief claimed is properly valued, but the memorandum of appeal is written upon paper insufficiently stamped, and the appellant, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the court, fails to do so.

"Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the appellant was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be, within the time fixed by the Court and that refusal to extend the time would cause grave injustice to the appellant."

5.3. Section 136 and arrest of persons or attachment of property in outside district

5.3.1. Under section 136 of the Code, when a Court executing a decress has to arrest a person or attach a property outside its jurisdiction, it can issue a warrant or an order for the purpose and send it through the District Court. Thereafter, the District Court shall cause the arrest or attachment to be made by its officers or by a court subordinate to itself and shall inform the court which issues the warrant or order. Other proceedings follow, as provided in the section. As regards the actual procedure to be followed, the relevant. part of section 136(1) provides that the Court to which the application is made—

"may in its discretion, issue a warrant of arrest or make an order of attachment and send to the District Court within the local limits of whose jurdisdicton such person or property resides or is situated, a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment."

5.3.2. *Question for considertion*—The question has arisen whether the provision in section 136(1) to the effect that the warrant is to be sent through the *the District Court* is mandatory (so that non-compliance with the provision will render the proceeding void) or whether it is discretionary (so that the non-compliance is regarded as a mere irregularity).

29. Raj Kumar v. Amar Singh, AIR 1981 P & H 1 (FB).
Lalit Kishore Chaturvedi v. Jagdish Prasad AIR 190 Supreme Court 1731.

5.3.3. Some High Courts take the first view and according to them—

(1) an order addressed to a Court except through the District Court, would be a nullity;

(2) the attachment effected in pursuance of such an order may be ignored as void; and

(3) if the property so attached is actually sold, the sale can be set aside on proof of substantial injury to the appellant.

This view is taken by the following High Courts :

(a) Allahabad,[31]

(b) Mysore,[32]

(c) Patna,[33]; and

(d) Punjak[34]

5.3.4. In the Allahabad case, the question was whether attachment of property by the Civil Judge, Lucknow, on the authority of a precept received by him from Kanpur, was valid. The Division Bench of the Allahabad High Court held[35] the attachment to be invalid. As the matter is discussed at some length in the judgment, it will be useful to quote paragraphs 17 and 17A of the judgment, which are as under :

"17. It appears to us that the provisions of S. 136 are quite explicit, and even though it may, to some extent, be said that the section lays down procedure for attachment of property outside the jurisdiction of the Court ordering the same, it also prescribes jurisdiction for attachment of property in such cases. The very fact that the order of attachment has to be sent to some other Court, indicates that the Court ordering the attachment has no jurisdiction to cause the attachment being made outside its own territorial jurisdiction. In order, therefore, that attachment be made, two conditions must be satisfied, namely :—

(1) The property must lie within the territorial jurisdiction of the Court causing the attachment to be made.

(2) The Court ordering the attachment must be seized of the matter.

"17A. The Court ordering attachment before judgment is seized of the matter, but the property does not lie within its jurisdiction. If the order of attachment is sent to a Court other than the District Court, the property required to be attached may lie within the jurisdiction of that Court but that Court cannot be seized of the matter unless the proceedings for attachment are properly before it. Sub-sections (1) and (2) of section 136, therefore, prescribe not only the manner in which the attachment shall be made but also jurisdiction for making the attachment. On receipt of the order of attachment, the District Court is seized of the matter and the property is also within its jurisdiction and attachment can, therefore, be made by it. Sub-section (2), however, prescribes that the District Court may cause the attachment to be made by its own officers or by a Court subordinate to itself. If the District Court exercises the option to get the attachment made by a Court subordinate to itself, it will be only then that the Court will be seized of the matter and since the property also lies within its jurisdiction, it will bable to get it attached."

5.3.5. The difficulty created by section 136 and its proper rationale have been dealt with by High Court of Mysore.[36] The following quotation from para 9 of the judgement is of some help :—

"The concensus of judicial opinion in India in behalf appers to be in consonance with the view which I have taken, as can be seen from the decisions of the various High Courts, namely AIR 1968 Punj & Hary 461 (Bhagwan Das Pribhdas v Santokh Singh Saran Singh); AIR 1963 All 320 (Haji Rahim Bux & Sons v Firm Samiullah and Sons); AIR 1051 Madh Bha 82 (Rameshwaradhyal Ramswaroop v Bheemsen Dulchand) and AIR 1937 Pat 603; (Bansropan Singh v Emperor). Sri Chattre, the learned counsel for respondent No. 1 has pressed into service the decision of the High Court of Travancore-Cochin in AIR 1952 Trav Co. 159 (FB) between Mariamma Mathew v Ittop Poulo and the decision of the Kerala High Court in AIR 1963 Ker 193 between Mookan Ouseph Thomakutty v Puramundekat Pandinjare Madathil Nanu which followed the earlier decision of the Travancore-Cochin High Court. The view taken by the High Court of Travancore-Cochin as well as the Kerala High Court in the aforesaid two decisions is that the giving effect to the order of attachment is only a procedural matter and that therefore section 136 of the Code of Civil Procedure should not be regarded as a provision conferring jurisdiction on another Court in giving effect to the order of attachment. I have already discussed the relevant provisions of the Code

31. Rahim Bux and Sons v. Firm Samjulla & Sons, AIR 1963 All. 320 (*see infra*).

32. S.A. Patil v. P. K. Rajput, AIR 1973 Mysore 82, 84, 85 para 6 (Malimath J.).

33. Bansropan v. Emperor, AIR 1937 Pat. 603, 605 (James & Madan JJ.).

34. Bhagwan Das v. Santokh Singh, AIR 1968 Punj. and Hary. 461 : 70 Punj. LR 467.

35. Rahim Bux & Sons v. Firm Samiulla and Sons, AIR 1963 Allahabad 320, 325, Paragraphs 17 to (M.C. Desai CJ. & S.D. Singh J.).

of Civil Procedure and recorded my reasons to show that section 136 of the Code of Civil Procedure is one which provided for conferring jurisdiction on Court to give effect to the order of attachment made by another Court, which jurisdiction it does not otherwise possess. With great respect I find myself unable to agree with the view taken in those two decisions that section 136 of the Code of Civil Procedure deals only with the procedural aspect and that any irregularity in following the same does not vitiate the attachment made."

5.3.6. The point was considered at some length by the High Court of Patna in a Division Bench ruling[37] though it was a criminal case, the question related to interpretation of section 136 of the Code of Civil Procedure, the question being whether a person who escaped from the custody of court peon who had arrested him on a defective warrant could be convicted under section 148 of Indian Penal Code. In this case, the warrant was not sent to the District Court but was endorsed directly to the Munsif and it ultimately found its way to the District Judge who ordered it for execution. The argument was that the District Judge has no power thus to execute a warrant which was not properly addressed to him under section 136. The Advocate General conceded that in this case the warrant was defective and could not be defended as a good warrant. The High Court made the following observations.:—

> " It apperars to us that when a Court exercises the extraordinary powers conferred by S. 136, Civil P. C., the provisions of that section must be strictly observed, and warrant must be endorsed to the District Court outside the jurisdiction of the issuing court, in which the warrant is to be executed. The warrant against Ramraj Singh was, therefore, defective and Mr. Sri Narain Sahay argues that as that was the warrant which was actually executed which led to the rescue. Ram Raj Singh cannot be treated as having been in lawful custody and no offence was therefor committed under s. 225 B of the Code by anybody concerned. If the matter ended there, the petitioners who have been convicted of the offence of rescuing or escaping from lawful custody and of rioting with the common object of effecting the rescue or escape would apparently be entitled to acquittal on those charges, although this defect in the form of the warrant was manifestly not known to them at the time."

5.3.7. But, as the learned Advocate General points out, "the petitioners have been convicted not merely for the rescue of Ramraj Singh but for that of Bansropan Singh also. Ransropan Singh was actually under arrest for the reason that he had wounded a constable, and had committed in the presence of the two constables, an offence punishable under section 324, I.P.C., for which, the police officers had powers to arrest him under Clause 1 of section 54, Criminal Procedure Code, so that he was in lawful custody and the persons rescuing him actually committed the offence punishable under section 225 of the Code. If he is regarded as having been in custody in execution of the warrant issued under 0.38, r. 1, Civil Procedure Code, the persons concerned in the rescue were quilty of the offence punishable under section 225B of the Code, since there was no defect in the warrant against Bansropan, so that in any view of the matter the persons resisting the arrest of Hansropan and rescuing him from custody were rightly convicted. Ramraj Singh merely escaped from the custody of the peon who had arrested him on a warrant which was defective. So far as he is concerned, the finding and sentences of the trial Court must be set aside, and he must be acquitted and dicharged from his bail."

5.3.8. In contrast, the following High Courts take the view that such non-compliance is a mere irregularity, which will not vitiate the proceedings :

(i Andhra Pradesh;[38] and

(ii) Kerala.

5.3.9. Interpreting section 101 of the Tranvancore Civil Procedure Code (corresponding to section 136), a Full Bench of the Travancore-Cochin High Court[40] took the view that the aforesaid section prescribed a mere matter of procedure, and sending the warrant, not to the district court but to a subordinate court in another district is only an irregularity which does not affect the jurisdictoin of the court. The Travancore-Cochin High Court put forth the reasoning that when an order of attachment is sent to the district court, the district court has no discretion of its own to refuse execution. It is bound to carry out the order itself, or to get it executed through a subordinate court. But, in the Allahabad case[41] of 1963, this reasoning has been criticised in the following words :—

"It is certainly true that the District Court, to which the order of attachment is sent, has no discretion in the matter and has to carry out the order of the Court issuing the order of attachment, but that does not necessarily mean that the provision made for the order of attachment being sent

36. S.A. Patil v. P. K. Rajput, AIR 1976 Mysore 82, 85, 86 para 86.

37. Bansropan Singh v. Emperior, AIR 1937 Pat. 603, 605 (James L Madan JJ.) .

38. Pollumal v. S.C. Negoji Rao, (1975) 2. A.P. L.J. 143 cited by A.N. Shah, CPC (1989) Page 1352, footnote 15.

39. Mookan Ouseph v. Paramundekat, AIR 1963 ket. 193.

40. Mariamma Mathew v. Ittop Poulu, AIR 1952 Travancore Cochin 159 (FB).

41. Rahim Bux and Sons v. Firm Samiulla and Sons, AIR 1963 Allahabad 320.

to the Court is a mere matter to procedure. The very fact that the Court ordering the attachment cannot itself issue a warrant and send it direct to the nazir for execution, indicates that a question of jurisdiction is involved in it. With respect, therefore we are unable to follow the view taken by the Full Bench in AIR 1952 Trav. Co. 150 (supra) and hold that the Civil Judge at Lucknow had no jurisdiction to attach the property and the attachment was consequently invalid. The effect would be as if attachment had not been made at all."

5.3.10. It is desirable that the position in this regard should be clarified. Adoption of the view that the non-compliance is a mere irregularity, would, at the first sight, appear attractive, because the question may be raised why a procedural irregularity should invalidate the act of a court, particularly in execution.

5.3.11. However, as mentioned above, many of the High Courts have pointed out that section 136 really creates a jurisdiction where there would otherwise be none. If the section had not been there, then the following consequences would have ensued :—

(a) The court issuing the order contemplated by section 136 (i.e., arrest or attachment of a person or thing outside its jurisdiction) would have been incompetent in the matter, because, in general, a court can only deal with matters within its local jurisdiction;

(b) The court within whose jurisdiction the person or thing actually is, would have (but for the section), no competence, because a court, in general, in concerned only with the execution of it own processes.

5.3.12. It is this vacuum that is sought to be filled in by section 136. Its terms must, therefore, be strictly complied with.

5.3.13. There is another aspect to the matter. Section 136 does not itself give jurisdiction to a subordinate court in a direct manner. What it contemplates is that the district court will issue the warrant of arrest or order of attachment—or it will cause it to be done by a subordinate court. Further, as provided by section 136(2), it "shall inform the court which issued or made such warrant or order of arrest or attachment." Thus, there is an element of centralised authority in the District Court. It seems, therefore. to be a logical view to take that any other mode of proceeding is not contemplated by the section as a valid procedure.

5.3.14. *Recommendation*—The position should therefore be made clear by inserting an *Explanation* after sub-section (4) in section 136 on the lines indicted below.

"*Explanation*—A warrant of arrest or an order of attachment shall be acted upon only when received through the District Court as provided in sub-section (1)."

We recommend accordingly.

CHAPTER VI

ORDERS 1 to 10

6.1. Order 2, Rule 2 and Mesne Profits Already Accrued

6.1.1. Order 2, rule 2(1), requires that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action". If the plaintiff does not do so, then, under rule 2(2), "he shall not afterwards sue in respect of the portion so omitted". Similarly, sub-rule ,(3) Rule 2, Order 2, provides as under :

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

6.1.2. *Question for consideration.* The question that has arisen is this. If a person sues for possession of property without claiming the mesne profits that have already accrued against the defendant who is alleged to be in wrongful possession, can he sue later for such accrued mesne profits ? Or, is such a suit barred by Order 2, rule 2(3) ?

6.1.3. According to the following High Courts, if a plaintiff who sues for possession of immovable property fails to claim accrued mesne profits, he cannot subsequently sue for the mesne profit which had already accrued at the time of the earlier suit :—

(a) Allahabad;[1]
(b) Bombay (later view);[2]
(c) Madhya Pradesh;[3]
(d) Orissa;[4] and
(e) Patna.[5]

6.1.4. According to the following High Courts, however, such a suit is not barred :—

(i) Andhra Pradesh;[6]
(ii) Bombay (earlier view);[7]
(iii) Calcutta;[8]
(iv) Madras;[9] and
(v) Punjab and Haryana.[10]

6.1.5. The Madras case was a Full Bench decision. The Bench posed the following question ; "If a plaintiff sues for possession only, when he might have jointed in the same cause of action claims for profits and damages, is it open to him to sue subsequently for profits which became payable before the institution of the suit and which might have been inluded in the suit ?"[11] It answered the question in the affirmative.

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1. Saghir Hassan v. Tayab Hasan, AIR 1940 All 524 [dissented from Sadhu Singh v. Pritam Singh, AIR 1976 P & H 38, 47 (FB)].
2. Channappa v. Bagalkot Ban,, AIR 1942 Bom. 338 (Heaumont U.J. & Sen J.).
3. Ram Swarup v. Jitmal, AIR 1966 MP 186, 188, para 8 (Krishnan J.).
4. Mukunda v. Krupasindhu, AIR 1954 Orissa 202, 203, 204, left hand para 3.
5. Ramjanam Singh v. Khub Lal, AIR 1925 Pat. 145.
6. Abburi Rangamma v. Chitrapu Rao, AIR 1966 AP 325.
7. Ramchandra v. Lodha, AIR 1924, Bom. 368.
8. Kishorilal Roy v. Sharut Chunder (1882) ILR 8 Calcutta 593; Sris Chandra v. Joyaramdanga Coal Co. , AIR 1942 Cal 40; Santosh Kumar v. Sachindra Nath, 62 Calcutta Weekly Notes 759.
9. Ponnamal v. Ramamirda Aiyar, AIR 1915 Mad. 912, 913 (FB).
10. Sadhu Singh v. Pritamsingh, AIR 176 P & H 38 (FB), dissenting from Saghir Hassan v.Tayab Hassan, AIR 1940 All. 524.
11. Ponnamal v. Ramamirda Ayiar, AIR 1915 Mad. 912, 913 (FB).

6.1.6. The Madras case of 1915 points out that when Order 2, rule 4 says that no claims shall be joined with suits for immovable property except claims for mesne profits etc., "it is quite clear that the legislature considered that claims for the recovery of and and claims for mesne profits were separate causes of action".[12]

6.1.7. *Recommendation*—It appears to us that the reasoning advanced in the Madras case[13] of 1915 is unanswerable. The need is to codify that interpretation by suitably amending the law. An explanation could be added to Order 2, rule 2 for the purpose.

6.2. Order 2, Rule 2 and Suits Filed Simultaneously

6.2.1. A controversy which has arisen out of Order 2, rule 2(2), is concerned with the prohibition indicated by the words "he shall not *afterwards* sue in respect of the portion so omitted or relinquished."

6.2.2. *Question for consideration*—The question is this. What is the position if two suits are filed on the same day, making different claims founded on the same cause of action ? How are the provisions of Order 2, rule 2 to be applied in such cases ?

6.2.3. High Courts have expressed three diverging views on this question. The three views are :—

(i) Order 2, rule 2, applies in such a case. One or the other suit must be dismissed, and, for this purpose, the suit which bears *the later number,* should be taken as suit filed "afterwards".

(ii) The rule applies, and the plaintiff must elect. But the test of "numbering" of the suit as per (i) above, should not be applied. The election should be of the plaintiff, who should decide which suit he desires to proceed with.

(iii) The Court should allow the two suits filed on the same day to be consolidated, instead of forcing upon the plaintiff dismissal of one of the suits as per (ii) above.

6.2.4. The first view is taken by the Allahabad High Court.[14] The second view is taken by the Madras High Court.[15] The third view has been taken by the Bombay High Court.[16]

6.2.5. In our opinion, the Allahabad view (*i.e.*, the first view mentioned above) is, with great respect, not a very satisfactory one. The accidents of numbering of suits should not conclusively determine the career of one or other of two suits filed on the same day. As regards the Madras view, (*i.e.*, the second of the three views mentioned above), it is, no doubt, a more practical view than the first one. Still, we think that the Bombay view is the most preferable for a variety of reasons. In the first place, it does substantial justice to the parties by suggesting a procedure (consolidation) which is convenient. Secondly, it strikes a fairly good balance between the interests of the plaintiff and those the defendant. The plaintiff, if he has a just cause, is enabled to obtain trial thereof. At the same time, the defendant is spared of the inconvenience of being vexed by two different suits based on the same cause of action. Thirdly, consolidation of suits and hearing them together really achieves the main object of Order 2, rule 2, which is to avoid multiplicity of litigation in the shape of "splitting of claims". If the plaintiff commits an irregularity by consolidating the claim, the court can rectify the irregularity by consolidating the split portions of the claim.

6.2.6. *Recommendation*—We would, therefore, recommend that a new rule 2A should be inserted in Order 2, as under :—

"2A. *Suits filed on the same day on same cause of action.*—Where a plaintiff sues the defendant on the same day through two or more separate suits in the same court and the suits are based on the same cause of action, then—

(a) The provisions of rule 2 of this Order shall not apply, but

(b) the court shall pass an order for consolidation of the suits and hearing them together, in the interests of justice."

6.3. Order 2, Rule 2 and Arbitrations

6.3.1. Order 2, rule 2 (to state its gist, again, so far as is material), provides that the plaintiff suing in court in respect of a cause of action must include the entire claim arising from that cause of action must include the entire claim arising from that cause of action, and, if he does not do so, he cannot later institute a suit for the claim not made earlier.

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12. Ibid.
13. Ibid.
14. Murti v. Bhola Ram, (89) ILR 18 All 165 (FB).
15. Rayalu Ayyar v. Ramudu Ayyar, AIR 1926 Mad. 934, 935, 936 (Coutts Troller (CJ.).
16. Ganesh v. Gopal, AIR 1943 Bom. 12, 17, 18 (Broomfield & Macklin JJ.)

6.3.2. Question for consideration. A controversy exists as to the applicability of this rule to arbitrations.

6.3.3. The Delhi High Court has held that Order 2, rule 2 does not apply to arbitrations on the reasoning that the arbitrator is not a "court". The High Court has described Order 2, rule 2, as a penal provision, "draconian in nature", and has held it to be unjust to apply the rule to arbitrations.[17] The Gujarat High Court, however, holds the rule to be applicable to arbitrations.[18] The Calcutta view on the subject has been fluctuating.[19]

6.3.4. In a Calcutta case decided in 1964, there are dicta to the effect that the principle of the rule does not apply to arbitration proceedings.[20] However, in a later case of the same High Court, it was held that the principle of this tile applies to arbitration proceedings in appropriate cases.[21]

6.3.5. In Kerorimall v. Union of India, Calcutta High Court[22] has held that the same dispute, once referred and embodied in an award, cannot be the subject matter of a fresh reference and, to that extent, the rule of *res judicate* applies to arbitration proceeding. But it further held that there is no authority for the proposition that disputes which could have been raised, but were not raised previously, could not be raised on the principle of constructive *res judicata*. It proceeded to observe that "there is authority for the proposition that the principle of Order 2 rule 2 is not applicable to arbitration proceedings. It is not necessary for me in the instant case to consider to what extent the rule of constructive *res judicata* is applicable to arbitration proceedings because I hold on facts that the instant dispute was expressly left out of consideration in the previous arbitration proceeding on the ground that the arbitrator locked jurisdiction to entertain the dispute."

6.3.6. Following observations of Ronkin J. from Balmukund's case[23] are quoted in the above case[24] :—

> "Order : II rule 2 is a special provision doubtless of the completest wisdom but unknown to the common law one moreover which attaches an indiscriminate and indeed incalculable penalty to a condition difficult to define. There is I think a cardinal error involved in any attempt to appeal even to the principle on which the Rule is founded for the jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of the cause of action but upon existence of a dispute."

6.3.7. The Delhi High Court[25] has also held Order II rule 2 to be not applicable to arbitrations following the case of Kerorimall (AIR 1964 Cal 545). The Delhi High Court has dissented from the later judgement of the Calcutta High Court by Sabyasachi Mukharji J. (as he then was) in the case of Jiwnani Engineering Works Pvt. Ltd. v. Union of India[26]. The Delhi High Court has observed as under :

> "A learned Judge of the Calcutta High Court (Sabyasachi Mukharji J.) held that though Order II rule 2 does not in terms apply to proceedings under the Act there is no reason why the principle thereof should not be applied to arbitration proceedings in appropriate cases. With respect to the learned judge, I feel bound to differ on the applicability of Order II rule 2 to arbitration proceedings. The reason is that the arbitrator is not a Court. Order II rule 2 applies to proceedings before a Court. It cannot apply to proceedings before the arbitrator. It is a penal provision. It is draconian in nature. To apply Order II rule 2 to arbitrations will not only be illegal but also unjust. I do not deny that the principle of *res judicata* applies to arbitration. That doctrine is founded in public policy and applies equally to suits and awards".

6.3.8. The Gujarat High Court has, however, disagreed with the view taken by the Calcutta and Delhi High Courts. It has said [27] "it is not possible for me to agree with the view taken by the Calcutta High Court in Jiwnani Engineering Works[28]. The learned Judge of the Delhi High Court has held that principle of *res judicata* apply to arbitration because that doctrine is founded in public policy and applies equally to suits and awards. Order 2 rule 2 is an analogous principle founded on

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17. Alkarma New Delhi v. DDA, AIR 1981 Delhi 230.
18. See Gujarat Cases, *Infra*.
19. See Calcutta cases, *infra*.
20. Kerorimall v. Union of India, AIR 1964 Cal 545, 548, para 10 (PC Mallick J.)
21. Jiwani Engg. Works Pvt. Ltd. v. Union of India, AIR 1978 Cal 228 (Sabyasachi Mukherji J.).
22. AIR 1964 Cal 545.
23. Balmukund Ruia v. Gopiram Bhotika, AIR 1920 Cal 808(2).
24. Kerorimall v. Union of India, AIR 1964 Cal. 545.
25. Alkarma, New Delhi v. DDA, AIR 1981 Del. 230.
26. Jiwani Engineering Works v. Union of India, AIR 1978 Cal 228 (Sabyasachi Mukherji J.).
27. Kothari & Associate Baroda v. State of Gujarat, AIR 1985 Guj 42, 45, 46 para 10 (R.A. Mehta J.).
28. Jiwanani Engg. Works Ltd. v. Union of India AIR 1978 Cal 228 (Sabyasachi Mukherji J.).

public policy. The learned Judge of the Delhi High Court has observed that such provision of Order 2 rule 2 is penal and to apply the same to arbitrations would be illegal and unjust. I am with respect unable to agree with any of these adjectives. If rule of *res judicata* is founded on rational and just public policy it would equally apply to the extension of the same principle. In the case of Balmukund Ruia [AIR 1920 Cal 808(2)] Rankin J. had observed that Order II rule 2 is a special provision doubtless of the completest wisdom but unknown to the common law one moreover which attaches an indiscriminate and indeed uncalculable penalty to a condition difficult to define. "Although I am unable to agree with the latter part of the above quotation it is clear that the provision of Order 2 rule 2 is a rule of completest wisdom. If it were to attach any indiscriminate and indeed incalculable penalty to a condition difficult to define it would not be rule of completest wisdom. The rule is merely to the effect that a person shall include whole of his claim to respect to the same cause of action and omission to sue in respect of any portion of his claim would be barred. This is a salutary provision which prevents multiplicity of proceedings and avoids the vice of splitting up the cause of action as observed by the learned judge in the case of Jiwnani Engineering Works. This principle ought to apply with greater force to the arbitration proceeding, which is meant for speedy disposal of disputes and if successive disputes on the same cause of action could be raised, that would de-feat the very object of the arbitration proceedings. The claim before the Arbitrator is clearly in the nature of the suit and, instead of a Civil Court adjudicating upon the claim, a separate forum of arbitrator adjudicates upon the same claim. Therefore, for the purpose of (arbitration) Order 2, rule 2 the principle of constructive *res judicata* ought to apply naturally to arbitration proceedings. I am in respectful and complete agreement with the reasoning and conclusion of the learned Judge in the case of Jiwnani Engineering Works :

The Judgement of the Supreme Court in the case of Munshi Ram v. Banwari Lal AIR 1962 SC 903, indirectly lends support to this reasoning. In that case, after arbitration award, the parties had arrived at a different settlement under Order 23 rule 3 and not in terms of the award and the Court held that the provisions of Order 23 rule 3 would be applicable. The Supreme Court observed that "the power to record such an agreement and to make it a part of the decree whether by including it in the operative portion or in the schedule to the decree, will follow from the application of the Civil Procedure Code by section 41 of the Arbitration Act and also section 141 of the Code."

Accordingly, the Gujarat High Court held that where disputes arose between the Government and the construction contractor, and, on the application of the contractor, the previous arbitration was made for a certain amount claimed as compensation due to delay or extension of time limit by the Government for execution of the order, a subsequent application for reference to arbitration claiming a certain amount under a different head based on the same cause of action (delay of extension of time limit) would be bared.[29]

6.3.9. The matter needs attention. It seems desirable to provide that the provisions of Order 2, rule 2 apply to arbitrators. Order 2, rule 2 is not a penal provision, but is intended to prevent multiplicity of suits. The reasoning elaborated in the Gujarat judgement in support of applying Order 2, rule 2 to arbitrations appears to be very persuasive.

6.3.10. It may be that Order 2, rule 2 is a stringent provision. But such a stringent rule appears to be needed in the interest of avoiding multiplicity of arbitration claims. There is no reason why the principle applicable to ordinary litigation should not apply to arbitrations as well. Provisions in Order 2, rules 1 and 2 of the Code, which prohibit the splitting of claim under the same cause of action are aimed at avoiding multiplicity of suits on the same cause of action.[30]

In fact, Order 2, rule 1 itself declares that its object is to prevent further litigation concerning them, *i.e.* concerning the subject in dispte. The legislative intent is that, as far as possible, all matters in dispute between the parties relating to the same transaction should be disposed off in the same suit.[31] This object is relevant equally to arbitrations, as to suits.

6.3.11. *Recommendation*—It seems desirable to insert a provision in the Arbitration Act, 1940 say, as section 13A, on the following lines :—

> "13A. *Party to include whole claim and all reliefs*—Subject to the provisions of the arbitration agreement, the provisions of 2 of O II in the First Schedule to the Code of Cvil Procedure, 1908, shall, so far as may be, apply to arbitrations governed by this Act, as they apply to suits to which the said Code applies."

The above recommendation is made for the reason that it is as much necessary to avoid multiple arbitrations on the same cause of action, as it is to avoid multiple suits on the same cause of action.

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29. Kothari and Associates, Baroda v. State of Gujarat, AIR 1985 Guj 42, 44, 45, 46 paras 6—10.
30. Mulla, CPC (1984) Vol. 2, p. 883.
31. Saral Chand v. Mohun Bibi (1898) ILR 25 Cal 371, 390.

6.4. *Order 7, Rule 11(a) and cause of action*

6.4.1. Order 7, rule 11(a) provides that the plaint shall be rejected where it does not disclose a cause of action. This has been interpreted by the Supreme Court as meaning that if, on a meaningful reading of the plaint it is found manifest that the plaint is vexatious or meritless in the sense of not disclosing a clear right to suit, then the plaint is to be rejected.[32]

6.4.2. Question for consideration. The question for consideration is this. For deciding whether the plaint discloses a cause of action or not, should the court assume the averments made in the plaint to be correct for the time being and then decide whether those averments disclose a cause of action ? Or, can the court go further and hold a deeper enquiry ?

6.4.3. The High Court of Rajasthan has held that what the court has to decide is, whether the allegations made in the plaint disclose a cause of action. This does not entitle the court to hold a probe into those allegations on the basis of the plea raised by the defendant.[33]

6.4.4. On the other hand, the High Court of Delhi[34] seems to take a view which would confer on the court a wider power. In the Delhi case, the question was as to whether the State Trading Corporation was the agent of the Central Government, by reason of which the Central Government was liable for the breach of contract committed by the Corporation. It was urged on behalf of the Union of India (Central Government) that the plaint did not disclose any cause of action against the Union of India and the suit should be dismissed against it. The High Court held that it was to be seen if, actually according to law, the contention of the plaintiff that the STC is an agent of the Government is justified or not and mere allegation of the plaintiff was not enough. This Delhi judgement has been dissented from, in the Rajasthan judgment[35] of 1983.

6.4.5. In an Allahabad case, it was emphasised that two cases stand apart from each other :—

(i) case where the plaint itself does not disclose the cause of action; and

(ii) case where, after the parties have produced oral and documentary evidence, the court, after a consideration of all the materials, comes to the conclusion that there is no cause of action.

In the former case, Order 7, rule 11(a) is attracted, while in latter case it is not attracted according to the Allahabad view.[36]

6.4.6. In the Delhi case of 1981, the arguments placed before the court and the reasoning of the court are found in paragraphs 11 and 12 of the judgment, quoted below.[37]

"11. The learned counsel for the plaintiff contended that at this stage the only thing plaintiff has to show is that the allegations contained in the plaint do spell out a cause of action against defendants including the Union of India, in the present case, that it is not necessary that the said cause of action should be established and that the matter of establishing cause of action would come up for consideration only when the case would be tried on merits. He, therefore, suggests that let this application of the Union of India be dismissed and the matter as to whether the plaintiff has any cause of action against the Union of India should be decided after the framing of issues and leading of entire evidence. The learned counsel explains that in the present case there was allegation of the plaintiff that defendant no. 2 was agent of the Union of India and that the said allegation is sufficient for disclosing the cause of action against the Union of India. In support of this contention he relied upon a judgement of Assam High Court in Shanti Ranjan Das Gupta v. Dasuram Mirzamal Firm, AIR 1957, Assam 49. It was held that a plaint could not be rejected on the ground that there was no cause of action for the suit because that was something different from saying that the plaint itself did not disclose any cause of action. The learned counsel contended that in the present case what the Union of India was urging was that the plaintiff had no cause of action because according to law defendant No. 2 was not agent of the Union of India.

"12. But the law in this respect is laid down by the Supreme Court in T. Arivandandam v. T.V. Satyapal, AIR 1977 SC 2421. It is laid down that if, on a meaningful and not formal reading of a plaint, it is manifest that the plaint is vexatious or meritless in the sense of not disclosing a clear right to sue, trial court should exercise its power under Order VII Rule 11, Code of Civil Procedure, and should reject the plaint. So, it is meaningful reading of the plaint which is required. It is to be seen if actually according to law, on the allegations contained in the plaint, defendant No. 2 was agent of the Union of India or not. Mere formal allegation of the plaintiff

32. T. Arvindanandam v. T.V. Satyapal, AIR 1977 SC 2421. 2423, para 5.
33. Ranjeetmal. v. Poonam Chand, AIR 1983 Rajasthan 1, 2, para 3 (Dwarka Prasad J.).
34. Sakthi Sugars Ltd., v. Union hf India, AIR 1981 Delhi 212.
35. Ranjeetmal v. Poonam Chand, AIR 1983 Raj 1, 2 (Dwarka Prasad J.).
36. Jagannath Prasad v. Chandrawati, AIR 1970 All. 309, 311, para 6 (FB) (per Gyanendra Kumar J.).
37. Sakthi Sugar Ltd. Union of India, AIR 1981 Del 212.

that defendant No. 2 was agent of the Union of India is not to be accepted. In view of the Supreme Court authority, it is the duty of the Court to probe whether allegations made in the plaint made defendant No. 2 as agent and the Union of India as the principal according to law. I have already held that according to law, defendant No. 2 was not agent of the Union of India, and that being so plaint does not disclose any cause of action against the latter".

6.4.7. *Recommendation*—There appears to be need for clarifying the position, because the situation in question is of a recurring nature. The object of the provision giving power to reject the plaint to ensure that an unnecessary trial of the various points raised in the pleadings should not be held where, *even after accepting the allegation to be correct,* there is no cause of action in favour of the plaintiff. This being the objective, it is desirable that the narrow view of the scope of the rule should be adopted rather than the wider view. If there is a serious question to be decided, the proper course would be to let the suit proceed and then determine the matter on preliminary issues. Accordingly, it is suggested that Order 7, rule 11(a), should be replaced by the following :—

"(a) where, the *averments made in the plaint, even assuming them to be true,* do not disclose a cause of action".

6.5. Order 8, Rule 6A and Limits as to nature of Counter-Claim

6.5.1. In the Civil Procedure Code, provisions relating to counter-claims have been inserted in 1976. A controversy has arisen as to the kind of counter-claims and the class of suits to which these provisions apply. Order 8, rule 6A(1), reads as under :—

"6-A(1). A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not :

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court."

6.5.2. Order 8, rule 6-A (2) provides, *inter alia,* that such cunter-claim shall have the same effect as a plaint. Order 8, rule 6-A(4) provides that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

6.5.3. *Question for consideration*—With reference to these provisions, the question has arisen whether, in a suit seeking a permanent injunction (or, for that matter, any kind of non-monetary relief), a counterclaim can be entertained.

6.5.4. The High Court of Patna has held that the right to make a counter-claim is limited to cases involving a money claim.[38]

6.5.5. It is necessary to quote paragraphs 8 to 11 of the judgment of the Patna High Court, because there were several questions involved. These paragraphs read as under :—

"Now, the question which has to be examined is as to whether there is any limitation on the nature of the counter-claim ? Rule 6 prescribes certain conditions before a plea of set-off can be entertained. These conditions are that (i) the suit must be one for recovery of money, (ii) the set-off claimed by the defendant must be in respect of an assertained sum of money, (iii) such sum must be legally recoverable by the defendant from the plaintiff (iv) both the parties must fill the same character as they fill in the plaintiffs suit, (v) such claim should not exceed the pecuniary limit of the jurisdiction of the court.

"So far as the new Rule 6-A is concerned, no such restrictions have been mentioned. It simply enables a defendant to set up by way of a counter-claim "any right or claim in respect of a cause of action accruing to the defendant against the plaintiff". Can it be said that in view of Rule 6-A defendant is at liberty to raise any dispute in the suit of the plaintiff irrespective of its nature ?

"The expression 'counter-claim" has often been used in context with 'set-off". In Stroud's Judicial Dictionary it has been mentioned that "set-off and counter-claim confer definite and independent remedies upon the defendant against the plaintiff." The expression 'counter-claim' had not been used in rule 6, but in several judicial pronouncements the said expression has been used alongwith the expression 'set off". In the case of Sheobachan Pandey v. Madho Saran Choubey (AIR 1952 Patna 73) a Bench of this Court while construing the scope of Order 8, rule 6 observed as follows (at p. 75) :

38. Jashwant Singh v. Darshan Kaur, AIR 1983 Patna 132, 134, 135, paras 8—11 (Division Bench).

"A cross-claim may be sent up as a shield or as a sword. When it is set up as shield it is a defensive weapon and may be pleaded by the defendant to reduce the liability against him even to the full extent of the plaintiff's claim. A counter-claim in the shape of a defensive measure is what is technically known as a set-off."

"If the expression 'counter-claim" used in the aforesaid Rule 6-A is given an interpretation to include any claim irrespective of its nature and as to whether it has any connection with the claim of the plaintiff then in a suit filed on behalf of the plaintiff for recovery of an amount advanced to the defendant, defendant can make a prayer to declare his title and to pass a decree for recovery of possession in respect of any land or house against the plaintiff of that suit, if any such dispute is pending between them, although it has no connection whatsoever with the claim for a money decree made on behalf of the plaintiff. In my view, the framers of the Code never purported to enlarge the scope of a suit filed on behalf of the plaintiff, at the instance of the defendant. When they have used the expression 'counter-claim' it means that the claim and the counter-claim may be decided in the same suit in order to avoid multiplicity of the suits. Perhaps, keeping this aspect of the matter in view, by amendment R 6-C has also been introduced which is as follows :—

"6-C. *Exclusion of counter-claim*—Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such-counter-claim may be excluded and the Court, may on hearing of such application make such order as it thinks fit."

Learned counsel appearing for the petitioner has also drawn our attention to new rule 6-F of Order 8 and the amended r 19 of O 20 in support of his contention that the right of the defendant to raise a counter-claim has limited by the Code only in cases where the dispute is in respect of a money claim· Rule 6-F of Order 8 is as follows :—

"6-F. *Relief to defendant where counter-claim succeeds*—Where in any suit a set-off or counter-claim is established as a defence, against the plaintiff's claim, and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance."

From rule 6-F, it is apparent that counter-claim must relate to a monetary claim, because Coure has been vested with power to pass a judgment even in respect of any balance found due to the defendant. Rule 19(1) of Order 20 is as follows :—

"19 (1). Where the defendant has been allowed set-off (or counter-claim) against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party."

"In view of the amended Rule 19(1), which is a provision regarding preparation of the decree in respect of suits where a counter-claim has been allowed by the Court, it is clear that in the decree what amount is due to the defendant has to be stated. In my opinion, the contention of the learned counsel for the petitioner that counter claim under the rules aforesaid can be made only in such suits in which there is dispute in respect of money claim, has to be accepted. In the instant case the suit which was filed on behalf of the plaintiff was for declaration that he was the licensee of the premises in question and has a right to remain in possession thereof for the period mentioned in the plaint. *In my view, it was not open to the defendant to make a prayer for eviction of the plaintiff by way of counter-claim.* As such, the order amounts to an exercise of jurisdiction illegally and with material irregularity and calls for an interference by this Court."

6.5.6. On the other hand, according to the High Court of Punjab and Haryana, it is permissible[39] to make a counter claim for non-monetary relief. this is also the Kerala view.[40]

6.5.7. The Patna view, with respect, goes counter to the whole concept of counter-claim. In this context, it would be useful to quote from Mulla[41].

"Rules 6-A and 6-G are new and confer in addition to a right of set-off under rule 6 a statutory right to file a counter-claim. Before their addition in order 8 a set-off and counter-claim were strictly speaking not permissible unless they fell within the limited compass of rule 6.[42] Even in the case of an equitakle set-off where the defendant's claim made in the set-off was larger than the plaintiff's claim and courts in view of order 20, rule 19 allowed a counter-claim for the balance

39. Suman Kumar v. St. Thomas School & Hostel, Air 1988 Punjab & Haryana 38, 39, para 2 (and earlier Punjab Cases cited in it, particularly Bhim Sain v. Laxmi Narain, AIR 1982 P & H 155).

40. Raman Sukumaran v. Velayudhan, AIR 1982 Ker 253, 255 para 6 (Khalid J.).

41. Mulla, Code of Civil Procedure, (1984) Vol 2 page 1086.

42. Laxmidas v. Nanabhai, AIR 1964 S.C. 11.

amount as a cross-suit, such procedure was admitted only where the claim in the plaint and that in the counter-claim arose *from the same transaction or a series of transactions which amounted to the same transaction.* The new rules now confer a statutory right to a defendant to setup a counter claim. The claim need not be for liquidated amount. This is clear from the words "a claim for damages or not" in rule 6-A. The wide words which r 6-A is couched shows that it can be brought in respect of any claim that could be the subject of an independent suit. It is no longer confined to money claims or to causes of action of the same nature as the original action and it need not relate to or be connected with the original cause of action or matter. The words 'any right or claim in respect of a cause of action accruing to the defendant" show that the cause of action from which the counter-claim arises, need not arise from or have any nexus with the cause of action pleaded by the plaintiff. A claim founded in tort may be opposed by one founded on contract. Further, the defendant by his counter-claim may ask for any relief, e.g., a declaration, relief against forfeiture, injunction receiver, specific performance, an account, payment of a money claim or damages. The words, "both before or after the filing of the suit" in rule 6-A show that a defendant may set up a cause of action which has accrued since the suit was filed.

A counter claim may contain more than one cause of action provided the different cause of action are such as can be joined in a suit as an independent. suit. Rules applicable to the form of a plaint would apply to a counter-claim (rule 6-A).

6.5.8. The Karnataka High Court[43] has observed that a set-off is a defence put forward seeking absolvement from payment of the claim made, whereas counter-claim is a separate and independent action for recovery of money from the other person and such a counter-claim need not be limited to monetary claims only.

6.5.9. The Orissa High Court[44] has held that Rule 6-A of Order 8 cannot be construed in a limited sense as has been done by the Patna High Court, and that the Court can entertain by way of a counter-claim whether the claim is in respect of money or not.

6.5.10. *Recommendation* :—In our view, the exposition of the law by Mulla (quoted above) is a sound one. It is supported by the wide language of the provisions in question and (read in conjunction with the safeguards provided in the rules) does justice to both the parties. We recommend that the wider view of the scope of counter-claim should be incorporated by suitable amendment. This could be achieved by adding, below Order 8, rule 6-A(1), an Explanation on the following lines :—

"*Explanation.*—Subject to the other provisions of this Code, it is immaterial that the cause of action in the counter-claim is not based on the same transaction as the suit, or that the suit is not for money, or that the counter-claim is not for money.

6.6. Order 9, Rule 13 and failure to attach copy of plaint

6.6.1. Order 5, rule 2, provides that a copy of the plaint must accompany the summons. Order 9, rule 13, second proviso, however, (as inserted in 1976), provides as under :—

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

6.6.2. *Question for consideration.*—The question has arisen whether an *ex parte* decree can be set aside for breach of Order 5, rule 2.

6.6.3. The High Court of Punjab and Haryana has held that not attaching the copy of the plaint to the summons is a mere irregularity; and, if the defendant has come to know of the case, the *ex parte* decree cannot be set aside, merely on the ground of the above irregularity[45].

6.6.4. But the High Court of Orissa seems to have taken a different view on the subject[46].

6.6.5. The Madhya Pradesh High[47] Court has also held that the language of Order 5, rule 2 is mandatory and whenever summons are issued to a defendant, it must accompany a copy of the plaint or a concise statement. It observed as follows :—

"The law is that alongwith the summons, a copy of the plaint should be served as it is very much essential because the purpose of service of a copy of the plaint, or if so permitted, of a concise statement thereof is to bring home to the defendant knowledge of a particular suit having been instituted against him so that he may know what is the claim brought out by the plaintiff against

43. M/s Anand Enterprises v. Syndicate Bank, AIR 1990, Karnataka 175.

44. M/s Ramsewak Kashinath v. Sarafuddin, AIR 1991, Orissa 51.

45. Risaldar Pakhar Singh v. Bhajan Singh, AIR 1987. Punjab and Haryana, 170, 172, 173, paras 6 to 9.

46. Hiren Ghosh v. Sasikala Padhi, (1984) 57 Cuttack LT, 494 cited in Risaldar Pakhar Singh v. Bhajan Singh, AIR 1987 P & H 170, 172, 173, paras 5 and 10.

47. Laxminarayan v. Rameshwar, AIR 1990 Madhya Pradesh 155.

him and he may make up his mind to defend himself or not. This is the reasson why the law makers have made Rule 2 of Order 5, C.P.C. mandatory by using the w rd shall. Accordingly, if the summons is not issued it cannot be said that there is a valid service on the defendant and when there is no valid service, even if an ex parte decree is passed on such service, it has to be set aside."

6.6.6. *Recommendation.*—It appears to us that the latter view is preferable. The ojbect of serving a summons on the defendant is to make him aware of the nature and details of the claim. Strictly speaking, it is the plaint that gives the real case. The summons is only incidental to the plaint. Even if the defendant may otherwise have received casual information about the litigation, that cannot constitute sufficient notice of its details. No one can assess with reasonable fullness the nature and dimensions of the litigation without a copy of the plaint or, if so permitted, a concise statement. We would, therefore recommend that the Orissa view should be adopted and suitably codified. The object could be achieved by inserting in Order 9, rule 13 a further proviso below the proviso quoted above as under :—

"Provided also, that notwithstanding anything contained in the above proviso where a copy of the plaint or concise statement has not been attached to the summons as required by rule 2 of Order V, such omission shall be deemed to be sufficient cause for setting aside a decree passed *ex-parte.*"

CHAPTER VII

ORDERS 11 TO 20

7.1. Order 14, Rule 2(5) and Examination of Witness

7.1.1. Order 18, rule 2(4) of the Code of Civil Procedure provides that notwithstanding anything contained in the rule, the Court may, for reasons to be recorded, direct or permit the defendant or any party to examine any witness *at any stage.*

7.1.2. *Question for consideration*—Some controversy whether the expression "at any stage" in this sub-rule means that any stage *previous to the delivery of judgement.* The application can be made or whether the expression bears a more limited meaning.

7.1.3. The Orissa High Court[2] has held that the expression means any stage previous to delivery of judgment. But the Bombay High Court has taken the view, that once the case is closed for judgment, the defendant cannot apply under Order 18 rule 2(4) to cross-examine the plaintiff and to adduce evidence. The Bombay High Court has expressly disagreed with the Orissa ruling. which holds that the expression means any stage prior to the delivery of the judgment in the case.

7.1.4. *Recommendation*—It is desirable to settle the law by a suitable amendment. To siretch the sub-rule as permitting such an application to call a witness after the case is closed for judgment, seems to be an underisable expansion of the normal procedure and, for this reason, it is recommended that in Order 18, rule 2(4). after the words "at any stage" which appear at the end, the words "before the case is closed for judgment" stshould be added.

7.2. *Order* 18, *Rule* 3 *and Reservation of evidence*

7.2.1. Order 18. rule 3(so far as is material), provides that where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues, or reserve it by way of answer to the evidence produced by the other party. The rule thus gives two options to the party, namely, (I) the option to produce, or (*ii*) the option to reserve. The procedure to be followed, if the latter option is exercised by the party in question, is set out in the latter half of the rule,.

7.2.2. *Question to be considered*—There is some controversy as to the exact stage at which the option allowed by the rule to the party beginning is to be exercised.

7.2.3. According to one view, the option must be exercised at the time, or before the time when the the other side begins and enters upon his evidence. This view is taken by the following High Courts—

(a) Andhra Pradesh[3]; (plaintiff need not opt before beginning his evidence).

(b) Delhi;[4]

(c) Punjab and Haryana[5]; and

(d) Rajasthan.[6]

One can describe it as the liberal view.

7.2.4. According to another view, the option must be exercised when the party himself begins. This view is taken by the Madhya Pradesh High Court[7].

7.2.5. According to the Madhya Pradesh High Court[8], the stage when the party begins must apprise the Court, is when *that party begins.* The court followed an unreported judgment of the same High Court (dated 23.10.1970) holding as under :

> "The party beginning must elect at the time of beginning whether it will produce evidence on all the issues or only on those (issues) the burden of proving which rests on him and the reservation is allowed when the other party has closed his evidence.' (This is how the earlier judgement of 1970 is quoted in the 1977 case). The Madhya Pradesh High Court dissents from the

1. Alekh v. Bharamar, AIR 1978 Orissa 58, 59, paras 2, 4 (S. Acharya J.).
2. Wasudeo v. Jagannath, AIR 1986 Bombay 43, 44, 45, paras 6 and 7 (Dhabe J.) .
3. Nookalamma v. Simhachalam, AIR 1969 AP 82, 83 (1971); 2 APLJ 339 (Kondaiah J.).
4. Kaviraj Ganpat Lal v. Om Prakash, (1975) 77 Punj LR(D) 10, referred to in AIR 1983 P & H 210.
5. Jaswant Kaur v. Devinder Singh, AIR 1983 Punj & Haryana 210 (see *infra*').
6. Ihderjeet Singh v. Raghunath Singh, AIR 1970 Raj 278.
7. Laxmi Narayan v. Baburam, AIR 1977 MP 191 (U. N. Bhachawat J.) (see *infra*).
8. *ibid*, paras 7 and 8.

view of Andhra Pradesh, Mysore and Rajasthan on the subject. However, as the trial court had not examined whether the plaintiff had or had not led evidence on the issues which he could have reserved by porperly exercising the option, the High Court remanded the case with the following direction :

"The trial court is directed to hear the parties and after considering the matter from the aspect whether the plaintiff had in fact led evidence on issues mentioned in para 2 above or not, decide the question of permitting the plaintiff to lead evidence in rebuttal of these issues.

7.2.6. The Madhya Pradesh judgment of 1977 (supra) has been expressly dissented from, by the High Court of Punjab and Haryana.[9]

7.2.7. The view of a Division Bench of the Punjab and Haryana High Court[10] is that the stage for reserving the right to lead evidence in rebuttal should "remain open upto the time beyond which it might lend to cause prejudice to the other party. Plainly enough, this would be the point of time before the commencement of the evidence by the opposite side at which stage clear notice may be given that the same may well be met by rebuttal testimony.'

7.2.8. According to this view, no serious prejudice arises, even if the right is exercised at a stage later than the commencement of the evidence of the party who has the right to begin. In the larger perspective ,therefore, the High Court oprted for a somewhat liberal view, to hold that this right may well be exercised at any time before the commencement of the evidence by the opposite side, so as to put it on guard and avoid prejudice before it begins the examination of its own witnesses.

7.2.9. According to the Mysore High Court, though the law does not prescribe the stage for apprising the court of the option, it is reasonable that this should be done "before he begins to adduce his evidence, and in any case before the other party begins his evidence, so that it might be borne in mind that the party beginning has not closed his evidence." In the Mysore case, the defendant (on whom the burden of proof lay on the facts and who had, therefore, the right to begin) did not apprise the court of the exercise of option until the evidence of both the parties was closed and the case set for arguments. It was held that the option could not be exercised at such a late stage.[11]

7.2.10. *Recommendation.*—In our opinion, the position definitely stands in need of clarification. The choice is between the liberal view and the strict view. The liberal view* should be preferred, because it can be adopted without any prejudice to the other side. The strict view** not only does violence to the language but is unnecessarily harsh. It is, therefore, suggested that Order 18 rule 3, as it stands at present, may be renumbered as sub-rule (1), and a new sub-rule (2) be added to that rule, as under :

"(2) The option referred to in sub-rule (1) shall be exercised and communicated to the court before the other party begins to produce its evidence.'

*Paragraph 7.2.3. *supra.*

**Paragraph 7.2.4. *supra.*

9. Jaswant Kaur v. Devinder Singh, AIR 1983 P & H 210, 213 para 11 (DB).

10. *Ibid.*

11. S. Chandra Keerti v. Abdul Gaffar, AIR 1971 Mys. 17, 18, paras 2, 3, and 4 (K. Jagannatha Shetty J.).

CHAPTER VIII

ORDERS 21 TO 30

8.1 Order 21, Rule 32 (5) CPC

8.1.1. In the Code of Civil Procedure, there is a provision for punishing disobedience to an injunction issued by the Court. Order 21, rule 32 of the Code deals with the subject. Apart from arrest of the judgment-debtor or attachment of his property for such disobedience, Order 21, rule 32, sub-rule (5) provides that where a decree for specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to the other processes mentioned above, direct that "*the act required to be done*" may be done, so far as practicable, by the decree-holder or some other person appointed by the Court, at the cost of the judgement-debtor. Upon the act being done, the expenses incurred in doing it may be ascertained in such manner as the Court may direct and may be recovered as if these expenses were included in the decree.

8.1.2. *Question for consideration*—Now a controversy has arisen as to the meaning of the word "act required" in Order 21, rule 32(5) of the Code. Do these words also cover the situation where *a prohibitory* injunction has been incrporated in the decree or, are they confined to cases where the decree is a mandatory one ?

8.1.3 There are two views on the subject—the wider view and the narrower view. The wider view has been taken by Allahabad. According to the Allahabad High Court, whether the injunction is mandatory or prohibitory, rule 32 (5) applies, and relief of the nature mentioned therein can be obtained in execution; a separate suit is not necessary. In the Allahabad case[1], the decree restrained the judgment-debtor from causing obstruction to a certain pathway. On the judgment-debtor placing obstacles, the decree-holder sought, in execution (i) attachment of the offending constructions, (ii) removal of those constructions and (iii) detention of the judgment-debtor in civil prison. The judgment-debtor raised an objection that such execution of the decree was not permissible. But the Allahabad High Court held that it was permissible.

8.1.4. In an ear'ier A"ahabad case[2], the plaintiff had obtained an interim injunction directing the defendant to refrain from interfering with p'aintiff's possession of certain plots. It was held that plaintiff *can sue* to recover damages, if the defendant stops him from cultivating the plot. Plaintiff's remedy was not confined to execution, This case, however, does not directly hold that Order 12 rule 32(5) is narrow in scope, as held by some of the other High Courts, In other words, it does not rule out the enforcement of a preventive injunction through execution.

8.1.5. In contrast, the following High Courts have taken the view that a fresh suit is required, where the injuncton is a prohibitory one :—

(i) Andhra Pradesh[3],

(ii) Calcutta[4],

(iii) Karnataka[5],

(iv) Kerala[6],

(v) Madras[7], and

(vi) Punjab[8].

8.1.6. The Andhra Pradesh reasoning is, that while Order 21, rule 32, sub-rule (1), would apply to mandatory as well as prohibitory injunctions, sub-rule (5) applies only to mandatory injunctions[9].

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1. Harihar Pandey v Mangal Prasad, AIR 1986 All 9, 13, 14 paras 16—19 (N. N. Mithal J.).
2. Chiranji Lal v Behari, AIR 1958 All 326, 329, paras 27, 28 (R. N. Gurtu J.).
3. Evuru Benkata Subbayya v Srishti Veerayya, AIR 1969 A.P. 92, 97, 98 paras 9, 10 (DB).
4. Hem Chandra v Narendra Nath, AIR 1934 Cal. 402, 403, 404.
5. Kariyappa v Haladappa, AIR 1989 Karnataka, 163 (Bhat J.)
6. Joseph v Makkaru, AIR 1960 Ker 127, 129 para 14 (M.S. Menon and B. Velu Pillai JJ.).
7. Nari Chinnabba Chetty v E. Chengalroya Chetty, AIR 1950 Mad 237.
8. Murari Lal v Nawal Kishore, AIR 1961 Pun 547, 549 paras 5—9 (S.S. Dulat and D. K. Mahajan JJ.).
9. Evuru Venkata Subbayya v Sristhi Veerayya, AIR 1969 AP 92, 97, para 9.

It has observed as under :

> "Sub-rule (5) is the only pertinent provision, but that again, on the language used, applies to mandatory injunctions. The word "injunction" in sub-rule (5) has been qualified by the words "has not been obeyed" and the rule says, that in the event of disobedience of the injunction, the Court may direct that the act required to be done may be done so far as practicable by the decree-holder, or some other person appointed by the Court. This could only be a mandatory direction. A prohibitory direction would *be not to do an act*. A mandatory direction is a command to do a positive act; a prohibitory injunction is a negative one restraining him from doing a particular act. The difference between the two is obvious and rule 32(5) can only be construed as applying to mandatory injunctions and not to prohibitory injunctions."

8.1.7. In a Calcutta case placing a narrow construction on Order 21 rule 32(5), it was stated.[10]

> "In the case of mandatory injuction clause (5) would often give the decree-holder a complete remedy. But if a simple prohibitory injunction is disobeyed a fresh cause of action arises for which adequate remedy, either by a mandatory injunction or in some other way has to be sought for in a suit."

8.1.8. In Karnataka case,[11] the decree-holder, sought in execution the appointment of a Commissioner for the removal of a superstructure which had been unauthorisedly built by the judgement-debtor, in violation of the injunction granted by a decree of the Court. The Karnataka High Court held that this could not be done by way of an execution proceeding. In its view, the decree-holder must in such circumstances, file a separate suit. This conclusion is based on a narrow construction of the words "act required" in Order 21, rule 32(5).

8.1.9. According to one of the Kerala cases, Order 21, rule 32(1) applies to a preventive injunction.[12] However, the judgement does not discuss the scope of Order 21, rule 32(5). In an earlier judgement does not discuss the scope of Order 21, rule 32(5). In an earlier judgement,[13] it had held that Order 21, rule 32(5) does not apply to prohibitory injunctions.

8.1.10. In a Delhi case,[14] the competition was between Order 21, rule 32 and Order 21 rule 35 The injunction issued against the licensee was to vacate the premises occupied by him as licensee. It was held that steps to evict the licensee would mean, practically, dispossession of the licensee (judgement-debtor). This was not permissible under Order 21, rule 32.

8.1.11. The Delhi case was really one in which the decree against the licensee was to quit and vacate the premises. The decree in question was sought to be enforced under Order 21, rule 32(5). The Court held that rule 32(5) cannot, in the very nature of things, come to the aid of a decree-holder to obtain possession. But the rulings of the other High Courts (mentioned above) do reveal a conflict of decisions.

8.1.12. *Recommendation*—Clarification is obviously needed on the point at issue. It is suggested that as a matter of legislative amendment, it is preferable to incorporate the wider view (though the majority of the High Courts have taken a contrary view) and to provide hat the words "act required to be done" cover prohibitory (as well as mandatory) injunctions. This would also be in conformity with section 3(2), General Clauses Act, 1897 which provides that in all Central Acts, the word "act" includes illegal omissions. Besides this, on the merits, there is ao justification why a decree-holder should be driven to a separate suit for getting relief in the natire of enforcement of a decree which the must have obtained after considerable expenditure of time, labour and money.

8.2 Order 21 rule 97 and application by a third party

8.2.1. Order 21, rule 97, may now be taken up. It deals with resistance or obstruction to possession of immovable property.

8.2.2. *Question for consideration*—On the question whether an application under Order 21, rule 97 by a third party other than the decree-holder/auction-purchaser is competent, there has been a conflict of decisions.

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10. Hem Chandra v Narendra Nath, AIR 1934 Cal 402, 403, 404 (M. N. Mukherji & S. K. Ghosh JJ.).
11. Kariyappa v Haladappa, AIR 1989 Karnataka 163 (Bhat J.).
12. Paul v Cheeran Narayanan, AIR 1969 Ker 232, 233 (Krishnamoorthy Iyer J.).
13. Joeph v Makkarlu, AIR 1960 Ker 127.
14. Sarup Singh v Daryodhan Singh, AIR 1973 Delhi 142 (FB).

8.2.3. It has been held by the High Court of Sikim [15] that such an application is competent, because—

(i) if there is a right, there must be a remedy; and

(ii) the absence of an express provision enabling a party to move the court, does not mean that a party cannot move the court for enforcing his right.

But it has been held by the High Courts of Calcutta [16], Madhya Pradesh [17] and Rajasthan [18] that this is not permissible. The Madhya Pradesh reasoning is to the effect that the third party can institute an independent civil suit for the declaration of title, claiming therein the relief of temporary injunction to protect his possession. But an applicatin under Order 21, rule 97, is out of question. According to the High Court of Madhya Pradesh, Order 21, rule 97, is permissive and not mandatory and the the decree-holder is not bound to resort to it against his will. 'No enquiry into the title or possession of a third party is contemplated at any rate at his instance either under the rules 35 and 36 or under rules 95 and 96 of Order 21, C.P.C. when the decree-holder or the auction-purchaser applies for obtaining possession. Subsequently, when the decree-holder or auction-purchaser is met with obstruction or resistance in obtaining possession, one of the options open to him is to apply under rule 97.'

8.2.4. The Rajasthan judgement, which discusses the matter elaborately, points out that if the legislature had intended to give such a right, it would have made such a provision.

8.2.5. The High Court of Calcutta [19] has also held that—

(i) a third party or

(ii) a person claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgement-debtor or

(iii) a person claiming *bona-fide* to have a right to be in such possession—

none of these classes of persons have *locus standi* to make an independent application under the provisions of Order 21, rule 99, C.P.C. It was further observed that on a construction of rules 97 to 99, it appears that if there is resistance to delivery of possession to the decree-holder or purchaser, it is only they who can apply under the provisions of Order 21 rule 97."

8.2.6. The Punjab & Haryana High Court [20] has held that the objetor could file objections claiming the disputed property to be his own under rule 97 of Order 21 only when an application is made by the decree-holder under sub-rule (1) this Rule and the court proceeds to adjudicate upon the application in accordance with the provisions contained in the subsequent rules.

The Madras High Court [21] has emphasised that "the main feature of the amendments made by 1976 Act is that all questions including the question as to the right, title or interest in the property arising between the parties to the proceedings under rule 97 or rule 99 must be determined by the executing court and not left to be decided by way of separate suit."

8.2.7. The Supreme Court [22] decided in the negative the question whether a writ petition under Article 226 was maintainable when there were elaborate and exhaustive provisions in the Civil Procedure Code for dealing with the matter of executability of a decree, in all its aspects. The Supreme Court also observed that the claim of the writ petitioners of being in possession of the premises as-tenants in their own right and not as sub-tenants of the tenant against whom alone the eviction decree had been passed, should have been adjudicated upon and finding recorded on the character of possession of the petitioners, before proceeding to consider whether the decree was executable or not against them.

8.2.8. *Recommendation*—It appears to us that, in the Interest of smooth and expeditious disposal of execution proceedings, it is preferable to incorporate the view taken by the High Courts of Madhya Pradesh, Rajasthan and Calcutta and we recommend that Order 21, rule 97 be amended for the purpose in a suibable manner. It may be convenient to add an Explanation below Order 21, rule 97, as under :

"*Explanation.*—Nothing in this rule shall be construced as enabling a purchaser who is not the decree-holder (or any person acting at the instance of such person) to apply under this rule".

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15. Ram Chandra v Mannal Singhi, AIR 1983 Sikkim 1.
16. Gopal Chandra v Sheikh Jamsed, AIR 195 Cal 51.
17. Usha Jain v Manmohan Bajaj, AIR 1980 MP 146 (FB).
18. Madan Lal v Hans Raj, AIR 1985 Raj 19, 25 to 27 paras 15—24 (M.C. Jain J.).
19. Gopal Chandra v Sheikh Jamsed, AIR 195 Cal 51.
20. Joginder Kaur v Yashodadevi AIR 1990 Punjab & Haryana 235.
21. N. Palaniappan v G. Pandurangan, AIR 1990 Madras 327.
22. Ghanshyamdas Gupta v Anant Kumar, AIR 1991 SC 2251.

8.3 Order 23, rule 1(3), and abatement of suit

8.3.1. Order 23, rule 1(3) permits withdrawal of a suit with liberty to file a fresh suit in certain circumstances namely, "formal defect" or "sufficient grounds".

8.3.2. *Question for consideration*—The question is, whether the rule applies in case of partial or total abatement of a suit, on the death of a party.

8.3.3. According to the High Court of Madras [23] it does. According to the High Courts of Orissa [24] and Gauhati [25], it does not.

8.3.4. The Orissa reasoning is to the effect that to permit the plaintiff to withdraw in such circumstances would be to permit him to get round the provision contained in Order 22, rule 9, and would be to put a premium on the laches and negligence of the plaintiff. It would confer undue advantage on the plaintiff and cause great disadvantage to the surviving defendant and to the legal representative of deceased defendant. By reason of abatement of a suit on death, certain rights and benefits accrue to the surviving defendant and also to the legal representative of the deceased defendant depending on he suit and the reliefs claimed. "I can see no reason, either in law or in equity, to deprive the defendant and the legal representative, of the rights and advantages so gained by the failureof the plaintiff to substitute, by permitting withdrawal of the suit with liberty to file a fresh suit on the same cause of action".[26]

8.3.5. There seems to be an earlier Calcutta case [27] taking the view that in such circumstances withdrawal cannot be granted. In that case, the suit was against the sole dependant for possession. On his death, his legal representatives were not substituted and, consequently, the suit abated. It was held that inasmuch as there was no suit pending upon abatement of the suit against the sole defendant, withdrawal of the suit with liberty to file a fresh suit could not be permitted.

8.3.6. But in a later Calcutta case, [28] such leave was granted where the suit abated on death of one co-trespasser.

8.3.7. In a Gauhati case [29] it was held that the abatement of suit against a trespasser defendant was not a formal defect within Order 23, rule 1. As regards the expression "sufficient ground" also counsel could not point out any. "In my opinion, when a defect goes to the root of the plaintiff's case and affects its merits, it cannot be a formal defect and the omission on the part of the plaintiff to substitute the heirs of the deceased plaintiff is not such a defect."

8.3.8. *Recommendation*—This brief resume of the case law shows need for clarification. Strictly speaking, where a suit has abated by reason of death, the suit comes to an end (i) by operation of the events that took place (ii) in the light of the law relating to abatement. Therefore, it sounds illogical to take a view that in such a case, the court can permit withdrawal of the suit with liberty to file a fresh suit. It would appear that to settle the controversy on the subject, it is necessary to insert an Explanation in order 23, rule 1(3), as under :—

> "*Explanation.*—Where, as a result of the provisions contained in Order 22 of this Schedule, a suit has abated or a part of the claim has abated, the abatement shall not be deemed to constitute a sufficient ground for granting to the plaintiff permission under this sub-rule to withdraw from such suit or from such part of the claim, as the case may be, with liberty to institute a fresh suit".

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23. Perla Perumal v Pichan (1910) 8 I C 268, cited in Seshamma v Venkata Surayanarayana, ILR 33 Mad 643. AIR 1914 Mad 170(2) (Sadasiva Aiyar and Spencer JJ.). (But the permission cannot be availed of, to sue the heirs of the deceased).
24. Shyam Ray v Haramani Dei, AIR 1984 Orissa 67, 69, 70 para 11 (R.C. Patnaik J.).
25. Prabhat Chandra Saikia v Rajani Bala Devi, AIR 1972 Gauhati 85, 86 (Baharul Islam J.).
26. Shuam Ray v Harmani Dei, AIR 1934 Orissa 67, 69, 70, 71 para 13 (R.C. Patnaik J.).
27. Ramesh v Deo Mehar Bibi (1936) 40 CWN 1019 (RC Mitter J.), noted in Shyam Ray v Harnam De, AIR 1984 Ori 67, 70 para 12.
28. Hakir Mahamed v Abdul Majid, AIR 1953 Cal 588, para 3 (There is no elaborate discussion (GN Das MJ.).
29. Prabhat Chandra Saikia v Rajani Bala Devi, AIR 1972 Gauhati 85, 86 (Baharul Islam J.).

CHAPTER IX

ORDER 31 TO 40

9.1 Order 33, Rule 1 and Corporations

9.1.1. Order 33, rule 1, of the Code of Civil Procedure 1908, provides that a suit may be instituted by an indigent persons (previously, a "pauper").

9.1.2. Question for consideration—The question has arisen whether this rule applies to artificial (judicial) persons. There is a conflict of decisions on the point.

9.1.3. The controversy can be best illustrated by narrating the developments that took place in the High Court of Punjab, where a narrower view, taken by a single Judge, came to be later replaced by a wider view, taken by a Division Bench. According to an earlier Punjab case,[1] the expression "person", for the purposes of Order 33, does not include a limited company. This conclusion is supported by three main reasons. First, the *Explanation* to rule 1 speaks of "wearing apparel" and these are words which could not apply to a limited company. Secondly, Order 33, rule 3, provides for personal appearance in the court—which would not be appropriate for a company. Thirdly, Order 33, rule 4, speaks of "examining" the applicant, which also would not be appropriate in the case of artificial persons. This view was, however, later overruled.[2]

9.1.4. Overruling a single Judge ruling of 1951, the Punjab High Court[3] in 1960 has, through a Divison Bench ruling held, that "person" in Order 33 of the Code includes juristic persons (in that case, Gurudwara Sahib Kothi Begwal). The Division Bench relied on section 3(39), General Clauses Act, 1897, under which the expression "person" includes any company or association or body of individuals, whether incorporated or not. The Division Bench did not agree with the objction based on the word "apparel". It pointed out, referring to Perumal v Sankha Nidh Ltd., AIR 1918 Mad 362 (DB), that all that the *Explanation* means is, that if the *appellant has the necessary* wearing apparel, then the value thereof can be deducted in asessing the applicant's means. It also added, that in a Supreme Court case[4] relating to the standing orders of an electric company, the Supreme Court had quoted, with approval, an English case,[5] where it had been held, that a right of appeal conditional on the appellant's entering into a recognisance was available to a Corporation. This showed that requirements contemplating something personal did not come in the way of a corporation claiming the benefit of the main provision.

9.1.5. According to the Division Bench of the Punjab High Court (1960), the condition regarding recognisance may be treated as inapplicable to corporations and the clause can be split up for the purpose. As regards Order 33, rule 3 which relates to "appearance", the Punjab Division Bench again pointed out (quoting the Madras case of 1918) that where, from the very nature of the party, the physical presence of the party is not possible, then the requirement for personal appearance would not apply.

9.1.6. The following courts (besides the Punjab High Court) have also held that Order 33 applies to artificial persons (Corporations and deities) :

(a) Madras;[6]

(b) Mysore;[7]

(c) Oudh;[8]

(d) Rangoon;[9]

(e) Madhya Pradesh.[10]

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1. Associated Pictures Ltd. v National Studies Ltd., AIR 1951 Punj 443 (Falshaw J.) (Overruled in AIR 1960 Punj 73).
   S.G. Sahib v Harnam Singh, AIR 1960 Punj 73 (DB) (K.L. Gosain & Harbans Singh JJ.) overruling AIR 1951 Punj 448.
2. *Ibid.*
3. Nagpar Electric Light and Power Co. Ltd. v Sree Pathirao, AIR 1958 SC, 658.
4. Gortis v Kent Water Works Co. (1827) 108 ER 741 (Bayley J.).
5. Perumal v Venkatesam, AIR 1918 Mad 362 (Bakewell and Kumar aswami Shastri JJ.).
6. M.C. Chiknanjudappa v D. K. Pillan, AIR 1955 Mys 128, 129, para 4 (Hombe Gowda J.).
7. Sripal Singh, v U. P. Cinetone, AIR 1944 Oudh 248 (Thomas J.).
8. D. K. Cassim & Sons v Abdul Rehman, AIR 1930 Rang 272 (Das & Brown JJ.).
9. Nandkishore Mohanlal v Thunjhunwala, AIR 1990 MP 331.

9.1.7. But, in a Calcutta case[11] the negative view was taken on the subject, holding that Order 33, rule 1 does not apply to artificial persons.

9.1.8. In a Manipur case[12], (following the Punjab Single Judge case of 1951, but without noticing the Punjab Division Bench ruling of 1960), it was held that Order 33, rule 1, is confined to natural persons. In this judgment, stress seems to have been laid on the requirement of personal appearance and it was held that a deity cannot be allowed to sue as a pauper in the court. The court took the view that unless rules 1, 3 and 4 of Order 33 are amended by the legislature, it is not possible to hold, on the existing rules, that a deity or an idol could file a suit through a shebait in *forma pauperis*.

9.1.9. *Recommendation.*—Clarification is needed on the point discussed above. The Supreme Court Judgment[13] of 1958 indirectly lends support to the wider view. In our opinion, the wider view should be codified as it is desirable that a provision of the nature under discussion should be comprehensive and should be available to juridical persons.

9.1.10. As a matter of legislative policy, it does not appear proper that artificial persons should be deprived of the benefit of Order 33, rule 1. Even if corporations may not usually need it, there may be cases where other juristic persons—such as a deity—may have to take recourse to this provision. It is, therefore, suggested that a rule may be added at the end of Order 33, to provide as under :

"The provisions of this Order shall apply to persons other than human beings, with such modifications as may be appropriate to facilitate such application."

9.2. Order 33, Rule 1, Clause (a), Explanation I

9.2.1. Under Order 33, rule 1, a suit may be instituted by an indigent persons subject to the provisions of the Order. Explanation I to clause (a) of the rule provides as under :—

"A person is an indigent person—

(a) *if he is not possessed of sufficient means* (other than property exempt from attachment in execution of a decree and the subject matter of the suit) to enable him to pay the fee prescribed by law for the plaint in the suit."

9.22. *Question for consideration*—The Explanation to Order 33, rule 1, *inter alis*, stresses the element of "possession". A question has arisen whether a mortgagor who has mortgaged his property, can be said to be "possessed" of the property.

9.2.3. There is also an exclusion, by virtue of the *Explanation*, for the subject matter of the suit. A conflict of decisions has arisen on the question whether the mortgagor's equity of redemption can be said to be "subject matter" of the suit. There is some obscurity also, on the question whether such equity can be said to be "possessed" by the mortgagor.

9.2.4. The High Court of Calcutta[14] has held that in a suit for the enforcement of a mortgage filed by mortgagee, the equity of redemption is not subject matter of suit. No doubt, as a result of the decree for sale, the mortgagor's equity of redemption would be lost. But the subject matter of the suit is only the money claimed by the mortgagee which is charged on the immovable properties that are mortgaged.

9.2.5. According to the Patna High Court also[16] the equity of redemption cannot be excluded where the morgtagee sues for engorcement of the mortgage.

9.2.6. However, according to the High Court of Andhra Pradesh, in the mortgagee's suits, such equity must be excluded.[16] The High Court agreed with the Madras view on the subject[17] and held, that even though the mortgagor was in possession of the mortgaged house, yet, as it had already been the subject matter of a preliminary decree, in favour of the mortgagee (against which decree, the mortgagor was now seeking permission to appeal as an indigent), "if it is considered to be the subject matter of the suit, then the respondent (mortgagor) would be under heavy pressure, either to part with the property or to further encumber the property at disadvantageous terms to secure the court fee. Under the circumstances, I am of the view that a broad construction is call ed for, in construing the words " subject matter of the suit" and, if so construed , I am of further view that the house subject of the mortgage should be exempt from the subject matter of suit, as provided under *Explanation* I(a) of rule 1 of Order 33."

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11. Bharat Abhyudaya Cotton Mills v Kameshwar Singh, AIR 1938 Cal 745 (Costello and Biswas JJ.).
12. Radha Krishna v Nathmal, AIR 1963 Manipur 49, 41, 42, para 6, 13 (Thirumalpad J.C.).
13. Nagpur Electric Light and Power Co. v Sree Pathira i, AIR 1958 SC 658.
14. Subodh Chandra Nag v. K. L. Bank, AIR 1941 Cal 659, 660, 661 (RC Mitter & Khandkar JJ.).
15. Durga Prasad v Srinfivas Sureka, AIR 1930 Pat 368.
16. Sreeamulu v M. Adinarayan Rao, AIR 1985 AP 62, 64 (Ramaswamy J.).
17. For the Madras cases, see *infra*.

9.2.7. What would be the position in redemption suits? A view (in favour of exclusion) has been taken in two Madras Cases, relating to suits for redemption.[18'19]

9.2.8. But the Allahabad view on the subject is to the contrary, holding that even in a redemption suit, the equity of redemption must be included in calculating the means of the applicant for indigent status.[20]

9.2.9. Thus, in this situation, there is a conflict between Allahabad and Madras. It may also be mentioned that in the Andhra Pradesh case of 1985 (though it was a suit by the mortgagee), the High Court expressly expressed[21] its agreement with the two Madras cases which were concerned with suit by the mortgagor. The position has become more complicated by reason of the fact that in a Calcutta case[22] (which stself was a suitt for enforcement of mortgage), the court observed, with reference to the Allahabad ruling,[23] as under:—

> "But we dos not wish to place much reliance upon the decision of the Allahabad High Court, reported in 33 All. 237, for the reason that in that case, the suit was not a suit for enforcement of the mortgage, but it was a suit for redemption. It may be possible to take the view that in a suit for redemption, the equity of redemption is the subject matter of the suit. But we may point out that, in spite of such a contention, the Allahabad High Court took the view that in considering the application to sue *in forma pauperis* in a suit for redemption, the value of the equity of redemption will have to be taken by the court in considering the question of the ability of the applicant to pay the requisite court fees".

9.2.10. *Recommendation.*—It appears to us, that the realistic approach would be to exclude the mortgagor's equity of redemption, while calculating his means for the purpose of Order 33. Our recommendation, therefore, would be to insert below Order 33, rule 1, an *Explanation*, somewhat on the following lines:—

> "*Explanation*: In a suit to which Order 34 applies, the mortgagor's right to redeem the mortgage shall be excludedin calculating his means for the purposes of this rule."

9.3. Order 33, Rule 5 and return of Application for want of Jurisdiction

9.3.1. Order 33, rule 5, states that the court shall sejcct an application (for indigent status) in any one of the circumstances mentioned in clauses (a) to (g) of that rule which, however, do not cover the case where the suit is not within the jurisdiction, pecuniary or otherwise, of the court.

9.3.2. *Question for codsideration.*—The question, therefore, arises whether rule 5 is exhaustive of the circumstances in which an application could be rejected, or whether the return or rejection of the application can be ordered outside the rule-for example, where the court does not have jurisdiction- and the case dealt with in Order 7, rule 10, of the Code.

9.3.3. The High Court of Patna[24] has taken the view that consideration of the question of jurisdiction would arise only after the application is registered as a plaint. The Patna High Court proceeds on the reasoning that the application is not a "plaint" and does not reach the stage of a plaint until the application is duly granted. Order 33, rule 5, gives no authority for returning the application for want of jurisdiction, according to this view.

9.3.4. On the other hand, the High Court of Kerala has held that such an application can be returned for presentation to the proper court.[25] The Kerala High Court proceeded on the reasoning, first, that Order 33, rule 5, is not exhaustive and, secondly, that an application for permission to sue as an indigent person is not merely an application pure and simple but it must also contain the particulars required in regard to plaints.

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18. Manicka v Narayanaswamy, AIR 1933 Mad 679 (Cornish J.).
19. Devaki v Rajagopal, AIR 1956 Mad 628, 629 (Basheer Ahmed Sayed J.).
20. Kapil Deo singh v Ram Rikha Singh, (1911) ILR 33 All 237.
21. Sreeramulu v Adinarayana, AIR 1985 AP 62, 65, para 7.
22. Subodh Chandra v K. L. Bank, AIR 1941 Cal 659, 660.
23. Kapil Deo v Ram Rikha, (1911) ILR 33 All 237.
24. Mohammed Abbas Mallik v Tahera Khatoon, AIR 1974 Pat 324, 326, 327, para 5, 6 (DB) dissenting from :
    (a) Periyasami v Minor Ulaganathan, AIR 1949 Mad 162.
    (b) Prem Singh v Sat Ram Das AIR 1958 Punj 52 (Bhandari CJ.).
    (c) Madhura Krishnamurthy v Year Ramamurthy, AIR, 1957 AP 654.
    (d) Raj Narain v Bhim Singh, AIR 1966 All 84.
25. V. Sreedharan v T.T. Nany, AIR 1987 Kerala 249, 251, paras 8 & 9(D.B.).

9.3.5. The Kerala High Court has also relied on the Supreme Court case of Vijay Pratap Singh v Dukh Haran Nath Singh[26] wherein the following observations occur:—

> "An application to sue *in form pauperis* is but a method prescribed by the Code for institution of a suit by a pauper without payment of fee prescribed by the Court Fees Act. If the claim made by the applicant that he is a pauper, is not established, the application may fail....The suit commences from the moment an application for permission to sue *in forma pauperis* as required by Order XXXIII is presented, and Order 7, rule 10, would be as much applicable in such a suit, as in a suit in which court-fee had been duly paid".

9.3.6. *Recommendation.*—We find the Kerala reasoning persuasive* and would recommend its adoption.

9.3.7. The object could be achieved by inserting in order 33, new rule 4A, in these terms:—

> "4A *Return of application beyond jurisdiction.*—
>
> The court shall return an application to the applicant for presentation to the proper court if the averments made by the applicant in the application show that the suit would be beyound the jurisdiction of the Court."

I was directed by P.P.S. to Hon'ble Chairman to

9.4. Order 34, code of civil procedure, and Mortgages of Movables

9.4.1. Order 34, of the Code of Civil Procedure, makes certain provisions as to suits on mortgages. The heading of the Order shows that it is confined to mortgage of immovable property.

9.4.2. *Question for consideration.*—The question has, nevertheless, arisen whether the Order applies also to mortgage of movable property or hypothecation thereof. There is a conflict of views on the subject amongst the High Courts.

9.4.3. The High Court of Punjab has held that Order 34 does not apply[27] to such transactions. This is also the Bombay view.[28] The Bombay judgment traces the history of the law, as under:—

> "But in construing this rule we must have regard to the context in which it appears, and I think also to its historical origin. O. 34 was incorporated in the Civil P.C. in 1908, and the provisions of the order were taken from the Transfer of Property Act. R. 14 was S. 99, T.P. Act, and that section appears in Chapter 4 of the Act which is headed "Of Mortgages of Immovable Property and Charges". "Charge" is defined in S. 100 of the Act and applies only to charges of immovable property. So that O. 34, was substituted for sections in the Transfer of Property Act which dealt only with mortgages of immovable proerty and I think a presumption arises that in taking these provisions out of an Act relating to property and incorporating them in an Act relating to procedure the legislature did not intend to extend the scope of the provisions, although, no doubt, that presumption would be rebutted if the legislature had used language to show that it did intend extend the scope of the provisions. Now not only is there no reference in 0.34 movable property but the order is headed "Suits relating to mortgages of immovable property."
>
> "Then, the substiuntive provisions of the order use such words as "mortgages" "mortgage security" and "mortgage property" without any distinction being drawn between mortgages of movable and immovable property, and it seems to me that in those circumstances we must read the heading as in effect defining those general words and limiting their operation to mortgages on immovable property. We referred to a certain number of cases as to the effect of headings in an Act of Parliament, and Mr. Coltman contends, relying particularly on the case of Flectcher v Birkenhead Corporation (1), that the Court can only look at a heading in order to assist in the construction of some word or phrase which is doubtful or ambiguous, and he says that the word of O.34 "mortgage", "mortgage security" and so forth are not ambiguous, but it seems to me that that is putting the case on too narrow a ground and that we are entitled to look at the heading in order to confine the generality of the language used in the body of the order. Reading O.34 in the light of the heading, and having regard to the history of the order, we must in my judgment construe it as confined entirely to mortgages of immovable property. That being so, I think that the counterclaim of defendant 6 necessarily fails."

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26. Vijay Pratap singh v Dukh Haran Nath Singh, AIR 1962 SU 941).
27. New Citizen v Burnel & Co., AIR 1954 Punj 180, 181, para 2 (Bhandari J.).
28. Official Assignee v Chimmiram M°Slal, AIR 1933 Bom. 51, 54, 55 (Beaumont C.J. and Blackwell J.).

9.4.4. But the Gujarat High Court has regarded Order 34 as applicable to the hypothecation of machinery.[29] There is also a dictum, to the same effect, in a Calcutta case. The dictum is, "The morlt gage, no doubt, was in respect of movables, but the rules of Order 34 of the code are based on well settled rules of equity which, in the absence of any statutory provisions to the contrary, *should be applied in suits on mortgages of movables as well.*"[30]

9.4.5. In a Calcutta case[31] relating to the hypothecation of movables, the bank was held entitled to a decree for sale (the borrower having defaulted), and it was held that the trial court ought not to have allowed instalments. This view is apparently based on the assumption that Order 34 applies to movables and therefore the provision of the Code (Order 20 rule 11 CPC) which applies to a decree for money and allows the award of instalments, does not apply.

9.4.6. In the Calcutta case of 1987,[32] the position was stated as under :—

"We may well agree with Mr. Bose that under the Indian law, there can be valid mortgage of movables, though such a mortgage may be different from such mortgage at common law or under Bills of Sale Act.

"Such mortgage, when not accompanied by delivery of possessions, is still operative save and except against *bona fide* purchasers without notice. See Misrilal v Mosahar Hossain (1886) ILR 13 Cal 262, Venkatachalam v Venkatarami Reddy, AIR 1940 Mad 929. This position appears now to be well recognised. But still the question remains as to whether a suit for enforcement of such a mortgage shall be governed by a procedure similar to the one prescribed by Order 34 of the Code. Though Mr. Bose has contended that it should be so governed *the judicial opinion on the point is not uniform.* Indeed a Division Bench of this court in the case of Co-operative Hindusthan Bank v Surendra Nath Das 36 Cal WN 263 : (AIR 1932 Cal 524) observed :

> 'The mortgage no doubt was in respect of movables but rules of Order 34 of the Code are based on well settled rules of equity which in the absence of any statutory provision to the contrary should be applied in suits on mortgages of movables as well.'

This observation supports the stand taken by Mr. Bose. But this observation has not been approved but distinguished by other High Courts vide New Citizen Bank v K.B. Burnel AIR 1954 Punj 180. In the case of Official Asignee of Bombay v Chimniram Motilal, AIR 1933 Bom 51 a Division Bench of the Bombay High court on more persuasive reasons has held that Order 34 of the Code is applicable to suits on mortgages in respect of immovable properties only, and not to suits on mortgages in respect of movables. On very careful consideration of the legal position we could prefer to follow the Bombay decision as above rather than the obiter observations of this court.

Though we may not accept the contention of Mr. Bose that the principles underlying Order 34 of the Code will govern the suit out of which the present appeal arises, yet we are left to consider two important issues, *viz.* (1) whether in such a suit there could be order for payment on instalment and (2) whether and how far the court in decreeing the interim interest or interest on judgement can deduce it from the contractual rate. We propose to consider the two issues separately.',

9.4.7. It may be mentioned that mortgages and other securities for money charged on movable property are recognised in Indian law. Section 66(3), Sale of Goods Act, 1930, lays down that the provisions of the Sale of Goods Act do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security. Although this section does not expressly mention "hypothecation", a transaction of hypothecation has been recognised in India.[34—35]

9.4.8. Unlike a pledge, hypothecation of movables can be effected without delivery of possession to the creditor.[35]

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29. G.S.F.U. v Jayshree Industries, AIR 1986 Guj. 29, 31, 32, paras 2-3 (J.P. Desai J.).
30. Co-operative Hindustan Bank v Surendra Nath, AIR 1932 Cal 524, 533, left hand (MN Mukherjee & S.N. Guha, JJ.).
31. Uffited Bank of India v New Glencoe Tea Co. Ltd. (1987) 62 Company Cases 762 (Cal), AIR 1987 Cal 143.
32. United Bank of India v New Glencoe Tea Co. Ltd. AIR 1987 Cal 143, 145, paras 6, 7 (DB).
33. Bank of Baroda v Rabari Bachubhai Hirabhai, AIR 1987 Guj *k*, para 8.
34. Re Yellamma Cotton Mills, AIR 1969 Mys 280, 287, paras 36, 37 (A. Narayan Pai J.).
35. State Bank of India v Victory Export Import Syndicate, AIR 1978 J & K 76, 77, para 3 I. K. Kotwal J.).

9.4.9. In this context, the High Court of Mysore has observed[36] as under :—

"In the case of hypothecation or pledges of movable goods, there is no doubt about the creditors' right to take possession, to sell the goods directly without the intervention of court for the purpose of recovering his dues. The position in the case of regular pledge completed by possession is undoubted and set out in the relevant sections of the Contract Act. Hypothecation is only extended idea of a pledge, the creditor permitting the debtor to retain possession either on behalf of or in trust for himself (the creditor)."

"Hence, so far as the movables actually covered by the hypothecation deeds are concerned, there can be no doubt that the Bank is entitled to retain possession and to exercise the right of private sale."

9.4.10. The High Court of Jammu and Kashmir[37] has dealt with the matter thus :—

"One of the ingredients of a valid pledge is the delivery of goods by the pawnor to the pawnee. Unless, therefore, a contract or a transaction at the time of its inception is accompanied by delivery of the goods pledged, it would not come within the definition of a pledge. A deed of an agreement not falling within the definition of a pawn or pledge would not be covered by Art 6(2) of Sch I to the Stamp Act and consequently the stamp payable on such a document would not be governed by the schedule provided therein. The crucial question which, therefore, falls for the determination is whether or not in the instant case delivery of possession of the goods hypothecated had also passed on to the Bank at the time the agreement dated 18-5-1970 came to be executed. On this score there is no dispute between the parties, and rightly so, because even on a plain reading of Cl 6 of the agreement it transpirse that the possession of the goods hypothecated was to remain with the debtor itself. That being so, this deed cannot be held to be a deed of pawn or pledge so as to attract the mischief of Art 6(2) of Sch I to the Stamp Act. A transaction of hypothecation and a transaction of pledge have a common ingredient inasmuch as both of them create a security in the goods hypothecated or pledged for the repayment of the loan; the ownership in the goods remaining with the person hypothecating or pledging the same. Nevertheless, there is a distinction between these two transactions because unlike a pledge where the possession of the goods pledged must pass on to the pawnee, no such possession passes on to the creditor in case of hypothecation."

9.4.11. This being the legal position, the controversy as to the applicability of Order 34 of the Code to the hypothecation of movables is of practical importance, because, if a decree passed on hypothecation of movables is regarded as a mortgage decree, then the provisions of the Code of Civil Procedure relating to money decrees would not apply. This means, *inter alia,* that there can be no order for instalments in such a suit.[38] Order 34 of the Code does not envisage instalments, in contrast with suits for money not secured by a mortgage. For suits in the latter category, Order 20, rule 11 of the Code provides for instalments.

9.4.12. *Recommendation*—The matter seems to need clarification. The object of Order 34 appears to be to regulate only suits concerning mortgages of immovable property—see the heading of the Order. This is borne out by the history of the provisions. It will be convenient to add, below Order 34, rule 1, the following *Explanation* as Explanation 2 (after renumbering the present *Explanation* as Explanation 1) :—

"*Explanation* 2.—Nothing in this Order applies to a mortgage, charge, hypothecation, pledge or other security created in respect of movable property."

9.5 Order 39, Rule 2A and breach of injunction

9.5.1. Order 39, rule 2A, punishes disobedience to an injunction issued by the court.

9.5.2. *Question for consideration*—The question has arisen whether, after a temporary injunction is vacated, its breach (committed before it was vacated), can be punished under Order 39, rule 2A.

9.5.3. The following High courts hold that this is not permissible :

(a) Allahabad[39] and

(b) Punjab.[40]

36. Re Yellamma Cotton Mills, AIR 1969 Mys 280, 287, paras 36, 37 (A Narayan pai J.).

37. State Bank of India v Victory Export Import Syndicate, AIR 1978 J & K 76, 77, para 3 (I. K. Kotwal J.).

38. Basanta Kumar v Chotanagpur Banking Assn., AIR 1948 Pat 18, 25 (Shearer and Reubeff, JJ.); Nishantilal v A. Saffkara Subba, AIR 1979 Mad. 13, 14, para 1 (Suryamurthy J.).

39. (a) Sitaram v Ganesh Dad, A.I.R. 1973 All 449 (Hari Swarup J.).

(b) Sheo Kumar v Zila Sahakari Vikas Sangh, AIR 1983 All 180 (SC) Mathur J.).

40. Rachhpal Sihgh v Gurdarshan Singh, AIR 1985 Punj & Hary 299, 301, para 5 (DB), agreeing with Sheo Kumar Saxena v Zila Sahkari Vikas Sangh, AIR All 180.

9.5.4. The Allahabad decisions before 1961 seem to emphasise the impropriety of such punishment.[41-42] But subsequent decisions of that High Court seem to regard such punishment as even illegal. The Allahabad High Court[43] is of the view that the purpose of Order 39, rule 2A is to enforce the order of injunction and that this provision permits the Court to execute the injunction order; the purpose is not to punish the man but to see that the order is obeyed and the wrong done by disobedience of the order is remedied and the status quo ante is brought into effect. The High Court observed that this view finds support from the observations of the Supreme Court,[44] wherein the latter held that the proceedings are in substance designed to effect enforcement of or to execute the order and a parallel was drawn between the provisions of Order 21, rule 32 and of Order 39, rule 2(iii) which is similar to Order 39, rule 2A.

9.5.5. In contrast with the first view, the following High Courts hold such punishment to be permissible :

(1) Gujarat;[45] and

(2) Orissa.[46-47]

9.5.6. In the Orissa case of 1971, it was pointed out that what the court was concerned with, was not the ultimate decision, but whether, on the date of the impugned act, the injunction had been violated.

9.5.7. The matter has not reached the Supreme Court. There are dicta in a Privy Council case to the effect that an injunction must be obeyed while in force, even if it is subsequently discharged because the plaintiff failed.[48] But the case did not specifically involve the question whether breach of an injunction can be punished after the injunction has been vacated.

9.5.8. *Recommendation*—In the interest of maintaining judicial dignity, it seems proper that the power of the courts must be recognised and put beyond doubt, even where the injunction has been vacated. The High Courts which take a different view have advanced the reason that such punishment does not fit in with the language of Order 39, rule 2A. But, with respect, the language presents no insurmountable problem. The precise dictum of the Privy Council in the judgement of 1915[49] was "it was of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged." We recommend that this approach should be adopted by suitably amending Order 39, rule 2A.

9.5.9. The following Explanation may be added to Order 39, rule 2A(1) :—

"*Explanation*—The court may make an order under this sub-rule, notwithstanding that the injunction or other order has been subsequently discharged or varied or set aside by the court under rule 4 of this Order or by any other court in appeal or revision."

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41. Surendra Nath v Sinclair Day, AIR 1950 All 285, 286 para 4 (Mallik DJ.) (Application for notice of contempt *held*, no deliberate disobedience. As order was vacated, it would not be proper to issue notice).
42. Manoharlal v Prem Shankar, AIR 196 All 231, dissented from in Govinda v Chakradhar. AIR 1971 Orissa 10, para 2
43. Sitaram v Ganesh Dass, AIR 1973 All 449.
44. State of Bihar v Sonabati Kumar, AIR 1961 SA 221.
45. Thakorelal v Chandulal, AIR 1967 Guj 124, 125, 126, para 2.
46. Govinda v Chakradhar, AIR 1971 Orissa 10, 11 para 2 (R. N. Misra, J.) (Punishment upheld), though injunction had been dissolved.
47. Kisohre Chandra v Puri Municipality, AIR 1988 Orissa 184.
48. Eastern Trust v Mackenizie Mann & Co. AIR 1915 P.C. 106(2), 110.
49. *Ibid.*

CHAPTER X

ORDERS 41 TO END

10.1. Order 43, Rule 1(r), Appeal against Interlocutory Orders Passed Ex-parte

10.1.1. Order 43, rule 1(r) provides for an appeal against "an order under rule 1, rule 2, rule 2(A), rule 4 or rule 10 of Order XXXIX". Rule 1 of Order 39, mentioned in Order 43, rule 1(r), relates to injunctions and connected orders.

10.1.2. *Question for consideration*—There appears to be a conflict of decisions on the question how far an appeal is maintainable against an order passed *in appeal* against an interlocutory order passed *ex-parte*.

10.1.3. According to the High Court of Kerala[1], such an appeal is maintainable.

10.1.4. The Allahabad[2] and Bombay[3] High Courts also hold such appeal to be maintainable, as also the Andhra Pradesh High Court[4].

10.1.5. But a different view has been taken by the High Courts of Karnataka[5] and Madras[6]. The Madras case would seem to disallow even an appeal against an original interlocutory order, if passed *ex parte*.

10.1.6. The reasoning underlying the first view is that such an order is also an Order 39 of the Code.

10.1.7. The second view, which is the contrary view, is based on the reasoning that the "order under Order 39, rule 1," referred to in Order 43, rule 1, must be a decision based on some ground and not a mere preliminary order for maintaining the *status quo*.

10.1.8. The Orissa High Court[7] also is of the view that "an order declaring to pass *exparte* temporary injunction and issuing notice to other side" is not appealable.

10.1.9. *Recommendation*—It seams proper to settle the conflict of decisions. It is suggested that in the interest of expeditious disposal of litigation, it should be enacted that an appeallate order does not fall within Order 43, rule 1. This should not cause hardship, since, in appropriate cases the remedy of revision would still be available. We recommend accordingly. The object can be achieved inserting in Order 43, rule 1 an Explanation on the above lines.

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1. V.T. Thomas v Malayala Manozama Company Ltd. AIR 1989 Keral a 48, 52 para 14.
2. Zilla Parishad v Brahma Rishi Sharma, AIR 1910 All 376 (DB).
3. Jusa v Ganpat, AIR 1976 Bom. 222, 223, para 1 and 3 (Dharamdhikari, J).
4. Andhra Pradesh University v Pvor Raju (1974) 2 and WR 17 cited in Jusa v Ganpat, AIR 1966 Bom 222.
5. Parijath v Kamalksha Nayar, AIR 1982 Karnataka 105, 110, para 15 (DB).
6. Abdul Shukoor Sahib v Uma Chandrer, AIR 1966 Madras 352 paras 5, 6 (DB).
7. Nalinprava Patnaik v Smt. Jyormayee Das, AIR 1991 NOC 70 (Orissa).

CHAPTER XI

SUMMARY OF RECOMMENDATIONS

The follwowing is the summary of the recommendations made in the preceding Chapters.

1. In section 2(2), after numbering the ending Explanation as *Explnation* 1, and *Explanation* should be inserted as under :—

"*Explanation* 2—'Default' includes default of appearance as well as any other kind of default"

(Para 2.1.7)

2. In section 2(11), it is desirable to clarify that when a coparcener in a Hindu undivided family dies, a surviving coparcener shall be deemed to be a legal representative of the deceased.

(Para 2.2.7)

3. In section 10, after the words "relief claimed", the words " in the suit subsequently instituted" should be added.

(Para 2.3.5)

4. In section 11, an *Explanation* should be added to provide that the provisions of section 11 shall apply to a consent decree.

(Para 2.4.13)

5. In section 20, an *Explanation* may be added to clarify that the place where the creditor resides should also be treated as the place where the payment is to be made, unless the agreement expressly provides to the contrary.

(Para 2.5.12)

6. In section 34, it is desirable to provide that the Court may, in the interest of justice, direct that the defendant shall pay *pendente lite* interest at a rate higher than the rate provided for in the contract; this *pendente lite* interest would be granted by the Court as per practice.

(Para 3.1.8)

7. It is desirable that, with regard to payment of interest, section 34 of the Code should be allowed to operate even regarding suits on negotiable instruments, and that section 79 of the Negotiable inttruments Act should be confined to the period before the institution of the suit. This may be effected by substituting in section 79 of the Negotiable instruments Act, for the words "such date after the institution of a suit", the words " not later than the institution of a suit".

(Para 3.2.7)

8. An *Explanation* should be inserted below section 39 to provide that nothing in the section shall be construed as authorising the court to execute a decree against a person or property outside the local limits of its jurisdiction.

(Para 3.3.8)

9. An *Explanation* should be inserted below section 92 as under:—

"*Explanation*-It shall not be obligatory for the court before granting leave under this section to issue notice to the party proposed to be used by the person applying for leave."

(Para 4.1.6)

10. Under section 96(3), a proviso should be added as follows:—

"Provided that nothing in this sub-section shall affect any right, in any appeal against a decree passed in a suit, to contest the decree on the ground that the compromise should, or should not, have been recorded."

(Para 4.2.11)

11. A suitable *Explanation* may be added to section 104(2) on the following lines:—

"*Explanation.*—Where an order is passed by a Single Judge of the High Court in an appeal from an order passed by a court subordinate to the High Court, no further appeal shall lie against the first mentioned order, notwithstanding anything to the contrary contained in the Letters Patent constituting the High Court."

(Para 5.1.11)

12. There should be inserted a suitable *Explanation* in section 107 to clarify that the provisions of Order VII, rule 11(b) and (c) apply to appeals also. In the alternative, in Order XLI, a rule applying the provisions of Order VII, rule 11 *mutatis mutandis* to appeals should be inserted as follows:—

"In rule 3, sub-rule (1A) should be added as under:—

"(1A) The memorandum of appeal shall be rejected in the following cases:—

(a) where the relief claimed is undervalued and the appellant, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so; or

(b) where the relief claimed is properly valued but the the memorandum of appeal is wirtten upon paper insufficiently stamped, and the appellant, on being required by the court to suply the requisite stamp paper within a time to be fixed by the court, fails to do so

"Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the appellant was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be, within the time fixed by the Court and that refusal to extend the time would cause grave injustice to the appellant."

The latter course may be more convenient for adoption.

(Paras 5.2.10 & 5.2.11)

13. An *Explanation* should be inserted after sub-section (4) in section 136 on the lines indicated below:—

"*Explanation*—A warrant of arrest or an order of attachment shall be acted upon only when received through the District Court as provided in sub-section (1).

(Para 5.3.14)

14. If a person sues only for possession of immovable property when he might have joined in the same cause of action claims for profits and damages, it should be open to him to sue subsequently for profits which became payable before the institution of the suit. Order II, rule 2 may be suitably amended.

(Para 6.1.7)

15. In order II, a new rule 2A should be inserted as follows:—

"2A. *Suits filed on the same day on same cause of action*—Where a plaintiff sues the defendant on the same day through two or more separate suits in the same court and the suits are based on the same cause of action, then—

(a) The provisions of rule 2 of this Order shall not apply, but

(b) the court shall pass an order for consolidation of the suits and hearing them together, in the interests of justice."

(Para 6.2.6)

16. It seems desirable to insert a provision in the Arbitration Act, 1940, as section 13A on the following lines:—

"13A. *Party to include whole and all reliefs*—Sibject to the provisions of the arbitration agreement, the provisions of rule 2 of Order II in the First Schedule to the Code of Civil Procedure, 1908 shall, so far as may be, apply to arbitrations governed by this Act, as they apply to suits to which the said Code applies."

(Para 6.3.11)

17. In Order VII, rule 11, the existing clause (a) should be replaced by the following:—

"(a) where the averments made in the plaint, even assuming them to be true, do not disclose a cause of action."

(Para 6.4.7)

18. An *Explanation* should be added below Order VIII, rule 6A(1) on the following lines :—

"*Explanation*—Subject to the other provisions of this Code, it is immaterial that the cause of action in the counter-claim is not based on the same transactions as the suit, or that the suit is not for money, or that the counter-claim is not for money."

(Para 6.5.10)

19. In Order IX, rule 13, a further proviso should be inserted below the second proviso as under :—

"Provided also the notwithstanding anything contained in the above proviso, where a copy of the plaint or consise statement has not been attached to the summ ns as required by rule 2 of Order V, such omission shall be deemed to be sufficient cause for setting aside a decree passed *ex parte*."

(Para 6.6.6)

20. In Order XVIII, rule 2(4), after the words "at any stage" which appear at the end, the words, "before the case is closed for judgement" should be added.

(Para 7.1.4)

21. In Order XVIII, rule 3 as it stands at present may be renumbered sub-rule (1), and a new sub-rule (2) may be added as under :—

"(2) The option referred to in sub-rule (1) shall be exercised and communicated to the court before the other party begins to produce its evidence."

(Para 7.2.10)

22. It should be clarified that the words "act required to be done" occurring in rule 32(5) of Order XXI cover both prohibitory and mandatory injunctions.

(Para 8.1.12)

23. An *Explanation* should be added below Order XXI, rule 97, as under :—

"*Explanation*—Nothing in this rule shall be construed as enabling a purchaser who is not the decree holder (or any person acting at the instance of such person) to apply under this rule."

(Para 8.2.8)

24. In Order XXIII, rule 1(3), an *Explanation* should be inserted as follows :—

"*Explanation*—Where, as a result of the provisions contained in Order XXII of this Schedule, a suit has abated or a part of the claim has abated, the abatement shall not be deemed to constitute a sufficient ground for granting to the plaintiff permission under this sub-rule to withdraw from such suit or from such part of the claim, as the case may be, with liberty to institute a fresh suit."

(Para 8.3.8)

25. In Order XXXIII, a rule may be added at the end to provide as under :—

"The provisions of this Order shall apply to persons other than human beings with such modifications as may be appropriate to facilitate such application."

(Para 9.1.9)

26. Below Order XXXIII, rule 1, an *Explanation* may be inserted on the following lines :—

"*Explanation*—In a suit which Order XXXIV applies, the mortgagoy's right to redeem the mortgage shall be excluded in calculating his means for the purposes of this rule."

(Para 9.2.10)

27. In Order XXXIII, a new rule 4A should be inserted, in these terms :—

"4A. *Return of application beyond jurisdiction*—The court shall return an application to the applicant for presentation to the proper court if the averments made by the applicant in the application show that the suit would be beyond the jurisdiction of the Court."

(Para 9.3.7)

28. Below Order XXXIV, rule 1, the following may be added as *Explanation* 2 after renumbering the present *Explanation* as *Explanation* 1 :—

"*Explanation* 2. Nothing in this Order applies to a mortgage, charge, hypothecation, pledge or other security created in respect of movable property."

(Para 9.4.12)

29. The following *Explanation* may be added to Order XXXIX, rule 2A(1) :—

"*Explanation*. The Court may make an order under this sub-rule, notwithstanding that the injunction or other order has been subsequently discharged or varied or set aside by the court under rule 4 of this Order or by any other Court in appeal or revision."

(Para 9.5.9)

30. In Order XLIII, rule 1, *Explanation* should be inserted to provide that an appellate order will not fall within this rule.

(Para 10.1 9)

The above recommendations we have made would help in resolving the conflicting opinions and interpretations in the field of procedural law in various cases decided by the High Courts. These recommendations involve amendments mainly to the Code of Civil Procedure, 1908 and a couple of incidental amendments to the provisions of the Negotiable Instruments Act, 1881 and the Arbitration Act, 1940 have also been suggested. We believe that implementation of these recommendations would be benefitting the interests of the litigant public and the judiciary in our country.

Sd/-

(K. N. SINGH)

Chairman

Sd/-

(G. V. G. KRISHNAMURTY)

Member-Secretary

New Delhi, dated the 28 *April*, 1992.

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