(h) Statutory notice whether mandatory

The provisions of Section 80 are express, explicit and mandatory and admit no implications or exceptions. They are imperative in nature and must be strictly complied with. Notice under Section 80 is the first step in the litigation.15 No court can entertain a suit unless the notice is duly served under sub-section (1) of Section 80. If the section has done injustice, it is a matter which can be rectified by a legislature and not by a court.16

As the Supreme Court17 has observed, "The section is imperative and must undoubtedly be strictly construed; failure to serve a notice complying with the requirements of the statute will entail dismissal of the suit."

(i) Construction of notice

The provisions of Section 80 of the Code must be strictly complied with. But it cannot be overlooked that it is a procedural provision, a machinery by which courts impart justice. A notice under this section, therefore, should not be construed in a pedantic manner divorced from common sense.18

As Pollock, C.B. stated, "We must import a little common sense into notice of this kind. A statutory notice must be reasonably construed, keeping in mind the ultimate object that an interpretation should not lead to injustice. Every venial defect or error not going to the root of the matter cannot be allowed to defeat justice or to afford an excuse to the Government or a public officer to deny just claim of an aggrieved party."19

The question has to be decided by reading the notice as a whole in a reasonable manner. If on such reading, the court is satisfied that the plaintiff has shown to have given the necessary information which the statute requires him to give to the defendants, inconsequential defect or error is immaterial and it will not vitiate the notice. As observed by

15 State of Seraikella v. Union of India, AIR 1951 SC 253:1951 SCR 474.

16 Bhagchand v. Secy. of State, AIR 1927 PC 176: (1926-27) 54 IA 338; Dhian Singh v. Union of India, AIR 1958 SC 274:1958 SCR 781; State of Madras v. C.P. Agencies, AIR 1960 SC 1309; Amar Nath v. Union of India, AIR 1963 SC 424: (1963) 1 SCR 657; Sawai Singhai Nirmal Chand v. Union of India, AIR 1966 SC 1068: (1966) 1 SCR 986; Ghanshyam Dass v. Dominion of India, (1984) 3 SCC 46: AIR 1984 SC 1004.

17 State of A.P. v. Gundugola Venkata, AIR 1965 SC 11 at p. 15: (1964) 4 SCR 945; Ghanshyam Dass v. Dominion of India, (1984) 3 SCC 46: AIR 1984 SC 1004.

18 State of Madras v. C.P. Agencies, AIR 1960 SC 1309; S.N. Dutt v. Union of India, AIR 1961 SC 1449: (1962) 1 SCR 560; State of A.P. v. Gundugola Venkata, AIR 1965 SC 11 at p. 15: (1964) 4 SCR 945; Dhian Singh v. Union of India, AIR 1958 SC 274: 1958 SCR 781; Raghunath Das v. Union of India, AIR 1969 SC 674: (1969) 1 SCR 450.

19 Jones v. Nicholls, (1844) 13 M&W 361 at p. 363:153 ER 149 at p. 150.

the Supreme Court, the provisions of the section are not intended to be used as booby-traps against ignorant and illiterate persons.20

(j) "Act purporting to be done in official capacity"

The expression "any act purporting to be done by such public officer in his official capacity" takes within its sweep acts as also illegal omissions. Likewise, it also covers past as well as future acts. All acts done or which could have been done under the colour or guise by an officer in the ordinary course of his official duties would be included therein.21

If the allegations in the plaint relate to an act purporting to be done by a public officer, whatever the relief prayed for, the section is attracted and a notice is mandatory.22 Again, an act does not mean any particular, specific or instantaneous act of a person but denotes a series of acts.23 Moreover, the words "acts purporting to be done" apply to misfeasance as well as non-feasance.24

Such acts, however, must be bona fide and they must have some nexus with the duty of the officer.25 The expression "any act purporting to be done by such public officer in his official capacity" connotes that the act must be such as could ordinarily be done by a person in the ordinary course of his official duties. It does not cover acts outside the sphere of his duties.26 "There must be something in the nature of the act complained of which attaches to the official character of the person doing it."27

The test is whether the officer can reasonably claim protection for his act or it was performed by him purely in his private or individual

20 Ghanshyam Dass v. Dominion of India, (1984) 3 SCC 46: AIR 1984 SC 1004; State of A.P. v. Gundugola Venkata, AIR 1965 SC 11 at p. 15: (1964) 4 SCR 945; Raghunath Das v. Union of India, AIR 1969 SC 674: (1969) 1 SCR 450.

21 Samanthala Koti v. Pothuri Subbiah, AIR 1918 Mad 62: (1917) 41 Mad 792: 34 Mad LJ 494 (FB); Gill v. R., AIR 1948 PC 128: (1947-48) 75 IA 41; Pukhraj v. State of Rajasthan, (1973) 2 SCC 701: AIR 1973 SC 2591; K. Satwant Singh v. State of Punjab, AIR 1960 SC 266.

22 State of Madras v. Chitturi Venkata, AIR 1957 AP 675: ILR 1956 Andh 114: 1956 AnWR 54:1956 ALT 106.

23 S. 3(2), General Clauses Act, 1897; see also Amalgamated Electricity Co. (Belgaum) Ltd. v. Municipal Committee, Ajmer, AIR 1969 SC 227 at p. 231: (1969) 1 SCR 430; State of Maharashtra v. Chander Kant, (1977) 1 SCC 257 at p. 260: AIR 1977 SC 148 at p. 150.

24 State of Maharashtra v. Chander Kant, (1977) 1 SCC 257 at p. 260: AIR 1977 SC 148 at p. 150; Ramaswami Ayyangar v. State of T.N., (1976) 3 SCC 779 at p. 783: AIR 1976 SC 2027 at p. 2031, see also, S. 34, IPC.

25 Chhaganlal v. Collector, Kaira, (1910) 35 Bom 42: 7 IC 993; Samanthala Koti v. Pothuri Subbiah, AIR 1918 Mad 62: (1917) 41 Mad 792: 34 Mad LJ 494 (FB).

26 Ibid.

27 State of Maharashtra v. Chander Kant, (1977) 1 SCC 257 at p. 260: AIR 1977 SC 148 at p. 150.

capacity. In the case of the former, a notice under Section 80 is necessary, in the case of the latter, it is not.28

(k) Waiver of notice

Though issuance of a notice under Section 80 is mandatory and a condition precedent for the institution of a suit, the provision is merely procedural in nature and not a substantive one. It does not affect the jurisdiction of the court. A notice under Section 80 is for the benefit of the Government or public officer. It is, therefore, open to the Government or public officer to waive such benefit.29 The question whether, in fact, there is waiver or not would necessarily depend on the facts of each case and is liable to be tried by the same court if raised.30

(l) Form of notice

A notice under Section 80 need not be in a particular form as no form has been prescribed by the Code for the purpose. It is sufficient if the notice complies with the requirements of the section. It should contain details sufficient to inform the party of the nature and basis of the claim and the relief sought.31

(m) Mode of service

A notice under Section 80 of the Code should be delivered to, or left at the office of, the appropriate authority specified in the section.32 It should be given to the Secretary of the department of the Government or the Collector of the District. Personal delivery of the notice is, however, not necessary. If such interpretation is adopted, the words "or left at his office" will become nugatory. Hence, such notice can either be served personally or be sent by registered post.

(n) Technical defect in notice: Section 80(3)

Sub-section (3) to Section 80 as inserted by the Code of Civil Procedure (Amendment) Act, 1976 clarifies that no suit instituted against the Government or public officer shall be dismissed merely on the ground of error or defect in the notice, if, in such notice, the name, description and residence of the plaintiff had been so given as to enable the authority or public officer to identify the person serving the notice and such notice had been delivered or left at the office of the authority

28 Ibid, see also Amalgamated Electricity Co. (Belgaum) Ltd. v. Municipal Committee, Ajmer, AIR 1969 SC 227 at p. 231: (1969) 1 SCR 430; Gill v. R., AIR 1948 PC 128: (1947-48) 75 IA 41; Hori Ram (Dr.) v. Emperor, AIR 1939 FC 43:1939 FCR 159.

29 Vellayan v. Province of Madras, AIR 1947 PC 197: (1946-47) 74 IA 223; Dhian Singh v. Union of India, AIR 1958 SC 274:1958 SCR 781.

30 Ibid, see also Vasant Ambadas v. Bombay Municipal Corpn., AIR 1981 Bom 394 at p. 396 (FB); Commr. of Taxes v. Golak Nath, AIR 1979 Gau 10 at p. 12.

31 S.N. Barick v. State of W.B., AIR 1963 Cal 79; Nannah v. Union of India, AIR 1964 Raj 41; Amar Nath v. Union of India, AIR 1963 SC 424 at p. 428-29: (1963) 1 SCR 657.

32 State of A.P. v. Gundugola Venkata, AIR 1965 SC 11: (1964) 4 SCR 945.

or public officer and the cause of action and the relief claimed by the plaintiff had been substantially indicated therein.

The above sub-section has been added with a view to ensuring that just claims of aggrieved parties will not be defeated on technical grounds. Now, a notice under Section 80 cannot be held invalid and no suit can be dismissed on the ground that there is technical defect or error in the notice or that the service of such notice is irregular.33 The Joint Committee stated:

"The Committee also feel that with a view to seeing that the just claims of many persons are not defeated on technical grounds, the suit against the Government or the public officer should not be dismissed merely by reason of any technical defect or error in the notice or any irregularity in the service of the notice if the name, description and residence of the plaintiff have been so given in the notice as to enable the appropriate authority or public officer to identify the person serving the notice, and the notice had been delivered or left at the office of the appropriate authority, and the cause of action and the relief claimed have been substantially indicated in the notice."34

(o) Exclusion of period of notice

In computing the period of limitation for instituting a suit against the Government or public officer, the period of notice has to be excluded.35

(p) Leave of court: Urgent relief: Section 80(2)

Sub-section (2) of Section 80 as inserted by the Code of Civil Procedure (Amendment) Act, 1976 enables the plaintiff to institute a suit against the Government or public officer for obtaining urgent or immediate relief with the leave of the court even without serving notice to the Government or public officer.36 This sub-section, thus, engrafts an exception to the rule laid down in sub-section (1) of Section 80 and allows the plaintiff to obtain urgent relief in grave cases even without issuing notice.37

33 S. 80(3); see also S.N. Dutt v. Union of India, AIR 1961 SC 1449: (1962) 1 SCR 560; Raghunath Das v. Union of India, AIR 1969 SC 674: (1969) 1 SCR 450; State of A.P. v. Gundugola Venkata, AIR 1965 SC 11: (1964) 4 SCR 945.

34 Report of the Joint Committee, Gazette of India, dt. 1-4-1976, Pt. II, S. 2, Extra., at pp. 804-09.

35 S. 15(2), Limitation Act, 1963; see also Jai Chand v. Union of India, (1969) 3 SCC 642; Amar Chand v. Union of India, (1973) 1 SCC 115: AIR 1973 SC 313.

36 S. 80(2); see also Ghanshyam Dass v. Dominion of India, (1984) 3 SCC 46: AIR 1984 SC 1004.

37 Ghanshyam Dass v. Dominion of India, (1984) 3 SCC 46: AIR 1984 SC 1004 at p. 1011.

The object underlying this provision is to prevent failure or miscarriage of justice in urgent cases. It is the urgency and immediate relief which would weigh with the court while dealing with a prayer to dispense with the requirement of a notice and not the merits of the case.
Sub-section (2), however, enacts that in such a case, the court shall not grant relief, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit.38
(q) Writ petition
A writ petition under Article 32 or 226 of the Constitution cannot be said to be a "suit" within the meaning of Section 80 of the Code. Hence, giving of prior notice to the Government or public officer is not necessary before filing a petition in the Supreme Court or in a High Court.39
(r) Computation of limitation
In computing the period of limitation for filing a suit, the period of notice should be excluded.40
(s) Premature suit
A suit instituted before the expiry of two months of notice as required by Section 80 of the Code is liable to be dismissed only on that ground.41
(t) Appeal
An order passed under Section 80 is neither a "decree" nor an appeal- able order and, hence, no appeal lies against such order.42
(u) Revision
An order under Section 80 of the Code is a "case decided" under Section 115 of the Code and is, therefore, revisable. If a court subordinate to the High Court makes an order which is patently illegal and suffers from jurisdictional error, it can be corrected by the High Court43

38 S. 79.
39 Soorajmull v. Controller of Customs, AIR 1952 Cal 103; Province of Bombay v. Khushaldas S. Advani, AIR 1950 SC 222:1950 SCR 621; N. Parameswara Kurup v. State of T.N., AIR 1986 Mad 126.
40 S. 15(2), Limitation Act, 1963.
41 Bihari Chowdhary v. State of Bihar, (1984) 2 SCC 627 at p. 631: AIR 1984 SC 1043 at p. 1045.
42 State of Gujarat v. K.R. Nayar, 1982 Guj LH 987; Kailash Chandra v. State of M.P., AIR 1992 MP 242:1991 MP LJ 754:1991 Jab LJ 524.
43 Ishwarlal v. State of Maharashtra, ILR 1966 Guj 660: (1966) 7 Guj LR 589; Muktarei Devi v. State of Manipur, AIR 1978 Gau 17.

(v) Title of suit: Section 79

In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be:

(a) in the case of a suit by or against the Central Government, the Union of India; and

(b) in the case of a suit by or against the State Government, the State.44

(w) Statement in plaint

A plaint can be presented after the expiration of two months of notice, which must contain a statement that a statutory notice under Section 80 of the Code has been delivered or left as required by sub-section (1) of the said section. An omission to make such a statement is fatal and, in its absence, the plaint will be rejected by the court.45

(x) Parties

Where a suit is filed against a public officer in respect of any act purporting to be done by him in his official capacity, the Government should be joined as a party to the suit.46

(y) Procedure: Order 27

In a suit by or against the Government, the plaint or written statement shall be signed by any person appointed by the Government who is acquainted with the facts of the case.47 Persons authorized to act for the Government shall be deemed to be recognized agents under the Code48 A Government Pleader can receive summons on behalf of the Government.49 A counsel for the State need not file a vakalatnama. Reasonable time should be granted to the Government for filing a written statement.50 In all suits against the Government or public officers, it is the duty of the court to assist in arriving at a settlement.51

Order 27-A provides that in a suit (or appeal) in which substantial question of law relating to interpretation of the Constitution is involved, the court must issue notice to the Attorney General of India if the question of law concerns the Central Government and to the

44 State of A.P. v. Gundugola Venkata, AIR 1965 SC 11 at p. 15: (1964) 4 SCR 945; Gangappa Gurupadappa v. Rachawwa, (1970) 3 SCC 716 at p. 721: AIR 1971 SC 442 at p. 446; Bihari Chowdhary v. State of Bihar, (1984) 2 SCC 627: AIR 1984 SC 1043.

45 S. 79; see also, Or. 27 Rr. 3, 5-A.

46 Or. 27 R. 1.

47 R.2.

48 R.4.

49 R. 5.

50 Ss. 81, 82; Or. 27; see also Collector, Northern Sub-Division v. Comunidade of Bombolim, (1995) 5 SCC 333.

51 R. 5-B; see also, S. 89, as inserted by the Amendment Act of 1999.

Advocate General of the State if the question concerns the State Government.52

(z) Other privileges

Rule 5-A provides that when a suit is filed against a public officer in respect of any act alleged to have been done by him in his official capacity, the government should be joined as a party to the suit. Rule 5-B casts a duty on the Court in suits against the Government or public officers to assist in arriving at a settlement. Rule 7 provides for extension of time to enable a public officer to make a reference to the Government where he is the defendant. Rule 8-A provides that no security shall be required from the Government or from any public officer sued in respect of an act alleged to have been done by him in his official capacity.

Section 81 provides that in a suit filed against a public officer in respect of any act purporting to be done by him in his official capacity, the court shall exempt him from appearing in person if it is satisfied that he cannot absent himself from his duty without detriment to the public service. He shall not be liable to arrest, nor his property shall be liable to be attached otherwise than in execution of a decree.

Section 82 enacts that no execution shall be issued on any decree passed against the Government or a public officer unless it remains unsatisfied for three months from the date of the decree.53

(2) Suits by aliens: Section 83

Alien enemies residing in India, with the permission of the Central Government, and alien friends, may sue in any court otherwise competent to try a suit, as if they were citizens of India. Alien enemies residing in India without such permission or residing in a foreign country, cannot sue in any court.54 Every person residing in a country which is at war with India shall be deemed to be an Indian enemy.55

(3) Suits by or against Foreign Rulers. Ambassadors and Envoys: Sections 84 to 87-A

A foreign State may sue in any competent court, provided that such suit is for the enforcement of private right vested in the Ruler of that State or in any officer of such State in his public capacity.56 "Foreign

52 For detailed discussion, see infra, "Suits involving questions as to interpretation of Constitution or validity of statutory instrument: Order 27-A".

53 S. 82. For detailed discussion, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. II, Ss. 79-82 at pp. 1-107.

54 S. 83.

55 Explanation to S. 83.

56 S. 84.

State" means any State outside India which has been recognized by the Central Government.57

A Ruler of a foreign State may sue in the name of his State. Likewise, a Ruler of a foreign State may be sued in the name of his State.58 The term "Ruler", in relation to a foreign State, means the person who is for the time being recognized by the Central Government to be the head of that State.59

The Central Government may, at the request of the Ruler of a foreign State, appoint any person to prosecute or defend a suit on behalf of such Ruler. Such a person appointed by the Central Government shall be deemed to be a recognized agent under the Code of the Ruler of a foreign State.60

Section 86(1) enacts that no suit shall be instituted against a foreign State, a Ruler of a foreign State, or an Ambassador or Envoy of a foreign State without the consent of the Central Government. Such consent shall not be given unless the Central Government is satisfied that the conditions laid down in sub-section (2) of Section 86 have been fulfilled.

Likewise, no decree can be executed against the property of any foreign State or a Ruler of a foreign State or an Ambassador or Envoy of a foreign State, except with the consent of the Central Government. Similarly, a Ruler of a foreign State, an Ambassador, an Envoy, a High Commissioner of a Commonwealth country or any other member of his staff, as the Central Government may specify, cannot be arrested under the Code.

It is, however, made clear that where a request is made to the Central Government for the grant of consent, before refusing the request either as a whole or in part, the Central Government must afford to the person seeking such consent reasonable opportunity of being heard.61

(4) Suits against Rulers of former Indian States: Section 87-B

In the case of any suit by or against the Ruler of any former Indian State which is based wholly or partly upon a cause of action which arose before the commencement of the Constitution the same can be

57 S.87-A(a).

58 S. 87.

59 S. 87-A(b).

60 S. 85.

61 Gaekwar Baroda State Rly. v. Hafiz Habib-ul-Haq, AIR 1938 PC 165: (1937-38) 65 IA 182; Mohanlal Jain v. Sawai Man Singhji, AIR 1962 SC 73: (1961) 1 SCR 702; Mirza Ali Akbar Kashani v. United Arab Republic, AIR 1966 SC 230: (1966) 1 SCR 319; Veb Deutfracht v. New Central Jute Mills Co. Ltd., (1994) 1 SCC 282: AIR 1994 SC 516; Harbhajan Singh v. Union of India, (1986) 4 SCC 678: AIR 1987 SC 9.

filed in accordance with the provisions in relation to suits by or against foreign Rulers, Ambassadors and Envoys.62
"Former Indian State" means any such Indian State as the Central Government may, by notification in the Official Gazette, specify for the purpose of Section 87-B of Code.63
(5) Suits by or against soldiers, sailors and airmen: Order 28
Where any soldier, sailor or airman is a party to the suit who is in actual service, and is unable to obtain leave for prosecuting or defending the suit in personam, he may authorize any person to sue or defend him.64 The person so authorized may himself prosecute or defend the suit or appoint a pleader65 Summons on a soldier, sailor or airman may be served through his commanding officer.66
(6) Suits by or against corporations: Order 29
A "corporation" is a fictitious or imaginary person invested by law with the attribute of a person. It can sue and be sued in its corporate name, e.g.
"A.B. Company Ltd. having its registered office at...."
Rule 1 of Order 29 provides that in suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by (z) the secretary; or (ii) any director; or (iii) other principal officer of the corporation able to depose to the facts of the case. Summons may be served as provided in Rule 2.67 The Court may at any stage of the suit require the personal appearance of any of the abovenamed officers, who may be able to answer material questions relating to the suit.68
(7) Suits by or against partnership firms: Order 30
(a) Suits by or against partners: Ride 1
Two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm

62 S. 87-B(l); see also Tokendra Bir Singh v. Govt. of India, AIR 1964 SC 1663; Usmanali Khan v. Sagar Mal, AIR 1965 SC 1798: (1965) 3 SCR 201; Mohan Lal v. Sawai Man Singh, supra.
63 S. 87-B(2), see also Narottam Kishore Deb v. Union of India, AIR 1964 SC 1590: (1964)
7 SCR 55; Tripura Goods Transport Assn. v. Commr. of Taxes, (1998) 2 SCC 264: AIR 1998 SC 465.
64 Or. 28 R. 1.
65 R. 2.
66 R. 3.
67 See supra, Chap. 7; see also Shalimar Rope Works v. Abdul Hussain, (1980) 3 SCC 595.
68 Or. 29 R. 3; see also Ram Chand & Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava, AIR 1966 SC 1899: (1966) 3 SCR 856; United Batik of India v. Naresh Kumar, (1996) 6 SCC 660: AIR 1997 SC 3.

of which they were partners when the cause of action accrued. Any party to a suit may, in such a case, apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accrual of the cause of action, partners in such firm. In a suit by or against a firm, any pleading may be signed and verified by any one of the partners.69

Rule 2 enables a defendant to ask for the disclosure of the names of the partners where the suit is filed by the partners in the name of the firm.70 If any of the partners dies before filing or during the pendency of the suit, it is not necessary to join his legal representative as a party to the suit.71

(b) Service of summons: Rule 3

Rule 3 provides for service of summons upon the firm and its partners.72 Rule 5 lays down that when a summons is issued to a firm under Rule 3, every person served shall be informed by notice whether he is served as a partner or as a person having control or management of the partnership business, or in both capacities. In the absence of such a notice, the person shall be deemed to be served as a partner.

(c) Appearance by partners: Rules 6-8

The defendant-partners shall appear individually in their own names. All subsequent proceedings, however, shall continue in the name of the firm.73 If a notice is served on a person having control or management over the partnership business, he need not appear unless he is a partner.74 Rule 8 enables a person who is served with a summons as a partner to appear under protest and deny that he was a partner at the material time and have the issue as to his being a partner tried at the trial. If the Court holds that he was a partner at the material time, it does not preclude him from denying the liability of the firm. On the other hand, if the Court holds that he was not a partner of the firm and is not liable as such, it does not preclude the plaintiff from serving a summons on the firm and proceeding with the suit.75

69 Or. 30 R. 1; see also Gambhir Mal v. J.K. Jute Mills Co. Ltd., AIR 1963 SC 243: (1963) 2 SCR 190; Purushottam Umedbhai & Co. v. Manilal & Sons, AIR 1961 SC 325: (1961) 1 SCR 982; Mandalsa Devi v. M. Ramnarain (P) Ltd., AIR 1965 SC 1718: (1965) 3 SCR 421.

70 Gambhir Mal v. J.K. Jute Mills Co. Ltd. (ibid.).

71 R.4.

72 See supra, Chap. 7.

73 R.6.

74 R. 7.

75 Mohatta Bros. v. Bharat Suryodaya Mills Co. Ltd., (1976) 4 SCC 420 at p. 426: AIR 1976 SC 1703 at p. 1709-10; Ganesh Trading Co. v. Moji Ram, (1978) 2 SCC 91: AIR 1978 SC 484.

(d) Suits between co-partners: Rule 9

Order 30 applies also to suits between a firm and one or more of its partners therein and to suits between firms having one or more partners in common. No execution, however, can be issued in such suits except with the leave of the court.76

(e) Suits against persons carrying on business in names of others: Rule 10 Any person carrying on business in a name or style other than his own name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, insofar as the nature of such case permits, all rules under Order 30 shall apply accordingly.77

(f) Decree in partnership suits

Order 20 Rule 15 of the Code provides for passing of a preliminary decree by the court before passing a final decree in a suit for dissolution of partnership or taking of partnership accounts.

(g) Execution of decree against partnership firm

Order 21 Rules 49 and 50 provide for execution of a decree against a partnership firm and for attachment of partnership property.78

(8) Suits by or against trustees, executors and administrators: Order 31

In suits between strangers and persons beneficially interested in the property vested in trustees, executors or administrators, it is not necessary to join the beneficiaries as parties to the suit. They can be presented by trustees, executors or administrators, as the case may be. The court may, if it thinks fit, order all or any of the beneficiaries as parties.79

Where a suit is filed against trustees, executors or administrators, all of them should be joined as parties, except (i) the executors who have not proved the will of the testator; or (ii) trustees, executors or administrators staying outside India.80

(9) Suits by or against minors and lunatics: Order 32

(a) Minor: Definition: Rule 1

A minor is a person who has not attained the age of 18 years. But in the case of a minor of whose person or property a guardian or next

76 R. 9.

77 R. 10.

78 Topanmal v. Kundomal, AIR 1960 SC 388; see also infra, "Execution" Pt. IV.

79 Or. 31 R. 1.

80 R. 2.

friend has been appointed by a court, or whose property is under the superintendence of a Court of Wards, the age of majority is 21 years.81

(b) Nature and scope

Order 32 prescribes the procedure of suits to which minors or persons of unsound mind are parties.82

(c) Object

Order 32 has been specially enacted to protect the interests of minors and persons of unsound mind and to ensure that they are represented in suits or proceedings by persons who are qualified to act as such.83 An infant is, in law, regarded as of immature intelligence and discretion,84 and owing to his want of capacity and judgment is disabled from binding himself except where it is for his benefit. Thus the law will, as a general principle, treat all acts of an infant which are for his benefit on the same footing as those of an adult, but will not permit him to do anything prejudicial to his own interests.85 Thus, a decree passed against a minor or a lunatic without appointment of a guardian is a nullity and is void and not merely voidable.86

(d) Suits by minors: Rules 1 to 2-A

Every suit by a minor should be instituted in his name through his guardian or next friend.87 If it is not done, the plaint will be taken off the file.88 Where such minor is a plaintiff, the Court may, at any stage of the suit, order his guardian or next friend, either on the application of the defendant or suo motu, for reasons to be recorded, to furnish security for costs of the defendant.89 This provision seeks to discourage vexatious litigation by guardians or next friends of minors.90

(e) Suits against minors: Rule 3

Where a suit is instituted against a minor, the court should appoint a guardian ad litem to defend the suit. Such appointment should continue throughout all the proceedings including an appeal or revision and in execution of a decree unless it is terminated by retirement, removal or death of such guardian.91

81 S. 3, Majority Act, 1875.
82 Or. 32 R. 15.
83 Ramchandar Singh v. B. Gopi Krishna, AIR 1957 Pat 260 at p. 264; Tulsiram v. Shyamlal Ganpatlal, AIR 1960 MP 73 at p. 74.
84 Coke’s Institutes at p. 291.
85 Halsbury's Laws of England, Vol. XVII at p. 46.
86 Ram Chandra v. Man Singh, AIR 1968 SC 954 at p. 955: (1968) 2 SCR 572.
87 R.1.
88 R.2.
89 R. 2-A.
90 Statement of Objects and Reasons.
91 R.3.

(f) Who may be appointed as guardian or next friend?: Ride 4 Any person who has attained majority and is of sound mind, may act as a guardian or next friend, provided his interest is not adverse to that of the minor, who is not the opposite party in the suit and who gives consent in writing to act as a guardian or next friend. In the interest of a minor, however, the court may permit another person to act as the next friend or guardian of the minor. In the absence of a fit and willing person to act as a guardian, the court may appoint any of its officers to be such guardian.92

(g) Powers and duties of guardian or next friend: Rules 5-7 No guardian or a next friend can, without the leave of the court, (i) receive any amount or movable property on behalf of a minor by way of compromise, nor enter into any agreement or compromise on his behalf in the suit. An application for leave of the court should be accompanied by an affidavit of the next friend or guardian, and if the minor is represented by a pleader, with the certificate of the pleader that such compromise is, in his opinion, for the benefit of the minor. Such certificate or opinion expressed in the affidavit, however, cannot preclude the court from examining whether the agreement or compromise proposed is for the benefit of the minor. An agreement or compromise entered into without the leave of the court is voidable at the instance of the minor. Once such an agreement or compromise is avoided by a minor, it has no effect at all93

Rules 6 and 7 provide that no next friend or guardian of a minor for the suit shall, without the leave of the court, (a) receive any money or other movable property on behalf of a minor either by way of compromise before decree or order in favour of the minor, (b) enter into any agreement or compromise on behalf of a minor with reference to the suit, unless such leave is expressly recorded in the proceedings.

The application for such leave must be accompanied by an affidavit of the next friend or guardian of the minor, as the case may be, and if the minor is represented by a pleader, by the certificate of the pleader to the effect that such compromise is in his opinion for the benefit of the minor. The opinion so expressed in the affidavit or certificate cannot preclude the court from examining whether in fact the compromise is for the benefit of the minor.

Any compromise entered into without the leave of the court shall be voidable against all parties other than the minor. Therefore, the

92 R.4.

93 Rr. 6 and 7; see also Bishundeo Narain v. Seogeni Rni, AIR 1951 SC 280: 1951 SCR 548; Kaushalya Devi v. Baijnath Sayal, AIR 1961 SC 790 at p. 792: (1961) 3 SCR 769.

compromise is good unless the minor chooses to avoid it.94 But once it is avoided by a minor, it ceases to be effective as regards the other parties also.95

Rules 6 and 7 are designed to safeguard the interests of a minor during the pendency of a suit against hostile, negligent or collusive acts of a next friend or guardian.96 They are based upon the general principle that infant litigants become wards of the court and the court has got the right and also the duty to see that the next friends or guardians act properly and bona fide in the interests of minors and that no suits are instituted or carried on by them for their own benefits only irrespective of the benefits of minors97

(h) Interest of infants of paramount consideration

The provisions of the Code have been based on the general principle that interest of infants is of paramount consideration. It is, therefore, the duty of the court to ensure that guardians and next friends act honestly and exercise their discretionary powers bona fide in the interests of minors.98

(i) Retirement, removal or death of guardian or next friend: Rules 8-11

A next friend or guardian of a minor cannot retire without first procuring a fit person for substituting him and giving security for the costs already incurred by him.99

The court may remove a next friend or guardian of a minor, if it satisfied that (i) his interest is adverse to that of the minor; or (ii) he is so connected with the opposite party that it is unlikely that the interest of the minor will be properly protected by him; or (iii) he does not discharge his duty; or (iv) he ceases to stay in India during the pendency of the suit; or (v) there is any other sufficiently justifiable cause.100

94 Bishundeo Narain v. Seogeni Rai, AIR 1951 SC 280: 1951 SCR 548; Kaushalya Devi v. Baijnath Sayal, AIR 1961 SC 790 at p. 792: (1961) 3 SCR 769; Dokku Bhushayya v. Katragadda Ramakrishnayya, AIR 1962 SC 1886 at p. 1891: (1963) 2 SCR 499; Rangasayi v. Nagarathnamma, AIR 1933 Mad 890 at p. 911 (FB); Dhirendra Kumar v. Sughandhi Bain, (1989) 1 SCC 85: AIR 1989 SC 147.

95 Kaushalya Devi v. Baijnath Sayal, supra.

96 Dokku Bhushayya v. Katragadda Ramakrishnayya, AIR 1962 SC 1886 at p. 1891: (1963) 2 SCR 499.

97 Rangasayi v. Nagarathnamma, AIR 1933 Mad 890 at p. 911 (FB); Dhirendra Kumar v. Sughandhi Bain, (1989) 1 SCC 85: AIR 1989 SC 147.

98 Bishundeo Narain v. Seogeni Rai, AIR 1951 SC 280: 1951 SCR 548; Kaushalya Devi v. Baijnath Sayal, AIR 1961 SC 790 at p. 792: (1961) 3 SCR 769; Dokku Bhushayya v. Katragadda Ramakrishnayya, AIR 1962 SC 1886 at p. 1891: (1963) 2 SCR 499; Rangasayi v. Nagarathnamma, AIR 1933 Mad 890 at p. 911 (FB); Dhirendra Kumar v. Sughandhi Bain, (1989) 1 SCC 85: AIR 1989 SC 147.

99 R.8.

100 R. 9.

Where the guardian or next friend of a minor desires to retire or fails to discharge his duty or where there are other sufficiently justifiable grounds, the court may permit such guardian or next friend to retire or may remove him and may also make such order as to costs as it thinks fit. It should also appoint a new next friend or guardian.101

On retirement, removal or death of a guardian or next friend, further proceedings in the suit shall remain stayed until another guardian or next friend is appointed.102

(j) Decree against minors: Rule 3-A

A decree passed against a minor without appointment of next friend or guardian is null and void. But a decree passed against a minor cannot be said to be illegal nor can be set aside only on the ground that the next friend or a guardian of the minor had an interest in the subject- matter of the suit adverse to that of the minor. If the minor is prejudiced by reason of adverse interest of the next friend or guardian, it can be made a ground for setting aside a decree. The minor may also obtain appropriate relief for misconduct or gross negligence on the part of his next friend or guardian.103

(k) Minor attaining majority: Rules 12-14

On attaining the age of majority, a minor plaintiff may adopt any of the following courses:

(i) He may proceed with the suit. In that case he shall apply for an order discharging the next friend or guardian and for leave to proceed in his own name.104

(ii) He may abandon the suit and apply for its dismissal on repayment of costs to the defendant or to his guardian or next friend.105

(iii) He may apply for dismissal of the suit on the ground that it was unreasonable or improper.106

(iv) Where he is a co-plaintiff, he may repudiate the suit and may apply to have his name struck off as co-plaintiff. If the Court finds that he is not a necessary party, it may dismiss him from the suit. But if he is a necessary party, the Court may make him a defendant.107

101 R. 11.
102 R. 10.
103 R. 3-A; see also Ram Chandra v. Man Singh, AIR 1968 SC 954 at p. 955: (1968) 2 SCR 572; Kameshwari Devi v. Barhani, (1997) 10 SCC 273.
104 R. 12(1), (2), (3).
105 R. 12(4).
106 R. 14.
107 R. 13.

(l) Persons of unsound mind

The provisions of Order 32 also apply to lunatics and persons of unsound mind.108

(10) Suits concerning family matters: Order 32-A

Order 32-A, as inserted by the Code of Civil Procedure (Amendment) Act, 1976 lays down the procedure where suits or proceedings relate to matters concerning a family.109

Ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigation concerning affairs of the family require special approach keeping in mind serious emotional aspects involved. Family counselling as one of the methods of achieving the ultimate object of preservation of the family, hence, should be kept in the forefront. Proceedings in such suits, therefore, may not always be held in open court but may be conducted in camera,110

The Supreme Court111, while dealing with the Family Courts Act, 1984, observed that the said Act was enacted with a view to promote conciliation in, and secure speedy settlement of, disputes relating to family matters. The said Act was enacted despite the fact that Order 32-A of the Code of Civil Procedure was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976, which could not bring out desired result.

Every endeavour should be made by the court to assist parties in arriving at an amicable settlement. For that purpose, it is open to the court to secure services of such persons (preferably women where they are available).112

(11) Friendly suits: Section 90, Order 36

(a) Nature and scope

A "friendly suit" (Special case) is a suit where the parties do not approach a court by presentation of a plaint as is done in ordinary civil litigation. They are, however, interested in the decision of any question of fact or of law. For the said purpose, they enter into an agreement in writing stating such question in the form of a case for the purpose of obtaining the opinion of the court. The court may decide the question if it is satisfied that such question is "fit" to be decided.113

108 R. 15; see also Sharda v. Dharmpal, (2003) 4 SCC 493: AIR 2003 SC 493; Raj Kumar v. Rameshchand, (1999) 8 SCC 29: AIR 1999 SC 3511.

109 Or. 32-A Rr. 1, 6.

110 R. 2, see also, Statement of Objects and Reasons.

111 K.A. Abdul Jaleel v. T.A. Shahida, (2003) 4 SCC 166: AIR 2003 SC 2525.

112 Rr. 3-5.

113 S. 90; Or. 36 R. 1.

(b) Object

In the Statement of Objects and Reasons, it was stated that where parties agree to state a case for the opinion of the court, the court would try and determine such question by registering it as a suit. Upon the judgment so pronounced, a decree will follow. Such decree could be a compromise decree.114

(c) Conditions

The following conditions must be satisfied before a court will hear a friendly suit:115

(1) The agreement is duly executed by the parties;

(2) The parties have a bona fide interest in the question stated; and

(3) The case is fit to be decided.

(d) Procedure

Order 32 provides procedure to be followed in friendly suits. Rules 1 and 2 speak of form and contents of an agreement. Such agreement duly entered into between the parties should be filed in the court having jurisdiction to entertain the suit. It shall be registered as a suit and shall be heard and disposed of by a judgment which will be followed by a decree. Thus, virtually, the decree is a consent decree. No appeal lies against such a decree.116

The procedure provided by Section 90 and Order 36, however, is rarely invoked because a litigant does not get apparent benefit under it.117 .

(e) Appeal

A decree passed in a "friendly" suit is in the nature of compromise decree. It is, therefore, not appealable.118

(12) Interpleader suit: Section 88; Order 35

(a) Meaning

"To interplead" means "to litigate with each other to settle a point concerning a third party".119

114 Trustees of the Port of Bombay v. Municipal Corpn. Bombay, AIR 1930 Bom 232: (1930) 54 Bom 825; Nilima v. Prakriti Bhushan, AIR 1982 Cal 12: (1981) 85 CWN 998.

1.5 Rr. 36 R. 1.

1.6 Rr. 2-5.

117 Statement of Objects and Reasons.

118 R. 6.

119 Concise Oxford English Dictionary (2002) at p. 740; Chamber's 20th Century Dictionary (1992) at p. 659.

In Halsbury's Laws of England, it has been stated:120

"Where a person is under liability in respect of a debt or in respect of any money, goods or chattels and he is, or expects to be, sued for or in respect of that debt or money, or those goods or chattels, by two or more persons making adverse claims thereto, he may apply to the court for relief by way of interpleader."

(b) Nature and scope

An interpleader suit is a suit in which the real dispute is not between a plaintiff and a defendant but between the defendants who interplead against each other, unlike in an ordinary suit. In a majority of cases, there is a dispute between a plaintiff and a defendant. In an interpleader suit, the plaintiff is not really interested in the subject-matter of the suit.121

Section 88 of the Code enacts that two or more persons claiming adversely to one another the same debt, sum of money or other property, movable or immovable, from a person who does not claim any interest therein except the charges and costs incurred by him and is ready to pay or deliver the same to the rightful claimant, may file an interpleader suit.

(c) Object

The primary object of filing an interpleader suit is to get claims of rival defendants adjudicated. It is the process wherein the plaintiff calls upon the rival claimants to appear before the court and get their respective claims decided. The decision of the court in an interpleader suit affords indemnity to the plaintiff on payment of money or delivery of property to the person whose claim has been upheld by the court.122

(d) Conditions: Section 88

Before an interpleader suit can be instituted, the following conditions must be satisfied:

(i) There must be some debt, sum of money or other property movable or immovable in dispute;

(ii) Two or more persons must be claiming it adversely to one another;

(iii) The person from whom such debt, money or property is claimed must not be claiming interest therein other than the charges and costs and he must be ready and willing to pay or deliver it to the rightful claimant; and

120 Halsbury's Laws of England (4th Edn.) Vol. 37 at p. 200, para 264.

121 Mulla, Code of Civil Procedure (2007) Vol. IV at pp. 167-71; Groundnut Extractions Export Development Assn. v. State Bank of India, (1977) 79 Bom LR184.

122 Groundnut Extractions Export Development Assn. v. State Bank of India, (1977) 79 Bom LR 184; Sobhanandrirao v. Jaggayya, AIR 1966 AP 92 at p. 95.

(iv) There must be no suit pending wherein the rights of rival claimants can be properly adjudicated.

(e) Illustrations

Let us consider some illustrations to understand the ambit and scope of interpleader suits:

(1) A is in possession of property claimed by B and C adversely. A does not claim any interest in the property and is ready to deliver it to the rightful owner. A can institute an interpleader suit.

(2) A, a railway company, is in possession of goods as a consignee. It does not claim any interest in the goods except lien for wharfage, demurrage and freight but rival claims have been made by B and C adversely to each other. A can institute an interpleader suit.

(3) A is liable to pay Rs 40,000. The amount is claimed by B and C adversely to each other. According to A, he has already paid Rs 10,000. An interpleader suit would be competent for Rs 30,000.

(4) A is liable to pay Rs 50,000. The said amount is claimed by B and C adversely. A does not dispute his liability and is willing to pay the amount either to B or to C declared to be the rightful claimant by the Court. A may file a suit under this section by making B and C as defendants (Or. 35 R. 1). He can deposit Rs 50,000 in Court (Or. 35 R. 2). On such deposit, the Court may discharge him from liability by awarding costs to him and by removing his name from the suit. (Or. 35 R. 4).

(5) A holds Rs 50,000 claimed by B and C adversely to each other. A institutes an interpleader suit by joining B and C as defendants. It is revealed that A had a secret agreement with B before the institution of the suit that if B succeeded in the suit, he would accept Rs 40,000 in full and final satisfaction of his claim. In view of the agreement, A has interest in the subject- matter of the suit and he cannot bring an interpleader suit. The suit must be dismissed;

(f) Who may file interpleader suit?

A person who has no interest in any debt, sum of money or other property, movable or immovable, except the charges or costs and is ready to pay or deliver the property to the rightful claimant may file an interpleader suit.123

123 Robinson v. Jenkins, (1890) 24 QB 275: 59 LJ QB 147; G. Hari Karmarkar v. J.A. Robin, AIR 1927 Rang 91; National Insurance Co. Ltd. v. Dhirendra Nath, AIR 1938 Cal 287.

(g) Who cannot file interpleader suit?: Rule 5

An agent cannot sue his principal, or a tenant or his landlord, for the purpose of compelling them to interplead with persons other than persons claiming through such principals or landlords.124 The reason for the rule seems to be that ordinarily an agent cannot dispute the title of his principal. Likewise, a tenant cannot dispute the title of his landlord during the subsistence of the tenancy.125

(h) Test

In order to decide whether a suit is in the nature of an interpleader suit, the court must have regard to all the prayers in the plaint. A suit does not become an interpleader suit merely because the plaintiff requires the defendants to interplead with each other as regards one of the prayers in the plaint.126

(i) Procedure: Order 35 Rides 1-4

Order 35 lays down the procedure for interpleader suits. In every interpleader suit, in addition to other statements, the plaint also must state (i) that the plaintiff claims no interest in the subject-matter in dispute other than the charges and costs; (ii) the claims have been made by the defendants severally; and (iii) there is no collusion between the plaintiff and any of the defendants.127

The court may order the plaintiff to deposit the amount or place the property in the custody of the court and provide costs incurred by him by giving him a charge on the thing claimed.128

At the first hearing, the court may declare that the plaintiff is discharged from all liability, award him costs and dismiss him from the suit.129 On the basis of evidence available, the court may also adjudicate the title to the thing claimed. Where it is not possible, the court may direct that an issue or issues between the parties be framed and tried, one of the claimants be made a plaintiff in lieu of or in addition to the original plaintiff and the suit shall proceed in an ordinary manner.130

124 R. 5.
125 S. 116, Evidence Act, 1872.
126 Jagganath v. Tulka Hera, (1908) 32 Bom 592 at p. 597; Vyvyan v. Vyvyan, 4 De GF&J 183; National Insurance Co. Ltd. v. Dhirendra Nath, AIR 1938 Cal 287; Mariyala Sambayya v. Narala Bala, AIR 1952 Mad 564.
127 Or. 35 R. 1.
128 Rr. 2, 6.
129 R. 4.
130 Rr. 4, 5.

(j) Appeal

An order dismissing the interpleader suit filed by the plaintiff is a "decree". Likewise an adjudication upon the claims of defendants is also appealable as "decree".131

A decision under Rules 3, 4 and 6 of Order 35 is an appealable order.132

(13) Suits by indigent persons: Order 33

(a) Nature and scope

Order 33 provides for filing of suits by indigent persons. It enables persons who are too poor to pay court fees and allows them to institute suits without payment of requisite court fees.

(b) Object

The provisions of Order 33 are intended to enable indigent persons to institute and prosecute suits without payment of any court fees. Generally, a plaintiff suing in a court of law is bound to pay court fees prescribed under the Court Fees Act at the time of presentation of plaint. But a person may be too poor to pay the requisite court fee. This order exempts such person from paying the court fee at the first instance and allows him to prosecute his suit in forma pauperis, provided he satisfies certain conditions laid down in this order.133

(c) Indigent person: Meaning: Order 33 Rule 1

A person is an "indigent person" (i) if he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit; or (ii) where no such fee is prescribed, when he is not entitled to property worth one thousand rupees. In both the cases, the property exempt from attachment in execution of a decree and the subject- matter of the suit should be excluded.134

Any property acquired by the applicant after the presentation of the application for permission to sue as an indigent person and the decisions thereon should also be taken into consideration for deciding the question whether the applicant is an indigent person.135 The word "person" includes juristic person.136

131 R.G. Orr v. R.M.M.S.T.V.E. Chidambaram, ILR (1909) 33 Mad 220; Maharaj Singh v. Chittarmal, ILR (1908) 30 All 22: 4 All LJ 683.

132 Or. 43 R. 1 (p).

133 Lim Pin Sin v. Eng Wan Hock, AIR 1928 Rang 306; Sumathykutty Amma v. Narayani Panikkathy, AIR 1973 Ker 19 at p. 20.

134 Expin. I to R. 1, Or. 33.

135 Expln. II to R. 1, supra.

136 Union Bank of India v. Khader International Construction, (2001) 5 SCC 22.

(d) Contents of application: Rule 2

Every application for permission to sue as an indigent person should contain the following particulars:

(1) The particulars required in regard to plaints in suits;

(2) A schedule of any movable or immovable property belonging to the applicant with the estimated value thereof; and

(3) Signature and verification as provided in Order 6 Rules 14 and 15.137

The application should be presented by the applicant to the court in person unless exempted by the court.138 Where there are two or more plaintiffs, it can be presented by any of them.139 The suit commences from the moment an application to sue in forma pauperis is presented.140

(e) Rejection of application: Rule 5

The court will reject an application for permission to sue as an indigent person in the following cases:141

(i) Where the application is not framed and presented in the prescribed manner; or

(ii) Where the applicant is not an indigent person; or

(iii) Where the applicant has, within two months before the presentation of the application, disposed of any property fraudulently or in order to get permission to sue as an indigent person; or where there is no cause of action; or

(iv) Where the applicant has entered into an agreement with reference to the subject-matter of the suit under which another person has obtained interest; or

(v) Where the suit appears to be barred by law; or

(vi) Where any other person has entered into an agreement with the applicant to finance costs of the litigation.

(f) Inquiry: Rule 1-A

In the first instance, an inquiry into the means of the applicant should be made by the Chief Ministerial Officer of the court. The court may adopt the report submitted by such officer or may itself make an inquiry.142

137 R. 2.

138 R. 3. See also Dipo v. Wassan Singh, (1983) 3 SCC 376: AIR 1983 SC 846.

139 Proviso to R. 3.

140 Vijai Pratap v. Dukh Haran Nath, AIR 1962 SC 941: 1962 Supp (2) SCR 675; Jugal Kishore v. Dhanno Devi, (1973) 2 SCC 567: AIR 1973 SC 2508.

141 R. 5; see also M.L. Sethi v. R.P. Kapur, (1972) 2 SCC 427: AIR 1972 SC 2379.

142 R. 1-A.

Where the application submitted by the applicant is in proper form and is duly represented, the court may examine the applicant regarding the merits of the claim and the property of the applicant.143

The court shall then issue notice to the opposite party and to the Government Pleader and fix a day for receiving evidence as the applicant may adduce in proof of his indigency or in disproof thereof by the opposite party or by the Government Pleader. On the day fixed, the court shall examine the witnesses (if any), produced by either party, hear their arguments and either allow or reject the application.144

(g) Where permission is granted?: Rules 8 to 9-A

Where an application to sue as a indigent person is granted, it shall be deemed to be a plaint in the suit and shall proceed in the ordinary manner, except that the plaintiff will not have to pay court fees or process fees.

The court may assign a pleader to an indigent person if he is not represented by a pleader. The Central Government or the State Government may make provisions for rendering free legal aid and services to indigent persons to prosecute their cases. A defendant can also plead set-off or counterclaim as an indigent person.145

(h) Where permission is rejected?: Rules 15 to 15-A Where the court rejects an application to sue as an indigent person, it will grant time to the applicant to pay court fees.146 An order refusing to allow an applicant to sue as an indigent person shall be a bar to a subsequent similar application. However, this does not debar him from suing in an ordinary manner, provided he pays the costs incurred by the Government Pleader and the opposite party in opposing the application.147

(i) Revocation of permission: Rule 9

The Court may, on an application by the defendant or by the Government Pleader, revoke permission granted to the plaintiff to sue as an indigent person in the following cases:148

(i) Where he is guilty of vexatious or improper conduct in the course of the suit; or

(ii) Where his means are such that he ought not to continue to sue as an indigent person; or

143 R. 4.
144 Rr. 6. 7.
145 Rr. 8, 9-A, 18.
146 R. 15-A.
147 R. 15.
148 R. 9.

(iii) Where he has entered into an agreement under which another person has obtained an interest in the subject-matter of the suit.

(j) Costs

The costs of an application to sue as an indigent person shall be the costs in the suit.149

(k) Recovery of court fees and costs

(A) Where indigent person succeeds.—Where the plaintiff (indigent person) succeeds in the suit, the court shall calculate the amount of court fees and costs and recover from the party as ordered by the court.150

(B) Where indigent person fails.—Where the plaintiff (indigent person) fails or the suit abates, the court shall order him (plaintiff) to pay court fees and costs.151

(l) Right of State Government

The State Government has right to recover court fees. For that purpose, it is deemed to be a party to the suit.152

(m) Realization of court fees: Rule 14

Where an indigent person succeeds in a suit, the State Government can recover court fees from the party as per the direction in the decree and it will be the first charge on the subject-matter of the suit. Where an indigent person fails in the suit, the court fees shall be paid by him. Where the suit abates on account of the death of a plaintiff, such court fees would be recovered from the estate of the deceased plaintiff.153

(n) Appeal

An order rejecting an application to sue as an indigent person is appealable.154

(o) Appeals by indigent persons: Order 44

A person unable to pay court fees on memorandum of appeal may apply to allow him to appeal as an indigent person. The necessary inquiry as prescribed in Order 33 will be made before granting or refusing the prayer. But where the appellant was allowed to sue as an indigent person in the trial court, no fresh inquiry will be necessary if he files an affidavit that he continues to be an indigent person.155

149 R. 16.
150 R. 10.
151 Rr. 11, 11-A.
152 R. 13.
153 R. 14.
154 Or. 43 R. 1 (na).
155 Or. 44.

(14) Suits involving questions as to interpretation of Constitution or validity of statutory instrument: Order 27-A

Order 27-A provides that in a suit or appeal in which a substantial question of law as to the interpretation of the Constitution, as referred to in Article 132(1) or 147 of the Constitution of India, is involved, the Court shall not proceed to determine the question until after notice to the Attorney General of India if the question of law concerns the Central Government and to the Advocate General of the State if the question of law concerns the State Government.155

If such officers apply, they may be made party to the suit or appeal.157 In such a case, the Attorney General or the Advocate General shall not be entitled to or liable for costs.158 Rules 1-A and 2-A as added by the Amendment Act of 1976 prescribe the procedure in suits or appeals involving the validity of any statutory instrument.

(15) Mortgage suits: Order 34

(a) Nature and scope

Order 34 lays down procedure with regard to suits relating to mortgages of immovable property. It provides for the frame of the suit relating to sale, foreclosure and redemption of mortgaged property and also to enforce charges. The procedure laid down in Order 34 is distinct and different for execution of decrees in mortgage suits than the procedure prescribed in Order 21 for execution of decrees passed in other suits.159

(b) Mortgage: Definition

Mortgage is defined in the following words:

"A mortgage is the transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage money and the instrument (if any) by which the transfer is effected is called a mortgage-deed."160

156 Or. 27-A Rr. 1 and 4; see also United Provinces v. Atiqa Begum, AIR 1941 FC 16; State of Gujarat v. Kasturchand, 1991 Supp (2) SCC 345: AIR 1991 SC 695.

157 R. 2.

158 R. 3.

159 S. Sivaprakasam v. B.V. Muniraj, (1997) 9 SCC 636.

160 S. 58(a) of the Transfer of Property Act, 1882.

(c) Essentials

From the above definition, it becomes clear that there are always two parties to a mortgage transaction: (i) mortgagor; and (ii) mortgagee. The mortgagor has a right to redeem his property from the mortgage encumbrance while the mortgagee has the right to sell the mortgaged property and the right to foreclose by depriving the mortgagor of his right of redemption.

(d) Object

The provisions of Order 34 have been enacted with the avowed object of avoiding multiplicity of suits by deciding all claims in the presence of the interested parties.

(e) Parties: Rule 1

Rule 1 of Order 34 enacts that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any such suit relating to mortgage.161

The object underlying joinder of parties in mortgage suits is to avoid multiplicity of proceedings and to ensure that all the claims effecting the mortgage security or the right of redemption may be disposed of in the same suit.

This provision is, however, subject to the provisions of the Code; and Order 1 Rule 9 lays down that no suit shall be defeated by reason of non-joinder of parties.152

(f) Suit for foreclosure: Rules 2-3

(i) Preliminary decree.—In suit for foreclosure, if the plaintiff succeeds, the court shall pass a preliminary decree (a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for principal and interest on the mortgage, the costs of the suit awarded to him; and other costs, charges and expenses properly incurred by him; or (b) declaring the amount so due; and (c) directing that if the defendant pays into court the said amount, on or before such date fixed or extended by the court, the plaintiff shall deliver to the defendant all documents relating to the mortgaged property and retransfer the property to the defendant free from the mortgage and all encumbrances created by the plaintiff and put the defendant in possession thereof. If the payment is not made by the defendant, the plaintiff shall be entitled to apply for a final decree debarring the defendant from his right to redeem the mortgage.153

161 Or. 34 R. 1; see also Chhaganlal v. Patel Narandas, (1982) 1 SCC 223: AIR 1982 SC 121.

162 Ibid; see also supra, Chap. 5; N.K. Mohd. Sulaiman v. N.C. Mohd. Ismail, AIR 1966 SC 792: (1966) 1 SCR 937.

163 Or. 34 R. 2.

(ii) Final decree.—Where the defendant makes payment of all amounts on or before the date fixed or extended by the court for such payment, the court shall, on an application being made by him, pass a final decree directing the plaintiff to deliver to the defendant all the documents referred to in the preliminary decree, to retransfer the property and to put the defendant in possession thereof. Where no payment has been made by the defendant on or before the date fixed or extended by the court for such payment, the court shall on application being made by the plaintiff pass a final decree declaring that the defendant is debarred of his right to redeem the mortgage and, if necessary, by directing the defendant to put the plaintiff in possession of the mortgaged property. On passing of a final decree, the defendant shall be deemed to have been discharged from all his liabilities in respect of the mortgage.164

(g) Suit for sale: Rides 4-6

(i) Preliminary decree— In a suit for sale, if the plaintiff succeeds, the court shall pass a preliminary decree in the aforesaid manner. In case of default by the defendant, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property be sold and the sale proceeds be applied in payment of amount due to the plaintiff be.165

(ii) Final decree— Where on or before the day fixed or at any time before the confirmation of sale, the defendant makes payment into court all amounts due, the court shall on application being made by him pass a final decree directing the plaintiff to deliver to the defendant all the documents referred to in the preliminary decree, to retransfer the mortgaged property and to put the defendant in possession thereof. Where the payment has not been made by the defendant, the court shall, on an application being made by the plaintiff pass a final decree directing sale of mortgaged property.166

If the net proceeds of such sale are less than the amount due, the court may pass a decree for the balance if it is legally recoverable from the defendant.167

(h) Suit for redemption: Rules 7-9

(i) Preliminary decree.—In a suit for redemption, if the plaintiff succeeds, the court shall pass a preliminary decree in the aforesaid manner. If the plaintiff does not make the payment, the defendant shall be entitled to apply for a final decree that the mortgaged property be sold

164 R. 3.
165 R. 4.
166 R. 5.
167 R. 6.

or that the plaintiff be debarred of his right to redeem the mortgaged property, depending upon the nature of the mortgage.168

(ii) Final decree.—Where before a final decree debarring the plaintiff of his right to redeem the mortgage has been passed or before the confirmation of a sale, the plaintiff pays all amounts due, the court shall, on application being made by him pass a final decree directing the defendant to deliver to the plaintiff all the documents referred to in the preliminary decree, to retransfer the mortgaged property and to put the plaintiff in possession thereof. Where no payment has been made by the plaintiff, the court shall, on application being made by the defendant, pass a final decree declaring that the plaintiff is debarred of his right to redeem the mortgage or directing that the mortgaged property be sold and proceeds thereof be applied in payment of amount found due to the defendant and the balance, if any, be paid to the plaintiff.169

If the net proceeds of such sale are less than the amount due, the court may pass a decree for the balance if it is legally recoverable from the plaintiff.170 If it appears that nothing is due to the defendant or that he has been overpaid, the court shall pass a decree directing him to retransfer the property and to pay to the plaintiff the amount which may be found due to him and he may be put in possession of the mortgaged property.171

The Code also makes provisions for payment of costs, mesne profits and interest in mortgage suits.172

(16) Summary suits: Order 37

(a) Nature and scope

Order 37 provides summary procedure in suits based on negotiable instruments or where the plaintiff seeks to recover debt or liquidated amount. The essence of summary suits is that the defendant is not, as in an ordinary suit, entitled as of right to defend the suit. He must apply for leave to defend within the stipulated period of ten days. Such leave will be granted only if the affidavit filed by the defendant discloses such facts as will make it incumbent upon the plaintiff to prove consideration or such other facts as the court may deem sufficient.173 The provisions of Order 37 are merely rules of procedure. They do not alter the nature of the suit or jurisdiction of courts.174

168 R. 7.
169 R. 8.
170 R. 8-A.
171 R. 9.
172 Rr. 10, 10-A, 11.
173 Or. 37 Rr. 1-3.
174 Prayag Deb v. Rama Roy, AIR 1977 Cal 1 (FB).

(b) Object

The object underlying the summary procedure is to prevent unreasonable obstruction by the defendant who has no defence and to assist expeditious disposal of cases.175

Trading and commercial operations will be seriously impeded if money disputes between the parties are not adjudicated upon immediately.176

Taken by and large, the object of the provision is to ensure that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining a decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of commercial transactions.177

(c) Discretionary power

The discretionary power conferred upon the court under Order 37 should be exercised judicially, judiciously and on well-settled principles of natural justice. Wherever defence raises a "triable issue", leave should be granted unconditionally. If it is not done, leave may become illusory.178

Care should be taken to see that the object of the rule to assist the expeditious disposal of commercial causes should not be defeated. But it also must be ensured that real and genuine triable issues are not shut out by unduly severe orders as to deposit.179

(d) Extent and applicability

The provisions of Order 37 apply to High Courts, City Civil Courts, Courts of Small Causes and other superior courts. They apply to (a) suits based upon bills of exchange, hundies and promissory notes; and (b) suits in which the plaintiff seeks to recover a debt or liquidated amount payable by the defendant with or without interest arising (i) on a written contract; or (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or debt other than penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated amount.180

175 Milkhiram India (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698: (1966) 68 Bom LR 36.

176 Ibid.

177 Ibid, see also Santosh Kumar v. Bhai Mool Singh, AIR 1958 SC 321:1958 SCR 1211.

178 Santosh Kumar v. Bhai Mool Singh, supra; Milkhiram India (P) Ltd. v. Chamanlal Bros., supra; Larsen & Toubro Ltd. v. Arun Kumar, (2000) 4 JT 556.

179 Ibid, see also Kamlesh Kohli v. Escotrac Finance & Investment Ltd., (2000) 1 SCC 324; Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687: AIR 1977 SC 577.

180 Rr. 1, 7; see also Prayag Deb v. Rama Roy, supra.

(e) Procedure

Rules 2 and 3 provide the procedure of summary suits. Rule 2 provides that after the summons of the suit has been issued to the defendant, the defendant must appear and the plaintiff will serve a summons for judgment on the defendant. The defendant is not entitled to defend a summary suit unless he enters an appearance. In default of this, the plaintiff will be entitled to a decree which will be executed forthwith.

Rule 3 prescribes the mode of service of summons and leave to defend. The defendant must apply for leave to defend within ten days from the date of service of summons upon him and such leave will be granted only if the affidavit filed by the defendant discloses such facts as may be deemed sufficient to entitle him to defend. Such leave may be granted to the defendant unconditionally or upon such terms as may appear to the court or judge to be just.181

Leave to defend, however, should not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put by him is frivolous or vexatious. If a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend should not be granted unless such admitted amount is deposited by him in the court.182

At the hearing of such summons for judgment, if the defendant does not apply for leave to defend or such leave is refused, the plaintiff is entitled to a decree forthwith. The court or judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit. No hard and fast rule can be laid down as to in what cases leave to defend can be granted. Each case must be decided on its own facts and circumstances and the discretion must be exercised judicially and in consonance with the principles of natural justice which form the foundations of our laws.183

(f) Test

The test whether leave to defend should be granted or not is to see whether the defence raises a real, honest and bona fide dispute and raises a triable issue or not. If the court is satisfied that the defence has raised a triable issue or a fair dispute has arisen, leave to defend should not be refused.184 Again, it is hazardous and unfair to pronounce a categorical opinion on such matter before the evidence is taken. It is only

181 Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687: AIR 1977 SC 577.
182 Ibid, see also supra, "discretionary power".
183 Ibid, see also Santosh Kumar v. Bhai Mool Singh, AIR 1958 SC 321:1958 SCR 1211.
184 Raj Duggal v. Ramesh Kumar, 1991 Supp (1) SCC 191: AIR 1990 SC 2218.

in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion to grant unconditional leave can be refused.185

As the matter is in the discretion of the court, no hard and fast rule can be laid down as to when the discretion should be exercised by granting unconditional leave to the defendant. In general, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good or even plausible, defence on those facts.186

Under special circumstances, the court can set aside the decree and stay the execution and may grant leave to the defendant to appear and defend the suit.187 However, inherent power under Section 151 of the Code cannot be exercised for setting aside such decree.188

(g) Difference between summary suit and ordinary suit

Whereas in an ordinary suit the defendant is entitled to defend the suit as of right, in a summary suit he is not so entitled except with the leave of the court.189 While in an ordinary suit the decree cannot be set aside by the trial court except on review, in a summary suit the trial court may set it aside under special circumstances.190

(h) Recording of reasons

Generally, a court while granting conditional leave, should record reasons. Absence to record reasons, however, will not make the order invalid.191

(i) Revision

An order passed under Order 37 is a "case decided" under Section 115 of the Code and is revisable though a High Court generally does not interfere with the discretion exercised by the trial court.192

185 Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., supra, at pp. 690 (SCC): at p. 580 (AIR).

186 Santosh Kumar v. Bhai Mool Singh, AIR 1958 SC 321:1958 SCR 1211.

187 R. 4.

188 Ramkarandas v. Bhagwandas, AIR 1965 SC 1144 at p. 1145: (1965) 2 SCR 186.

189 R. 3.

190 R. 4.

191 V. Kamalanathan v. E.I.D. Parry Ltd., (1978) 1 Mad LJ 25: AIR 1978 NOC 271; Fateh Lal v. Sunder Lal, AIR 1980 Raj 220; Vijaykumar K. Shah v. Firm of Pari Naresh Chandra, AIR 1968 Guj 247; Bombay Enamel Works v. Purshottam, AIR 1975 Bom 128; Milkhiram India (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698; Ashok Umraomal Sancheti v. Rispalchand, (2000) 9 SCC 737.

192 Mechelec Engineers v. Basic Equipment Corpn., supra.

(j) Principles

In Kiranmoyee Dassi v. Dr. J. Chatterjee193, the High Court of Calcutta- laid down the following principles relating to suits of a summary nature:

(i) If the defendant satisfies the court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(ii) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence, the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(iii) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but, in such a case, the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(iv) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(v) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.194

(17) Suits relating to public nuisance: Section 91

(a) Nature and scope

Section 91 of the Code provides for filing of a suit in the case of public nuisance or other wrongful acts affecting the public at large. It states

193 AIR 1949 Cal 479: 49 CWN 246: ILR (1945) 2 Cal 145.

194 Ibid, at p. 486 (AIR): at p. 253 (CWN); approved in Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687.

that such a suit can be instituted for declaration, injunction or such other relief which may be appropriate in the circumstances of the case.

(b) Object

Ratanlal and Dhirajlal stated, "Though not so dangerous as occasion for keeping the peace or good behaviour, nor so urgent as unlawful assemblies, they (nuisances) are yet sufficiently fraught with potential danger as to warrant a summary action on the part of the majistry."195

In the leading case of Municipal Council, Ratlam v. Vardichan196, the Supreme Court observed that a public nuisance is a challenge to the social justice component of the Rule of Law. In case of public nuisance it is the power coupled with duty of the Government or local authority to take appropriate steps to remove it.

(c) Public nuisance: Meaning

The expression "public nuisance" has not been defined in the Code. It can, however, be said to be an act or omission which causes common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to the persons who may have occasion to use public rights.197

Thus, obstruction of a public highway, pollution of public waterways, storage of inflammable materials, endangering life, health or property of public, ringing of bell day and night, etc. are instances of public nuisances.

(ii) Who may sue?

Any of the following persons may bring a suit in relation to public nuisance or other wrongful acts:

(i) Advocate General;198

(ii) Two or more persons with the leave of the court.199

(iii) Any private person if he has sustained special damage.200

(e) Remedies

The following remedies are available against public nuisance:

(1) A person committing a public nuisance may be punished under the Indian Penal Code;201

195 Ratanlal & Dhirajlal, Code of Criminal Procedure, 2006, at p. 191.

196 (1980) 4 SCC 162 at p. 171: AIR 1980 SC 1622 at p. 1628; see also, Law Commission's Fifty-fourth Report at pp. 10-11.

197 S. 268, IPC.

198 S. 91(1)(a), CPC.

199 S. 91(l)(b), CPC.

200 S. 91(2), CPC

201 S. 290, IPC, 1860.

(2) Magistrates may remove public nuisance in certain circumstances by exercising summary powers;202
(3) A suit can be instituted for declaration, injunction or other appropriate relief without proof of special damage;203 and
(4) A suit may also be filed by a private individual, where he has suffered special damage.204

(f) Appeal

An appeal lies against an order refusing to grant leave to file a suit for public nuisance or other wrongful acts affecting public.205

(18) Suits relating to public trusts: Section 92

(a) Nature and scope

Section 92 of the Code provides for filing of a suit in respect of breach of trust created for public purposes of a charitable or religious nature by the Advocate General or two or more persons having an interest in the trust with the leave of the Court for reliefs specified therein.

(b) Extent and applicability

A suit under Section 92 of the Code is of a special nature for the protection of public rights in public trusts and charities. Such a suit is basically on behalf of all persons interested in the trust. The beneficiaries choose two or more persons for filing the suit and that is how their names are shown as plaintiffs. But the plaintiffs are merely representatives of all the beneficiaries and the action is instituted on behalf of all. The suit is thus a representative suit and a decision in such suit would also attract the doctrine of res judicata.206

(c) Object

The main object of this provision is to afford protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them207 and to prevent multifarious and

202 Ss. 133-43, CrPC, 1973.
203 S. 90(1), CrPC.
204 S. 91(1), CPC.
205 S. 104 (ffa), CPC.
206 R. Venugopala v. Venkatarayulu Naidu Charities, 1989 Supp (2) SCC 356: AIR 1990 SC 444; Ahmad Adam Sait v. M.E. Makhri, AIR 1964 SC 107: (1964) 2 SCR 647; Raje Anandrao v. Shamrao, AIR 1961 SC 1206: (1961) 3 SCR 930.
207 Madappa v. M.N. Mahanthadevaru, AIR 1966 SC 878 at p. 881: (1966) 2 SCR 151; Swami Paramatmanand v. Ramji Tripathi, (1974) 2 SCC 695 at p. 699: AIR 1974 SC 2141 at p. 2144; R.M. Narayana Chettiar v. N. Lakshmanan Chettiar, (1991) 1 SCC 48: AIR 1991 SC 221; Vidyodaya Trust v. Mohan Prasad, (2008) 4 SCC 115: AIR 2008 SC 1633; see also, Statement of Objects and Reasons, Gazette of India, Pt. II, S. 2, Extra., dated 8-4-1974 at p. 306.

vexatious suits being filed by irresponsible persons against the trustees whose duty is to administer such trusts.208
Before the Advocate General files a suit or before the court grants leave for filing a suit under Section 92, prima facie satisfaction regarding breach of trust or of the necessity for obtaining directions of the court must be there.209
(d) Conditions
Before an action can be taken under this section, the following conditions must be fulfilled:210
(1) The trust must have been created for public purposes of a charitable or religious nature;
(2) There must be a breach of trust or direction of the court must be necessary in the administration of such a trust; and
(3) The relief claimed must be one or the other of the reliefs specified in Section 92.
If any of the three conditions is not satisfied, the suit falls outside the scope of the said section.211
(e) Section whether mandatory
The provisions are mandatory and must be complied with. Where the conditions laid down in the section have not been fulfilled, no suit can be instituted. The defect is basic and fundamental and goes to the root of the matter.212
(f) Who may sue?
A suit under Section 92 may be filed:
(i) by the Advocate General in Presidency Towns and outside Presidency Towns by the Collector or such officer as the State Government may appoint on that behalf; or
(ii) by two or more persons having an interest in the trust and who have obtained the leave of the court.213

208 Narendrasingji Ranjitsingji v. Udesinghji, AIR 1947 Bom 451 at p. 460: (1947) 49 Bom LR 318.
209 Madappa v. M.N. Mahanthadevaru, supra.
210 Bishwanath v. Thakur Radha Ballabhli, AIR 1967 SC 1044: (1967) 2 SCR 618; Sugra Bibi v. Hazi Kummu, AIR 1969 SC 884: (1969) 3 SCR 83; Harendra Nath v. Kaliram Das, (1972) 1 SCC 115: AIR 1972 SC 246 at p. 250; Pragdasji v. Ishwarlalbhai, AIR 1952 SC 143 at p. 144: 1952 SCR 513; Swami Paramatmanand v. Ramji Tripathi, supra; Kintali China Jaganadham v. K. Laxmi Naidu, AIR 1988 Ori 100: (1987) 64 Cut LT 493.
211 Bishwanath Thakur Radha Ballabhli, AIR 1967 SC 1044: (1967) 2 SCR 618.
212 R.M. Narayana Chettiar v. N. Lakshmanan Chettiar, (1991) 1 SCC 48: AIR 1991 SC 221; P.V. Mathew v. K.V. Thomas, AIR 1983 Ker 5: 1982 Ker LT 493; Kintali China Jaganadham v. K. Laxmi Naidu, AIR 1988 Ori 100: (1987) 64 Cut LT 493; Narain Lal v. Sunderlal Tholia, AIR 1967 SC 1540; Swami Paramatmanand v. Ramji Tripathi, (1974) 2 SCC 695: AIR 1974 SC 2141.
213 Ss. 92-93 CPC.

(g) Who may be sued?

A suit may be brought against the persons in possession of trust property who claim adversely to the trust or against trustees who have committed breach of trust.214

(h) Notice

Considering the object underlying Section 92 of the Code, the court should normally issue a notice to the defendants before granting leave to file a suit. The defendants may satisfy the court that the allegations made in the plaint are false and frivolous, or the persons who have applied for leave want to harass the trust. But if the suit is filed without notice to the defendants, it would not be bad and non-maintainable.215

(i) Relief

A suit may be instituted for any one or more of the following reliefs:216

(i) removing any trustee;
(ii) appointing a new trustee;
(iii) vesting any property in a trustee;
(iv) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;
(v) directing accounts and inquiries;
(vi) declaring what proportion of the trust property or of the interest therein shall be allotted to any particular object of the trust;
(vii) authorising the whole or any part of the trust property to be let, mortgaged or exchanged;
(viii) settling a scheme;
(ix) granting such further or other relief as the nature of the case may require.

214 Syed Mohd. Salie Labbai v. Mohd. Hanifa, (1976) 4 SCC 780 at pp. 813-14: AIR 1976 SC 1569 at p. 1598; Venkatanarasimha v. Subba Rao, AIR 1923 Mad 376; Perla v. Collector of Vizag, AIR 1953 Mad 908; Anjuman Isamila v. Latapat Ali, AIR 1950 All 109; Satya Charan v. Rudranand, AIR 1953 Cal 716.

215 R.M. Narayann Chettiar v. N. Lakshmanan Chettiar, (1991) 1 SCC 48: AIR 1991 SC 221.

216 S. 92(1), Code of Civil Procedure, 1908; see also Pragdasji v. Ishwarlalbhai, AIR 1952 SC 143 at p. 144:1952 SCR 513; Bishwanath v. Thakur Radha Ballabhli, AIR 1967 SC 1044: (1967) 2 SCR 618; Sugra Bibi v. Hazi Kummu, AIR 1969 SC 884: (1969) 3 SCR 83; Harendra Nath v. Kaliram Das, (1972) 1 SCC 115: AIR 1972 SC 246; Charan Singh v. Darshan Singh, (1975) 1 SCC 298: AIR 1975 SC 371; Syed Mohd. Salie Labbai v. Mohd. Hanifa, (1976) 4 SCC 780 at p. 813-14: AIR 1976 SC 1569 at p. 1598; Sarat K. Mitra v. Hem Ch. Dey, AIR 1960 Cal 558 at p. 559.

If the suit is not for any of the above reliefs, it is not maintainable and should be dismissed.217

(J) Appeal

An appeal lies against an order refusing leave to file a suit for breach of trust.218

(k) Doctrine ofcy-pres

(i) Meaning— Cy-pres means "as nearly as possible to the testator's or donor's intentions when these cannot be precisely followed".219

(ii) Doctrine explained.—Where there is a gift or trust for a charity which can be substantially, but not literally, fulfilled, it will be effectuated by moulding it so that as nearly as practicable the intention of the benefactor may be carried out. The doctrine of cy-pres, thus, makes possible the application of funds to purposes as nearly as possible to those selected by the donor.220

In Ratilal v. State of Bombay221, the Supreme Court explained the doctrine thus:

"When the particular purpose for which a charitable trust is created fails or by reason of certain circumstances the trust cannot be carried into effect either in whole or in part, or where there is a surplus left after exhausting the purposes specified by the settlor, the court would not, when there is a general charitable intention expressed by the settlor, allow the trust to fail but would execute it cy-pres, that is to say, in some way as nearly as possible to that which the author of the trust intended. In such cases, it cannot be disputed that the court can frame a scheme and give suitable directions regarding the objects upon which the trust money can be spent."222

(iii) Recommendation of Law Commission.—On the recommendation of the Law Commission, the doctrine of cy-pres has been applied to suits under Section 92 of the Code. Sub-section 3 to Section 92 as inserted by the Code of Civil Procedure (Amendment) Act, 1976 incorporates

217 Pragdasji v. Ishwarlalbhai, AIR 1952 SC 143:1952 SCR 513; Harendra Nath v. Kaliram Das, (1972) 1 SCC 115: AIR 1972 SC 246.

218 S. 104 (ffa).

219 Concise Oxford English Dictionary (2007) at p. 357; Stroud's Judicial Dictionary (5th Edn.) Vol. I at p. 612; Halsbury’s Modern Equity (11th Edn.) at p. 509.

220 Ibid, see also Ratilal v. State of Bombay, infra.

221 AIR 1954 SC 388:1954 SCR 1055.

222 Ibid, at p. 394 (AIR); see also N.S. Rajabathar v. M.S. Vadivelu, (1970) 1 SCC 12: AIR

the doctrine of cy-pres, which is similar to Section 13 of the English Charities Act, 1960.223
The application of the doctrine of cy-pres, however, has its own limitations. The court has no power, authority or jurisdiction to deviate from the intention expressed by the settlor on the ground of expediency or on what the court considers to be much more beneficial than what the settlor directed.224

223 Law Commission's 54th Report at pp. 65-67; Sarkar, Law of Civil Procedure (9th Edn.) at p. 459; Ram Sarup v. Union of India, AIR 1985 Del 318: (1985) 27 DLT 134: 1985 Raj LR 133.
224 Mayor of Lyons v. Advocate General of Bengal, (1875-76) 3 IA 32: ILR (1876) 1 Cal 303 (PC); Ratilal v. State of Bombay, AIR 1954 SC 388:1954 SCR 1055; Halsbury's Laws of England (3rd Edn.) Vol. 4 at p. 324.

Part Three
Appeals, Reference, Review and Revision

PART III
1 General

ANY PERSON who feels aggrieved by any decree or order passed by the court may prefer an appeal in a superior court if an appeal is provided against that decree or order or may make an application for review or revision. In certain cases, a subordinate court may make a reference to a High Court. The provisions relating to Appeals, Reference, Review and Revision may be summarised thus:

(A) Appeals.— Sections 96 to 112 and Orders 41 to 45

First Appeals: Sections 96 to 99-A, 107 and Order 41

Second Appeals: Sections 100-103,107,108 and Order 42

Appeals from Orders: Sections 104-108 and Order 43

Appeals by Indigent Persons: Order 44

Appeals to the Supreme Court: Sections 109, 112 and Order 45

(B) Reference.—Section 113 and Order 46

(C) Review.—Section 114 and Order 47

(D) Revision.—Section 115

PART III
2
First Appeals

SYNOPSIS

1. APPEAL: MEANING

THE EXPRESSION "appeal" has not been defined in the Code. According to dictionary meaning, "appeal" is "the judicial examination of the decision by a higher court of the decision of an inferior court".1

Stated simply, appeal is a proceeding by which the defeated party approaches a higher authority or court to have the decision of a lower authority or court reversed.

In Nagendra Nath Dey v. Suresh Chandra Dey2, speaking for the Judicial Committee of Privy Council, Sir Dinsha Mulla stated:

1 Chamber's 21st Century ... oncise Oxford English Dictionary (2002) at p. 63; Nagendra Nath v. Suresh Chandra, AIR 1932 PC ... eeraya v. N. Subbiah Chaudhry, AIR 1957 SC 540: 1957 SCR 488; Lakshmiratan Engg. Works Ltd. ... 968) 1 SCR 505.

2 AIR 1932 PC 165 at p. 1

"There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate court, asking to set aside or reverse a decision of a subordinate court, is an appeal within the ordinary acceptation of the term." An appeal is thus a removal of a cause from an inferior court to a superior court for the purpose of testing the soundness of the decision of the inferior court. It is a remedy provided by law for getting the decree of the lower court set aside. In other words, it is a complaint made to the higher court that the decree passed by the lower court is unsound and wrong.3 It is "a right of entering a superior court and invoking its aid and interposition to redress an error of the court below".4

2. ESSENTIALS

Every appeal has three basic elements:5

(i) A decision (usually a judgment of a court or the ruling of an administrative authority);

(ii) A person aggrieved (who is often, though not necessarily, a party to the original proceeding); and

(iii) A reviewing body ready and willing to entertain an appeal.

3. RIGHT OF APPEAL

A right of appeal is not a natural or inherent right.6 It is well-settled that an appeal is a creature of statute and there is no right of appeal unless it is given clearly and in express terms by a statute.7 Whereas sometimes an appeal is a matter of right, sometimes it depends upon discretion of the court to which such appeal lies. In the latter category of cases, the right is to apply to the court to grant leave to file an appeal; for instance, an appeal to the Supreme Court under Article 136 of the Constitution of India.8 If a particular Act does not provide a right

3 Nagendra Nath v. Suresh Chandra, AIR 1932 PC 165 at p. 167: (1931-1932) 59 IA 283; Shankar Ramchandra v. Krishnaji Dattatreya, (1969) 2 SCC 74: AIR 1970 SC 1.

4 Attorney General v. Sillem, (1864) 10 HLC 704 at p. 715:11 ER 1200 at p. 1209 (per Lord Westbury, LC); see also Dayawati v. Inderjit, AIR 1966 SC 1423: (1966) 3 SCR 275.

5 Louis Blom, "Final Appeal: A Study of the House of Lords in its Judicial Capacity".

6 Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393 at p. 397: AIR 1974 SC 1126 at p. 1129; Rami Manprasad v. Gopichand, (1973) 4 SCC 89 at p. 92: AIR 1973 SC 566; Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd., (1983) 3 SCC 75: AIR 1983 SC 786.

7 Ibid, see also Anant Mills Co. Ltd. v. State of Gujarat, (1975) 2 SCC 175 at p. 202: AIR 1975 SC 1234 at p. 1249; Rami Manprasad Gordhandas v. Gopichand Shersingh Gupta, supra; Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd., supra; Gujarat Agro-Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad, (1999) 4 SCC 468: AIR 1999 SC 1818; CCE v. Flock (India) (P) Ltd., (2000) 6 SCC 650.

8 For detailed discussion and case law, see, V.G. Ramachandran, Law of Writs (2006) Vol. II, Pt. IV, Chap. 2.

of appeal, it cannot be declared ultra vires only on that ground.9 Again, the right of appeal is a substantive right and not merely a matter of procedure.10 It is a vested right and accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.11 This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary implication, and not otherwise.11

Thus, if an appeal lies against an order passed by a Single judge of the High Court under Sections 397 and 398 of the Companies Act, 1956, to the Division Bench, the said right cannot be taken away on the ground that the High Court has not framed the necessary rules for filing such an appeal.12 Substitution of a new forum of appeal should not be readily inferred.13 The right being a creature of statute, conditions can always be imposed by the statute for the exercise of such right.14

In Anant Mills Co. Ltd. v. State of Gujarat15, speaking for the Supreme Court, Khanna, J. said:

"It is well-settled by several decisions of this court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous

9 Kartar Singh v. State of Punjab, (1994) 3 SCC 569.

10 Garikapati Veeraya v. N. Subbiah Chaudhry, AIR 1957 SC 540:1957 SCR 488; Custodian of Evacuee Property v. Khan Saheb Abdul Shukoor, AIR 1961 SC 1087 at p. 1092: (1961) 3 SCR 855; Vijay Prakash v. Collector of Customs, (1988) 4 SCC 402: AIR 1988 SC 2010; Special Military Estates Officer v. Munivenkataramiah, (1990) 2 SCC 168 at p. 172: AIR 1990 SC 499 at p. 502.

11 Garikapati Veeraya v. N. Subbiah Chaudhry, AIR 1957 SC 540: 1957 SCR 488; Bhau Ram v. Baij Nath, AIR 1961 SC 1327: (1962) 1 SCR 358; P. Mohd. Meera v. Thirumalaya Gounder, AIR 1966 SC 430 at p. 431: (1966) 1 SCR 574; Mukund Deo v. Mahadu, AIR 1965 SC 703 at p. 705; Katikara Chintamani Dora v. Guntreddi Annamanaidu, (1974) 1 SCC 567 at p. 582: AIR 1974 SC 1069 at p. 1081; Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd., supra; Deep Chand v. Land Acquisition Officer, (1994) 4 SCC 99 at p. 102: AIR 1994 SC 1901 at p. 1904.

12 Arti Dutta v. Eastern Tea Estate (P) Ltd., (1988) 1 SCC 523: AIR 1988 SC 325.

13 Stridewell Leathers (P) Ltd. v. Bhankerpur Simbhaoli Beverages (P) Ltd., (1994) 1 SCC 34 at p. 38: AIR 1994 SC 158 at pp. 163-64.

14 Anant Mills Co. Ltd. v. State of Gujarat, supra; Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd., supra; Vijay Prakash D. Mehta v. Collector of Customs, supra; A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602 at p. 661: AIR 1988 SC 1531 (A right of appeal cannot be created by judiciary).

15 (1975) 2 SCC 175: AIR 1975 SC 1234.

as to amount to unreasonable restrictions rendering the right
almost illusory."16

4. ONE RIGHT OF APPEAL

A single right of appeal is more or less a universal requirement. It is based on the principle that all men are fallible and judges are human beings who may commit a mistake. Absence of even one right of appeal must be considered to be a glaring lacuna in a legal system governed by the Rule of Law.17

A hierarchy of courts with appellate powers each having its own power of judicial review has of course being found to be counter-productive but the converse is equally distressing in that there is not even a single judicial review.18

The Law Commission also observed, "An unqualified right of first appeal may be necessary for the satisfaction of the decretal litigant but a wide right of second appeal is more in the nature of luxury".19

The only ground upon which a suitor ought to be allowed to bring the judgment of one court for examination before the members of another is the certainty or extreme probability.20

Sections 96,100,104 and 109 of the Code of Civil Procedure confer the right of appeal on aggrieved persons in cases mentioned therein. Sections 96 to 99 and 107 read with Order 41 deal with first appeals.

5. SUIT AND APPEAL

There is a fundamental distinction between the right to file a suit and the right to file an appeal. The said distinction has been appropriately explained by Chandrachud, J. (as he then was) in the case of Ganga Bai v. Vijay Kumar21 in the following words:

"There is a basic distinction between the right of suit and the
right of appeal. There is an inherent right in every person to bring
a suit of a civil nature and unless the suit is barred by statute one

16 Ibid, at p. 202 (SCC): at p. 1249 (AIR); see also Seth Nand Lal v. State of Haryana, 1980 Supp SCC 574: AIR 1980 SC 2097; Rami Manprasad v. Gopichand, (1973) 4 SCC 89: AIR 1973 SC 566; Mela Ram v. CIT, AIR 1956 SC 367; D.N. Taneja v. Bhajan Lal, (1988) 3 SCC 26; Shyam Kishore v. MCD, (1993) 1 SCC 22: AIR 1992 SC 2279; CCE v. Flock (India) (P) Ltd., (2000) 6 SCC 650.

17 Sita Ram v. State of U.P., (1979) 2 SCC 656 at pp. 669, 676: AIR 1979 SC 745 at pp. 754, 759; Lt. Col. Prithi Pal Singh v. Union of India, (1982) 3 SCC 140 at pp. 177-80: AIR 1982 SC 1473 at pp. 1437-38; A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602: AIR 1988 SC 1531.

18 Ibid, see also Union of India v. Charanjit S. Gill, (2000) 5 SCC 742: AIR 2000 SC 3425.

19 Law Commission's 54th Report at p. 84; see also, Herbert, Uncommon Law (3rd Edn.) at p. 259.

20 Herbert, Uncommon Law (3rd Edn.) at p. 259.

21 (1974) 2 SCC 393: AIR 1974 SC 1126.

may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law."22 (emphasis supplied)

Before more than hundred years, in Zair Husain v. Khurshed Jan23, the High Court of Allahabad stated:

"Unless a right of appeal is clearly given by a statute, it does not exist. Whereas a litigant has independently of any statute a right to institute any suit of a civil nature in one court or another."

6. APPEAL IS CONTINUATION OF SUIT

An appeal is a continuation of a suit.24 A decree passed by an appellate court would be construed to be a decree passed by the Court of the first instance. An appeal is virtually a rehearing of the matter. The appellate court possesses the same powers and duties as the original court. Once again the entire proceedings are before the appellate court which can review the evidence as a whole, subject to statutory limitations, if any, and can come to its own conclusion on such evidence.25

In Dayawati v. Inderjit26, speaking for the Supreme Court, Hidayatullah, J. (as he then was) stated:

"An appeal has been said to be 'the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below'. The only difference between a suit and an appeal is that an appeal 'only reviews and corrects the proceedings in a cause already constituted but does not create the cause'."27

Moreover, where an appeal is provided by law and is filed against a decree or order passed by a lower court, the decision of the appellate court will be the operative decision. It is obvious that when an appeal is made, the appellate authority can do one of the three things, namely:

22 Ibid, at p. 397 (SCC): at p. 1129 (AIR).

23 (1906) 28 All 545 at pp. 549-50.

24 Garikapati Veeraya v. N. Subbiah Chaudhry, AIR 1957 SC 540: 1957 SCR 488: Nair Service Society Ltd. v. K.C. Alexander, AIR 1968 SC 1165 at p. 1177: (1968) 3 SCR 163; Mithilesh Kumari v. Prem Behari, (1989) 2 SCC 95: AIR 1989 SC 1247; Lakshmi Narayan v. Niranjan Modak, (1985) 1 SCC 270; Darshan Singh v. Ram Pal Singh, 1992 Supp (1) SCC 191 at p. 212: AIR 1991 SC 1654 at p. 1665; Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma, 1995 Supp (4) SCC 286: AIR 1995 SC 2001; Dilip v. Mohd. Azizul Haq, (2000) 3 SCC 607: AIR 2000 SC 1976; D.P. Reddy v. K. Sateesh, (2008) 8 SCC 505.

25 Ramankutty v. Avara, (1994) 2 SCC 642 at p. 645.

26 AIR 1966 SC 1423: (1966) 3 SCR 275.

27 Ibid, at p. 1427 (AIR).

(i) it may reverse the order under appeal; (ii) it may modify that order; and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. [I]t is the appellate decision alone which subsists and is operative and capable of enforcement.28 (emphasis supplied)

In Garikapati Veeraya v. N. Subbiah Chaudhry29, referring to various leading decisions on the subject, the Supreme Court laid down the following principles relating to a right of appeal:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists on and from the date the lis commences and, although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.30

7. APPEAL AND REVISION

The revisional jurisdiction of a High Court is a part and parcel of the appellate jurisdiction of the High Court. When the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. Revisional jurisdiction is one of the modes of exercising

28 Collector of Customs v. East India Commercial Co. Ltd., AIR 1963 SC 1124 at p. 1126: (1963) 2 SCR 563. See also Nair Service Society Ltd. v. K.C. Alexander, AIR 1968 SC 1165 at p. 1177: (1968) 3 SCR 163; Tarlok Singh v. Municipal Corpn., Amritsar, (1986) 4 SCC 27: AIR 1986 SC 1957; CIT v. Amritlal Bhogilal and Co., AIR 1958 SC 868 at p. 871:1959 SCR 713.

29 AIR 1957 SC 540:1957 SCR 488.

30 Ibid, at p. 543 (AIR) (per S.R. Das, J.); see also LIC v. India Automobiles & Co., (1990) 4 SCC 286: AIR 1991 SC 884; D.N. Taneja v. Bhajan Lal, (1988) 3 SCC 26 at p. 32.

powers conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense.31

There is, however, an essential distinction between the two. The distinction is based in the two expressions i.e. "appeal" and "revision". A right of appeal carries with it a right of rehearing on law as well as on fact, unless the statute conferring the right of appeal limits the rehearing in one way or the other. The power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law.32 The conferment of revisional jurisdiction is to keep subordinate courts within the bounds of their authority and to make them act according to the procedure established by law.33 Revisional jurisdiction is not wide enough to make the High Court a second court of first appeal.34 The High Court cannot, in exercise of revisional powers, substitute its own view for the view taken by a subordinate court.35

Again, an appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitations.36 But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to re-examine, review or reassess the evidence and to substitute its own findings unless the statute expressly confers on it that power.37 That limitation is implicit in the concept of revision.38 (emphasis supplied)

In Associated Cement Co. Ltd. v. Keshvanand39, the Supreme Court stated, "It is trite legal position that appellate jurisdiction is coextensive

31 Shankar Ramchandra v. Krishnaji Dattatreya, (1969) 2 SCC 74: AIR 1970 SC 1.

32 Hari Shankar v. Rao Girdhari Lal, AIR 1963 SC 698 at pp. 700-01:1962 Supp (1) SCR 933; Amarjit Kaur v. Pritam Singh, (1974) 2 SCC 363: AIR 1974 SC 2068; Sk. Jaffar v. Mohd. Pasha, (1975) 1 SCC 25 at p. 28: AIR 1975 SC 794; Manick Chandra v. Debdas Nandy, (1986) 1 SCC 512 at pp. 516-17: AIR 1986 SC 446.

33 Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259: AIR 1980 SC 1253.

34 Dattonpant v. Vithalrao, (1975) 2 SCC 246: AIR 1975 SC 1111.

35 Girdharbhai v. Saiyed Mohd. Mirasaheb Kadri, (1987) 3 SCC 538 at p. 551: AIR 1987 SC 1782 at p. 1789.

36 Mohanlal v. Sawai Man Singhji, AIR 1962 SC 73: (1961) 1 SCR 702; Dayawati v. Inderjit, AIR 1966 SC 1423: (1966) 3 SCR 275; Amarjit Kaur v. Pritam Singh, (1974) 2 SCC 363: AIR 1974 SC 2068; Hasmat Rai v. Raghunath Prasad, (1981) 3 SCC 103: AIR 1981 SC 1711; Union of India v. Cyanamide India Ltd., (1987) 2 SCC 720: AIR 1987 SC 1802; Mithilesh Kumari v. Prem Behari, (1989) 2 SCC 95: AIR 1989 SC 1247.

37 State of Kerala v. K.M. Charia Abdulla & Co., AIR 1965 SC 1585 at p. 1587: (1965) 1 SCR 601; Manick Chandra Nandy v. Debdas Nandy, supra; Lachhman Dass v. Santokh Singh, (1995) 4 SCC 201.

38 Lachhman Dass v. Santokh Singh, (1995) 4 SCC 201.

39 (1998) 1 SCC 687: AIR 1998 SC 596.

with original court's jurisdiction as for appraisal and appreciation of evidence and reaching findings of facts and appellate court is free to reach its own conclusions on evidence untrammelled by any finding entered by the trial court. Revisional powers on the other hand belong to supervisory jurisdiction of a superior court. While exercising revisional powers the court has to confine itself to the legality and propriety of the findings and also whether the subordinate court has kept itself within the bounds of its jurisdiction, including the question whether the court has failed to exercise jurisdiction vested in it. Though the difference between the two jurisdictions is subtle, it is quite real and has now become well recognised in legal provinces."40
(emphasis supplied)
It is submitted that the following observations of Hidayatullah, J. (as he then was) in Hari Shanker v. Rao Girdhari Lal41 lay down correct law on the point. Speaking for the majority, His Lordship concluded:
"The distinction between an appeal and a revision is a real one.
A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as, we find, has been done in second appeal arising under the Code of Civil Procedure. The power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. Under Section 115 of the Code of Civil Procedure, the High Court's powers are limited to see whether in a case decided, there has been an assumption of jurisdiction where none existed, or refusal of jurisdiction where it did, or there has been material irregularity or illegality in the exercise of that jurisdiction. The right there is confined to jurisdiction and jurisdiction alone. In other Acts, the power is not so limited, and the High Court is enabled to call for the record of a case to satisfy itself that the decision therein is according to law and to pass such orders in relation to the case, as it thinks fit."42

8. FIRST APPEAL AND SECOND APPEAL

A first appeal lies against a decree passed by a court exercising original jurisdiction, a second appeal lies against a decree passed by a first appellate court. Whereas a first appeal can be filed in a superior court which may or may not be a High Court, a second appeal can be filed only in the High Court. A first appeal is maintainable on a question

40 Ibid, at p. 692 (SCC): at p. 598 (AIR) (per Thomas, J.); see also Sarla Ahuja v. United India Insurance Co. Ltd., (1998) 8 SCC 119.
41 AIR 1963 SC 698:1962 Supp (1) SCR 933.
42 Ibid, at pp. 700-01 (AIR).

of fact, or on a question of law, or on a mixed question of fact and law. A second appeal can be filed only on a substantial question of law. No second appeal lies if the amount does not exceed Rs 3000.43 No Letters Patent Appeal is maintainable against a "judgment" rendered by a Single judge of the High Court to a Division Bench of the same court either in First Appeal or in Second Appeal.44

9. CONVERSION OF APPEAL INTO REVISION

If an appeal is preferred in a case in which no appeal lies, the court may treat the memorandum of appeal as a revision or vice versa.45 Since there is no specific provision for such conversion, the court would be justified in invoking the inherent powers under Section 151 and in passing appropriate orders as may be necessary in the interests of justice.46 There is no period of limitation for making an application of conversion. But while exercising this power, the court should see if the appeal or the revision, as the case may be, has been filed within the time prescribed for filing such a proceeding47

10. RIGHT OF APPEAL: MATERIAL DATE

The right of appeal is a substantive and vested right and accrues in favour of the litigant on the day the lis commences and although it may be actually exercised only after an adverse judgment is pronounced, such a right is governed by the law prevailing at the date of the institution of the suit and not by the law in force at the time when the judgment is rendered or an appeal is preferred.48

11. SECTION 96

Section 96 of the Code confers a right of appeal. It reads as under:

(1) Save where otherwise expressly provided in the body of this Code, or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decisions of such court.

43 S. 102.

44 S. 100-A, see also infra, "Letters Patent Appeal".

45 Reliable Water Supply Service of India v. Union of India, (1972) 4 SCC 168: AIR 1972 SC 2083 at p. 2085; Karuppan v. Santaram, AIR 1973 Ker 28; Chhelaram v. Manak, AIR 1997 Raj 284.

46 Ibid, For detailed discussion of S. 151, see infra, Pt. V, Chap. 4.

47 Bahori v. Vidya Raw, AIR 1978 All 299:1978 All WC 387; Ram Prasad v. Nand Kumar & Bros., (1998) 6 SCC 748 at p. 751: AIR 1998 SC 2730; J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. CCE, (1998) 3 SCC 540 at p. 546: AIR 1998 SC 1270.

48 Colonial Sugar Refining Co. Ltd. v. Irving, 1905 AC 369 (PC); Garikapati Veeraya v. N. Subbiah Chaudhry, AIR 1957 SC 540:1957 SCR 488; Dayawati v. Inderjit, AIR 1966 SC 1423: (1966) 3 SCR 275; Sita Ram v. State of U.P., (1979) 2 SCC 656: AIR 1979 SC 745.

(2) An appeal may lie from an original decree passed ex parte.
(3) No appeal shall lie from a decree passed by the court with the consent of parties.
(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees.

12. WHO MAY APPEAL?

Section 96 of the Code recognises the right of appeal from every decree passed by any court exercising original jurisdiction. It does not refer to or enumerate the persons who may file an appeal. But before an appeal can be filed under this section, two conditions must be satisfied:

(i) The subject-matter of the appeal must be a "decree", that is, a conclusive determination of "the rights of the parties with regard to all or any of the matters in controversy in the suit";49 and
(ii) The party appealing must have been adversely affected by such determination.50

The ordinary rule is that only a party to a suit adversely affected by the decree or any of his representatives-in-interest may file an appeal.51 But a person who is not a party to a decree or order may, with the leave of the court, prefer an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially affected by it.52

The test whether a person is an aggrieved person is to see whether he has a genuine grievance because an order has been made which prejudicially affects his interests either pecuniary or otherwise.53 As has been observed in the case of Krishna v. Mohesh54, "the question who may appeal is determinable by the common sense consideration that there can be no appeal where there is nothing to appeal about".

Generally speaking, a decision cannot be said to adversely affect a person unless it will operate as res judicata against him in any future suit.55 In order to find out whether a decision will operate as res judicata and will thus adversely affect a party, the substance of the judgment

49 S. 2(2). For detailed discussion of "decree", see supra, Pt. I, Chap. 2.
50 State of Punjab v. Amar Singh, (1974) 2 SCC 70 at p. 89: AIR 1974 SC 994 at p. 1006.
51 Ibid.
52 Ibid; Jatan Kumar v. Golcha Properties (P) Ltd., (1970) 3 SCC 573 at p. 575: AIR 1971 SC 374 at p. 376.
53 Adi Pherozshah Gandhi v. H.M. Seervai, (1970) 2 SCC 484 at p. 503: AIR 1971 SC 385 at p. 399. For detailed discussion of "aggrieved person", see, Author's Lectures on Administrative Law (2008) Lecture IX.
54 (1905) 9 CWN 584 at p. 588.
55 State of Punjab v. Amar Singh, supra; Adi Pherozshah Gandhi v. H.M. Seervai, supra.

and decree, and not the form, must be considered. For this purpose the court may go behind the decree to see what really the adjudication was.

The question whether a party is or is not adversely affected by a decree is a question of fact to be determined in each case according to its particular circumstances and no rule of universal application can be laid down.

From the above general principles, the following persons are entitled to appeal under this section:

(i) A party to the suit who is aggrieved or adversely affected by the decree, or if such party is dead, his legal representatives.56

(ii) A person claiming under a party to the suit or a transferee of the interests of such party, who, so far as such interest is concerned, is bound by the decree, provided his name is entered on the record of the suit.57

(iii) A guardian ad litem appointed by the court in a suit by or against a minor.58

(iv) Any other person, with the leave of the court, if he is adversely affected by the decree.59

13. APPEAL BY ONE PLAINTIFF AGAINST ANOTHER PLAINTIFF

As a general rule, one plaintiff cannot file an appeal against a co-plaintiff. But where the matter in controversy in the suit forms subject-matter of dispute between plaintiffs inter se, an appeal can be filed by one plaintiff against another plaintiff.60

14. APPEAL BY ONE DEFENDANT AGAINST ANOTHER DEFENDANT

The principle which applies to filing of appeal by one plaintiff against another plaintiff equally applies to an appeal by one defendant against another defendant. It is only where the dispute is not only between the plaintiffs and the defendants but between defendants inter se and such decision adversely affects one defendant against the other that such appeal would be competent.61

56 S. 146; see also Kirpal Kuar v. Bachan Singh, AIR 1958 SC 199:1958 SCR 950; Saila Bala Dassi v. Nirmala Sundari Dassi, AIR 1958 SC 394 at p. 398:1958 SCR 1287.

57 Ibid.

58 S. 147, Or. 32 R. 5.

59 State of Punjab v. Amar Singh, supra; Adi Pherozshah Gandhi v. H.M. Seervai, supra.

60 Vithu v. Bhima, ILR (1891) 15 Bom 145; Bank of India v. Mehta Bros., AIR 1991 Del 194.

61 Nirmala Bala v. Balai Chand, AIR 1965 SC 1874: (1965) 3 SCR 550; P.N. Kesavan v. Lekshmy Amma, AIR 1968 Ker 154; Bhima Jally v. Nata Jally, AIR 1977 Ori 59.

15. WHO CANNOT APPEAL?

If a party agrees not to appeal or waives his right to appeal, he cannot file an appeal and will be bound by an agreement if otherwise such agreement is valid.62 Such an agreement, however, must be clear and unambiguous. Whether a party has or has not waived his right of appeal depends upon the facts and circumstances of each case.63 Similarly, where a party has accepted the benefits under a decree of the court, he can be estopped from questioning the legality of the decree.64

As Scrutton, L.J.65 observed, "It startles me that a person can say the judgment is wrong and at the same time accept the payment under the judgment as being right... . In my opinion, you cannot take the benefit of a judgment as being good and then appeal against it as being bad."

Finally, the vested right of appeal is destroyed if the court to which an appeal lies is abolished altogether without any forum being substituted in its place.66

16. AGREEMENT NOT TO APPEAL

A right of appeal is a statutory right. If a statute does not confer such right, no appeal can be filed even with the consent or agreement between the parties.67

But an agreement between the parties not to file an appeal is valid if it is based on lawful or legal consideration and if otherwise it is not illegal.68

17. APPEAL: NOMENCLATURE NOT MATERIAL

The use of expression "appeal", "first appeal" or "second appeal" is neither material nor decisive. It is the substance and not the form which is relevant.

In Ramchandra Goverdhan Pandit v. Charity Commr.69, a first appeal was filed in the High Court against an order passed by the Charity Commissioner on an application under Section 72 of the Bombay Public

62 Ameer Ali v. Inderjeet Singh, (1871) 14 MIA 203 (PC).

63 Ibid, see also Protap Chunder v. Arathoon, ILR (1882) 8 Cal 455; Mohd. Mia Pandit v. Osman Ali, AIR 1935 Cal 239: (1935) 62 Cal 229.

64 Dexters Ltd. v. Hill Crest Oil Co., (1926) 1 KB 348: (1925) All ER Rep 273: 95 LJ KB 386, CA; R.C. Chandiok v. Chuni Lal, (1970) 3 SCC 140: AIR 1971 SC 1238; see also supra, Pt. II, Chap. 6.

65 Dexters Ltd. v. Hill Crest Oil Co., supra.

66 Daji Saheb v. Shankar Rao, AIR 1956 SC 29 at p. 30: (1955) 2 SCR 872.

67 For detailed discussion see supra, "Rights of appeal".

68 Katikara Chintamani Dora v. Guntreddi Annamanaidu, (1974) 1 SCC 567: AIR 1974 SC 1069; Ameer Ali v. Inderjeet Singh, (1871) 14 MIA 203 (PC).

69 (1987) 3 SCC 273: AIR 1987 SC 1598; see also Parvez Rustamji v. Navrojji Sorabji, AIR 2001 Guj 160.

Trusts Act, 1950. The Supreme Court held that the appeal before the Single judge of the High Court was in substance and in reality Second Appeal and Letters Patent Appeal was not maintainable against the "judgment" by the Single judge.

18. APPEAL AGAINST EX PARTE DECREE: SECTION 96(2)

As stated above,70 one of the remedies available to the defendant, against whom an ex parte decree is passed, is to file an appeal against such a decree under Section 96(2) of the Code, though he may also file an application to set aside ex parte decree.

Both the remedies are concurrent and can be resorted to simultaneously. One does not debar the other. As has been rightly said:

"Where two proceedings or two remedies are provided by a statute, one of them must not be taken as operating in derogation of the other."71

In an appeal against an ex parte decree, the appellate court is competent to go into the question of the propriety or otherwise of the ex parte decree passed by the trial court.

19. NO APPEAL AGAINST CONSENT DECREE: SECTION 96(3)

Section 96(3) declares that no appeal shall lie against a consent decree. This provision is based on the broad principle of estoppel. It presupposes that the parties to an action can, expressly or impliedly, waive or forgo their right of appeal by any lawful agreement or compromise or even by conduct. The consideration for the agreement involved in a consent decree is that both the sides give up their right of appeal.72

Once the decree is shown to have been passed with the consent of the parties, Section 96(3) becomes operative and binds them. It creates an estoppel between the parties as a judgment on contest.73 Where there is a partial compromise and adjustment of a suit and a decree is passed in accordance with it, the decree to that extent is a consent decree and is not appealable.74 This provision, however, does not apply where the factum of compromise is in dispute or the compromise decree

70 See supra, Pt. II, Chap. 8.

71 Ajudhia Prasad v. Balmukund, (1866) 8 All 354 at p. 361 (FB); Rani Choudhury v. Suraj Jit Choudhury, (1982) 2 SCC 596: AIR 1982 SC 1393; Archana Kumar v. Purendu Prakash, (2000) 2 MP LJ 491 (FB).

72 Katikara Chintamani Dora v. Guntreddi Annamanaidu, (1974) 1 SCC 567 at pp. 584-85: AIR 1974 SC 1069 at p. 1081.

73 Ibid, see also Thakur Prasad v. Bhagwan Das, AIR 1985 MP 171:1985 MP LJ 149.

74 Ibid, For detailed discussion, see, Author's Code of Civil Procedure (Lawyers' Edn.) Vol. II at pp. 329-32.

is challenged on the ground that such compromise had not been arrived at lawfully.75

20. NO APPEAL IN PETTY CASES: SECTION 96(4)

Section 96(4) has been inserted by the Amendment Act of 1976. It bars appeals except on points of law in certain cases. Prior to 1976, Section 96 allowed a first appeal against every decree. Now, sub-section (4) bars appeals on facts from decrees passed in petty suits where the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees, if the suits in which such decrees are passed are of a nature cognisable by Courts of Small Causes. The underlying object in enacting the said provision is to reduce appeals in petty cases. Such restrictions are necessary in the interests of the litigants themselves. They should not be encouraged to appeal on facts in trivial cases.76

21. APPEAL AGAINST PRELIMINARY DECREE

An appeal lies against a preliminary decree.77 A preliminary decree is as much a final decree. In fact, a final decree is but a machinery for the implementation of a preliminary decree.78 Failure to appeal against a preliminary decree, hence, precludes the aggrieved party from challenging the final decree.79 Where an appeal is filed against a preliminary decree and is allowed and the decree is set aside, the final decree falls to the ground as ineffective since there is no preliminary decree to support the final decree.80

22. NO APPEAL AGAINST FINAL DECREE WHERE NO APPEAL AGAINST PRELIMINARY DECREE

As stated above, an appeal lies against a preliminary decree since a preliminary decree is as much a decree as a final decree. A final decree may be said to be but a machinery for the implementation of the preliminary decree. In fact, a final decree owes its existence to the preliminary decree. Therefore, a failure to appeal against a preliminary decree precludes the aggrieved party from disputing its correctness or

75 Banwari Lal v. Chando Devi, (1993) 1 SCC 581: AIR 1993 SC 1139; see also Thakur Prasad v. Bhagwan Das, AIR 1985 MP 171:1985 MP LJ 149:1985 Jab LJ 248.

76 Law Commission's Fifty-fourth Report at p. 72, Statement of Objects and Reasons; see also, Clause 9 on "Notes on Clauses" to the CPC (Amendment) Bill, 1997.

77 Phoolchand v. Gopal Lal, AIR 1967 SC 1470: (1967) 3 SCR 153; see also, S. 97.

78 Venkata Reddy v. Pethi Reddy, AIR 1963 SC 992 at pp. 994-95: 1963 Supp (2) SCR 616; Mool Chand v. Director, Consolidation, (1995) 5 SCC 631: AIR 1995 SC 2493; Shankar v. Chandrakant, (1995) 3 SCC 413: AIR 1995 SC 1211.

79 Ibid, see also, S. 97.

80 Ibid, see also Sital Parshad v. Kishori Lal, AIR 1967 SC 1236 at p. 1240: (1967) 3 SCR 101.

raising any objection to it in the appeal against the final decree.81 The whole object of enacting Section 97 is to make it clear that any party being aggrieved by a preliminary decree must appeal against that decree; and if he fails to appeal against such a decree, the correctness of such a decree cannot be challenged by way of an appeal against the final decree, which means that the preliminary decree would be taken to have been correctly passed.82

23. APPEAL AGAINST JUDGMENT

The Code provides an appeal from a decree and not from a judgment. An aggrieved party, however, may file an appeal against the judgment, if a decree is not drawn up by the court.83

24. NO APPEAL AGAINST FINDING

Section 96 of the Code enacts that an appeal shall lie from every decree passed by any court exercising original jurisdiction. So also, Section 100 allows a second appeal to the High Court from every decree passed in appeal. Likewise, an appeal lies against an order under Section 104 read with Order 43 Rule 1 of the Code. It, however, states that no appeal shall lie from other orders.84 Hence, an appeal lies only against a "decree" or an "order" which is expressly made appealable under the Code.

A finding recorded by a court of law may or may not amount to a "decree" or an "order". Where such a finding does not amount to a "decree" or an "order", no appeal lies against such adverse finding. Thus, where a suit is dismissed, the defendant against whom some adverse finding has been recorded on some issue has no right of appeal and he cannot question the finding by instituting an appeal.85

The Explanation to Rule 22 of Order 41, as added by the Amendment Act of 1976, however, enables the respondent to file cross-objections against any finding recorded against him even though the ultimate decree may be in his favour.86

81 S. 97; see also Venkata Reddy v. Pethi Reddy, AIR 1963 SC 992 at p. 994-95:1963 Supp (2) SCR 616; Mool Chand v. Director, Consolidation, (1995) 5 SCC 631: AIR 1995 SC 2493.

82 Kaushalya Devi v. Baijnath Sayal, AIR 1961 SC 790 at p. 794: (1961) 3 SCR 769; Chittoori v. Kudappa, AIR 1965 SC 1325 at pp. 1332, 1339: (1965) 2 SCR 661.

83 Or. 20 Rr. 6-A, 6-B; Or. 41 R. 1 (1); see also Jagat Dhish v. Jawahar Lal, AIR 1961 SC 832: (1961) 2 SCR 918; Hari Shankar v. Jag Deyee, (2000) 39 All LR 120.

84 S. 105.

85 Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393: AIR 1974 SC 1126; Deva Ram v. Ishwar Chand, (1995) 6 SCC 733; Banarsi v. Ram Phal, (2003) 9 SCC 606: AIR 2003 SC 1989.

86 Banarsi v. Ram Phal, (2003) 9 SCC 606: AIR 2003 SC 1989; Shyam Nath v. Durga Prasad, AIR 1982 All 474 at pp. 476-77.

25. APPEAL AGAINST DEAD PERSON

No appeal can be instituted against a dead person. Such an appeal, therefore, can be regarded as a "stillborn" appeal. In such cases, an application can be made praying for the substitution of the legal representatives of the deceased respondent who died prior to the filing of the appeal. In that case, the appeal can be taken to have been filed on the date of the application for substitution of the legal representatives. If, by that time, the appeal is time-barred, the appellant can seek condonation of delay.87

26. FORM OF APPEAL88: RULES 1-4

As stated above, Sections 96 to 99-A enact the substantive law as regards First Appeals, while Order 41 lays down the procedure relating thereto. The expressions appeal and memorandum of appeal denote two distinct things. An appeal is the judicial examination by a higher court of the decision of an inferior court. The memorandum of appeal contains the grounds on which judicial examination is invited. For purposes of limitation and for purposes of the rules of the court, it is required that a memorandum of appeal shall be filed.89

In order that an appeal may be said to be validly presented, the following requirements must be complied with:90

(i) It must be in the form of a memorandum setting forth the grounds of objections to the decree appealed from;

(ii) It must be signed by the appellant or his pleader;

(iii) It must be presented to the court or to such officer as it appoints in that behalf;

(iv) The memorandum must be accompanied by a certified copy of the decree;

(v) It must be accompanied by a certified copy of the judgment, unless the court dispenses with it; and

87 Bank of Commerce Ltd. v. Protap Chandra Ghose, AIR 1946 FC 13: 1946 FCR 32; N. Jayaram Reddy v. Revenue Divisional Officer, (1979) 3 SCC 578: AIR 1979 SC 1393; M. Veerappa v. Evelyn Sequeira, (1988) 1 SCC 556: AIR 1988 SC 506; Karuppaswamy v. C. Ramamurthy, (1993) 4 SCC 41: AIR 1993 SC 2324.

88 For Model First Appeal, see, Appendix "D".

89 Lakshmiratan Engg. Works Ltd. v. Commr. (Judicial), Sales Tax, AIR 1968 SC 488 at pp. 492-93: (1968) 1 SCR 505; Shyam Kishore v. MCD, (1993) 1 SCC 22: AIR 1992 SC 2279.

90 Or. 41 R. 1. See also Jagat Dhish v. Jawahar Lal, AIR 1961 SC 832: (1961) 2 SCR 918; Phoolchand v. Gopal Lal, AIR 1967 SC 1470 at p. 1472: (1967) 3 SCR 153; Shakuntala Devi v. Kuntal Kumari, AIR 1969 SC 575: (1969) 1 SCR 1006; Shastri Yagnapurushdasji v. Muldas Bhundardas, AIR 1966 SC 1119: (1966) 3 SCR 242; Dipo v. Wassan Singh, (1983) 3 SCC 376: AIR 1983 SC 846; Jogdhayan v. Babu Ram, (1983) 1 SCC 26: AIR 1983 SC 57; Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd., (1983) 3 SCC 75: AIR 1983 SC 786; State of Rajasthan v. Raj Singh, (1996) 5 SCC 516: AIR 1996 SC 2812.

(vi) Where the appeal is against a money decree, the appellant must deposit the decretal amount or furnish the security in respect thereof as per the direction of the court.

The memorandum of appeal must contain the grounds of objections to the decree appealed from, concisely, under distinct heads, without any argument or narrative and should be numbered consecutively.

Rule 2 precludes the appellant to urge, except with the leave of the court, any grounds of objection not set forth in the memorandum of appeal. The underlying object of this provision is to give notice to the respondent of the case he has to meet at the hearing of the appeal.91

The appellate court, however, is entitled to decide an appeal even on a ground not set forth in the memorandum of appeal.92

But when the appellate court suo motu proposes to do so, the party affected must be given an opportunity to contest the case on that ground. A memorandum of appeal should be prepared after carefully considering (i) the pleadings; (ii) the issues; (iii) the findings thereon;

(iv) the judgment; and (v) the decree. Where the memorandum of appeal is not in a proper form, the court may reject it or return it to the appellant for the purpose of being amended.93

Rule 4 provides that where a decree proceeds upon a ground common to all the plaintiffs or defendants, any one of the plaintiffs or defendants may appeal from the whole decree, and thereupon the appellate court can reverse or vary the decree in favour of all the plaintiffs or the defendants, as the case may be.94

The general rule is that on an appeal by one of the several plaintiffs or defendants, an appellate court can reverse or vary the decree of the trial court only in favour of the party appealing. Rule 4 is an exception to this principle. It confers on the court the power to make an appropriate order needed in the interests of justice by reversing or varying the decree in favour of all the plaintiffs or defendants, as the case may be. In such a case, an appeal by one is virtually treated as an appeal on behalf of all, though they may not be parties to the appeal.95 Rule 4 is based on two considerations; firstly, to give the appellate court full

91 Kalyanpur Lime Works Ltd. v. State of Bihar, AIR 1954 SC 165 at p. 169:1954 SCR 958; Chittoori v. Kudappa, AIR 1965 SC 1325 at p. 1336-37: (1965) 2 SCR 661; Daman Singh v. State of Punjab, (1985) 2 SCC 670 at p. 682: AIR 1985 SC 973 at p. 980.

92 Yeshwant Deorao v. Walchand Ramchand, AIR 1951 SC 16 at p. 20: 1950 SCR 852; Chittoori Subbanna v. Kudappa Subbanna, supra, at pp. 1328-29 (AIR).

93 R.3.

94 Lal Chand v. Radha Krishan, (1977) 2 SCC 88 at p. 93: AIR 1977 SC 789 at pp. 792-93.

95 Rameshwar Prasad v. Shambehari Lal, AIR 1963 SC 1901 at p. 1904: (1964) 3 SCR 549; Ratan Lal v. Lalmandas, (1969) 2 SCC 70: AIR 1970 SC 108.

power to do justice to all parties, whether before it or not; and secondly, to prevent contradictory decisions in the matter in the same suit.96

27. MEMORANDUM OF APPEAL97

28. FORUM OF APPEAL

The right of appeal is undoubtedly a substantive right and its deprivation is a serious prejudice. But there is no vested right in procedure. Hence, no one can claim that one's appeal should be heard by a particular court. Change in the forum of appeal, therefore, cannot be said to cause prejudice to a party98

29. VALUATION IN APPEAL

For the purpose of jurisdiction of the court, the appellant has to put valuation in appeal. Such valuation may be the same for jurisdiction as well as for court fees, for instance, an appeal for recovery of money due. It may differ also, for instance, in suits for partition, pre-emption, redemption of mortgage, etc99

30. PRESENTATION OF APPEAL: RULES 9 & 10

Rule 9 states that the court from whose decree an appeal lies shall entertain the memorandum of appeal, shall make an endorsement thereon and shall register the appeal in register of appeals.100

96 Jagdei v. Sampat Dube, AIR 1937 All 796 at p. 797; Harihar Prasad v. Balmiki Prasad, (1975) 1 SCC 212: AIR 1975 SC 733; Har Narain v. Chandgi, 1987 Supp SCC 738: AIR 1987 SC 1325; Banarsi v. Ram Phal, (2003) 9 SCC 606: AIR 2003 SC 1989; see also supra, Pt. II, Chap. 8.

97 For detailed discussion, see supra, "Form of appeal".

98 Custodian of Evacuee Property v. Khan Saheb Abdul Shukoor, AIR 1961 SC 1087: (1961) 3 SCR 855; Ittyavira Mathai v. Varkey Varkey, AIR 1964 SC 907: (1964) 1 SCR 495; Maria Christina v. Amira Zurana, AIR 1965 SC 432; Garikapati Veeraya v. N. Subbiah Chaudhry, AIR 1957 SC 540:1957 SCR 488; Gopalakrishna Pillai v. Meenakshi Ayal, AIR 1967 SC 155: 1966 Supp SCR 128; Francisco Luis v. Vithal, AIR 1989 Bom 303; Mohinder Singh v. Jagjit Singh, AIR 1960 Punj 434; Municipal Committee, Simla v. Gurdial Singh, AIR 1973 HP 64; Gopal v. Chimabai, AIR 1938 Bom 464; Shivaji v. Deoji, AIR 1974 MP 123; Kiran Singh v. Chaman Paswan, AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117; Stridewell Leathers (P) Ltd. v. Bhankerpur Simbhaoli Beverages (P) Ltd., (1994) 1 SCC 34: AIR 1994 SC 158.

99 Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd., (1983) 3 SCC 75: AIR 1983 SC 786. For detailed discussion, see supra, Pt. I, Chap. 1.

1011 R. 9 of O. 41 as amended from 1 July 2002 reads thus;

"9. Registry of memorandum of appeal—(1) The Court from whose decree an appeal lies shall entertain the memorandum of appeal and shall endorse thereon the date of presentation and shall register the appeal in a book of appeal kept for that purpose.

(2) Such book shall be called the register of appeal.

"It may be stated that in Salem Advocate Bar Assn. v. Union of India, (2003) 1 SCC 49: AIR 2003 SC 189. The Supreme Court held that the interpretation that Rule 9 requires

In view of the above provision of filing of appeals in the court which passed the decree, Rules 13, 15 and 18 requiring notice to the court whose decree is under challenge have been deleted.

It is, however, submitted that the provision relating to filing of appeals is vague, ambiguous, unclear and confusing. It is not clear whether Rule 9 is merely an enabling or permissive provision or is imperative and peremptory. No doubt, it uses the expression "shall". But suppose, the aggrieved appellant intends to file an appeal in an appellate court directly where an appeal lies, is he prevented from instituting such appeal in a court competent to hear the appeal? Can such court refuse to entertain an appeal though it is an appellate forum under the Code? Again, even after entertaining an appeal, what the trial court will do with the memorandum of appeal? How it will forward the said memorandum of appeal and records and proceedings to the appellate court in absence of any provision to that effect. It may be stated that there was a provision for transmission of record by a trial court to an appellate court (Rule 13), which has been deleted. At present, there is no specific or express provision relating to transmission of record by the trial court.101

The matter does not rest there. Suppose, the appellant wants to obtain stay, injunction or other interim order. Who will grant such relief? Rule 5(1) has remained unamended. Under that rule, only an appellate court can grant interim order. It, therefore, can safely be said that no such order can be made by the court which passed the decree, which is under challenge. Once an appeal is instituted, sub-rule (2) of Rule 5 gets exhausted and has no application.102 What will happen then?

an appeal to be filed in the same court which passed the decree is not correct. An appeal must be filed in the court before which it is maintainable.

101 R. 13 as it stood before the Amendment Act of 2002 ran thus;

"13. Appellate Court to give notice to Court whose decree appealed from.—(l) Where the appeal is not dismissed under Rule 11, the appellate court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) Transmission of papers to Appellate Court.—Where the appeal is from the decree of a Court, the records of which are not deposited in the appellate court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such appears as may be specially called for the appellate court.

(3) Copies of exhibits in Court whose decree appealed from.—Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant."

102 R. 5(1) and (2) read as under:

"5. Stay by Appellate Court.—(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the appellate court may for sufficient cause order stay of execution of such decree.

In the opinion of the author, all these questions, at least for the time being, have remained unanswered.

Under Rule 10(1) the appellate court may at its discretion require the appellant to furnish security for the costs of appeal or of the suit or of both. Where the appellant is residing out of India and does not possess sufficient immovable property within India other than the subject-matter of the appeal, it is obligatory on the court to demand security in such cases.103

The object of Rule 10 is to secure the respondent from the risk of having to incur further costs in an appeal which he might otherwise never recover from the appellant. An order for furnishing security may be made either before the respondent is called upon to appear and answer or afterwards on his application. Where the appellant fails to furnish security within the time granted by the court or the time subsequently extended by it, the court shall reject the appeal.104 The appellate court may, however, at its discretion restore an appeal which has been rejected for failure to give security for costs.105 An application for restoration can be filed within thirty days from the date of the rejection of an appeal.106

31. LIMITATION

The Code of Civil Procedure confers a right of appeal, but does not prescribe a period of limitation for filing an appeal. The Limitation Act, 1963, however, provides the period for filing appeals. It states that an appeal against a decree or order can be filed in a High Court within ninety days and in any other court within thirty days from the date of the decree or order appealed against.107

Explanation. — An order by the appellate court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the appellate court shall, pending the receipt from the appellate court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

(2) Stay by Court which passed the decree.—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

103 Proviso to R. 10(1).

104 R. 10(2).

105 Balwant Singh v. Daulat Singh, ILR (1886) 8 All 315 (PC); Basantlal v. Naidu, AIR 1962 AP 10.

106 Art. 122 of the Limitation Act, 1963.

107 Art. 116, Limitation Act, 1963.

32. CONDONATION OF DELAY: RULE 3-A Rule 3-A has been inserted by the Amendment Act of 1976. It provides that where an appeal has been presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application that the applicant had sufficient cause for not preferring the appeal within time.

Prior to insertion of Rule 3-A, the practice was to admit such an appeal subject to the objection regarding limitation. This practice was disapproved by the Privy Council,108 and it stressed the expediency of adopting a procedure for securing the final determination of the question as to limitation before admission of the appeal. This rule is added to give effect to the recommendation of the Privy Council.109

As observed by the Supreme Court in State of M.P. v. Pradeep Kumar110, the object of this provision is two-fold; firstly, to inform the appellant that the delayed appeal will not be entertained unless it is accompanied by an application explaining the delay; and secondly, to communicate to the respondent that it may not be necessary for him to get ready on merits as the court has to first deal with an application for condonation of the delay as a condition precedent. The provision is, however, directory and not mandatory. If the memorandum of appeal is filed without an accompanying application for condonation of delay, the consequence is not necessarily fatal. The defect is curable.111

Interpreting the provision in its proper perspective, the Court stated:

"It is true that the pristine maxim vigilantibus, non dormientibus, jura subeniunt (law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism "to err is human" is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judicature permanently closed before him. The effort of the court should not be one finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine."112

(emphasis supplied)

108 Krishnasami v. Ramasami Chettiar, AIR 1917 PC 179: (1917-18) 45 IA 25.

109 Statement of Objects and Reasons; see also Naran Anappa v. Jayantilal, AIR 1987 Guj 205: (1986) 1 Guj LR 206.

110 (2000) 7 SCC 372.

111 Ibid, at p. 378 (SCC).

112 Ibid, at pp. 376-77 (SCC) (per Thomas, J.)

33. STAY OF PROCEEDINGS: RULES 5-8

Rule 5 provides for stay of an execution of a decree or an order. After an appeal has been filed, the appellate court may order stay of proceedings under the decree or the execution of such decree. But mere filing of an appeal does not suspend the operation of a decree. Stay may be granted if sufficient grounds are established.113

The object underlying Rule 5 is to safeguard the interests of both, the decree-holder and the judgment-debtor. It is the right of the decree- holder to reap the fruits of his decree. Similarly, it is the right of the judgment-debtor not merely to get barren success in case his appeal is allowed by the appellate court. This rule thus strikes a just and reasonable balance between these two opposing rights.

The following conditions must, therefore, be satisfied before stay is granted by the court114:

(a) The application has been made without unreasonable delay;

(b) Substantial loss will result to the applicant unless such order is made; and

(c) Security for the due performance of the decree or order has been given by the applicant.

The court may also make an ex parte order for stay of execution pending the hearing of the application if the above conditions are satisfied.113

Rule 3-A(3), however, lays down that the court shall not grant stay of the execution of a decree against which an appeal is proposed to be filed so long as the court does not, after hearing under Rule 11, decide to hear the appeal on merits.

In case of money decree, sub-rule (3) of Rule 1 as inserted by the Amendment Act, 1976 provides for the deposit of the decretal amount or for the furnishing of security. This provision has been made for the benefit of the decree-holder and with a view to lessen his hardship. Deposit of the decretal amount, however, is not a condition precedent for the presentation of an appeal.115

Sub-rule (5) of Rule 5 as added in 1976 mandates that no stay of execution of a decree shall be granted unless the deposit is made or security is furnished.

113 R. 5(1)(2); see also Kamla Devi v. Takhatmal, AIR 1964 SC 859 at p. 862: (1964) 2 SCR 152; Mool Chand v. Raza Buland Sugar Co. Ltd., (1982) 3 SCC 484; Dilip Kumar v. Ramesh Chandra, 1991 Supp (2) SCC 260; Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd., (2005) 1 SCC 705.

114 R. 5(3), (4).

115 Mehta Teja Singh and Co. v. Grindlays Bank Ltd., (1982) 3 SCC 199; Union Bank of India v. Jagan Nath Radhey Shyam and Co., AIR 1979 Del 36; Dijabar v. Sulabha, AIR 1986 Ori 38; Malwa Strips (P) Ltd. v. Jyoti Ltd., (2009) 2 SCC 426.

Explanation to Rule 5(1) clarifies that the order of stay becomes effective from the date of communication to the court of first instance and not prior thereto.
Where an order has been made for the execution of a decree from which an appeal is pending, on sufficient cause being shown by the appellant, the court which passed the decree shall take security from the decree-holder for the restitution of any property which may be or has been taken in execution and for due performance of the decree or order of the appellate court. If such an application is made to the appellate court, it may direct the trial court to take such security.116
Where an order for sale of immovable property in execution of a decree has been passed and the appeal has been pending against such decree, on an application being made by the judgment-debtor, the court must stay the sale of immovable property on giving security or otherwise as it thinks fit.117
34. SUMMARY DISMISSAL: RULES 11 & 11-A
Rule 11 deals with the power of the appellate court to dismiss an appeal summarily. This rule refers to a stage after the memorandum of appeal has been filed and the appeal has been registered under Rule
9. Rule 11 embodies a general principle that whenever an appeal is preferred, the appellate court is entitled, after hearing the appellant or his advocate, to reject the appeal summarily if prima facie there is no substance in it.118
The discretion, however, must be exercised judiciously and not arbitrarily. Such power should be used very sparingly and only in exceptional cases. When an appeal raises triable issues, it should not be summarily dismissed.119
Where the appellate court which dismisses an appeal summarily is other than a High Court, it must record reasons for doing so.120 However, in matters involving construction of documents, even a High Court should record reasons.121
The same principle applies to Letters Patent Appeals arising out of First Appeals since in such appeal (LPA), all questions of fact and law are open to challenge.122

116 R. 6(1), (2).
117 R. 6(2); see also Pratibha Singh v. Shanti Devi, (2003) 2 SCC 330: AIR 2003 SC 643.
R. 11(1).
119 Mahadev Tukaram v. Sugandha, (1973) 3 SCC 746: AIR 1972 SC 1932; Umakant Vishnu v. Pramilabai, (1973) 1 SCC 152: AIR 1973 SC 218; Vinod Trading Co. v. Union of India, (1982) 2 SCC 40; Kiranmal v. Dnyanoba Bajirao, (1983) 4 SCC 223: AIR 1983 SC 461.
120 R. 11(4); see also Govinda Kadtuji v. State of Maharashtra, (1970) 1 SCC 469: AIR 1970 SC 1033.
121 Shanker v. Gangabai, (1976) 4 SCC 112 at p. 115: AIR 1976 SC 2506 at p. 2509.
122 Gaudiya Mission v. Shobha Bose, AIR 2008 SC 1012.

Again, when the first appellate court affirms the findings of the trial court, it is its duty to record reasons in brief for doing so. It is all the more necessary in a case where such court is a final court of finding of fact and where the judgment of the trial court is based on appreciation of oral and documentary evidence which is seriously challenged by the contesting party.123

But once an appeal is admitted, the court cannot dismiss it on technical grounds or without hearing the appellant.124 Similarly, an appeal cannot be admitted partly. It can be admitted or dismissed wholly.125 If the appellant or his pleader does not appear when the appeal is called on for hearing, the court may dismiss it for default.126 The word may shows that the court has discretion in the matter and is not bound to dismiss the appeal for default of appearance. The court may adjourn the hearing of the appeal to a future date or even admit it. Where an appeal is dismissed for default, it may be restored if it is proved that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing.127

35. ABATEMENT OF APPEAL

The provisions relating to abatement of suits apply to appeals also.128

36. ADMISSION OF APPEAL: RULES 12, 14

If the appeal is not summarily dismissed, the appellate court shall fix a day for hearing of the appeal, and the notice of such date of hearing shall be served upon the respondent with a copy of the memorandum of appeal.129

37. DOCTRINE OF MERGER

Where an appeal is provided against a decree passed by the trial court and such appeal is preferred, it is the decree of the appellate court which is operative in law, which can be enforced.

The doctrine of merger is based on the principle that there cannot be, at one and the same time, more than one operative decree governing the same subject-matter. Hence, as soon as an appeal is decided by an appellate court, the decree of the trial court ceases to have existence in the eyes of the law and is superseded by a decree by an appellate

123 Kerala Transport Co. v. Shah Manilal Mulchand, 1991 Supp (2) SCC 461 at p. 462.

124 Dipo v. Wassan Singh, (1983) 3 SCC 376: AIR 1983 SC 846; Jhanda Singh v. Gram Sabha of Village Umri, (1971) 3 SCC 980.

125 Ramji Bhagala v. Krishnarao, (1982) 1 SCC 433: AIR 1982 SC 1223.

126 R. 11(2). See also Thakur Sakhpal Singh v. Thakur Kalyan Singh, AIR 1963 SC 146: (1963) 2 SCR 733; Shantilal v. Bai Basi, AIR 1976 Guj 1: (1975) 16 Guj LR1.

127 R. 19.

128 Or. 22 R. 11. For detailed discussion, see supra, Pt. II, Chap. 13.

129 Rr. 12, 14.

court. In other words, the decree passed by the trial court merges with the decree of the appellate court.130

38. PROCEDURE AT HEARING: RULES 16-21

(a) Right to begin: Rule 16

The appellant has a right to begin.131 After hearing the appellant in support of the appeal, if the court finds no substance in the appeal, it may dismiss the appeal at once without calling upon the respondent to reply. But if the appellate court does not dismiss the appeal at once, it will hear the respondent against the appeal and the appellant shall then be entitled to reply.132

(b) Dismissal for default and restoration: Rules 17-19

If the appellant does not appear when the appeal is called on for hearing, the court may dismiss the appeal in default.133 The court, however, cannot dismiss it on merits.134 The appeal, however, cannot be dismissed although the notice has not been served upon the respondent, if the respondent appears when the appeal is called on for hearing.135

Where the appeal has been dismissed for default or for non-payment of process fees, the appellant may apply to the appellate court for the restoration of the appeal. On sufficient cause being shown, the appellate court shall restore the appeal on such terms as to costs or otherwise as it thinks fit.136 The court may require the counsel to go on for hearing after restoration and may refuse to restore the matter for further adjournment.137 Appearance of a party or his advocate and

130 Jowad Hussain v. Gendan Singh, AIR 1926 PC 63: (1925-26) 53 IA 197; Lachmeshwar Prasad v. Keshwar Lal, AIR 1941 FC 5:1940 FCR 84; CIT v. Amritlal Bhogilal and Co., AIR 1958 SC 868: 1959 SCR 713; Collector of Customs v. East India Commercial Co. Ltd., AIR 1963 SC 1124: (1963) 2 SCR 563; State of Madras v. Madurai Mills Co. Ltd., AIR 1967 SC 681: (1967) 1 SCR 732; Gojer Bros. (P) Ltd. v. Ratan Lal Singh, (1974) 2 SCC 453: AIR 1974 SC 1380; Dilip v. Mohd. Azizul Haq, (2000) 3 SCC 607: AIR 2000 SC 1976.

131 R. 16(1).

132 R. 16(2).

133 R. 17(1). See also New Brahma Kshatriya Coop. Housing Society v. Govindlal, AIR 1975 Guj 173: (1974) 15 Guj LR 689; Ajit Kumar v. Chiranjibi Lal, (2002) 3 SCC 609; Shiv Kumar v. Darshan Kumar, (2009) 2 SCC 116.

134 Expln. to R. 17(1). See also Shantilal v. Bai Basi, AIR 1976 Guj 1: (1975) 16 Guj LR 1; Abdur Rahman v. Athifa Begum, (1996) 6 SCC 62; Secy., Dept, of Horticulture v. Raghu Raj, (2009) 1 Guj LH 457 (SC).

135 Proviso to R. 18.

136 R. 19. See also Rafiq v. Munshilal, (1981) 2 SCC 788: AIR 1981 SC 1400; Goswami Krishna v. Dhan Prakash, (1981) 4 SCC 574; Savithri Amma Seethamma v. Aratha Karthy, (1983) 1 SCC 401: AIR 1983 SC 318; Lachi Tewari v. Director of Land Records, 1984 Supp SCC 431: AIR 1984 SC 41; Mangilal v. State of M.P., (1994) 4 SCC 564.

137 New Brahma Kshatriya Coop. Housing Society v. Govindlal Narbherem Thakore, AIR 1975 Guj 173: (1974) 15 Guj LR 689 at p. 696; Madhumilan Syntex Ltd. v. Union of India,

prayer for recalling of an order of dismissal for default may be a good ground for restoring a matter but it cannot be said to be a good ground for restoration of the matter for hearing in future. In other words, "a matter may be restored for hearing and not for adjournment".138

(c) Ex parte hearing and rehearing: Rules 17 & 21

Where the appellant appears and the respondent does not appear when the appeal is called on for hearing, the appeal shall be heard ex parte.139 If the judgment is pronounced against the respondent, he may apply to the appellate court for rehearing of the appeal. If he satisfies the court that the notice of appeal was not duly served upon him or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit.140

However, ordinarily, no ex parte decree should be passed by a court except on reliable evidence.141

(d) Addition of respondent: Rule 20

Where it appears to the appellate court at the hearing of the appeal that any person who was a party to the suit in the trial court but who has not been made a party to the appeal is interested in the result of the appeal, the court may adjourn the hearing of the appeal and direct that such person be joined as a respondent.142 Such addition of a respondent cannot be ordered after the expiry of the period of limitation for appeal, unless the reasons are recorded for doing so.143 The Court can also make an order as to costs.144

The object of Rule 20 is to protect parties to the suit who have not been made respondents in the appeal from being prejudiced by modifications being made behind their back in the decree under appeal.145 Over and above Rule 20, the appellate court has inherent power to

(2007) 11 SCC 297: AIR 2007 SC 1481.

138 Madhumilan Syntex Ltd. v. Union of India, (2007) 11 SCC 297 at pp. 305-06: AIR 2007 SC 1481 (per Thakker, J.)

139 R. 17(2).

140 R. 21; see also Sourindra Mohan v. State of W.B., (1982) 2 SCC 360: AIR 1982 SC 1193; Savithri Amma Seethamma v. Aratha Karthy, (1983) 1 SCC 401: AIR 1983 SC 318.

141 Sudha Devi v. M.P. Narayanan, (1988) 3 SCC 366: AIR 1988 SC 1381.

142 R. 20(1); see also SBI v. Ramkrishna Pandurang, 1990 Supp SCC 801: AIR 1990 SC 1981; Shew Bux v. Bengal Breweries Ltd., AIR 1961 SC 137: (1961) 1 SCR 680.

143 R. 20(2). See also Ch. Surat Singh v. Manohar Lal, (1971) 3 SCC 889: AIR 1971 SC 240.

144 R. 20(2).

145 Subramaniam v. Veerabhadram, (1908) 31 Mad 442 at p. 444.

add a party respondent or to transpose a party from one category to another.145

39. CROSS-OBJECTIONS: RULE 22

(a) General

Order 41 Rule 22 is a special provision permitting the respondent who has not filed an appeal against the decree to object to the said decree by filing cross-objections in the appeal filed by the opposite party.147 Filing of cross-objections by the respondent, however, is optional and voluntary. The provision is permissive and enabling and not peremptory or obligatory.148 Where the suit is partly decided in favour of the plaintiff and partly in favour of the defendant and the aggrieved party (either the plaintiff or the defendant) files an appeal, the opposite party may adopt any of the following courses:

(i) He may prefer an appeal from that part of the decree which is against him. Thus, there may be two appeals against the same decree; one by the plaintiff and the other by the defendant. They are known as "cross-appeals". Both these appeals will be disposed of together.

(ii) He may not file an appeal against the part of the decree passed against him but may take objection against that part. Such objections are called "cross-objections".

(iii) Without filing a cross-appeal or cross-objection, he may support the decree (a) on the grounds decided in his favour by the trial court; or (b) even on the grounds decided against him.149

146 Saila Bala Dassi v. Nirmala Sundari Dassi, AIR 1958 SC 394 at p. 398: 1958 SCR 1287.

147 R. 22(1) of Order 41 reads thus:

"Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader notice of the date fixed for hearing the appeal, or within such further time as the appellate court may see fit to allow."

148 Ravinder Kumar v. State of Assam, (1999) 7 SCC 435: AIR 1999 SC 3571.

149 Ramanbhai Ashabhai v. Dabhi Ajitkumar Fulsinji, AIR 1965 SC 669 at p. 676: (1965) 1 SCR 712; Indian Cable Co. v. Workmen, (1974) 3 SCC 11 at pp. 17-18: AIR 1972 SC 2195 at pp. 2198-99; Choudhary Sahu v. State of Bihar, (1982) 1 SCC 232 at p. 235: AIR 1982 SC 98 at p. 99; CST v. Vijai International Udyog, (1984) 4 SCC 543: AIR 1985 SC 109; Krishan Gopal v. Haji Mohd. Muslim, AIR 1969 Del 126; Bihar Supply Syndicate v. Asiatic Navigation, (1993) 2 SCC 639 at pp. 650-51; Union of India v. Kolluni Ramaiah, (1994) 1 SCC 367 at p. 370: AIR 1994 SC 1149 at p. 1151; Banarsi v. Ram Phal, (2003) 9 SCC 606: AIR 2003 SC 1989; S. Nazeer Ahmed v. State Bank of Mysore, (2007) 11 SCC 75: AIR 2007 SC 989; see also infra, "Modification of decree: Rule 33".

(b) Nature

The expression "cross-objection" expresses the intention of the legislature that it can be directed by the respondent against the appellant. One cannot treat an objection by a respondent in which the appellant has no interest as a cross-objection. The appeal is by the appellant against a respondent, the cross-objection must be an objection by a respondent against the appellant.150 (emphasis supplied)

A cross-objection is like cross-appeal. It has thus all the trappings of an appeal. The mere distinction between the two lies in the fact that whereas cross-objections form part of the same record, cross-appeals are two distinct and independent proceedings.151

(c) Who may file cross-objections?

Cross-objections can be filed by the respondent (1) if he could have filed an appeal against any part of the decree;152 or (2) if he is aggrieved by a finding in the judgment, even though the decree is in his favour because of some other finding.153

Cross-appeals and cross-objections provide two different remedies for the same purpose since the cross-objections can be filed on the points on which that party could have preferred a cross-appeal.154 The right to file cross-objections is substantive in nature and not merely procedural.155

(d) Against whom cross-objections may be filed

Ordinarily, cross-objections may be filed only against the appellant. In exceptional cases, however, one respondent may file cross-objections against the other respondents156; for instance, when the appeal by some of the parties cannot effectively be disposed of without opening

150 Vadlamudi Venkateswarlu v. Ravipati Ramamma, AIR 1950 Mad 379: ILR 1950 Mad 874 (FB); Patina Lal v. State of Bombay, AIR 1963 SC 1516: (1964) 1 SCR 980; Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528: AIR 1988 SC 54.

151 N. Jayaram Reddy v. Revenue Divisional Officer, (1979) 3 SCC 578: AIR 1979 SC 1393: Superintending Engineer v. B. Subba Reddy, (1999) 4 SCC 423: AIR 1999 SC 1747.

152 R. 22(1); see also N. Jayaram Reddy v. Revenue Divisional Officer, (1979) 3 SCC 578: AIR 1979 SC 1393.

153 Expln. to R. 22(1).

154 N. Jayaram Reddy v. Revenue Divisional Officer, (1979) 3 SCC 578: AIR 1979 SC 1393. [It may, however, be stated that no appeal lies against a mere "finding" if such finding does not amount to "decree". For detailed discussion, see supra, "No appeal against finding". But cross-objections can be filed even against a "finding" which may not amount to decree; see Expln. to R. 22(1)].

155 Panna Lal v. State of Bombay, AIR 1963 SC 1516 at p. 1520: (1964) 1 SCR 980.

156 Ibid, see also Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528: AIR 1988 SC 54.

the matter as between the respondents inter se; or in a case where the objections are common as against the appellant and co-respondent.157

Thus, where the relief sought against the appellant in cross-objections is intermixed with the relief granted to the other respondents in such a way that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents, cross-objections by one respondent against the other respondents may be allowed.158

The principle that no decision can be made against a person who is not a party to the proceedings applies to cross-objections also. Hence, cross-objections cannot be allowed against a person who is not a party to the appeal.

(e) When cross-objections may be filed?

The provisions of Order 41 Rule 22 contemplates right to file crossobjections only when an appeal is filed and also when such appeal is admitted by the appellate court and notice is issued on the respondent.159

A stage of filing cross-objections arises only when an appeal is admitted and the court directs notice to be issued to the respondent. No cross-objections, hence, can be filed if no appeal is filed by the appellant or an appeal is filed but has not been admitted. Mere posting of preliminary hearing of an appeal is not enough. Similarly, prior to service of notice of hearing of appeal by the court, no cross-objections would lie. That, however, does not make cross-objections suffer from legal infirmity.160

(f) Ambit and scope

Where the respondent has filed cross-objections, even if the original appeal is withdrawn or dismissed for default, they will be heard and decided on merits.158

Where an appeal is withdrawn or dismissed for default and the cross-objections are decided on merits, restoration of appeal and rehearing will not automatically warrant rehearing of cross-objections.161

157 Panna Lal, supra; Mahant Dhangir, supra, at p. 533 (SCC): at p. 57 (AIR).

158 R. 22(4); see also Hari Shankar v. Sham Manohar, (2005) 3 SCC 761: 2005 AIR SCW 1712.

159 Balwant Singh v. State of M.P., 1986 MP LJ 571:1986 Jab LJ 686.

160 Manthena Ramanamma v. Tehsildar, AIR 1976 AP 81; Ram Kripal v. Radhey Shyam, AIR 1970 Raj 234:1970 Cri LJ 1558; (2003) 4 JLJR 502: (2004) 3 JLR 246 (Jhar).

161 Nanoo Gopinathan v. Neelacantan Balakrishnan, AIR 1990 Ker 197.

But where the appeal is dismissed as time-barred162, or has abated163, or is held to be not maintainable164, the cross-objections cannot be heard on merits as they are contingent and dependent upon the hearing of the appeal.165

(g) Cross-appeal whether may be treated as cross-objections

An appeal filed beyond the period of limitation may be treated as cross-objections under Order 41 Rule 22. A cross-appeal may be treated as cross-objection only if such appeal is filed after the other appeal and not if it is filed before that appeal.166

(h) Form

Cross-objections shall be in the form of a memorandum of appeal and they should be served on the party affected thereby or his pleader.167 A respondent can file cross-objections as an indigent person.168

(i) Limitation

Cross-objections can be filed within one month from the date of service on the respondent or his pleader of the notice of the date fixed for hearing of the appeal.169 The appellate court may, at its discretion, extend the period within which cross-objections can be filed.170 The discretion, however, must be exercised judicially and on sufficient cause for delay being shown and is open to review by the superior court.

(j) Cross-objection against finding: Explanation to Rule 22(1)

Explanation to sub-rule (1) of Rule 22 of Order 41, as added by the Amendment Act, 1976 permits respondent to file cross-objection not only against decree but also against finding not amounting to decree. The

162 Charity Commr. v. Padmavati, AIR 1956 Bom 86; A.L.A. Alagappa Chettiar v. Chockalinagam Chetty, AIR 1919 Mad 784 (FB); Ram Chand v. Ramku, AIR 1977 HP 82.

163 Abdullamiya Hamdumiya v. Mohamedmiya Gulamhusein, AIR 1949 Bom 276; Lt. Col. P.H. Choudhary v. Altaf Ahmed, AIR 1963 AP 382.

164 Kashiram Senu v. Ranglal Motilalshet, AIR 1941 Bom 242; Ram Chand v. Ramku, supra; Chanchalgauri v. Narendrakumar, AIR 1986 Guj 55; Municipal Corpn. of Delhi v. International Security & Intelligence Agency Ltd., (2004) 3 SCC 250: AIR 2003 SC 1515: 2003 AIR SCW 870.

165 N. Jayaram Reddy v. Revenue Divisional Officer, (1979) 3 SCC 578: AIR 1979 SC 1393.

166 Nripjit Kaur v. Sardar Satinder Singh, AIR 1955 Punj 190; Bhagai Ram v. Raghbar Dial, AIR 1925 Lah 57; Mihan Singh v. Tilak Ram, AIR 1934 Lah 273; Labhu Ram v. Ram Pratap, AIR 1944 Lah 76; (1969) 1 Mys LJ 507; S.M. Singh v. Punjabi University, Patiala, AIR 1975 Punj 318.

167 R. 22(2).

168 R. 22(5).

169 R. 22(1).

170 Vishwa Nath v. Maharaji, AIR 1977 All 459.

position, however, as regards filing of appeal has remained as it was before the amendment.171

After the amendment in Rule 22 now, a party to a suit who has succeeded and whose favour, a decree is passed by the court cannot file an appeal against any "finding" recorded against him, but if the other side prefers an appeal against the decree, he may file cross-objection against the "finding" of the lower court notwithstanding that the ultimate decision or decree may be partly or wholly in his favour.

(k) Procedure at hearing

The appeal and the cross-objections should be heard together and they should be disposed of by a common judgment incorporating the decisions on both; the appeal as well as the cross-objections.172

(l) Omission to file cross-objections

A party in whose favour a decree has been passed has a substantive and valuable right which should not be lightly interfered with. As an ordinary rule, therefore, in the absence of a cross-appeal or cross-objection by a respondent, the appellate court has no power to disturb the decree of the lower court so far as it is in favour of the appellant. This is, however, subject to the provisions of Order 41 Rule 33 of the Code.173

(m) Disposal of appeal and cross-objections

The court should decide and dispose of appeal and cross-objections together by one judgment and such decision should be incorporated in one decree. This approach seeks to avoid contradictory and inconsistent decisions on the same questions in one and the same suit.174

(n) Principles

The following principles govern cross-objections:175

(1) An appeal is a substantive right. It is a creation of the statute. The right to appeal does not exist unless it is specifically conferred.

(2) A cross-objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of a memorandum and the

171 Notes on Clauses.

172 R. 22(5). See also Krishan Gopal v. Haji Mohd. Muslim, AIR 1969 Del 126.

173 Choudhary Sahu v. State of Bihar, (1982) 1 SCC 232 at p. 235: AIR 1982 SC 98 at p. 99; Nirmala Bala v. Balai Chand, AIR 1965 SC 1874: (1965) 3 SCR 550; Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528: AIR 1988 SC 54; Panna Lal v. State of Bombay, AIR 1963 SC 1516; Banarsi v. Ram Phal, (2003) 9 SCC 606: AIR 2003 SC 1989; State of Gujarat v. Dharmistaben Narendrasinh Rana, (2001) 3 Guj LR 2056.

174 Krishan Gopal v. Haji Mohd. Muslim, AIR 1969 Del 126; State of Kerala v. K.K. Padmavathi, (1984) 1 TAC 119; State v. Salu, AIR 1963 Raj 93.

175 Superintending Engineer v. B. Subba Reddy, (1999) 4 SCC 423: AIR 1999 SC 1747.

provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of an appeal, apply to a cross-objection as well.

(3) Court fee is payable on a cross-objection like that on the memorandum of an appeal. Provisions relating to appeals by indigent persons also apply to cross-objections.

(4) Even where an appeal is withdrawn or is dismissed for default, a cross-objection may nevertheless be heard and determined.

(5) A respondent even though he has not appealed may support the decree on any other ground but if he wants to modify it, he has to file a cross-objection to the decree which objection he could have taken earlier by filing an appeal. The time for filing an objection which is in the nature of an appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time can also be extended by the Court like in an appeal.

(6) A cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give quietus to the whole litigation by his accepting the judgment and decree or order even if it was partly against his interest. When, however, the other party challenges the same by filing an appeal, the statute gives the respondent a second chance to file an appeal by way of a cross-objection if he still feels aggrieved by the judgment and decree or order.176

40. POWERS OF APPELLATE COURT: SECTION 107, RULES 23-29 & 33

Sections 96-108 and Rules 23 to 33 of Order 41 enumerate the powers of an appellate court while hearing first appeals. They may be summarised thus:

(a) Power to decide a case finally: Section 107 (l) (a), Rule 24

Section 107(l)(a) and Rule 24 of Order 41 enable the appellate court to dispose of a case finally. Where the evidence on record is sufficient to enable the appellate court to pronounce judgment, it may finally determine the case notwithstanding that the judgment of the trial court has proceeded wholly upon some ground other than that on which the appellate court proceeds. The general rule is that a case should, as far as possible, be disposed of on the evidence on record and should not be remanded for fresh evidence, except in rare cases177, by drawing

176 Ibid, at pp. 433-34 (SCC): at pp. 1753-54 (AIR) (per Wadhwa, J.).

177 Sunder Singh v. Narain Singh, 1969 SCD 900; Rajeshwar Rao v. Collector, Hyderabad, (1969) 2 SCWR 344; Annamalai v. Narayanswami Pillai, AIR 1972 Mad 316 at pp. 318-19; D. Kaur v. Kanti Khare, (1981) 4 SCC 152: AIR 1982 SC 789; Nedunuri Kameswaramma

the final curtain on the litigation between the parties.178 Fragmentary decisions are most inconvenient and tend to delay the administration of justice.179 "If life like a dome of many-coloured glass stains the white radiance of eternity, so do the doings and conflicts of mortal beings till death tramples them down."180

(b) Power to remand: Section 107(1)(b), Rules 23 & 23-A

(i) Meaning

Remand means to send back.

(ii) Nature

Rule 23 of Order 41 of the Code enacts that where the trial court has decided the suit on a preliminary point without recording findings on other issues and if the appellate court reverses the decree so passed, it may send back the case to the trial court to decide other issues and determine the suit. This is called remand.

Rule 23-A as inserted by the Amendment Act, 1976 enables the appellate court to remand a case where the lower court has decided it on merits but the appellate court considers such remand in the interest of justice.

(iii) Scope

By passing an order of remand, an appellate court directs the lower court to reopen and retry the case. On remand, the trial court will readmit the suit under its original number in the register of civil suits and will proceed to determine it as per the directions issued by the appellate court.181

v. Sampati Subba Rao, AIR 1963 SC 884: (1963) 2 SCR 208; Patel Sureshbhai v. Patel Satabhai, (1983) 3 SCC 294: AIR 1983 SC 648; Kausalya Devi v. Land Acquisition Officer, (1984) 2 SCC 324: AIR 1984 SC 892; Bhairab Chandra v. Ranadhir Chandra, (1988) 1 SCC 383: AIR 1988 SC 396.

178 Sant Narain v. Rama Krishna Mission, (1974) 2 SCC 730 at p. 737: AIR 1974 SC 2241 at p. 2246; Bechan Pandey v. Dulhin Janki Devi, (1976) 2 SCC 2£6 at p. 290: AIR 1976 SC 866 at p. 869; Chinnamarkathian v. Ayyavoo, (1982) 1 SCC 159 at p. 170: AIR 1982 SC 137 at p. 143; Kausalya Devi Bogra v. Land Acquisition Officer, (1984) 2 SCC 324 at p. 334: AIR 1984 SC 892 at p. 897; K. Gopalan v. K. Balakrishnan, (2005) 12 SCC 351.

179 Nanhelal v. Umrao Singh, AIR 1931 PC 33: (1930-31) 58 IA 50:130 IC 686.

180 Per Khanna, J. in Bechan Pandey v. Dulhin Janki Devi, supra, at p. 299 (SCC): at p. 869 (AIR). See also, observations of Chief Justice Crewe quoted by His Lordship.

181 R. 23.

(iv) Conditions

The appellate court has power to remand a case either under Rule 23 or under Rule 23-A. A remand cannot be ordered lightly.182 It can be ordered only if the following conditions are satisfied:183

(1) The suit must have been disposed of by the trial court on a preliminary point.—Before the court can exercise the power of remand under Rule 23, it is necessary to show that the lower court has disposed of the suit on a preliminary point.

A point can be said to be a preliminary point, if it is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without the necessity for a decision on the other points in the case.184 Such preliminary point may be one of fact or of law, but the decision thereon must have avoided the necessity for a full hearing of the suit.

Thus, where the lower court dismisses the suit as being not maintainable, or barred by limitation; or res judicata; or as disclosing no cause of action; it does so on a preliminary point of law. On the other hand, where the lower court dismisses the suit on the ground that the plaintiff is estopped from proving his case; or that it was motivated; or that the plea raised at the hearing was different from that raised in the plaint, it does so on a preliminary point of fact.

(2) The decree under appeal must have been reversed.—No remand can be ordered by the appellate court under this rule unless the decision of the lower court on the preliminary point is reversed in appeal.185

Where such is not the case, the appellate court cannot order remand simply because the judgment of the lower court is not satisfactory; or that the lower court has misconceived or misread the evidence; or has ignored the important evidence; or has acted contrary to law; or that the materials on which the conclusion is reached are scanty; and the appellate court must decide the appeal in accordance with law.186

(3) Other grounds.—Rule 23-A of Order 41, as inserted by the Amendment Act of 1976, empowers the appellate court to remand a

182 K. Krishna Reddy v. Collector, Land Acquisition, (1988) 4 SCC 163: AIR 1988 SC 2123; Bhairab Chandra Nandan v. Ranadhir Chandra Dutta, (1988) 1 SCC 383: AIR 1988 SC 396; Peria Nachi Muthu v. Raju Thevar, (1985) 2 SCC 290: AIR 1985 SC 821; Sunder Singh v. Narain Singh, 1969 SCD 900; Rajeshwar Rao v. Collector, Hyderabad, (1969) 2 SCWR 344; Kausalya Devi v. Land Acquisition Officer, (1984) 2 SCC 324: AIR 1984 SC 892; Thatchara Bros. v. M.K. Marymol, (1999) 1 SCC 298.

183 Mohd. Akbar Khan v. Motai, AIR 1948 PC 36; State v. Sanubhai, (1970) 11 Guj LR 613; Kalipada Dinda v. Kartick Chandra Hait, AIR 1977 Cal 3.

184 Malayath Veetil Raman v. C. Krishnan Nambudripad, AIR 1922 Mad 505 at p. 508 (FB); Chaudhary Chandrika Prasad v. Mithu Rai, AIR 1927 Pat 296; Bai Bai v. Mahadu Maruti, AIR 1960 Bom 543 at p. 547; D.P. Singh v. State of U.P., AIR 1973 All 174 at pp. 181-82.

185 Purapabutchi Rama v. Purapa Vimalakumari, AIR 1969 AP 216 at p. 220.

186 Sunder Singh v. Narain Singh, supra; Rajeshwar Rao v. Collector, Hyderabad, supra.

case even when the lower court has disposed of the case otherwise than on a preliminary point and the remand is considered necessary by the appellate court in the interests of justice.

The primary object of Rule 23-A is to widen the powers of the appellate court to remand a case in the interests of justice.187 Even before the insertion of new Rule 23-A, it was held that an order of remand can be passed, if it is necessary to do so in the interests of justice.188 But it was also held that the power of remand must be regulated by the provisions of Rules 23 and 25 of Order 41 and that inherent powers under Section 151 of the Code cannot be exercised by the appellate court to order remand.189 The power of remand was, thus, strictly a limited power and yet in practice, many cases arose wherein remand was necessitated for some reasons other than those mentioned in Rules 23 and 25. The Law Commission190, therefore, recommended an amendment of the rule empowering the appellate court to remand a case whenever it thinks it is necessary in the interests of justice. The said recommendation has been accepted and Rule 23-A has accordingly been added.

(v) Effect

An order of remand reverses the decision of the lower court and reopens the case for retrial by the lower court except in regard to the matters decided by the appellate court.

An order of remand is appealable.191 If the party aggrieved by an order of remand does not appeal therefrom, he cannot subsequently question its correctness under the inherent powers of the court under Section 151 of the Code.192

187 Statement of Objects and Reasons. See also Ramesh Kumar v. Kesho Ram, 1992 Supp (2) SCC 623: AIR 1992 SC 700; Patel Sureshbhai v. Patel Satabhai, (1983) 3 SCC 294: AIR 1983 SC 648; Ashwinkumar K. Patel v. Upendra J. Patel, (1999) 3 SCC 161: AIR 1999 SC 1125; Ram Autar v. Director of Consolidation, 1991 Supp (1) SCC 552: AIR 1991 SC 480; Raghbendra Bose v. Sunil Krishna, (2005) 12 SCC 309; Shanti Devi v. Daropti Devi, (2006) 13 SCC 775.

188 State of T.N. v. S. Kumaraswami, (1977) 4 SCC 602 (III): AIR 1977 SC 2026; Dwarka Nath v. Ram Rati Devi, (1980) 1 SCC 17: AIR 1980 SC 192.

189 Mahendra Manilal v. Sushila Mahendra, AIR 1965 SC 364 at p. 399: (1964) 7 SCR 267; Nain Singh v. Koonwarjee, (1970) 1 SCC 732 at pp. 734-35: AIR 1970 SC 997 at p. 998.

190 Law Commission's Fourteenth Report, Vol. I at p. 405; Law Commission's Twenty- seventh Report at p. 241; Law Commission's Fifty-fourth Report at pp. 299-300.

191 Or. 43 R. 1(u).

192 S. 105(2). See also Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati, supra; Nain Singh v. Koonwarjee, (1970) 1 SCC 732 at pp. 734-35: AIR 1970 SC 997 at p. 998; Sita Ram v. Sukhnandi Dayal, (1971) 3 SCC 488 at p. 494: AIR 1972 SC 1612 at p. 1617; Jasraj Inder Singh v. Hemraj Multanchand, (1977) 2 SCC 155 at p. 164: AIR 1977 SC 1011 at pp. 1017-18; State of Maharashtra v. Harishchandra, (1986) 3 SCC 349.

Similarly, the court to which the case is remanded is also bound by it and cannot go behind the order of remand.193 While remanding the case, the appellate court shall fix a date for the appearance of the parties before the lower court so as to receive its directions regarding the suit or proceeding pending in the lower court194 It thus nullifies the order passed by the trial court.195 It must, however be noted that when an appellate court remands a case setting aside findings of the lower court, only those findings can be said to have been set aside and not all the findings recorded by the trial court.196

(vi) Duty of trial court

Once an order of remand is made by a superior court, an inferior court has to decide the matter as per the direction of the superior court. In CWT v. Aluminium Corpn. Ltd.197, the High Court of Calcutta expressed "doubts" about the "competence" of the Supreme Court to remand the case. When the matter reached the Supreme Court again, the Apex Court observed that the High Court clearly exceeded its jurisdiction in examining the "competence" of the Apex Court to remand the case. It declared, "It would have done well to remind itself that it was bound by the orders of this Court and could not entertain or express any argument or views challenging their correctness. The judicial tradition and propriety required that court not to sit on judgment over the decision and orders of this Court."198 (emphasis supplied)

(vii) Conclusions

The appellate court should not exercise the power of remand very lightly. As far as possible it should dispose of the appeal finally unless remand is imperative.199 The correctness of an order of remand if not questioned at the time when it was made by filing an appeal, nevertheless

193 Nain Singh v. Koonwarjee, supra) Bhopal Sugar Industries Ltd. v. ITO, AIR 1961 SC 182 at p. 185: (1961) 1 SCR 474; Tobacco Manufacturers (India) Ltd. v. CST, AIR 1961 SC 402 at p. 405: (1961) 2 SCR 106; CWT v. Aluminium Corpn. Ltd., (1973) 3 SCC 643: (1972) 1 SCR 486; Jasraj Inder Singh v. Hemraj Multanchand, (1977) 2 SCC 155 at p. 164: AIR 1977 SC 1011 at pp. 1017-18; Kausalya Devi v. Land Acquisition Officer, (1984) 2 SCC 324 at pp. 333-34: AIR 1984 SC 892 at pp. 896-97; Narinder Singh v. Surjit Singh, (1984) 2 SCC 402: AIR 1984 SC 1359; Cassell & Co. Ltd. v. Broome, 1972 AC 1027: (1972) 2 WLR 645 (HL): (1972) 1 All ER 801.

194 R. 26-A.

195 Kausalya Devi Bogra v. Land Acquisition Officer, (1984) 2 SCC 324: AIR 1984 SC 892; Mangal Prasad v. Narvadeshwar Mishra, (2005) 3 SCC 422: AIR 2005 SC 1964.

196 Mohan Lal v. Anandibai, (1971) 1 SCC 813: AIR 1971 SC 2177.

197 (1973) 3 SCC 643: (1972) 1 SCR 484.

198 Ibid, at p. 646 (SCC) (per Hegde, J.).

199 K. Krishna Reddy v. Collector, Land Acquisition, (1988) 4 SCC 163: AIR 1988 SC 2123; Surendra Narain v. Prashidh Narain, 1988 Supp SCC 171; Bechan Pandey v. Dulhin Janki Devi, (1976) 2 SCC 286: AIR 1976 SC 866; Patel Sureshbhai v. Patel Satabhai, (1983) 3 SCC 294: AIR 1983 SC 648; Ashwinkumar K. Patel v. Upendra J. Patel, (1999) 3 SCC 161: AIR

can be challenged later on in an appeal arising out of the final judgment and decree.200

(viii) Appeal

An order passed under Rule 23 or 23-A of Order 41 is appealable.201

(c) Power to frame issues and refer them for trial: Section 107 (1)(c), Rules 25 and 26

(f) Scope

Where the lower court has omitted (i) to frame any issue; or (ii) to try any issue; or (iii) to determine any question of fact, which is essential to the right decision of the suit upon merits, the appellate court may frame issues and refer them for trial to the lower court and shall direct that court to take the additional evidence required. The lower court shall try such issues and shall return the evidence and the findings within the time fixed by the appellate court.202

(ii) Effect

Such evidence and findings shall form part of the record in the suit, and either party may file in the appellate court a memorandum of objections to any such finding of the lower court within a time fixed by the appellate court.203 The appellate court should, thereafter, hear the whole appeal and the hearing should not be confined to the points on which the findings were called for.204

(iii) Rules 23, 23-A and 25: Distinction

The points of distinction between Rules 23, 23-A and Rule 25 are as under:

(1) While after remand under Rules 23 or 23-A, the whole case goes back for decision to the lower court (except on the point on which the appellate court has reversed the finding of the lower court), under Rule 25 the case is retained in the file of the appellate court and only issues are remitted to the lower court for trial and findings thereon.

1999 SC 1125; Gangadharan v. Janardhana Mallan, (1996) 9 SCC 53: AIR 1996 SC 2127; J. Lingaiah v. G. Hanumanthappa, (2001) 10 SCC 751.

200 Jasraj Inder Singh v. Hemraj Multanchand, (1977) 2 SCC 155: AIR 1977 SC 1011; Sukhrani v. Hari Shanker, (1979) 2 SCC 463: AIR 1979 SC 1436; Margaret v. Indo Commercial Bank Ltd., (1979) 2 SCC 396: AIR 1979 SC 102.

201 Or. 43 R. 1(4); see also infra, Chap. 4.

202 S. 107(1)(c), Or. 41 R. 25. See also Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati, supra; Pasupuleti Venkateswarlu v. Motor & General Traders, (1975) 1 SCC 770: AIR 1975 SC 1409.

203 R. 26.

204 Gogida Gurumurthy v. Kurimeti Ayyappa, (1975) 4 SCC 458: AIR 1974 SC 1702 at p. 1703; Soundararaj v. Devasahayam, 1984 Supp SCC 235: AIR 1984 SC 133.

(2) An order of remand under Rules 23, 23-A is a final order which cannot be reconsidered by the court which passed it except on review, while an order under Rule 25 is an interlocutory order which is open to be reconsidered by the court which has passed it.
(3) Whereas an order under Rules 23, 23-A is appealable, an order under Rule 25 is not appealable.
(d) Power to take additional evidence: Section 107(1)(d), Rules 27- 29
(i) General
As a general rule, the appellate court shall decide an appeal on the evidence led by the parties before the trial court and should not admit additional evidence for the purpose of disposal of an appeal.205 Subrule (1) of Rule 27 also reads thus, "The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court."
Section 107(1)(d), however, is an exception to the general rule, and empowers an appellate court to take additional evidence or require such evidence to be taken subject to the conditions laid down in Rule 27 of Order 41.206
(ii) Meaning
The term "additional evidence" does not mean evidence over and above the evidence led by the party in the lower court. Such a view would be introducing an additional condition not contemplated by the Code. There should be no distinction between a party who has led some evidence and a party who has not led evidence at all. All that is required is that the conditions laid down in the Code for leading of additional evidence must be fulfilled.207
(iii) Object
The basic principle of admission of additional evidence is that the person seeking the admission of additional evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance. Secondly, the party affected by the admission of additional evidence should have an opportunity

205 Municipal Corpn. of Greater Bombay v. Lala Pancham, AIR 1965 SC 1008 at p. 1012: (1965) 1 SCR 542; Soonda Ram v. Rameshwarlal, (1975) 3 SCC 698 at p. 699: AIR 1975 SC 479 at p. 480; K. Venkataramiah v. A. Seetharama Reddy, AIR 1963 SC 1526 at p. 1528: (1964)
2 SCR 35.
206 K. Venkataramiah v. A. Seetharama Reddy (ibid.).
207 Jaipur Development Authority v. Kailashwati Devi, (1997) 7 SCC 297: AIR 1997 SC 3243.

to rebut such additional evidence. Thirdly, the additional evidence must be relevant for the determination of the issue.208

(iv) Nature and scope

When a party is unable to produce the evidence in the trial court under the circumstances mentioned in the Code, he should be allowed to produce the same in an appellate court. The power is discretionary and should be exercised on sound judicial principles and in the interests of justice.209

(v) Circumstances

Rule 27 enumerates the circumstances in which the appellate court may admit additional evidence, whether oral or documentary, in appeal. They are as under:210

(1) Where the lower court has improperly refused to admit evidence which ought to have been admitted; or

(2) Where such additional evidence was not within the knowledge of the party or could not, after exercise of due diligence, be produced by him at the time when the lower court passed the decree; or

(3) Where the appellate court itself requires such evidence either (a) to enable it to pronounce judgment; or (b) for any other substantial cause.

In Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi211, the Supreme Court stated, "The basic principle of admission of additional evidence is that the person seeking the admission of additional evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance. Secondly, the party affected by the admission of additional evidence should have an opportunity to rebut such additional evidence. Thirdly, that additional evidence was relevant for the determination of the issue.

(A) Improper refusal to admit evidence.—Where the lower court has refused to admit evidence which was tendered and which ought to have been admitted, the appellate court may admit such evidence at the appellate stage.212 The expression ought to have been admitted means

208 Shivajirao Nilangekar v. Dr. Mahesh Madhav, (1987) 1 SCC 227 at p. 243: AIR 1987 SC 294 at p. 304; N. Kamalam v. Ayyasamy, (2001) 7 SCC 503.

209 Jaipur Development Authority v. Kailashwati Devi, (1997) 7 SCC 297: AIR 1997 SC 3243: Arjan Singh v. Kartar Singh, AIR 1951 SC 193:1951 SCR 258; Natha Singh v. Financial Commr., (1976) 3 SCC 28: AIR 1976 SC 1053; Mahavir Singh v. Naresh Chandra, (2001) 1 SCC 309: AIR 2001 SC 134.

210 R. 27(1) (a) (aa) & (b).

211 (1987) 1 SCC 227 at p. 243: AIR 1987 SC 294 at p. 304.

212 Official Liquidator v. Raghawa Desikachar, (1974) 2 SCC 741 at pp. 746-47: AIR 1974 SC 2069 at pp. 2073-74; Shivajirao Nilangekar v. Dr. Mahesh Madhav, (1987) 1 SCC 227: AIR

should be admitted in the exercise of sound discretion.213 The appellate court, therefore, before admitting additional evidence must be satisfied that the trial court was unjustified in refusing to admit such evidence.

Thus, where the lower court has refused to take certain evidence on the ground of its late production, such rejection cannot be said to be unjustified and the appellate court should not interfere with the discretion of the lower court and admit such evidence.214

(B) Discovery of new evidence.—Clause (aa) of sub-rule (1) of Rule 27, inserted by the Amendment Act of 1976, empowers the appellate court to receive additional evidence at the appellate stage if the party seeking to produce additional evidence satisfies the court that, in spite of the exercise of due diligence, such evidence was not within his knowledge or could not be produced by him when the decree was passed against him.215

One of the basic principles for admission of additional evidence is that the person seeking admission of additional evidence should establish that in spite of due diligence such evidence could not be produced at the first instance.216 The provision, however, is not confined to cases where the parties have adduced some evidence in the lower court. Even if he has not adduced any evidence before the trial court, additional evidence can be permitted by the appellate court if the conditions laid down in clause (ad) of Rule 27(1) of Order 41 are satisfied.217

(C) Requirement by appellate court.—The appellate court may itself require additional evidence for either of the two purposes: (a) to enable it to pronounce judgment; or (b) for any other substantial cause.218

213 Sumitra v. Maharaja, AIR 1963 HP 21 at p. 23; Arjan Singh v. Kartar Singh, AIR 1951 SC 193 at p. 195:1951 SCR 258; Natha Singh v. Financial Commr., (1976) 3 SCC 28 at p. 31: AIR 1976 SC 1053 at pp. 1056-57.

214 Pramod Kumari v. Om Prakash, (1980) 1 SCC 412 at p. 416: AIR 1980 SC 446 at p. 448; Roop Chand v. Gopi Chand, (1989) 2 SCC 383; Shiv Chander v. Amar Bose, (1990) 1 SCC 234: AIR 1990 SC 325.

215 Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi, (1987) 1 SCC 227: AIR 1987 SC 294; Shiv Chander Kapoor v. Amar Bose, (1990) 1 SCC 234: AIR 1990 SC 325; Pramod Kumari Bhatia v. Om Prakash Bhatia, (1980) 1 SCC 412: AIR 1980 SC 446; State of A.P. v. Kalva Suryanarayana, (1992) 2 SCC 732: AIR 1992 SC 797; Hindustan Brown Boveri Ltd. v. Workmen, (1968) 1 LLJ 571: (1968) 16 FLR 325 (SC); Yudhistir v. Ashok Kumar, (1987) 1 SCC 204: AIR 1987 SC 558; Haryana State Industrial Development Corpn. v. Cork Mfg. Co., (2007) 8 SCC 120.

216 Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi, supra, at p. 243 (SCC): at p.
304 (AIR).

217 Jaipur Development Authority v. Kailashwati Devi, (1997) 7 SCC 297: AIR 1997 SC 3243.

218 Arjan Singh v. Kartar Singh, AIR 1951 SC 193: 1951 SCR 258; Kamala Ranjan v. Baijnath Bajoria, AIR 1951 SC 1: 1950 SCR 840; Yudhistir v. Ashok Kumar, (1987) 1 SCC 204: AIR 1987 SC 558; Sarada v. Manikkoth Kombra, (1996) 8 SCC 345; City Improvement Trust Board v. H. Narayanaiah, (1976) 4 SCC 9: AIR 1976 SC 2403; Natha Singh v. Financial Commr., (1976) 3 SCC 28: AIR 1976 SC 1053; Billa Jagan Mohan v. Billa Sanjeeva, (1994) 4

The requirement must be of the appellate court. "The legitimate occasion for the application of the present rule is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made outside the court of such evidence and the application is made to import it."219 Thus, subsequent events can be considered by the court.220 But a matter cannot be remanded for allowing a party to adduce additional evidence when such evidence was available and yet not produced in the lower court.221

The true test, therefore, is whether the appellate court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced.222

Similarly, the appellate court may admit additional evidence "for any sufficient cause". An application of additional evidence must be disposed of before pronouncing judgment.223 The expression any substantial cause should be liberally construed so as to advance substantial justice between the parties.224 Thus, the additional evidence may be required to enable the court to pronounce judgment; or for any other substantial cause, but, in either case, it must be the court which requires it.225 A mere difficulty in coming to a decision is not sufficient for admission of evidence under Rule 27.

The words "for any other substantial cause" must be read with the word "requires" which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule will apply.226 The defect may be pointed out by a party, or that a party may move the court to supply the defect, but the requirement must be the requirement of the court upon its appreciation of the evidence as it stands.227

The provisions of Rule 27 are not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts

SCC 659; Mahavir Singh v. Naresh Chandra, (2001) 1 SCC 309: AIR 2001 SC 134; State of Gujarat v. Mahendrakumar, (2006) 9 SCC 772: AIR 2006 SC 1864.

219 Kessowji Issur v. Great Indian Peninsula Railway Co., ILR (1907) 31 Bom 381 (PC): (1906-07) 34 IA 115 (PC); Arjan Singh v. Kartar Singh, supra.

220 Gulabbai v. Nalin Narsi Vohra, (1991) 3 SCC 483: AIR 1991 SC 1760.

221 Koyappathodi M. Ayisha v. State of Kerala, (1991) 4 SCC 8 at p. 11: AIR 1991 SC 2027.

222 Arjan Singh v. Kartar Singh, supra; Natha Singh v. Financial Commr., supra.

223 Premier Automobiles Ltd. v. Kabirunissa, 1991 Supp (2) SCC 282: AIR 1991 SC 91; State of Rajasthan v. T.N. Sahani, (2001) 10 SCC 619; Sanjiv Goel v. Avtar S. Sandhu, (2006) 9 SCC 748.

224 K. Venkataramiah v. A. Seetharama Reddy, supra, at p. 1530 (AIR); State of U.P. v. Manbodhan Lal, AIR 1957 SC 912 at p. 915:1958 SCR 533.

225 Ibid, see also Arjan Singh v. Kartar Singh, AIR 1951 SC 193:1951 SCR 258.

226 Mahavir Singh v. Naresh Chandra, (2001) 1 SCC 309: AIR 2001 SC 134; Billa jagan Mohan v. Billa Sanjeeva, (1994) 4 SCC 659; Sunder Lal & Sons v. Bharat Handicrafts (P) Ltd., AIR 1968 SC 406: (1968) 1 SCR 608.

227 K. Venkataramiah v. A. Seetharama Reddy, supra.

of his case and to fill in gaps.228 The expression "to enable it (appellate court) to pronounce judgment" means when the appellate court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands. The ability to pronounce judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of the court delivering it.229

The provisions of Rule 27 have not been engrafted in the Code so as to patch up weak points by the party in the case and to fill up the omission in the court of appeal. It does not authorise any lacunae or gaps in evidence by a party to be filled up. The authority and jurisdiction as conferred on the appellate court to allow fresh evidence is restricted.230 It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way.231 (emphasis supplied)

(vi) Recording of reasons

Whenever the appellate court admits additional evidence, it should record reasons for doing it.232 The underlying object of this provision is to keep a clear record of what weighed with the appellate court in allowing the additional evidence to be produced.233 As observed by their Lordships of the Privy Council, "It is a salutary provision, which operates as a check against a too easy reception of evidence at a late stage of the litigation, and the statement of the reasons may inspire confidence and disarm objection."234

Again, where a further appeal lies from the decision of the appellate court, recording of reasons is necessary so as to enable the higher court to decide whether the discretion under the rule has been judicially exercised by the court below.235 The omission to record reasons,

228 State of U.P. v. Manbodhan Lal, supra; Maganlal v. Mulchand, 1969 UJSC 654; Sunder Lal & Sons v. Bharat Handicrafts (P) Ltd., AIR 1968 SC 406 at p. 409: (1968) 1 SCR 608.

229 Mahavir Singh v. Naresh Chandra, (2001) 1 SCC 309: AIR 2001 SC 134; Syed Abdul Khader v. Rami Reddy, (1979) 2 SCC 601: AIR 1979 SC 553; Municipal Corpn. of Greater Bombay v. Lala Pancham, AIR 1965 SC 1008: (1965) 1 SCR 542.

230 N. Kamalam v. Ayyasamy, (2001) 7 SCC 503.

231 Municipal Corpn. of Greater Bombay v. Lala Pancham, supra, at p. 1012 (AIR); Syed Abdul Khader v. Rami Reddy, (1979) 2 SCC 601: AIR 1979 SC 553; N. Kamalam v. Ayyasamy, (2001) 7 SCC 503.

232 R. 27(2). See also K. Venkataramiah v. A. Seetharama Reddy, supra, at p. 1529 (AIR); City Improvement Trust Board v. H. Narayanaiah, (1976) 4 SCC 9 at p. 20: AIR 1976 SC 2403 at p. 2414.

233 K. Venkataramiah v. A. Seetharama Reddy, supra, at p. 1527 (AIR).

234 Gunga Gobind Mundul v. Collector of the Twenty-four Pergunnahs, (1867) 11 MIA 345 at p. 368 (PC); see also Hurpurshad v. Sheo Dyal, (1875-76) 3 IA 259; Manmohan Das v. Ramdei, AIR 1931 PC 175.

235 K. Venkataramiah v. A. Seetharama Reddy, supra.

therefore, must be treated as a serious defect.236 The provision, however, is directory and not mandatory, and failure to record reasons does not make the evidence inadmissible if the reception of such evidence is otherwise justified under the rule.237

(vii) Mode of taking additional evidence

Rules 28 and 29 lay down the mode of taking additional evidence when the appellate court admits additional evidence in appeal. The appellate court may take the evidence itself or direct the lower court from whose decree the appeal is preferred or any other subordinate court to take it.238 Where the appellate court directs the lower court to record evidence, it should retain the appeal on its file and dispose it of on receipt of the additional evidence.239

(e) Power to modify decree: Rule 33240

(i) General

Rule 33 of Order 41 empowers an appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between one respondent and another respondent. It empowers an appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal, but also to give such other relief to any of the respondents as the case may require.241

236 Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528 at pp. 534-35: AIR 1988 SC 54 at p. 58; Chaya v. Bapusaheb, (1994) 2 SCC 41; K. Muthuswami v. N. Palaniappa, (1998) 7 SCC 327: AIR 1998 SC 3118; see also Tummalla Atchaiah v. Venka Narasingarao, (1979) 1 SCC 166: AIR 1978 SC 725.

237 Ibid, see also Venkataramaiah v. Seetharama Reddy, supra.

238 R. 28.

239 R. 29, see also A.P. State Wakf Board v. All-India Shia Conference (Branch), (2000) 3 SCC 528: AIR 2000 SC 1751.

240 R. 33 of Or. 41 reads as under:

"33. Power of Court of Appeal.—The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees."

241 Rameshwar Prasad v. Shambehari Lal, AIR 1963 SC 1901: (1964) 3 SCR 549; Panna Lal v. State of Bombay, AIR 1963 SC 1516: (1964) 1 SCR 980; Nirmala Bala v. Balai Chand, AIR 1965 SC 1874: (1965) 3 SCR 550; Giani Ram v. Ramjilal, (1969) 1 SCC 813: AIR 1969 SC 1144; Ramchand v. Janki Ballabliji Maharaj, (1969) 2 SCC 313: AIR 1970 SC 532; Ramgaya Prasad v. Murli Prasad, (1973) 2 SCC 9: AIR 1972 SC 1181; Koksingh v. Deokabai, (1976) 1 SCC 383: AIR 1976 SC 634; Choudhary Sahu v. State of Bihar, (1982) 1 SCC 232 at pp. 235-37: AIR 1982 SC 98 at pp. 99-100; Bihar Supply Syndicate v. Asiatic Navigation, (1993)

(ii) Illustrations
(i) A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate court decides in favour of X. It has power to pass a decree against Y.
(ii) A claims a sum of money as due to him from X or Y. The suit is decreed partly against X and partly against Y. X appeals but Y does not. The appellate court can discharge X making Y liable for the whole amount.
(iii) Object
The underlying object of Rule 33 is to enable the appellate court to do full and complete justice between the parties. It is true that the power of the appellate court is discretionary. But it is a proper exercise of judicial discretion to determine all questions in order to render full justice to the parties. The court should not refuse to exercise the discretion on mere technicalities.242 No hard and fast rule can be laid down as to the circumstances in which the power of Rule 33 may or may not be exercised and each case must depend on its own facts.243
(iv) Rules 22 and 33: Distinction
Generally, cross-objections under Rule 22 of Order 41 can be directed only against the appellant and only in exceptional cases can they be filed by one respondent against the other respondent. The provisions of Rule 33 dealing with the power of the appellate court to grant relief to parties to a suit who have not appealed or filed cross objections, on the other hand, enable the court to make any order as the case may require to meet the ends of justice not only between the appellant and respondent but also between a respondent and co-respondent.244
In Panna Lal v. State of Bombay245, after reviewing several decisions, the Supreme Court stated, "(T)he legislature wanted to give effect to the views held by the different High Courts that in exceptional cases as mentioned above an objection can be preferred by a respondent against a co-respondent is indicated by the substitution of the word

2 SCC 639 at pp. 650-51; Shankar Popat. Hiraman Umaji, (2003) 4 SCC 100: AIR 2003 SC 1682.
242 Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528 at pp. 534-35: AIR 1988 SC 54 at p. 58; Chaya v. Bapusaheb, (1994) 2 SCC 41; K. Muthuswami v. N. Palaniappa, (1998) 7 SCC 327: AIR 1998 SC 3118.
243 Ibid, see also Tummalla Atchaiah v. Venka Narasingarao, (1979) 1 SCC 166: AIR 1978 SC 725.
244 Panna Lal v. State of Bombay, AIR 1963 SC 1516: (1964) 1 SCR 980; Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528: AIR 1988 SC 54; Bihar Supply Syndicate v. Asiatic Navigation, (1993) 2 SCC 639: AIR 1993 SC 2054; Narayanarao v. Sudarshan, 1995 Supp (4) SCC 463; S. Nazeer Ahmed v. State Bank of Mysore, (2007) 11 SCC 75: AIR 2007 SC 989.
245 AIR 1963 SC 1516: (1964) 1 SCR 980.

'appellant' in the third paragraph by the words 'the party who may be affected by such objection'."

If the cross-objection filed under Rule 22 of Order 41, CPC was not maintainable against the co-respondent, the court could consider it under Rule 33 of Order 41, CPC. Rule 22 and Rule 33 are not mutually exclusive. They are closely related with each other. If an objection cannot be urged under Rule 22 against a co-respondent, Rule 33 could take over and come to the rescue of the objector. The appellate court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower court. The appellate court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under Rule 33 is wide enough to determine any question, not only between an appellant and respondent, but also between a respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice.246

(v) Conditions

The language of Rule 33 is very wide. The following requirements, however, must be satisfied before it can be invoked:

(1) The parties before the lower court must also be there before the appellate court; and

(2) The question raised must have properly arisen out of the judgment of the lower court.

If these conditions are fulfilled, the appellate court can consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal.247

(vi) Ambit and scope

The sweep of power under Rule 33 is wide enough to determine any question not only between the appellant and the respondent but also between the respondent and co-respondents. The appellate court can

246 Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528: AIR 1988 SC 54; see also Bihar Supply Syndicate v. Asiatic Navigation, supra, at p. 651 (SCC); Chaya v. Bapusaheb, supra; Chunilal v. H.K. Adhyaru, AIR 1956 SC 655: (1956) 26 Comp Cas 168; Kanaya Rain v. Rajender Kumar, (1985) 1 SCC 436: AIR 1985 SC 371; Shadi Singh v. Rakha, (1992) 3 SCC 55: AIR 1994 SC 800; Syed Asadullah v. ADJ, Allahabad, (1981) 3 SCC 483: AIR 1981 SC 1724; Laxmi & Co. v. Dr. Anant R. Deshpande, (1973) 1 SCC 37: AIR 1973 SC 171; Mithilesh Kumari v. Prem Behari, (1989) 2 SCC 95: AIR 1989 SC 1247.

247 Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528 at pp. 534-35: AIR 1988 SC 54 at p. 57; K. Muthuswami v. N. Palaniappa, (1998) 7 SCC 327: AIR 1998 SC 3118.

pass any decree or order which ought to have been passed in the facts and circumstances of the case. The words "as the case may require" used in Rule 33 enable the appellate court to pass any order or decree to meet the ends of justice.248 The only constraint on the power of the court is that the parties before the lower court should also be there before the appellate court.

(vii) Limitations

Though Rule 33 is expressed in very wide terms, it has to be applied with care and caution and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the court to adjust the rights of the parties.249 The rule does not confer unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the trial court.250 Nor the appellate court will interfere with finding of fact.251 Again, the discretionary power cannot be exercised to nullify the effect of the abatement of appeal.252

As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or objection, it must be exercised with care and caution. The Rule does not confer an unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the court appealed from. While exercising powers under this Rule the court should not lose sight of other provisions of the Code itself nor the provisions of other laws, viz. the law of limitation or the law of court fees, etc.253

Moreover, such power cannot be exercised without issuing notice and affording an opportunity to the party likely to be affected.254 The expression "which ought to have been passed" means "which ought in law to have been passed".255 Such a power is to be exercised in exceptional

248 Rameshwar Prasad v. Shambehari Lal, supra; Mahant Dhangir v. Madan Mohan, supra.

249 Ibid, see also Nirmala Bala v. Balai Chand, supra, at p. 1884 (AIR); Choudhary Saha v. State of Bihar, supra, at p. 235 (SCC): at p. 99 (AIR).

250 Nirmala Bala Ghose v. Balai Chand Ghose, supra; State of Punjab v. Bakshish Singh, (1998) 8 SCC 222: AIR 1999 SC 2626.

251 Sarju Pershad v. Jwaleshwari Pratap, AIR 1951 SC 120: 1950 SCR 781; Mohd. Salamatullah v. Govt. of A.P., (1977) 3 SCC 590: AIR 1977 SC 1481.

252 Rameshwar Prasad v. Shambehari Lal, supra, at p. 1877 (AIR); Harihar Prasad v. Balmiki Prasad, (1975) 1 SCC 212: AIR 1975 SC 733.

253 Choudhary Sahu v. State of Bihar, (1982) 1 SCC 232 at p. 235: AIR 1982 SC 98 at p. 99; State of Punjab v. Bakshish Singh, supra.

254 Trimbak Narayan v. Babulal Motaji, (1973) 2 SCC 154: AIR 1973 SC 1363.

255 Giani Ram v. Ramjilal, (1969) 1 SCC 813: AIR 1969 SC 1144 at p. 1147; Nirmala Bala Ghose v. Balai Chand Ghose, supra, at p. 1877 (AIR); Shankar Popat v. Hiraman Umaji, (2003)

cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties.256 (emphasis supplied)

(viii) Conclusions

It is submitted that the following observations of Shah, J. (as he then was) in Nirmala Bala Ghose v. Balai Chand Ghose257, lay down correct law on the point and, therefore, are worth quoting:

"The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 Rule 33 may properly be invoked. The ride however does not confer an unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the Court appealed from "258 (emphasis supplied)

(f) Other powers: Section 107(2)

Section 107(2) of the Code enacts that over and above the aforesaid powers, an appellate court has the same powers as an original court. This provision is based on the general principle that an appeal is a continuation of a suit and therefore, an appellate court can do, while the appeal is pending, what the original court could have done while the suit is pending.259

Thus, an appellate court is empowered to reappreciate the evidence, to add, transpose or substitute the parties, to permit the withdrawal of proceedings, to return a plaint or memorandum of appeal for presentation to the proper court, to allow amendments in pleadings, to take notice of subsequent events, to take into consideration a change

4 SCC 100: AIR 2003 SC 1682.

256 Rameshwar Prasad v. Shambehari Lal Jagannath, AIR 1963 SC 1901: (1964) 3 SCR 549; see also Harihar Prasad Singh v. Balmiki Prasad Singh, (1975) 1 SCC 212: AIR 1975 SC 733.

257 AIR 1965 SC 1874: (1965) 3 SCR 550.

258 Ibid, at p. 1874 (AIR); see also Bihar Supply Syndicate v. Asiatic Navigation, (1993) 2 SCC 639.

259 R.S. Lala Praduman v. Virendra Goyal, (1969) 1 SCC 714 at p. 717: AIR 1969 SC 1349 at p. 1351; Nair Service Society Ltd. v. K.C. Alexander, AIR 1968 SC 1165 at p. 1178: (1968) 3 SCR 163; Ramankutty Guptan v. Avara, (1994) 2 SCC 642 at p. 645: AIR 1994 SC 1699. For detailed discussion, see supra, "Suit and appeal".

in law and to apply the existing or changed law, to order restitution, to enlarge time for doing certain acts, etc.260

41. DUTIES OF APPELLATE COURT

It should not, however, be forgotten that the powers of an appellate court are not absolute or uncontrolled. The Code also imposes certain duties on appellate courts and the court has to decide appeals keeping in mind these duties. These duties are as follows:

(a) Duty to decide appeal finally

It is the duty of the appellate court to decide an appeal in accordance with law after considering the evidence as a whole. The judgment of the appellate court must clearly show that it has applied its judicial mind to the evidence as a whole.261

(b) Duty not to interfere with decree for technical errors

Section 99 of the Code enacts that a decree which is otherwise correct on merits and is within the jurisdiction of the court should not be upset merely for technical and immaterial defects. The underlying object of Section 99 is "to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuitry of litigation".262

As observed by the Supreme Court,263 "When a case has been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it has resulted in failure of justice."

(c) Duty to reappreciate evidence

As seen above, an appeal is a continuation of a suit. Inasmuch as an appeal is a rehearing of the matter, the appellate court can reappreciate the entire evidence, oral as well as documentary, and can arrive at its own conclusion. At the same time, however, the appellate court

260 Ibid, See also Qudrat Ullah v. Municipal Board, Bareilly, (1974) 1 SCC 202 at p. 217: AIR 1974 SC 396 at p. 404; Narhari Shivram v. Pannalal Umediram, (1976) 3 SCC 203 at p. 209: AIR 1977 SC 164 at p. 169; Bai Dosabai v. Mathurdas Govinddas, (1980) 3 SCC 545 at pp. 552-53: AIR 1980 SC 1334 at pp. 1339-40; M.M. Quasim v. Manolmr Lal, (1981) 3 SCC 36: AIR 1981 SC 1113; S. 144. See also infra, Pt. V, Chap. 2; S. 148. See also infra, Pt. V, Chap. 4; Ramesh Kumar v. Kesko Ram, 1992 Supp (2) SCC 623: AIR 1992 SC 700. For detailed discussion and case law, see, Authors Code of Civil Procedure (Lawyers' Edn.) Vol. II at pp. 456-66.

261 State of T.N. v. S. Kumaraswami, (1977) 4 SCC 602(III): AIR 1977 SC 2026. For detailed discussion see supra, "Power to decide a case finally".

262 Mohd. Husain v. Babu Kishwa Nandan, AIR 1937 PC 233 at p. 234: (1936-37) 64 IA 250; Kiran Singh v. Chaman Paswan, AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117; Virendra Singh v. Vimal Kumar, (1977) 1 SCC 718 at p. 722: AIR 1976 SC 2169 at p. 2172; Kempamma v. Kalamma, AIR 1992 Kant 282; Kalipada Das v. Bimal Krishna, (1983) 1 SCC 14: AIR 1983 SC 876.

263 Kiran Singh v. Chaman Paswan, supra; Virendra Singh v. Vimal Kumar, supra.

will bear in mind a finding recorded by the trial court on oral evidence. It should not forget that the trial court had the advantage and opportunity of watching the demeanour of witnesses and, hence, the trial court's conclusions should not normally be disturbed. No doubt, the appellate court has the same powers as the original court, but they have to be exercised with proper care, caution and circumspection. When a finding of fact has been arrived at by the trial court by mainly appreciating oral evidence, it should not be lightly disturbed unless the approach of the trial court in appraisal of evidence is materially erroneous, contrary to well-established principles or perverse.264

In T.D. Gopalan v. Hindu Religious & Charitable Endowments265, the Supreme Court observed, "We apprehend that the uniform practice in the matter of appreciation of evidence has been that if the trial court has given cogent and detailed reasons for not accepting the testimony of a witness, the appellate court in all fairness to it ought to deal with those reasons before proceeding to form a contrary opinion about accepting the testimony which has been rejected by the trial court."

Three requisites should normally be present before an appellate court reverses a finding of fact recorded by the trial court:266

(i) it applied its mind to reasons given by the trial court;

(ii) it had no advantage of seeing and hearing the witnesses; and

(iii) it records cogent and convincing reasons for disagreement with the trial court.

In Sarju Pershad v. Jwaleshwari Pratap267, dealing with such a situation, the Supreme Court observed, "The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial judge. The rule is-and it is nothing more than a rule of practice—that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a

264 S. 107(2); see also R.S. Lala Praduman v. Virendra Goyal, (1969) 1 SCC 714: AIR 1969 SC 1349; Madhusudan Das v. Narayanibai, (1983) 1 SCC 35: AIR 1983 SC 114; Jagdish Singh v. Madhuri Devi; Arundhati v. Iranna, (2008) 3 SCC 181.

265 (1972) 2 SCC 329: AIR 1972 SC 1716 at p. 1719.

266 Madhusudan Das v. Narayanibai, (1983) 1 SCC 35 at pp. 39-40: AIR 1983 SC 114; see also Jagdish Singh v. Madhuri Devi, supra.

267 AIR 1951 SC 120:1950 SCR 781.

sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial judge on a question of fact.268 The duty of the appellate court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the court, outweighs such finding."269 (emphasis supplied) In the case of Madhusudan Das v. Narayanibai270, the Supreme Court once again observed, "At this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies... . The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact."271

In Radha Prasad v. Gajadhar Singh272, after considering a number of English as well as Indian decisions, the Supreme Court laid down the following principle, which, it is respectfully submitted, lays down the correct law on the point regarding the powers of the first appellate court in appreciation of evidence and inference with finding of fact recorded by the trial court:

"The position in law, in our opinion, is that when an appeal lies on facts, it is the right and the duty of the appeal court to consider what its decision on the question of facts should be, but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing

268 Ibid, at p. 121 (AIR).
269 Ibid, at p. 123 (AIR).
270 (1983) 1 SCC 35: AIR 1983 SC 114.
271 Ibid, at pp. 39-40 (SCC): at pp. 116-17 (AIR).
272 AIR 1960 SC 115: (1960) 1 SCR 663.

the witnesses and that it should not lightly reject the trial judge's conclusion that the evidence of a particular witness should be believed or should not be believed, particularly when such conclusion is based on the observation of the demeanour of the witness in court. But, this does not mean that merely because an appeal court has not heard or seen the witness it will in no case reverse the findings of a trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the appeal court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the trial judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the trial Judge is wrong, the appeal court should have no hesitation in reversing the findings of the trial judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in court but a question of inference of one fact from proved primary facts the court of appeal is in as good a position as the trial judge and is free to reverse the findings if it thinks that the inference made by the trial judge is not justified."273

(d) Duty to record reasons

Again, though an appellate court has power to dismiss an appeal summarily, such power should be exercised sparingly and in exceptional cases and, that too, after recording reasons. If such appellate court is other than a High Court, requirement of recording of reasons is mandatory. But in case of a High Court also, it is appropriate if it passes a speaking order when dismissing an appeal in limine.

Rule 31, however, enjoins an appellate court to record reasons in support of its judgment. The judgment must be self-contained with reasons in support of the findings arrived at by the court. It must discuss the evidence in the light of points for determination and come to its own conclusion.

In State of Punjab v. Jagdev Singh274, the High Court allowed the petition of the detenu and set aside an order of detention passed against him. The reasons in support of the judgment were, however, not recorded. When the matter was taken further the Supreme Court observed that when the appellate court is other than the Supreme Court,

273 Radha Prasad v. Gajadhar Singh, AIR 1960 SC 115 at p. 118: (1960) 1 SCR 663; see also Mohd. Salamatullah v. Govt. of A.P., (1977) 3 SCC 590: AIR 1977 SC 1481; S.V.R. Mudaliar v. Rajabu F. Buhari, (1995) 4 SCC 15: AIR 1995 SC 1607; Gajanan Krishnaji v. Dattaji Raghobaji, (1995) 5 SCC 347: AIR 1995 SC 2284.

274 (1984) 1 SCC 596: AIR 1984 SC 444.

it is desirable that a final order which an appellate court intends to pass should not be announced until a reasoned judgment is ready for pronouncement. The Supreme Court did not approve the practice of announcing a final order without a reasoned judgment and recorded reasons for not approving such practice in the following words:

"We would like to take this opportunity to point out that serious difficulties arise on account of the practice increasingly adopted by the High Courts, of pronouncing the final order without a reasoned judgment. It is desirable that the final order which the High Court intends to pass should not be announced until a reasoned judgment is ready for pronouncement. Suppose for example, that a final order without a reasoned judgment is announced by the High Court that a house shall be demolished, or that the custody of a child shall be handed over to one parent as against the other, or that a person accused of a serious charge is acquitted, or that a statute is unconstitutional or, as in the instant case, that a detenu be released from detention. If the object of passing such orders is to ensure speedy compliance with them, that object is more often defeated by the aggrieved party filing a special leave petition in this court in a predicament because, without the benefit of the reasoning of the High Court, it is difficult for this court to allow the bare order to be implemented. The result inevitably is that the operation of the order passed by the High Court has to be stayed pending delivery of the reasoned judgment."275 (emphasis supplied)

It is, no doubt, true that normally even the Supreme Court also should follow this practice. However, in exceptional cases, the Supreme Court may depart from this course and pronounce an operative part of the order without a reasoned judgment. But, it cannot be forgotten that the Supreme Court is the final court and no further appeal lies against the said order. The reasons, in these circumstances, may not be said to be essential. The Supreme Court rightly observed in this context:

"It may be thought that as such orders are passed by this court, therefore, there is no reason why the High Courts should not do the same. We would like to point out respectfully that the orders passed by this court are final and no appeal lies against them. The Supreme Court is the final court in the hierarchy of our courts. Besides, orders without a reasoned judgment are passed by this court very rarely, under exceptional circumstances. Orders passed by the High Court are subject to the appellate jurisdiction of this court under Article 136 of the Constitution and other provisions of the statutes concerned. We thought it necessary to make these observations in

275 Ibid, at p. 611 (SCC): at p. 452 (AIR) (para 30) (per Chandrachud, C.J.).

order that a practice which is not very desirable and which achieves no useful purpose may not grow out of its present infancy."276
(emphasis supplied)

In State of Punjab v. Surinder Kumar277 also, the Supreme Court reiterated the principle laid down in Jagdev Singh Talwandi and made the following observations which, it is submitted, lay down correct law on the point: "On the question of the requirement to assign reasons for an order, a distinction has to be kept in mind between a court whose judgment is not subject to further appeal and other courts. One of the main reasons for disclosing and discussing the grounds in support of a judgment is to enable a higher court to examine the same in case of a challenge. It is, of course, desirable to assign reasons for every order or judgment, but the requirement is not imperative in the case of this court."278
(emphasis supplied)

Very recently, in Jagdish Singh v. Madhuri Devi,279 the Family Court granted divorce to the husband on the ground of cruelty. The High Court, without considering the relevant evidence and without recording reasons, reversed the finding recorded by the trial court as to cruelty by wife and dismissed the petition filed by the husband by a "cryptic" order. The aggrieved husband approached the Supreme Court.

Allowing the appeal, setting aside the judgment of the High Court and remanding the matter for fresh disposal on merits, the Supreme Court held that the High Court had "virtually" reached a conclusion without recording reasons in support of such conclusion.

The Court stated:

"When the court of original jurisdiction has considered oral evidence and recorded findings after seeing the demeanour of witnesses and having applied its mind, the appellate court is enjoined to keep that fact in mind. It has to deal with the reasons recorded and conclusions arrived at by the trial court. Thereafter, it is certainly open to the appellate court to come to its own conclusion if it finds that the reasons which weighed with the trial court or conclusions arrived at were not in consonance with law."280

276 State of Punjab v. Jagdev Singh, (1984) 1 SCC 596: AIR 1984 SC 444 para 31.
277 (1992) 1 SCC 489: AIR 1992 SC 1593: (1992) 19 ATC 345.
278 Ibid, at pp. 491-92 (SCC): at p. 1594 (AIR).
279 (2008) 10 SCC 497: AIR 2008 SC 2296.
280 Ibid, at p. 506 (per Thakker, J.).

(e) Other duties

An appellate court should not dismiss an appeal in limine raising triable issues.281 An appeal can be admitted or dismissed as a whole. It cannot be admitted partly.282 Once the appeal is admitted, it cannot be dismissed on technical grounds.283 An appellate court cannot grant stay against the execution of a decree if an appeal is time-barred.284 Normally, it should not grant stay against a money decree.285 When other matters involving a common question or identical points are pending, a summary dismissal of an appeal is not justified.286 Similarly, when two cognate appeals are filed against the same judgment, both the appeals should be taken up for hearing and decided together.287 Where an appeal on a similar question or point of law is pending in a superior court, a subordinate court should not proceed to decide the point, but should wait till the question is decided by the higher court.288

In first appeal, all questions (questions of fact as also of law) are open. The judgment of the first appellate court must, therefore, be supported on findings on all issues raised in the appeal. If the appellate court agrees with the conclusions of the trial court, it need not restate evidence discussed by the first court and "general agreement" with such findings would be sufficient. But such agreement should not be a device or camouflage for shirking the duty cast on the appellate court.289

Where an appeal is heard by a Bench of two or more judges, it must be decided in accordance with their opinion or of the majority of such judges. Where there is no majority concurring in a judgment varying

281 Mahadev Tukaram v. Sugandha, (1973) 3 SCC 746: AIR 1972 SC 1932; Umakant Vishnu v. Pramilabai, (1973) 1 SCC 152; Vi nod Trading Co. v. Union of India, (1982) 2 SCC 40; Kiranmal v. Dnyanoba Bajirao, (1983) 4 SCC 223.

282 Ramji Bhagala v. Krishnarao, (1982) 1 SCC 433: AIR 1982 SC 1223.

283 Dipo v. Wassan Singh, (1983) 3 SCC 376: AIR 1983 SC 846; Jhanda Singh v. Gram Sabha of Village Umri, (1971) 3 SCC 980.

284 For detailed discussion, see supra, "Stay of proceedings and of execution".

285 R. 1(3); see also Mehta Teja Singh and Co. v. Grindlays Bank Ltd., (1982) 3 SCC 199; Union Bank of India v. Jagan Nath Radhey Shyam and Co., AIR 1979 Del 36; Dijabar v. Sulabha, AIR 1986 Ori 38; Malwa Strips (P) Ltd. v. Jyoti Ltd., (2009) 2 SCC 426.

286 Vinod Trading Co. v. Union of India, (1982) 2 SCC 40; State of Gujarat v. Prabhat Solvent Extraction Industries (P) Ltd., (1982) 1 SCC 624; Bir Bajrang Kumar v. State of Bihar, AIR 1987 SC 1345.

287 CST v. Vijai International Udyog, (1984) 4 SCC 543: AIR 1985 SC 109.

288 D.K. Trivedi & Sons v. State of Gujarat, 1986 Supp SCC 20: AIR 1986 SC 1323.

289 Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179; Madhukar v. Sangram, (2001) 4 SCC 756; Sk. Mehboob Mader v. Syed Ashfaque Hussain, 1988 Supp SCC 558; Ratneshwari Nandan v. Bhagwati Saran, AIR 1950 FC 142: 1949 FCR 667; Govind Prasad v. Hari Dutt, (1977) 9 SCC 736: AIR 1977 SC 1005.

or reversing the decree, the decree shall be confirmed.290 Where two or other even number of judges composing the Bench differ on a point of law, they must state the point and the appeal shall then be heard by one or more of other judges and decided according to the opinion of the majority.291 The object of enacting this provision is that on a question of fact when there is a difference of opinion, the view expressed by the trial court in the absence of a majority opinion should be confirmed.292

Where the sanctioned strength of judges is there but only two judges are available who differ from each other and refer the matter to the third judge, the appeal should wait till the arrival of the third judge. It cannot be contended that in such an eventuality the order impugned in the appeal should be confirmed.293

An appellate court has to accept a statement of fact as to what transpired at hearing or recorded in the judgment of the court below as true, final and conclusive. If a litigant feels aggrieved by such fact or statement, proper course for him is not to make a complaint before the appellate court but to approach the same court, to call the attention of the same judge who recorded it and to have it deleted or corrected.294

42. JUDGMENT: SECTION 98, RULES 30-34

After hearing the parties or their pleaders, the appellate court shall pronounce the judgment in open court, either at once or on some future date after giving notice to the parties or their pleaders. It is not necessary for the court to read out the whole judgment and it can read out only the final order but a copy of the whole judgment should be made available for the perusal of the parties or their pleaders after the judgment is pronounced.295

The judgment of the appellate court shall be in writing and shall state (i) the points for determination; (ii) the decision thereon; (iii) the reasons for the decision; and (iv) where the appeal is allowed and the decree of the lower court is reversed or varied, the relief to which the appellant is entitled. It shall be signed and dated by the judge or judges concurring therein.296

290 S. 98; see also Tej Kaur v. Kirpal Singh, (1995) 5 SCC 119: AIR 1995 SC 1681.

291 Ibid.

292 Ibid.

293 Sikkim Subba Associates v. State of Sikkim, (2001) 5 SCC 629: AIR 2001 SC 2062.

294 State of Maharashtra v. Ramdas Shrinivas, (1982) 2 SCC 463: AIR 1982 SC 1298. For detailed discussion and case law, see, Author's Code of Civil Procedure (Lawyers's Edn.) Vol. II at p. 476; V.G. Ramachandran, Law of Writs (2006) Vol. II, Pt. V, Chap. 2.

295 R. 30.

296 Rr. 31 & 32; see also Gunnamani Anasuya v. Parvatini Amarendra, (2007) 10 SCC 296: AIR 2007 SC 2380; Shiv Kumar v. Santosh Kumari, (2007) 8 SCC 600.

Any judge dissenting from the judgment of the court shall state in writing the decision or order which he thinks should be passed on the appeal and state his reasons for the same.297

As stated above, the appellate court is required to record reasons for its decision, but where the appellate court agrees with the view of the trial court on the evidence, it need not restate the effect of evidence and restate the reasons given by the trial court. Expression of general agreement with the reasons given by the trial court would ordinarily suffice.298

43. DECREE: RULES 35-37

The decree of an appellate court shall contain (i) the date and the day on which the judgment was pronounced; (ii) number of the appeal, names and description of the parties and a clear specification of the relief granted or other adjudication made; (iii) the costs of the appeal and of the suit and by whom they are to be paid; and (iv) the date and signature of the judge or judges who passed it. A dissenting judge need not sign the decree.299

Certified copies of the judgment and decree shall be sent to the lower court and shall be furnished to the parties at their expense on an application being made to the appellate court.300

44. LETTERS PATENT APPEAL

The Code of Civil Procedure makes no provision for an appeal within the High Court. Therefore, the question whether an appeal would lie against an order passed by a Single Judge to a Division Bench of the same court would depend upon the provisions of the Letters Patent of the High Court concerned. Under the relevant clause of the Letters Patent of the Chartered High Courts, from a "judgment" of a Single judge of the High Court, an appeal lies to the Division Bench of that High Court provided that such an appeal is not barred by any statute (e.g. Section 100-A of the Code) and provided that the other conditions are satisfied. Such an appeal can be filed within 30 days from the date of the order passed by the Single Judge.301 The procedure laid down in Order 41 applies to Letters Patent Appeals also.302

297 R. 34.

298 Girijanandini Devi v. Bijendra Narain, AIR 1967 SC 1124 at p. 1129: (1967) 1 SCR 93; State of Karnataka v. Hemareddy, (1981) 2 SCC 185 at pp. 188-89: AIR 1981 SC 1417 at p. 1420. For duty to record reasons by Quasi-judicial Authorities, see, Author's Lectures on Administrative Law (2008) Lecture VI.

299 R. 35.

300 Rr. 37 & 36.

301 Art. 117, Limitation Act, 1963.

302 Budge Budge Municipality v. Mongru Mia, AIR 1953 Cal 433; Shah Babulal v. Jayaben D. Kania, (1981) 4 SCC 8: AIR 1981 SC 1786; Umaji Keshao v. Radhikabai, 1986 Supp SCC

It may, however, be stated that Section 100-A, as amended by the Code of Civil Procedure (Amendment) Act, 2002 states that notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, no further appeal303 shall lie from a judgment and decree by a Single Judge in a first appeal.

In this connection, it may be noted that Justice Malimath Committee had examined the issue of further appeal against a judgment of a Single judge exercising first appellate jurisdiction, i.e. under Section 96 of the Code and also exercising jurisdiction under Article 226 or 227 of the Constitution and recommended to suitably amend Section 100-A of the Code abolishing intra-court appeal in those cases.304

The recommendations were accepted and by the Code of Civil Procedure (Amendment) Act, 1999305, Section 100-A was amended abolishing Letters Patent Appeal against the decision of a Single Judge in a first appeal as also in a petition under Article 226/227 of the Constitution of India. The Amendment Act of 1999 received assent of the President on 30 December 1999 but was not brought into force. Meanwhile by the Amendment Act of 2002,306 Section 100-A was further amended and a Letters Patent Appeal was barred against a decision by a Single judge in a First Appeal only. The amendment has been brought into force from 1 July 2002.307

45. APPEAL TO SUPREME COURT

Sections 109 and 112 provide for appeals to the Supreme Court in certain circumstances. Order 45 prescribes procedure for such appeals.308 These provisions, however, have to be read along with the relevant provisions of the Constitution of India.309

401: AIR 1986 SC 1272; Devaraju Pillai v. Sellayya Pillai, (1987) 1 SCC 61: AIR 1987 SC 1160.

303 Letters Patent Appeal.

304 Notes on Clauses —Clause 10.

305 Act 46 of 1999.

306 Act 22 of 2002.

307 For detailed discussion, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. II, Section 96.

308 For detailed discussion, see infra, Chap. 5.

309 Arts. 132-36.